PART I

CHAPTER I

INTRODUCTORY

SYNOPSIS

A. CONSTITUTIONAL LAW

A state is defined in International Law as "an independent political entity" "occupying a defined territory" "the members of which are united together for the purpose of resisting external force and preservation of internal order."

This statement lays stress on what may be called 'police functions' of the state, *viz.*, preservation of law and order and defence of the country from external aggression. It needs to be emphasized however that no modern state today rests content with such a limited range of functions. A modern state does not rest content with being merely a 'police' or 'law and order' state. It is much more than that. It tends to become a social welfare state.

The significant point however is that in order to carry out its activities and functions, whatever may be their range, it becomes necessary for any state to establish certain basic organs or agents or instrumentalities which act on its behalf and through which the state can function and operate. All the people in a state cannot combine and operate all together all the time to achieve the desired goals. Thus, certain fundamental organs become necessary. This creates the need for Constitutional Law. If there is need for certain organs through which the state acts, there must be some law to lay down how these organs are to be established? How these organs are to function? What their powers are going to be? What is to be their mutual relationship with each other? A state cannot govern itself on an *ad hoc* basis without their being some norms to regulate its basic institutions. There must be a predictable body of norms and rules from which the governmental organs must draw their powers and functions. The purpose of having a Constitution is to have a frame-work of government which is likely to endure through the vicissitudes of a nation. This purpose does not appear to have been achieved in India. There have been nearly 300 amendments to the Constitution.

The Legal System of a country is divisible into—(i) Law governing the state; (ii) Law by which the state governs or regulates the conduct of its members. Laws like Contracts, Torts, Property, Criminal Law fall in the second category. Constitutional Law, Administrative Law and Public International Law fall in the first category. These are laws which seek to govern the state. Laws governing the state fall in the category of Public Law. Laws governing the affairs of the citizens fall in the category of Private Law.

Speaking generally, the Constitution of a country seeks to establish its fundamental or basic or apex organs of government and administration, describe their structure, composition, powers and principal functions, define the interrelationship of these organs with one another, and regulate their relationship with the people, more particularly, the political relationship.[1] And even about these basic institutions, only the basic norms are inscribed in the Constitution. All and sundry rules are not brought into discussion under the rubric of Constitutional Law. It may be noted that the term "Constitutional law" is broader than the term "Constitution", as it comprises of the "Constitution", relevant statutory law, judicial decisions and conventions.

Traditionally, the structure of a country's government is divided into three institutional components; (1) Legislature to make laws; (2) Executive to implement and execute laws; and (3) Judiciary to interpret the laws and administer justice. Thus, the Constitution deals with such questions as: How is the Legislature structured, composed and organised? What are its powers and functions? Similar questions are to be asked about each of the other two organs as well. Some other questions which the Constitution has to answer are: What is the mutual relationship between the Legislature and the Executive? Or, between the Executive and the Judiciary? Or, between the Legislature and the Judiciary? What is the relationship between these organs and the people? Does the Constitution guarantee any rights for the people?

While these three organs are basic in any country, and the Constitution does invariably deal with them, the Constitution may also create any other organ

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1. Wade & Phillips, *Const. & Adm. Law*, 1, 5 (IX Ed., ed Bradley); K.C. Wheare, *Modern Constitutions*, 1 (1971); O Hood Phillips, *Const. And Adm. Law*, 5 (1987).

which it may regard as significant and fit for inscription in the Constitution. For example, the Indian Constitution provides for the creation of a Finance Commission every five years to settle the financial relationship between the Centre and States and it also establishes on a permanent footing an Election Commission to ensure free and fair elections. In *Chander Hass*[2] a two judge Bench of the Supreme Court citing Montesquieus has unqualifiedly stated the Montesquieus view of separation of powers and the dangers involved in deviating from his view was an apt warning for the Indian Judiciary which has been "rightly criticized for 'overreach' and encroachment in the domain of the other two organs" i.e., the Parliament and the Executive. The Bench seems to have broken down in the face of intensely adverse criticism launched principally against the Supreme Court's 'activist' role by the legislators as well as the Executive.[3] All the observations of the Court relating to separation of powers was wholly uncalled for since the real question in controversy was whether the Punjab and Haryana High Court could direct creation of posts to accommodate daily wage earners who, according to the High Court, ought to have been regularized. This issue had been answered in the negative by a long line of cases and, therefore, the law was well settled on the issue. In fact the sudden attack on the Judiciary by the Judiciary finds place in the judgment after the Court, having considered the merits concluded:

> "Consequently, this appeal is allowed and the judgment and order of the High Court as well as that of the first appellate court are set aside and the judgment of the trial court is upheld. The suit is dismissed. No costs".

Then they said:

> "Before parting with this case we would like to make some observations about the limits of the powers of the judiciary. We are compelled to make these observations because we are repeatedly coming across cases where judges are unjustifiably trying to perform executive or legislative functions. In our opinion this is clearly unconstitutional. In the name of judicial activism judges cannot cross their limits and try to take over functions which belong to another organ of the State."

What followed covering about 7 pages of the report is not only obiter but betrays a constitutional fundamental that the judges cannot convert the courts into hustings. Uninformed, obiter of the Supreme Court can attract media attention to the Judges who author such obiter but tends to lower reputation of the Court amongst the right thinking members of the society and shake the confidence of the people in an institution charged by the Constitution to enforce the rule of law.[4] These observations are not 'law declared' within the meaning of Art. 141 of the Constitution.

A significant aspect of the relationship between the government and the people is the guaranteeing of certain Fundamental Rights to the people. Modern Constitutions lay a good deal of emphasis on people's Fundamental Rights. The underlying idea is that there are certain basic rights which are inherent in a human

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2. *Divisional Manager, Aravali Golf Club v. Chander Hass,* (2008) 1 SCC 683 : (2007) 12 SCR 1084 : (2008) 3 JT 221.

3. Significantly, while condemning what is currently referred to as judicial activism the Bench displayed an amazing lack of courage in pointing out any particular precedent when the Courts have exceeded their jurisdictions and usurped the powers of the other two organs of the State.

4. It will be out of place to go into the question at greater length in a book like this.

being and which no government should seek to take away either by legislation or by executive action. The judiciary is endowed with the function of protecting these rights and acting as the guardian thereof. If the legislature passes any law or the executive takes an action, so as to infringe any of the Fundamental Rights, then the courts may declare such a law or action as unconstitutional. Some of these basic rights are: freedom of the person, freedom of speech, right to equality, freedom of conscience and religion, etc.

The Constitution of a country may be federal or unitary in nature. In a federal Constitution there is a Central Government having certain powers which it exercises over the entire country. Then there are regional governments and each of such governments has jurisdiction within a region. All kinds of relations arise between the Central Government and the Regional Governments. India is an example of a federal Constitution. Some other federal Constitutions are: U.S.A., Canada, Australia, Malaysia, Germany, etc.

A federal Constitution is a much more complicated and legalistic document than a unitary Constitution which has one Central Government in which all powers of government are concentrated and which can delegate such of its powers to such of its agencies as it likes. A federal Constitution must settle many details (like distribution of powers between the Central Government and the regional governments) which a unitary Constitution is not concerned with. Britain, Sri Lanka, Singapore have unitary Constitutions.

The Constitutional law of a country consists of both 'legal' as well as 'non-legal' norms. 'Legal' norms are enforced and applied by the courts and if any such norm is violated, courts can give relief and redress. On the other hand, 'non-legal' norms arise in course of time as a result of practices followed over and over again. Such norms are known as conventions, usages, customs, practices of the Constitution. There may be nothing in the Constitution sanctioning them, nevertheless, they exist. In the words of Jennings: "Thus within the framework of the law there is room for the development of the rules of practice, rules which may be followed as consistently as the rules of law which determines the procedure which the men concerned with Government follow."[5]

According to KEETON, the conventions of the Constitution are 'the unwritten principles which, though they could never be enforced as law in the courts are nonetheless rules since in fact the players of the constitutional game do observe them, for if they are not observed, the constitutional game would immediately degenerate into a political fracas or, worse still, a bloody revolution.[6]"

The sanction behind conventions is mostly political or public opinion. As AHMADI, C.J., has observed about the growth of conventions: "Conventions grow from long-standing accepted practice or by agreement in areas where the law is silent and such a convention would not breach the law but fill the gap."[7] Constitutional conventions provide the flesh which clothes the dry bones of the law.

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5. W.I. Jennings, Law and the Constitution.

6. KEETON, *THE UNITED KINGDOM, COMMONWEALTH SERIES*, I, 36-37 (1955).

7. *S.P. Anand v. H.D. Deve Gowda*, AIR 1997 SC 272, 279 : (1996) 6 SCC 734. For discussion on this case, see, Ch. III, *infra.*

On conventions, also see, Ch. XL, *infra*.

Conventions play a more significant role in an unwritten Constitution than in a written Constitution but to have a full picture of a country's Constitutional law, reference needs to be made not only to 'legal' but to 'non-legal' norms as well. Britain is a very good example of a country where conventions play a very active role. In India, conventions operate in several areas, the most significant of which is the relationship between the Executive and the Legislature. Reference to conventions is made at several places in the following pages.[8]

Generally, it is said that conventions may not lead to any court case and are not enforceable by the courts. But there are instances of conventions being recognised, and even applied by the Courts in India as well as abroad. Reference may be made in this connection *inter alia* to the following cases : *Carltona Ltd. v. Commissioners of Works;*[9] *Madzimbamuto v. Lardner-Burke;*[10] *Att. Gen. v. Jonathan Cape Ltd.,*[11] *Adegbenx v. Akintola,*[12] *Re Amendment of the Constitution of Canada*[13], *Ram Jawaya v. State of Punjab;*[14] *U.N.R. Rao v. Indira Gandhi;*[15] *Samsher Singh v. State of Punjab*[16]. These examples show that constitutional conventions do influence judicial decisions to some extent. With the judicial recognition of conventions, the distinction between law and conventions has become blurred in course of time.

It may also be noted that even some legal rules may be characterised as 'directory' and not 'mandatory'. This may especially be so with respect to procedural rules contained in the Constitution.[17]

The Constitution is a source of, and not an exercise of, legislative power.[18]

A Constitution may be written or unwritten. A written Constitution is one which is written down in the form of a Constitutional document. The British Constitution is characterised as 'unwritten' because it is not embodied in one comprehensive Constitutional document. It is interspersed in several statutes which define some Constitutional principles; in court decisions; in common law principles and in conventions and usages. The central doctrine of the British Constitution is Sovereignty of Parliament which means that Parliament can make or unmake any law and no distinction is drawn between an ordinary law and the Constitutional law. The cornerstone of the British Constitution, the principle of Sovereignty of Parliament, is in itself nothing more than a concept based on tradition which is recognised and enforced by the courts. Characterising this as the "formlessness of the British Constitution", KEETON goes on to observe:

> "The absence of a written Constitution deprives us of a fundamental starting point from which all Constitutional law can be derived. We have no *grundnorm*

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8. See, for example, Chs. III, VII and XL.
9. [1943] 2 All ER 560.
10. [1969] 1 AC 645.
11. (1976) Q.B. 752 (known as the Crossman Diaries case).
12. (1963) A.C. 614.
13. (1981) 123 DLR (3rd) (Canada).
14. AIR 1955 SC 549 : (1955) 2 SCR 225; Ch. III, *infra.*
15. AIR 1971 SC 1002 : (1971) 2 SCC 63; Ch. III, *infra*.
16. AIR 1974 SC 2192 : (1974) 2 SCC 831.
Also see, *infra*, Chs. III, VII and XL.
17. S.A. de Smith, *Constitutional and Administrative Law*, 44-62, 99-108, 144-172 (1977).
An example of a "directory" rule in India is to be found in Art. 77 of the Constitution, see, Ch. III, *infra.* Also see, "Directive Principles", Ch. XXXIV, *infra.*
18. *Pratap Singh v. State of Jharkhand*, (2005) 3 SCC 551 : AIR 2005 SC 2731.

from which the individual norms of Constitutional law can receive their validity."

Most of the modern Constitutions are of the written type. The U.S.A. wrote its Constitution in 1787, Canada in 1867, and Australia in 1900. The U.S. Constitution is a brief, compact and organic instrument which shuns details.[19] Even in Britain, many voices can be heard now that it ought to write down its Constitution and that Fundamental Rights should be guaranteed therein.[20] However, even a written Constitution generates some conventions and customs which help in bringing the Constitution in conformity with the constantly changing social and economic conditions. Also, no written Constitution can contain all the detailed rules needed for the working of various bodies and institutions in the country. Therefore, subject to the Constitution, a number of statutes may have to be enacted laying down the detailed working rules for many purposes.

The difference between a written and unwritten Constitution is somewhat basic. A written Constitution is the formal source of all Constitutional law in the country. It is regarded as the supreme or fundamental law of the land, and it controls and permeates each institution in the country. Every organ in the country must act in accordance with the Constitution.

This means that the institutions of government created by the Constitution have to function in accordance with it. Any exercise of power outside the Constitution is unconstitutional. The government being the creature of the Constitution, Constitution delimits the powers of governmental organs and any exercise of power beyond the constitutional parameters becomes unauthorized. Therefore, any law made by the Legislature, any action taken by the Executive, if inconsistent with the Constitution, can be declared unconstitutional by the courts[21].

The Constitution is an organic living document. Its outlook and expression as perceived and expressed by the interpreters of the Constitution must be dynamic and keep pace with the changing times. Though the basics and fundamentals of the Constitution remain unalterable, the interpretation of the flexible provisions of the Constitution can be accompanied by dynamism and lean, in case of conflict, in favour of the weaker or the one who is more needy.[22]

The courts are regarded as the interpreters as well as the guardian of the Constitution. It is for the courts to scrutinize every act of the government with a view to ensure that it is in conformity with the Constitution. If a law passed by the legislature or an act done by the executive is inconsistent with a constitutional provision, the court will say so, and declare the law or the act as unconstitutional and void.

It is the obligation of the judiciary to see that the Constitution is not violated by any governmental organ and hence the judiciary is called as the guardian

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19. "The Constitution of the United States is not a prolix document. Words are sparingly used; and often a single phrase contains a vast arsenal of power." Douglas, *From Marshall To Mukherjea*, 146 (*Tagore Law Lectures*, 1956).

20. Leslie Scarman, *English Law—The New Dimension*.
A debate was held on this issue in the House of Lords: See, *The Times*, Nov. 30, 1978. Also see, Lord Hailsham's *Richard Dimbleby Lecture* in *The Times*, Oct. 15, 1976. Lord Hailsham has characterised the present-day government in Britain as "elective dictatorship". Also see, *infra*, Ch. XX.

21. For further discussion on this point, see, Chs. IV, VIII, XX, XXXIII and XL, *infra.*

22. *State of W.B. v. Kesoram Industries Ltd.*, (2004) 10 SCC 201 : AIR 2005 SC 1646.

and protector of the Constitution. Judicial review has come to be regarded as an integral part of a written Constitution.[23] The courts thus play a much more creative role under a written Constitution than they do under an unwritten Constitution. In a written Constitution, courts not only interpret ordinary laws and do justice between man and man, they also give meaning to the cold letter of the Constitution and this may, at times, vitally affect the Constitutional process in the country.

What do the words used in a constitutional document actually mean? Whenever such a question arises, it is ultimately for the courts to decide. In the ultimate analysis, the word of the Apex Court as to what the Constitution means prevails. The role of the judiciary in the U.S.A. has been underlined in the following words by HUGHES who later became the Supreme Court Chief Justice: "We are under a Constitution but the Constitution is what the judges say it is". DOWLING emphasizes the judicial role in the U.S.A. by saying: "The study of Constitutional law... may be described in general terms as a study of the doctrine of judicial review in action".[24] These statements do reveal the truth although they give a much more exaggerated picture of the courts' role than what it truly is.

Another significant feature of a written Constitution is the need of special procedure to amend it. This procedure is more complicated and rigorous than passing an ordinary law and is characterised as the constituent process as distinguished from ordinary legislative process.[25] Thus, a written Constitution is often characterised as rigid as contrasted with an unwritten Constitution, which is called flexible, as it can be changed by an ordinary legislation. It can be appreciated that if the written Constitution is not rigid, if it can be amended easily, and if it is not deemed to be the fundamental law of the country, then it ceases to effectively limit and restrain power.

It is also to be noted that a Parliament functioning under a written Constitution cannot claim for itself unlimited power to do what it likes. It has become fashionable for politicians in India to say that Indian Parliament is sovereign, meaning it can do whatever it desires. Such an assertion is not realistic. Parliament is sovereign to the extent that India is a sovereign country and that it is not subject to any external power. But Indian Parliament is not sovereign if it means that it has uncontrolled power to do what it likes. Since Parliament functions under a written Constitution, it has to observe the restrictions imposed on it by the Constitution. It can do what the Constitution permits it to do but cannot do what the Constitution prohibits.[26] Similar is the position of the Executive.[27] Thus, a written Constitution may seek to put formal restraints upon the abuse of power. This may be lacking in an unwritten Constitution.

All the points mentioned above will become clear as we go along through the following pages.

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23. See, Ch. XL, *infra.*
24. DOWLING, *CASES AND MATERIALS ON CONSTITUTIONAL LAW*, 19 (1965).
25. See, Ch. XLI, *infra.*
26. See, Ch. II, Sec. M, *infra.*
Also, Ch. XL, *infra.*
27. See, Ch. III, *infra.*

B. CONSTITUTIONALISM

Besides the concept of the Constitution, there is also the all-important concept of 'Constitutionalism'.

Modern political thought draws a distinction between 'Constitutionalism' and 'Constitution'. A country may have the 'Constitution' but not necessarily 'Constitutionalism'. For example, a country with a dictatorship, where the dictator's word is law, can be said to have a 'Constitution' but not 'Constitutionalism'.

The underlying difference between the two concepts is that a Constitution ought not merely to confer powers on the various organs of the government, but also seek to restrain those powers. Constitutionalism recognises the need for government but insists upon limitations being placed upon governmental powers. Constitutionalism envisages checks and balances and putting the powers of the legislature and the executive under some restraints and not making them uncontrolled and arbitrary.

Unlimited powers jeopardise freedom of the people. As has been well said: power corrupts and absolute power corrupts absolutely. If the Constitution confers unrestrained power on either the legislature or the executive, it might lead to an authoritarian, oppressive government. Therefore, to preserve the basic freedoms of the individual, and to maintain his dignity and personality, the Constitution should be permeated with 'Constitutionalism'; it should have some in-built restrictions on the powers conferred by it on governmental organs.

'Constitutionalism' connotes in essence limited government or a limitation on government. Constitutionalism is the antithesis of arbitrary powers.[28] 'Constitutionalism' recognises the need for government with powers but at the same time insists that limitations be placed on those powers. The antithesis of Constitutionalism is despotism. Unlimited power may lead to an authoritarian, oppressive, government which jeopardises the freedoms of the people. Only when the Constitution of a country seeks to decentralise power instead of concentrating it at one point, and also imposes other restraints and limitations thereon, does a country have not only 'constitution' but also 'constitutionalism'.

'Constitutions spring from a belief in limited government'.[29] According to SCHWARTZ, in the U.S.A., the word Constitution means "a written organic instrument, under which governmental powers are both conferred and circumscribed". He emphasizes that "this stress upon grant and limitation of authority is fundamental".[30] As PROFESSOR VILE has remarked:[31]

> "Western institutional theorists have concerned themselves with the problems of ensuring that the exercise of governmental power, which is essential to the realisation of the values of their societies, should be controlled in order that it should not itself be destructive of the values it was intended to promote."

The idea of Constitutionalism is not new. It is embedded deeply in human thought. Many natural law philosophers have promoted this idea through their writ-

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28. CHARLES H. MCILWAIN, *CONSTITUTIONALISM : ANCIENT AND MODERN*, 21; S.A. DE SMITH, *CONSTITUTIONAL AND ADMINISTRATIVE LAW*, 34 (1977); GIOVANNI SARTORI, Constitutionalism : A Preliminary Discussion, (1962) 56 *Am. Pol. SC Rev*., 853

29. WHEARE, op. cit., 7.

30. SCHWARTZ, *CONSTITUTIONAL LAW : A TEXT BOOK*, 1 (1972).

31. M.J.C. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS*, 1

ings. Some of these philosophers are: ACQUINAS, PAINE, LOCKE, GROTIUS AND ROUSSEAU.[32] The Magna Carta (1215) strengthened the traditional view that law is supreme. As observed by ARTHUR SUTHERLAND, "The Great Charter was obviously a cherished standard, a welcome assurance that people could set some limitation on the arbitrary power of the king."[33]

A written Constitution, independent judiciary with powers of judicial review, the doctrine of rule of law and separation of powers, free elections to legislature, accountable and transparent democratic government, Fundamental Rights of the people, federalism, decentralisation of power are some of the principles and norms which promote Constitutionalism in a country.

C. RULE OF LAW

A few words may be said here about the concept of Rule of Law as other ideas and concepts relating to Constitutionalism will be discussed in due course in the following pages.

The doctrine of Rule of Law is ascribed to DICEY whose writing in 1885 on the British Constitution included the following three distinct though kindered ideas in Rule of Law:[34]

(i) *Absence of Arbitrary Power* : No man is above law. No man is punishable except for a distinct breach of law established in an ordinary legal manner before ordinary courts. The government cannot punish any one merely by its own fiat. Persons in authority in Britain do not enjoy wide, arbitrary or discretionary powers. Dicey asserted that wherever there is discretion there is room for arbitrariness.

(ii) *Equality before Law* : Every man, whatever his rank or condition, is subject to the ordinary law and jurisdiction of the ordinary courts. No man is above law.

(iii) *Individual Liberties* : The general principles of the British Constitution, and especially the liberties of the individual, are judge-made, *i.e*., these are the result of judicial decisions determining the rights of private persons in particular cases brought before the courts from time to time.

DICEY asserted that the above-mentioned features existed in the British Constitution.

The British Constitution is judge-made and the rights of the individual form part of, and pervade, the Constitution. The rights of the individuals are part of the Constitution because these are secured by the courts. The British Constitutional

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32. FRIEDMANN, *LEGAL THEORY;* Dias and Hughes, *JURISPRUDENCE;* Lloyd, *INTRODUCTION TO JURISPRUDENCE.*

33. *CONSTITUTIONALISM IN AMERICA*, 13.

34. DICEY, A.V., *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION*, Ch. 4 (X ed.). For discussion on DICEY'S views see COSGROVE, *THE RULE OF LAW*, 66-113 (1980). WADE & PHILLIPS, *CONSTITUTIONAL AND ADMINISTRATIVE LAW*, 86 (ed, Bradley, IX Ed.); O' HOOD PHILLIPS, *CONST. AND ADM. LAW*, 33-39 (1987); S.A. DE SMITH, *op. cit*., 35, JAIN, M.P. *A TREATISE ON ADM. LAW*, I, 17-23.

Law is not the source, but the consequence, of the rights of the individuals as defined by the courts.

DICEY was thinking of the common law freedoms, such as, personal liberty, freedom of speech, public meeting, etc. What DICEY was saying was that certain Constitutions proclaim rights but do not provide adequate means to enforce those rights. In the British Constitution, on the other hand, there is inseparable connection between the means of enforcing a right and the right to be enforced.

Referring in particular to the *Habeas Corpus* Act, DICEY said that it was "worth a hundred Constitutional articles guaranteeing individual liberty." DICEY however accepted that there was rule of law in the U.S.A., because there the rights declared in the Constitution could be enforced, and the Constitution gave legal security to the rights declared.

The third principle is peculiar to Britain. In many modern written Constitutions, the basic rights of the people are guaranteed in the Constitution itself. This is regarded as a better guarantee for these rights and even in Britain there exists at present strong opinion that basic rights should be guaranteed.

DICEY'S thesis has been criticised by many from various angles but, the basic tenet expressed by him is that power is derived from, and is to be exercised according to law. In substance, DICEY'S emphasis, on the whole, in his enunciation of Rule of Law is on the absence of arbitrary power, and discretionary power, equality before Law, and legal protection to certain basic human rights, and these ideas remain relevant and significant in every democratic country even to-day.

It is also true that dictated by the needs of practical government, a number of exceptions have been engrafted on these ideas in modern democratic countries, *e.g.*, there is a universal growth of broad discretionary powers of the administration[35]; administrative tribunals have grown[36]; the institution of preventive detention has become the normal feature in many democratic countries[37]. Nevertheless, the basic ideas are worth preserving and promoting.

The concept of Rule of Law has been discussed in several international forums.[38] The effort being made is to give it a socio-legal-economic content and a supranational complexion.[39]

Rule of Law has no fixed or articulate connotation though the Indian courts refer to this phrase time and again. The broad emphasis of Rule of Law is on absence of any centre of unlimited or arbitrary power in the country, on proper structurisation and control of power, absence of arbitrariness in the government. Government intervention in many daily activities of the citizens is on the increase creating a possibility of arbitrariness in State action. Rule of Law is useful as a counter to this situation, because the basic emphasis of Rule of Law is on exclusion of arbitrariness, lawlessness and unreasonableness on the part of the government.

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35. For a detailed discussion on Discretionary Powers, see, JAIN, *A TREATISE ON INDIAN ADMINISTRATIVE LAW, I,* Chs. XVII-XIX*;* JAIN, *CASES & MATERIALS ON INDIAN ADM. LAW, III*, Ch. XVI.
36. For Tribunals, see JAIN, *TREATISE,* Ch. XIII; *CASES,* II, Ch. XII; *infra,* Ch. VIII.
37. *Infra,* Ch. XXVII.
38. INTERNATIONAL COMMISSION OF JURISTS, *DELHI DECLARATION, 1959.*
39. WADE & PHILLIPS, 93-5.

Rule of Law does not mean rule according to statutory law pure and simple, because such a law may itself be harsh, inequitable, discriminatory or unjust. Rule of law connotes some higher kind of law which is reasonable just and non-discriminatory. Rule of Law to-day envisages not arbitrary power but controlled power. Constitutional values, such as constitutionalism, absence of arbitrary power in the government, liberty of the people, an independent judiciary etc. are imbibed in the concept of Rule of Law.

The Indian Constitution by and large seeks to promote Rule of Law through many of its provisions. For example, Parliament and State Legislatures are democratically elected on the basis of adult suffrage.[40] The Constitution makes adequate provisions guaranteeing independence of the judiciary.[41] Judicial review has been guaranteed through several constitutional provisions.[42] The Supreme Court has characterised judicial review as a "basic feature of the Constitution"[43] Art. 14 of the Constitution guarantees right to equality before law.[44] This Constitutional provision has now assumed great significance as it is used to control administrative powers lest they should become arbitrary.[45]

The Supreme Court has invoked the Rule of Law several times in its pronouncements to emphasize upon certain Constitutional values and principles. For example, in *Bachan Singh*,[46] Justice BHAGWATI has emphasized that Rule of Law excludes arbitrariness and unreasonableness. To ensure this, he has suggested that it is necessary to have a democratic legislature to make laws, but its power should not be unfettered, and that there should be an independent judiciary to protect the citizen against the excesses of executive and legislative power.

In *P. Sambamurthy v. State of Andhra Pradesh*,[47] the Supreme Court has declared a provision authorising the executive to interfere with tribunal justice as unconstitutional characterising it as "violative of the rule of law which is clearly a basic and essential feature of the Constitution."[48]

In *Wadhwa*,[49] the Supreme Court has again invoked the Rule of Law concept to decry too frequent use by a State Government of its power to issue ordinances as a substitute for legislation by the Legislature.[50]

In *Yusuf Khan v. Manohar Joshi*,[51] the Supreme Court has laid down the proposition that it is the duty of the state to preserve and protect the law and the

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40. *Infra*, Chs. II, VI and XIX.
41. *Infra*, Chs. IV and VIII.
42. *Infra.* Chs. IV, VIII, XXIII, XL and XL.
43. *Minerva Mills Ltd. v. Union of India,* AIR 1980 SC 1789 : (1980) 2 SCC 591.
For discussion on the doctrine of Fundamental Features of the Constitution, see, *infra*, Ch. XLI.
44. *Infra*, Ch. XXI.
45. *Ibid.* Also see, M.P. JAIN, *A TREATISE OF ADMINISTRATIVE LAW*, I, Ch. XVIII; M.P. JAIN, *INDIAN ADM. LAW—CASES & MATERIALS*, II, Ch. XV.
46. *Bachan Singh v. State of Punjab*, AIR 1982 SC 1325 : (1982) 3 SCC 24; *infra*, Ch. XXVI.
47. AIR 1987 SC 663 : (1987) 1 SCC 362.
48. *Infra*, Ch. IX.
49. *D.C. Wadhwa v. State of Bihar,* AIR 1987 SC 579 : (1987) 1 SCC 378; *infra*, Ch. III, Sec. D(ii)(d) and Ch. VII, Sec. D(ii)(c).
50. On Ordinance-Making Power, see, *infra*, Ch. III and Ch. VII.
51. (1999) SCC (Cri) 577.

Constitution and that it cannot permit any violent act which may negate the rule of law.

The two great values which emanate from the concept of Rule of law in modern times are:

(1) no arbitrary government; and

(2) upholding individual liberty.

Emphasizing upon these values, KHANNA, J., observed in *A.D.M. Jabalpur v. S. Shukla.*[52]

> "Rule of law is the antithesis of arbitrariness...Rule of law is now the accepted norm of all civilised societies...Everywhere it is identified with the liberty of the individual. It seeks to maintain a balance between the opposing notions of individual liberty and public order. In every state the problem arises of reconciling human rights with the requirements of public interest. Such harmonizing can only be attained by the existence of independent courts which can hold the balance between citizen and the state and compel governments to conform to the law".

A significant derivative from 'Rule of Law' is judicial review. Judicial review is an essential part of Rule of Law. Judicial review involves determination not only of the constitutionality of the law but also of the validity of administrative action. The actions of the state public authorities and bureaucracy are all subject to judicial review; they are thus all accountable to the courts for the legality of their actions. In India, so much importance is given to judicial review that it has been characterised as the 'basic feature' of the Constitution which cannot be done away with even by the exercise of the constituent power.[53]

D. HISTORICAL PERSPECTIVE

The Constitution of India, the precursor of the new Indian renaissance, became effective on January 26, 1950.[54] Before the advent of the Constitution, India was governed under the Government of India Act, 1935, which became effective in 1937. India was then a part of the British Empire; sovereignty of the British Crown prevailed over the country and it was in the exercise of this sovereignty that the British Parliament had enacted the Act of 1935.

Only two major features of the Act need be mentioned here. First, the Act conferred only a very limited right of self-government on the Indians. The executive authority in a Province was vested in the Governor appointed by the Crown. He was to act ordinarily on the advice of the Ministers who were to be responsible to the Provincial Legislature which was elected on a limited franchise. But the Governor could exercise certain functions 'in his discretion' or 'individual judgment' in which case he was not bound by the ministerial advice and was subject to the control of the Governor-General.

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52. AIR 1976 SC 1207, at 1254, 1263 : (1976) 2 SCC 521; see, Ch. XXXIII, Sec. F.

53. *State of Bihar v. Subhash Singh,* AIR 1997 SC 1390 : (1997) 4 SCC 430. Also see, *infra,* Ch. XLI.

54. However, a few provisions of the Constitution, viz., Arts. 5, 6, 7, 8, 9, 60, 324, 366, 367, 379, 380, 388, 391, 392, 393 and 394, came into force on November 26, 1949.

The executive authority at the Centre was vested in the Governor-General appointed by the Crown. Though ordinarily the Governor-General would act on ministerial advice, he could discharge certain functions 'in his discretion' or 'individual judgment' in which case he was not bound by ministerial advice but was subject to the control of the Secretary of State for India who was a member of the British Cabinet. Defence and external affairs, among others, fell in this category.

Secondly, the Act of 1935 sought to change the character of the Indian Government from unitary to federal. The Indian Federation was to consist of the Provinces in which British India was divided, and the States under the native princes.

The federal scheme, however, never became fully operative as the princes did not join the Federation; the federal concept was implemented partially in so far as the relationship between the Centre and the Provinces was ordered on this basis. Further, the ministerial form of government, as envisaged by the Act of 1935, could not also be introduced at the Centre which continued to function under the Government of India Act, 1919. Accordingly, the Central Government consisted of the Governor-General and a nominated Executive Council. In this structure, the Governor-General occupied the key position as he could overrule his Council on any point if in his opinion the safety, tranquility or interests of British India were materially affected.[55]

In short, before 1947, the effective power and control over the Indian Administration lay with the Secretary of State, the Governor-General and the Governors; Indian participation in the governmental process was minimal and naturally the Indians never felt reconciled to such a dispensation.

There thus arose an insistent demand for independence which resulted in the setting up of a Constituent Assembly for drafting a Constitution for a free India. The Assembly formally commenced its task of Constitution-making from December 9, 1946, when it held its first meeting but could not make much headway because of the political impasse arising from a lack of understanding between the two major political parties, the Indian National Congress and the Muslim League. The political deadlock was resolved in 1947 when the British Parliament enacted the Indian Independence Act which partitioned the country into two independent units—India and Pakistan. The Constituent Assembly then embarked on its work in right earnest, and after three years' hard labour finalised and adopted the Constitution of India on November 26, 1949.

E. SALIENT FEATURES OF THE INDIAN CONSTITUTION

(a) MODERN CONSTITUTION

The fact that the Indian Constitution was drafted in the mid-twentieth century gave an advantage to its makers in so far as they could take cognisance of the various constitutional processes operating in different countries of the world and thus draw upon a rich fund of human experience, wisdom, heritage and traditions in the area of governmental process in order to fashion a system suited to the

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55. For details see, KEITH, *CONSTITUTIONAL HISTORY OF INDIA*, 331-357 (1937); GLEDHILL, *THE REPUBLIC OF INDIA*, 17-42 (1964); M. RAMASWAMY, CONSTITUTIONAL DEVELOPMENTS IN INDIA, (1955) *Stanford Law Review*, 326.

political, social and economic conditions in India.[56] In the end result, the Indian Constitution has turned out to be a very interesting and unique document.

One could discern in it the impact of several Constitutions. As for instance, the Indian Federalism is influenced by the American, Canadian and Australian Federalism. Fundamental Rights in India owe a great deal to the American Bill of Rights; the process of Constitutional amendment adopted in India is a modified version of the American system.

The influence of the British Constitutional Law, theories and practices on the Indian Constitution is quite pervasive. As for example, the parliamentary form of government in India closely follows the British model in substance; the system of prerogative writs which plays a crucial role in protecting peoples' legal rights and ensuring judicial control over administrative action is Britain's contribution to India. Australia's experiences have been especially useful for ordering the Centre-State financial relationship, and for promoting the concept of freedom of trade and commerce in the country. Inspiration has come from the Irish Constitution in the shaping of the Directive Principles of State Policy.

The Government of India Act, 1935, which preceded the Indian Constitution, has furnished not only administrative details, but also the verbatim language of many provisions of the Constitution.

It will, however, be wrong to suppose that the Indian Constitution is just a carbon copy of other Constitutions and contains nothing new and original. While adopting some of the principles and institutions developed in other democratic and federal countries, it yet strikes new paths, new approaches and patterns, in several directions. It makes bold departures in many respects from the established Constitutional norms and introduces many innovations. For example, in the area of Centre-State relationship, with a view to achieve the twin objectives of promoting the unity of India and reducing rigidity inherent in a federal system, the Indian Constitution makes several provisions which are original in conception as nothing parallel to these is to be found in any other federal Constitution and, to this extent, it makes a distinct contribution to the development of theories and practices of federalism in general.

(b) WRITTEN CONSTITUTION

India's Constitution is a lengthy, elaborate and detailed document. Originally it consisted of 395 Articles arranged under 22 Parts and eight Schedules. Today, after many amendments, it has 441 Articles and 12 Schedules. It is probably the longest of the organic laws now extant in the world.

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56. The Draft Constitution was criticized on the floor of the Constituent Assembly on the ground that most of it had been borrowed from other constitutions and that it could claim very little originality. In reply to this, AMBEDKAR observed:

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

See, VII *CONSTITUENT ASSEMBLY DEBATES* (hereinafter cited as *CAD*), 35-56.

Several reasons contributed to its prolixity. First, the Constitution deals with the organisation and structure not only of the Central Government but also of the States. Secondly, in a federal Constitution, Centre-State relationship is a matter of crucial importance. While other federal Constitutions have only skeletal provisions on this matter, the Indian Constitution has detailed norms. Thirdly, the Constitution has reduced to writing many unwritten conventions of the British Constitution, as for example, the principle of collective responsibility of the Ministers, parliamentary procedure, etc.

Fourthly, there exist various communities and groups in India. To remove mutual distrust among them, it was felt necessary to include in the Constitution detailed provisions on Fundamental Rights, safeguards to minorities, Scheduled Tribes, Scheduled Castes and Backward Classes.

Fifthly, to ensure that the future India be based on the concept of social welfare, the Constitution includes Directive Principles of State Policy.

Lastly, the Constitution contains not only the fundamental principles of governance but also many administrative details such as the provisions regarding citizenship, official language, government services, electoral machinery, etc. In other Constitutions, these matters are usually left to be regulated by the ordinary law of the land. The framers of the Indian Constitution, however, felt that unless these provisions were contained in the Constitution, the smooth and efficient working of the Constitution and the democratic process in the country might be jeopardised.

The form of administration has a close relation with the form of the Constitution, and the former must be appropriate to, and in the same sense as, the latter. It is quite possible to pervert the Constitutional mechanism without changing its form by merely changing the form of the administration and making it inconsistent with, and opposed to, the spirit of the Constitution. Since India was emerging as an independent country after a long spell of foreign rule, the country lacked democratic values. The Constitution-makers, therefore, thought it prudent not to take unnecessary risks, and incorporate in the Constitution itself the form of administration as well, instead of leaving it to the legislature, so that the whole mechanism may become viable.

It would, however, be wrong to suppose that the Indian Constitution with all its prolixity finally settles all problems of government. It leaves a number of matters to be taken care of by ordinary legislation. It also provides scope, though not so much as in Britain, for the growth and development of conventions.[57] Thus, the relationship between the President or the State Governor and his Council of Ministers, the concept of ministerial responsibility for acts of the officials, the relationship between the Prime Minister or the Chief Minister in a State and his Council of Ministers, the appointment of a State Governor, dissolution of the Lok Sabha or of a State Legislative Assembly by the President or the Governor respectively, the relations between the President and the Governor, are some of the matters which are left to be evolved by conventions.[58]

It is not correct to assume that the conventions of the British Constitution would operate *suo motu* in India wherever relevant and applicable. In course of time, some of these conventions have been questioned, and new conventions are

57. *Supra*, pp. 4-5.
58. See, Chs. III and VII, *infra*.

in the process of emergence. This is mainly because most of the conventions of the British Constitution have been evolved in the context of a two-party system, while in India, a multiparty system is envolving. More will be said on this subject in later pages.

(c) PREAMBLE

Unlike the Constitutions of Australia, Canada or the U.S.A., the Constitution of India has an elaborate Preamble. The purpose of the Preamble is to clarify who has made the Constitution, what is its source, what is the ultimate sanction behind it; what is the nature of the polity which is sought to be established by the Constitution and what are its goals and objectives?

The Preamble does not grant any power but it gives a direction and purpose to the Constitution. It outlines the objectives of the whole Constitution. The Preamble contains the fundamentals of the Constitution. It serves several important purposes, as for example:

(1) It contains the enacting clause which brings the Constitution into force.

(2) It declares the great rights and freedoms which the people of India intended to secure to all its citizens.

(3) It declares the basic type of government and polity which is sought to be established in the country.

(4) It throws light on the source of the Constitution, viz. the People of India.

The words in the Preamble, "We the people of India...in our Constituent Assembly...do hereby adopt, enact and give to ourselves this Constitution", propound the theory that the 'sovereignty' lies in the people, that the Constitution, emanates from them; that the ultimate source for the validity of, and the sanction behind the Constitution is the will of the people; that the Constitution has not been imposed on them by any external authority, but is the handiwork of the Indians themselves.

Thus, the source of the Constitution are the people themselves from whom the Constitution derives its ultimate sanction. This assertion affirms the republican and democratic character of the Indian polity and the sovereignty of the people. The People of India thus constitute the sovereign political body who hold the ultimate power and who conduct the government of the country through their elected representatives.

The claim that the People of India have given to themselves the Constitution is in line with similar claims made in several other democratic Constitutions, such as those of the U.S.A.,[59] Ireland, etc.

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59. "That the people have original right to establish, for their future government, such principles, as, in their opinion, shall most conduce to their own happiness is the basis on which the whole American fabric has been erected. The exercise of this original right is a great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme and can seldom act, they are designed to be permanent."
MARSHALL, C.J., in *Marbury v. Madison*, 1 Cr. 137.
"India and the United States both recognise that the people are the basis of all sovereignty." DOUGLAS, *supra*, at 6.

As regards the nature of the Indian Polity, the Preamble to the Constitution declares India to be a 'Sovereign Socialist Secular Democratic Republic'. The term 'Sovereign' denotes that India is subject to no external authority and that the state has power to legislate on any subject in conformity with constitutional limitations.[60] The term 'democratic' signifies that India has a responsible and parliamentary form of government which is accountable to an elected legislature. The Supreme Court has declared 'democracy' as the basic feature of the Constitution.[61] The term 'Republic' denotes that the head of the state is not a hereditary monarch, but an elected functionary.

As to the grand objectives and socio-economic goals to achieve which the Indian Polity has been established, these are stated in the Preamble. These are: to secure to all its citizens social, economic and political justice; liberty of thought, expression, belief, faith and worship; equality of status and opportunity, and to promote among them fraternity so as to secure the dignity of the individual and the unity and integrity of the Nation.

Emphasizing upon the significance of the three concepts of liberty, equality and fraternity used in the Preamble, Dr. Ambedkar observed in his closing speech in the Constituent Assembly on November 25, 1949 : "The principles of liberty, equality and fraternity are not to be treated as separate items in a trinity. They form a union of trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy. Liberty cannot be divorced from equality, equality cannot be divorced from liberty. Nor can liberty and equality be divorced from fraternity. Without equality liberty would produce the supremacy of the few over the many. Equality without liberty, would kill individual initiative".[62]

The Supreme Court has emphasized that the words "fraternity assuring the dignity of the individual" have "a special relevance in the Indian context" because of the social backwardness of certain sections of the community who had in the past been looked down upon.[63]

To give a concrete shape to these aspirations, the Constitution has a Chapter on Fundamental Rights which guarantee certain rights to the people, such as, freedom of the person, freedom of speech, freedom of religion, etc.[64]

According to the Supreme Court, "The Constitution envisions to establish an egalitarian social order rendering to every citizen, social, economic and political justice in a social and economic democracy of the Bharat Republic."[65] The Constitution thus ensures economic democracy along with political democracy.

The goals and objectives of the Indian Polity as stated in the Preamble are sought to be further clarified, strengthened and concretised through the Directive Principles of State Policy.[66] Therefore, it is essential that the Preamble be read

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60. *Synthetics v. State of Uttar Pradesh,* (1990) 1 SCC 109 : AIR 1990 SC 1927.
Also see, *Charan Lal Sahu v. Union of India,* (1990) 1 SCC 613 : AIR 1990 SC 1480.
61. See, *infra,* Ch. XLI; *S.R. Bommai v. Union of India,* AIR 1994 SC 1918 : (1994) 3 SCC 1.
62. B. SHIVA RAO, *THE FRAMING OF INDIAN CONSTITUTION : SELECT DOCUMENTS,* Vol. IV, 944.
63. *Indra Sawhney v. Union of India,* AIR 1993 SC 477 : 1992 Supp (3) SCC 217.
For a fuller discussion on this case, see, *infra,* under Art. 16; Ch. XXII.
64. See, *infra,* pp. 22-23; Chs. XX-XXXIII, *infra.*
65. *Samatha v. State of Andhra Pradesh,* AIR 1997 SC at 3326 : (1997) 8 SCC 191.
66. See below under "Welfare State", p. 20; Ch. XXXIV, *infra.*

along with the Directive Principles which lay down certain goals for the government to achieve so as to maximize social welfare of the people.

The Constitution is thus an instrument to achieve the goal of economic democracy along with political and social democracy. This aspect was emphasized upon by Dr. Ambedkar in his concluding speech in the Constituent Assembly:

> "Political democracy cannot last unless there lies at the base of it social democracy. What does social democracy mean? It means a way of life which recognises liberty, equality and fraternity..."

Ordinarily, Preamble is not regarded as a part of the statute, and, therefore, at one time, it was thought that the Preamble does not form part of the Constitution.[67] But that view is no longer extant. The majority of the Judges constituting the Bench in *Kesavananda* have laid down that the Preamble does form part of the Constitution. These Judges have bestowed great respect on the Preamble to the Constitution. For example, SIKRI, C.J., has observed in *Kesavananda Bharati v. Union of India*.[68]

> "It seems to me that the Preamble to our Constitution is of extreme importance and the Constitution should be read and interpreted in the light of the grand and noble vision expressed in the Preamble."

SHELAT and GROVER, J.J., have observed in the same case:[69]

> "Our Court has consistently looked to the Preamble for guidance and given it a transcendental position while interpreting the Constitution or other laws".

The Supreme Court has referred to the Preamble several times while interpreting constitutional provisions.[70]

The Preamble lays emphasis on the principle of equality which is basic to the Indian Constitution. The principle of equality is a basic feature or structure of the Constitution which means that even a constitutional amendment offending the basic structure of the Constitution is *ultra vires.* A legislature cannot transgress this basic feature of the Constitution while making a law.[71]

(d) SOCIALIST STATE

The word "socialist" was not there originally in the Preamble. It was added to the Preamble by the 42nd Amendment of the Constitution in 1976.[72] Thus, the concept of "socialism" has been made explicit and India's commitment to this ideal has been underlined and strengthened.

The term "socialist" has not been defined in the Constitution. It does not however envisage doctrinaire socialism in the sense of insistence on state ownership

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67. *In re Berubari Union and Exchange of Enclaves,* AIR 1960 SC 845 : (1960) 3 SCR 250; *infra*, Ch. V.
68. AIR 1973 SC 1461 at 1506 : (1973) 4 SCC 225.
69. *Ibid* at 1578.
70. See, for example : *In re : Berubari Union,* AIR 1960 SC 845 : (1960) 3 SCR 250; *Behram Khurshid Pesikaka v. State of Bombay*, AIR 1955 SC 123 : (1955) 1 SCR 613; *Basheshar Nath v. Commr. I.T.*, AIR 1959 SC 149 : 1959 Supp (1) SCR 528; *In re Kerala Education Bill*, 1957, AIR 1958 SC 956 : 1959 SCR 995; *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461 : (1973) 4 SCC 225.
71. See, *infra*, Ch. XLI.
72. See, Chs. XXXIV and XLII, *infra.*

as a matter of policy. It does not mean total exclusion of private enterprise and complete state ownership of material resources of the Nation.

In India, there has always been emphasis on mixed economy, i.e., along with a public sector, the private sector also has a role to play. The government accepts the policy of mixed economy where both public and private sectors co-exist side by side. However, the private enterprises has so far been rigorously controlled by the government[73], but signs are appearing on the horizon that in future the private enterprise is going to play a much more important economic role than it has played so far.

The Supreme Court has in a number of decisions referred to the concept of socialism and has used this concept along with the Directive Principles of State Policy[74] to assess and evaluate economic legislation. The Court has derived the concept of social justice and of an economically egalitarian society from the concept of socialism. According to the Supreme Court, "the principal aim of socialism is to eliminate inequality of income and status and standards of life, and to provide a decent standard of life to the working people."[75]

Democratic socialism aims to end poverty, ignorance, disease and inequality of opportunity. Socialistic concept of society should be implemented in the true spirit of the Constitution.[76] In *Samatha v. State of Andhra Pradesh*,[77] the Supreme Court has stated while defining socialism : "Establishment of the egalitarian social order through rule of law is the basic structure of the Constitution."[78]

The Court has laid emphasis on social justice so as to attain substantial degree of social, economic and political equality. Social justice and equality are complimentary to each other.[79]

Another idea propounded by the Court is that socialism means distributive justice so as to bring about the distribution of material resources of the community so as to subserve the common good.[80]

By reading the word 'socialist' in the Preamble with the Fundamental Rights contained in Arts. 14 and 16, the Supreme Court has deduced the Fundamental Right to equal pay for equal work and compassionate appointment.[81]

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73. See, *infra*, under Art. 19(1)(g), Ch. XXIV, and Art. 301, Ch. XV.
Also see, Ch. XXXIV, *infra.*

74. See, Ch. XXXIV, *infra.*

75. *D.S. Nakara v. Union of India,* AIR 1983 SC 130 : (1983) 1 SCC 305. Also see, *Minerva Mills v. Union of India,* AIR 1980 SC 1789 : (1980) 2 SCC 591; *Randhir v. Union of India,* AIR 1982 SC 879 : (1982) 1 SCC 618; *S.R. Bommai v. Union of India,* AIR 1994 SC 1918 : (1994) 3 SCC 1.

76. *G.B. Pant University of Agriculture & Technology v. State of Uttar Pradesh,* (2000) 7 SCC 109 : AIR 2000 SC 2695; *HSEB v. Suresh,* (1999) 3 SCC 601 : AIR 1999 SC 1160.

77. AIR 1997 SC 3297, 3330 : (1997) 8 SCC 191.

78. For discussion on the concept of "Basic Structure of the Constitution", see *infra,* Ch. XLI.
For further discussion on the concept of socialism, see, Ch. XXXIV, *infra,* under Directive Principles.

79. *Air India Statutory Corp. v. United labour Union,* AIR 1997 SC 645 : (1997) 9 SCC 377.

80. For further discussion on this theme, see, Ch. XXXIV, *infra,* under "Directive Principles."

81. See, *infra,* Chs. XXI and XXIII; *Balbir Kaur v. Steel Authority of India,* AIR 2000 SC 1596 : (2000) 6 SCC 493.
Also see, Ch. XXXIV, *infra.*

(e) WELFARE STATE

The Indian Constitution has been conceived and drafted in the mid-twentieth century when the concept of social welfare state is the rule of the day. The Constitution is thus pervaded with the modern outlook regarding the objectives and functions of the state. It embodies a distinct philosophy of government, and explicitly declares that India will be organised as a social welfare state, *i.e*., a state which renders social services to the people and promotes their general welfare. In the formulations and declarations of the social objectives contained in the Preamble,[82] one can clearly discern the impact of the modern political philosophy which regards the state as an organ to secure the good and welfare of the people.

This concept of a welfare state is further strengthened by the Directive Principles of State Policy which set out the economic, social and political goals of the Indian Constitutional system. These directives confer certain non-justiciable rights on the people, and place the government under an obligation to achieve and maximise social welfare and basic social values like education, employment, health, etc.

In consonance with the modern beliefs of man, the Indian Constitution sets up a machinery to achieve the goal of economic democracy along with political democracy, for the latter would be meaningless without the former in a poor country like India.[83]

(f) SECULAR STATE

India is a country of religions. There exist multifarious religious groups in the country but, in spite of this, the Constitution stands for a secular state of India.

The word 'secular' was not present originally in the Preamble. It was added thereto by the 42nd Constitutional Amendment in 1976.[84] What was implicit in the Constitution until then became explicit. Even before 1976, the concept of secularism was very much embedded in the Indian constitutional jurisprudence as many court cases of this era would testify.[85]

The concept of "secularism" is difficult to define and has not thus been defined in the Constitution. Secularism has been inserted in the Preamble by reason of the Constitution (Forty-second Amendment) Act, 1976. The object of insertion was to spell out expressly the high ideas of secularism and the compulsive need to maintain the integrity of the nation which are subjected to considerable stresses and strains, and vested interests have been trying to promote their selfish ends to the great detriment of the public good.[86] The concept is based on certain postulates. Thus, there is no official religion in India. There is no state-recognised church or religion. Several fundamental rights guarantee freedom of worship and religion as well as outlaw discrimination on the ground of religion

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82. See above (c) under "Preamble".
83. For Directive Principles, see Ch. XXXIV, *infra.*
84. See Ch. XLII, *infra.*
85. See, Ch. XXIX, *infra.*
86. *M. P. Gopalakrishnan Nair v. State of Kerala*, (2005) 11 SCC 45 : AIR 2005 SC 3053.

and, thus, by implication prohibit the establishment of a theocratic state. The state does not identify itself with, or favour, any particular religion. The state is enjoined to treat all religions and religious sects equally. No one is disabled to hold any office on the ground of religion. There is only one electoral roll on which are borne the names of all qualified voters.[87]

The essential basis of the Indian Constitution is that all citizens are equal, and that the religion of a citizen is irrelevant in the matter of his enjoyment of Fundamental Rights. The Constitution ensures equal freedom for all religions and provides that the religion of the citizen has nothing to do in socio-economic matters. "Though the Indian Constitution is secular and does not interfere with religious freedom, it does not allow religion to impinge adversely on the secular rights of citizens or the power of the state to regulate socio-economic relations."[88]

The Supreme Court has declared secularism as the basic feature of the Indian Constitution.[89] The Court has further declared that secularism is a part of fundamental law and an unalienable segment of the basic structure of the country's political system.[90] It has explained that secularism is not to be confused with communal or religious concepts of an individual or a group of persons. It means that the State should have no religion of its own and no one could proclaim to make the State have one such or endeavour to create a theocratic State. Persons belonging to different religions live throughout the length and breadth of the country. Each person, whatever be his religion, must get an assurance from the State that he has the protection of law freely to profess, practise and propagate his religion and freedom of conscience. Otherwise, the rule of law will become replaced by individual perceptions of one's own presumptions of good social order. Religion cannot be mixed with secular activities of the State and fundamentalism of any kind cannot be permitted to masquerade as political philosophies to the detriment of the larger interest of society and basic requirement of a Welfare State. The Court noted disturbing trends. It noted that lately, vested interests fanning religious fundamentalism of all kinds, and vying with each other, are attempting to subject the Constitutional machineries of the State to great stress and strain with certain quaint ideas of religious priorities.

(g) RESPONSIBLE GOVERNMENT

To give reality and content to the democratic ideals propounded in the Preamble, the Constitution establishes parliamentary form of government both at the

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87. Ch. XIX, *infra.*

88. I.L.I., *SECULARISM : ITS IMPLICATIONS FOR LAW AND LIFE IN INDIA*, 4-5(1966); Also, V.P. LUTHRA, *CONCEPT OF THE SECULAR STATE IN INDIA (1964)*; J.M. SHELAT, *SECULARISM, PRINCIPLES AND APPLICATION*, (1972); SRIVASTAVA, *RELIGIOUS FREEDOM IN INDIA (1982).*

89. *Kesavananda v. State of Kerala*, AIR 1973 SC 1461 : (1973) 4 SCC 225; *infra*, Ch. XLI; *S.R. Bommai v. Union of India*, AIR 1994 SC 1918 : (1994) 3 SCC 1; *infra*, Chs. XIII and XXIX.

90. *State of Karnataka v. Praveen Bhai Thogadia*, (2004) 4 SCC 684 : AIR 2004 SC 2081.

Centre and the States, in which the executive is responsible to an elected legislature.

This system differs fundamentally from the presidential system prevailing in America. Whereas the American system is based on the doctrine of separation of powers between the executive and the legislative organs, the Indian system is based on the principle of co-ordination and co-operation of the two organs.[1]

The popular Houses at the Centre and the States are elected on the basis of adult suffrage.[2] The President, the Head of the Indian Union, is elected by the elected members of Parliament and the State Legislative Assemblies. This system of election ensures that the President is the choice of the people throughout the country and that he represents both the Centre and the States.[3]

The executive power though formally vested in the President, is in effect exercised by the Council of Ministers headed by the Prime Minister and responsible to the Lok Sabha.[4] The President is more of a symbol, a high dignitary having ceremonial functions. The same pattern has been duplicated in the States with some modifications.[5]

The head of a State is the Governor who is a nominee of the Centre and, though largely a symbol like the President, yet has some functions to discharge as a representative of the Central Government. Effective power in a State, like the Centre, lies in the Council of Ministers headed by the Chief Minister and responsible to the elected House of the State Legislature.[6]

Details of the relationship existing between the President or the Governor and the respective Council of Ministers are not fully set out in the Constitution. This is an area, therefore, where conventions play a significant role.[7]

(h) FUNDAMENTAL RIGHTS

The Indian Constitution guarantees to the people certain basic human rights and freedoms, such as, *inter alia*, equal protection of laws, freedom of speech and expression, freedom of worship and religion, freedom of assembly and association, freedom to move freely and to reside and settle anywhere in India, freedom to follow any occupation, trade or business, freedom of person, freedom, against double jeopardy and against *ex post facto* laws. Untouchability, the age old scourge afflicting the Hindu Society, has been formally abolished.[8]

A person can claim Fundamental Rights against the state subject to the state imposing some permissible restrictions in the interests of social control. The grounds for impositing these restrictions on Fundamental Rights are expressly mentioned in the Constitution itself and, therefore, these rights can be abridged only to the extent laid down.

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1. For discussion of the Presidential System, see, *infra*, Ch. III.
2. See, Chs. II, VI and XIX, *infra.*
3. See, Ch. III, *infra.*
4. See, *infra*, Ch. III.
5. See, Ch. VII, *infra.*
6. See, *infra*, Ch. VII, under State Executive.
7. See, *supra*, pp. 4-5.
8. For Fundamental Rights see, *infra*, Chs. XX-XXXIII.

These rights, in substance, constitute inhibitions on the legislative and executive organs of the state. No law or executive action infringing a Fundamental Right can be regarded valid. In this way, the Constitution de marcates an area of individual freedom and liberty wherein government cannot interfere.

The Constitution provides an effective machinery in Arts. 32 and 226 for the enforcement of these Rights.[9] Without due enforcement, these Rights will be of not much use. The judiciary ensures an effective and speedy enforcement of these rights.

Since the inauguration of the Constitution, many significant legal battles have been fought in the area of Fundamental Rights and, thus, a mass of interesting case-law has accumulated in this area. On the whole, the Supreme Court has taken the position that the Fundamental Rights should be interpreted broadly and liberally and not narrowly. As the Court has observed in *Maneka Gandhi v. Union of India:*[10]

> "The attempt of the Court should be to expand the reach and ambit of the Fundamental Rights rather than to attenuate their meaning and content by a process of judicial construction".

The Constitution-makers decided to incorporate Fundamental Rights in the Constitution because of several reasons, such as, consciousness of the massive minority problem in India; memories of the protracted struggle against the despotic British rule; acknowledgement of the Gandhian ideals; the climate of international opinion and the American experience.

These Fundamental Rights have been conceived in a liberal spirit and seek to draw a reasonable balance between individual freedom and social control. These rights constitute a counterpart of the American Bill of Rights and though there are quite a few signs of resemblance between the two, the Fundamental Rights in India cover a much wider ground and are expressed in much greater detail than is the case in the U.S.A. The Bill of Rights in the U.S.A. has served as a bulwark against abuse of authority by the organs of government and has made a tremendous contribution to the promotion of a regime of freedom and liberty. The Fundamental Rights also play a similar role and promote rule of law in India.[11]

One of the most notable developments which has taken place in the Indian Constitutional jurisprudence since 1978 has been that the Supreme Court has declared that Fundamental Rights can even be implied over and above those which have been expressly stated in the Constitution. The Supreme Court does not follow the rule that unless a right is expressly stated as a Fundamental Right, it cannot be treated as one. Overtime, the Court has been able to imply, by its creative interpretative process, several Fundamental Rights out of the ones expressly stated in the Constitution. Thus, the range and coverage of the Fundamental Rights can go on expanding as a result of judicial interpretation of the Constitution in tune with the needs of a developing socio-economic society.[12]

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9. See, Chs. IV, VII and XXXIII, *infra.*

10. AIR 1978 SC 597 : (1978) 1 SCC 248. For a detailed discussion on this case, see, Ch. XXVI, *infra.*

11. See, *infra,* Ch. XL, on "Constitutional Interpretation".
Also, Chs. XX-XXXIII, *infra.*

12. For discussion on this aspect, see, *infra,* Chs. XXVI, XXXIV and XL.

(i) MINORITIES AND BACKWARD CLASSES

The Indian society lacks homogeneity as there exist differences of religion, language, culture, *etc*. There are sections of people who are comparatively weaker than others—economically, socially and culturally—and their lot can be ameliorated only when the state makes a special effort to that end. Mutual suspicion and distrust exists between various religious and linguistic groups.

To promote a sense of security among the Minorities, to ameliorate the conditions of the depressed and backward classes, to make them useful members of society, to weld the diverse elements into one national and political stream, the Constitution contains a liberal scheme of safeguards to Minorities, Backward Classes and Scheduled Castes. Provisions have thus been made, *inter alia*, to reserve seats in the Legislatures,[13] to make reservations in services,[14] to promote the welfare of the depressed and Backward Classes[15] and to protect the language and culture of the minorities.[16] No weightage or special privilege has, however, been accorded to any section in the matter of representation in the legislatures.[17]

The Constitution also sets up an effective institutional machinery to oversee that these safeguards are properly effectuated by the various governments in the country. This machinery has now been strengthened by statutory bodies.[18]

(j) ELECTIONS

India has adopted adult suffrage as a basis of elections to the Lok Sabha and the State Legislative Assemblies. Every citizen, male or female, who has reached the age of 18 years or over, has a right to vote without any discrimination.[19]

It was indeed a very bold step on the part of the Constitution-makers to adopt adult suffrage in a country of teeming millions of illiterate people, but they did so to make democracy broad-based and to base the system of government on the ultimate sanction of the people.

To introduce any property or educational qualification for exercising the franchise would have amounted to a negation of democratic principles, as such a qualification would have disenfranchised a large number of depressed and poor people. Further, it cannot be assumed that a person with a bare elementary education is in a better position to vote than a labourer or a cultivator who knows what his interests are and will choose his representatives accordingly.[20]

Several general elections have been held so far on the basis of adult franchise, and from all accounts, the step taken by the framers appears to have been well-advised.

To ensure free, impartial and fair elections, and to protect the elections from being manipulated by the politicians, the Constitution sets up an autonomous

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13. Chs. II, VI and XXXV, *infra.*
14. Ch. XXIII, *infra.*
15. Chs. XXII, XXXIV and XXXV, *infra.*
16. Chs. XVI and XXX, *infra.*
17. JAIN, *Safeguards to Minorities*: *Constitutional Principles, Policies and Framework in I.L.I.*, *MINORITIES AND THE LAW (1972).* Also see, *infra*, Chs. XIX and XXXV.
18. See, *infra*, Ch. XXXV, Sec. F.
19. See, Ch. XIX, *infra.*
20. ALLADI K. AYYAR, *CONSTITUTION AND THE FUNDAMENTAL RIGHTS*, 6; XI *CAD* 835.

Election Commission to supervise and conduct elections to Parliament and State Legislatures.[21]

(k) JUDICIARY

A notable feature of the Constitution is that it accords a dignified and crucial position to the judiciary.[22]

A well-ordered and well-regulated judicial machinery has been introduced in the country with the Supreme Court at the apex. The jurisdiction of the Supreme Court is very broad. It is the general court of appeal from the High Courts, the ultimate arbiter in all Constitutional matters and also enjoys an advisory jurisdiction.[23] It can hear appeals from any court or tribunal in the country and can issue writs for enforcing the Fundamental Rights.[24] There is thus a good deal of truth in the assertion that the Supreme Court of India has wider powers than the highest court in any other federation.

There exists a High Court in each State. The High Courts have wide jurisdiction and have been constituted into important instruments of justice. They are the general Court of appeal from the Courts subordinate to them. The most significant aspect of their jurisdiction is the power to issue writs[25]. The writ-jurisdiction of the High Courts is invoked very commonly to enforce Fundamental Rights and to control administrative process.

Although the Indian and the American Constitutions are both federal in nature, the Indian judicial system differs from that of the U.S.A., *inter alia*, in one very significant respect, *viz*., whereas the U.S.A. has a dual system of courts—a federal judiciary with the Supreme Court at the top along with a separate and parallel judicial system in each State—India has a unified and not a dual system of courts. The Supreme Court, the High Courts and the Lower Courts constitute a single, unified, judiciary having jurisdiction over all cases arising under any law whether enacted by Parliament or a State Legislature.

The unified judicial system avoids diversity in remedial procedures and confusing jurisdictional conflicts between the two parallel judicial systems such as arise in the U.S.A. The Indian system thus has the advantage of simplicity over its American counterpart. As Justice DOUGLAS observes, "The dual system is in many respects cumbersome, expensive and productive of delays in the administration of justice," and that "it has presented difficulties and perplexities that the other federal systems have not experienced".[26]

The judiciary in India has been assigned a significant role to play. It has to dispense justice not only between one person and another, but also between the state and the citizens. It interprets the Constitution and acts as its guardian by keeping all authorities—legislative, executive, administrative, judicial and *quasi*-judicial—within bounds. The judiciary is entitled to scrutinise any governmental action in order to assess whether or not it conforms with the Constitution and the valid laws made thereunder. The judiciary supervises the administrative process

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21. Ch. XIX, *infra.*
22. For details of the Judicial System see, *infra*, Chs. IV and VIII.
23. See, *infra*, Ch. IV, for details.
24. See, Ch. XXXIII, Sec. A, *infra.*
25. See, *infra*, Chs. VIII and XXXIII.
26. DOUGLAS, *op. cit.*, 86-7.

in the country, and acts as the balance-wheel of federalism by settling inter-governmental disputes.

The judiciary has power to protect people's Fundamental Rights from any undue encroachment by any organ of the government. The Supreme Court, in particular, acts as the guardian and protector of the Fundamental Rights of the people. A person complaining of breach of his Fundamental Right can straight away invoke the Court's writ jurisdiction under Art. 32 of the Constitution.[27] In the words of the Court itself, it acts "as a sentinal on the *qui vive* to protect Fundamental Rights"[28]. While interpreting the Fundamental Rights and other Constitutional provisions, at times, the Supreme Court has displayed judicial creativity of a very high order. The Court accepts that it has to play a law-creative role.[29]

To enable the Supreme Court and the High Courts to discharge their functions impartially, without fear or favour, the Constitution contains provisions to safeguard judicial independence. The Judges of these Courts are appointed by the Central Executive on the advice of the Judges themselves. Once appointed, the Judges hold office till they reach the age of superannuation as fixed by the Constitution and, thus, their tenure is independent of the will of the executive. A special procedure has been laid down for removing the Judges on the ground of incapacity or misbehaviour.[30]

The Constitutional provisions establishing an independent judiciary, having the power of 'judicial review' go a long way in establishing within the country a government according to law. As already stated, 'judicial review' has been declared to be a basic feature of the Indian Constitution.[31]

(l) FEDERAL CONSTITUTION

India's Constitution is of the federal type. It establishes a dual polity, a two tier governmental system, with the Central Government at one level and the State Government at the other. The Constitution marks off the sphere of action of each level of government by devising an elaborate scheme of distribution of legislative, administrative, and financial powers between the Centre and the States. A government is entitled to act within its assigned field and cannot go out of it, or encroach on the field assigned to the other government.

India is a member of the family of federations, of which the better known members are the U.S.A., Canada and Australia. The Indian Federalism has been designed after a close and careful study of the contemporary trends in these federations. Consequently, the Indian federal scheme while incorporating the advantages of a federal structure, yet seeks to mitigate some of its usual weaknesses of rigidity and legalism.[32] It does not, therefore, follow strictly the conventional or orthodox

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27. Ch. XXXIII, Sec. A, *infra.*

28. *Pathumma v. State of Kerala,* AIR 1978 SC 771, at 774 : (1978) 2 SCC 1. See, *infra,* Chs. XXXXIII.

29. See, *infra,* Ch. XL.

Some of the cases to which reference can be made in this connection are : *Golak Nath,* AIR 1967 SC 1643 : (1967) 2 SCR 762; *Kesavananda,* AIR 1973 SC 1461 : (1973) 4 SCC 225; *Maneka Gandhi,* AIR 1978 SC 597 : (1978) 1 SCC 248; *Unni Krishnan,* AIR 1993 SC 2178 : (1993) 1 SCC 645.

30. See Chs. IV and VIII, *infra,* for details of the process of judicial appointments.

31. See, Ch. XLI, *infra; supra,* footnote 53, on page 12.

32. For a detailed discussion on Federalism, see, *infra,* Chs. X-XVII.

federal pattern. Along with adopting some of the techniques developed in other federations for making the federal fabric viable, it also breaks much new ground and develops some novel expedients and techniques of its own, and is thus characterised by several distinctive features as compared with other federal countries.

Instead of the word "federation" the word "Union" was deliberately selected by the Drafting Committees of the Constituent Assembly to indicate two things *viz*. (a) that the Indian Union is not the result of an agreement by the states and (b) the component states; have no freedom to secede from it. Though the country and the people may be divided into different States for convenience of administration, the country is one integral whole, its people a single people living under a single imperium derived from a single source.[33]

Within a federal framework, the Indian Constitution provides for a good deal of centralisation. The Central Government has a large sphere of action and thus plays a more dominant role than the States. There is a long Concurrent List containing subjects of common interest to both the Centre and the States. The emergency provisions provide a simple way of transforming the normal federal fabric into an almost unitary system so as to meet national emergencies effectively.[34]

In certain situations, Parliament becomes competent to legislate even in the exclusive State field, and the process of amending the Constitution is not very rigid. India's Federalism is thus a flexible mechanism. The Constitution devises several structural techniques to promote intergovernmental co-operation and thus India furnishes a notable example of co-operative federalism.

India is a dual polity but has only a single citizenship, *viz*., the Indian citizenship, and there is no separate State citizenship.[35] This is in contrast to the American pattern of dual citizenship—the citizenship of the U.S.A and that of each State. This creates the problem that a State may, in certain cases, discriminate in favour of its own citizens in some matters, such as, the right to hold a public office, to vote, to obtain employment, or to secure licences for practising such professions as law or medicine in the State. The concept of one citizenship in India seeks to avoid some of these difficulties. By and large, an Indian enjoys practically the same political and civil rights of citizenship throughout the country no matter in which State he resides.

While each State of the U.S.A is free to draft its own Constitution covering matters within its competence, it is not so in India where the Constitution is a single frame which applies to the Centre as well as the States, from which neither can get out and within which each must work. India has achieved, and seeks to maintain, uniformity in basic civil and criminal laws. In other federations, duality of government produces a diversity of laws. This diversity may be alright up to a point as being an attempt to accommodate the laws to local needs and circum-

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33. *Hinsa Virodhak Sangh v. Mirzapur Moti Juresh Jamat,* (2008) 5 SCC 33 : AIR 2008 SC 1892.

34. "All federal systems including the American are placed in a tight mould of federalism. No matter what the circumstances, it cannot change its form and shape. It can never be unitary. On the other hand, the (Indian) Constitution can be both unitary as well as federal according to the requirements of time and circumstances. In normal times, it is framed to work as a federal system. But in times of war it is so designed as to make it work as though it was a unitary system".
AMBEDKAR, VII *CAD* 34-35.

35. On Citizenship, see, *infra,* Ch. XVIII.

stances. But then, beyond a certain point, it may cause confusion to the people. It may also retard movement of people from one place to another because something which is lawful in one State may be regarded as unlawful in another State. Such a situation has been largely avoided in India. Before 1935, India was governed as a unitary state, and a uniform system of laws had been established in many areas like civil procedure, criminal procedure, crimes, evidence, transfer of property, marriage, divorce, inheritance.[36] The Constitution places these subjects in the Concurrent List so that uniformity may be preserved in these laws which are at the basis of civil and corporate life without impairing the federal system.

Under the impact of wars, international crises, scientific and technological developments, and the emergence of the political philosophy of social welfare state, the whole concept of federalism has been undergoing a change; centralising tendencies have become manifest, and strong national governments have emerged in practically every federation. Taking note of these developments, and keeping in view the practical needs of the country, the Constitution-makers designed for India a federal structure, not with a view to its conformity with some static or theoretical pattern, but to subserve the needs of a vast and diverse country like India.

The Indian Constitution-makers were swayed not by any theoretical or *a priori*, but by pragmatic, considerations in designing federalism. The Constitution initiates a few new trends in the area of federalism. The scholars have characterised the Constitution in various ways, *e.g.*, *quasi*-federal, unitary with federal features, federal with unitary features, centralised federation, etc. The fact, however, remains that though the Centre in India is strong, and utmost intergovernmental co-operation is sought to be promoted within the Constitutional frame-work, yet the States are not agents of the Centre; they exist under the Constitution and not at the sufferance of the Centre; they enjoy large amount of autonomy in normal times; their powers are derived from the Constitution and not from the Central laws; and the federal portion of the Constitution can be amended not unilaterally by the Centre alone but only with the co-operation of the Centre and the States.[37] These aspects constitute the elements and essence of federalism and these are all present in the Indian Federation. Federalism has been declared to be an essential feature of the Constitution and a part of its basic structure.[38]

F. FUNDAMENTAL LAW

The Constitution of India being written constitutes the fundamental law of the land. This has several significant implications. It is under this fundamental law that all laws are made and executed, all governmental authorities act and the validity of their functioning adjudged. No legislature can make a law, and no governmental agency can act, contrary to the Constitution. No act, executive, legislative, judicial or *quasi*-judicial, of any administrative agency can stand if contrary to the Constitution. The Constitution thus conditions the whole governmental process in the country. The judiciary is obligated to see that the provisions

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36. For a discussion on the process of development of laws in India see, JAIN, *OUTLINES OF INDIAN LEGAL HISTORY*, XXIV-XXVIII (1990).
37. On the Constitution Amendment Process, see, *infra*, Ch. XLI.
38. See, Ch. XLI, *infra.*

of the Constitution are not violated by any governmental organ. This function of the judiciary entitles it to be called as the 'guardian' of the Constitution and it can declare an Act of a legislature or an administrative action contrary to the Constitution as invalid.[39] A Constitutional right cannot be thwarted by any concession of counsel.[40]

Since Britain has no written Constitution, courts there interpret the law but not the Constitution. The Indian courts, on the other hand, are also entrusted with the task of rendering an authoritative interpretation of the Constitution, and because of this arbitral function, they assume the character of vital instruments of government and policy-making.[41] Further, the Constitution is amendable not by ordinary legislative process, but by a special and elaborate procedure and, therefore, the constituent process differs from the ordinary legislative process. The Indian Constitution can, therefore, be characterised as rigid as distinguished from the British Constitution which is of the flexible type as it can be amended by the ordinary legislative process.[42]

Though rigid, the Indian Constitution contains within itself elements of growth, dynamism, expansion and flexibility. It does not seek to impose on the country any particular economic philosophy or social order. It establishes a democratic process of government for over 1000 million people and for that reason India is characterised as the biggest democracy in the world. The founding fathers have given to the people of India a Constitutional fabric which is in line with the world's most democratic concepts and which the people can use to organize a social structure according to their genius and needs following the path of rule of law.

39. For Judicial Interpretation of the Constitution, see, Ch. XL, *infra.*
40. *Election Commission of India v. St. Mary's School*, (2008) 2 SCC 390 : AIR 2008 SC 655..
41. See, *infra*, Ch. XL. Also see, UPENDRA BAXI, *THE INDIAN SUPREME COURT AND POLITICS* (1980)
42. For Amending Process, of the Constitution, see, *infra*, Ch. XLI.

PART II

THE UNION [OR LESS FORMALLY] OF INDIA AS A CONSTITUTIONAL ENTITY

Structurally, the Union may be resolved into three institutional components: (*a*) Legislative as represented by Parliament; (*b*) Executive as represented by the President and the Council of Ministers; and (*c*) Judicial as represented by the Supreme Court of India.

The composition, structure and powers of these three components, and their relationship *inter se* with each other, are discussed in the following few Chapters.

Articles 53 to 151 of the Constitution deal with the Union. Of these, Arts. 52 to 78 and 123 deal with the composition and powers of the Central Executive, Arts. 79 to 122 and 148-151 lay down the composition, powers and procedures of Parliament, and Arts. 124 to 147 deal with the Constitution and powers of the Supreme Court.

CHAPTER II

PARLIAMENT

SYNOPSIS

A. CONSTITUTION OF PARLIAMENT

India's Parliament is bicameral. The lower House is designated as the 'House of the People' or Lok Sabha, and the Upper House as the 'Council of States' or Rajya Sabha. The two Houses along with the President constitute Parliament [Art. 79]. All these three organs are essential to the process of legislation by Parliament.[1]

The President does not sit or participate in the deliberations in any House but he is a constituent part of Parliament in the sense that he has certain important functions to discharge in relation thereto, as for example, he summons the Houses, dissolves the Lok Sabha, prorogues the meetings of the Houses, gives assent to the Bills passed by the two Houses, etc.[2]

In Britain, Parliament consists of the Crown, the House of Commons and the House of Lords. India thus follows the British model in making the President, a counterpart of the British Crown, a constituent part of Parliament. In the United States, the central legislature, known as the Congress, consists of the Senate and the House of Representatives. Unlike India or England, the President is not regarded as a constituent part of the Congress because of the doctrine of separation of powers.[3]

The two Houses of Parliament in India differ from each other in many respects. They are constituted on entirely different principles, and, from a functional point of view, they do not enjoy a co-equal status.

Lok Sabha is a democratic chamber elected directly by the people on the basis of adult suffrage. It is thus designed to reflect the popular will and in this lies its strength. It is to Lok Sabha that the Council of Ministers is responsible[4] and it has the last word in such matters as taxation and expenditure of public money[5].

Rajya Sabha, on the other hand, is constituted by indirect elections. Constitutionally the Council of Ministers is not responsible to it. Because of these rea-

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1. See. J., *infra.*
2. See, *infra*, under "Meeting of Parliament", Sec. G.
3. *Infra*, Chapter III, Sec. E.
4. See, *infra*, Ch. III, Sec. B.
5. *Infra*, this Chapter, Sec. J(ii).

sons, the role of Rajya Sabha in the country's affairs is somewhat secondary to that of Lok Sabha, and this is so in spite of the fact that there are a few powers in the arena of Centre-State relations which can be exercised only by the Rajya Sabha and not by the Lok Sabha[6].

Rajya Sabha is designed to fulfil a number of purposes. First, it has been envisaged as a forum to which seasoned and experienced public men might get access without undergoing the din and bustle of a general election which is inevitable for finding a seat in the Lok Sabha. In this way, senior public men are enabled to apply their mature judgment and wisdom to solving the problems facing the country. The value of the Upper House, therefore, lies in the talent, experience and knowledge which it can harness to the service of the country which might be lost otherwise.

Secondly, Rajya Sabha serves as a debating chamber to hold dignified debates and acts as a revising chamber over the Lok Sabha which, being a popular chamber, may at times be swayed to act hastily under pressure of public opinion or in the heat of passions of the moment. The existence of two debating chambers means that all proposals and programmes of the government are discussed twice and that these will be adopted after mature and calm consideration, and thus precipitous action may be prevented. As a revising chamber, the Rajya Sabha may also help in improving Bills passed by the Lok Sabha.

Lastly, the Rajya Sabha is designed to serve as a chamber where the States of the Union of India are represented as States in keeping with the federal principle. The House has, therefore, been given some federal functions to discharge in its character of a House representing the States.[7] In practice, however, the Rajya Sabha does not act as a champion of local interests, or as a battle ground between the Centre and the States. Even though elected by the State Legislatures, the members of the Rajya Sabha vote not at the dictate of the State concerned, but according to their own views and party affiliation. Rajya Sabha has thus emerged as a forum where problems are discussed and considered from a national rather than a local perspective.

Demands are made now and then to abolish the Rajya Sabha. The Lok Sabha discussed a private member's resolution to this effect on March 30, 1973, but the general view was in favour of its retention.

B. COMPOSITION OF RAJYA SABHA

The maximum strength of Rajya Sabha has been fixed at 250 members. Of these, up to 238 members are the elected representatives of the States and the Union Territories [Art. 80(1)(b)], and twelve members are nominated by the President from amongst those who have special knowledge or practical experience of such matters as literature, science, art and social services [Arts. 80(1)(a) and 80(3)].

The seats in the House are allotted among the various States and the Union Territories on the basis of population, the formula being one seat for each million of population for the first five millions and thereafter one seat for every two mil-

6. See, *infra,* Ch. X.
7. See, under "Federalism", *infra,* Ch. X.

lion population or part thereof exceeding one million. A slight advantage is thus given to the States with smaller population over the States with bigger population. Proportionately larger representation has been given to the Union Territory of Delhi in view of the fact that it has no local legislature of its own and Parliament itself functions as such.

In the Constituent Assembly, a view was propounded that, on the analogy of the American Senate,[8] the States in India should have equal representation in the Rajya Sabha irrespective of their differences in area or population. This view, however, did not prevail and the distribution of seats in the House came to be fixed on a population basis with a slight weightage in favour of comparatively less populous States. The allocation of seats in the House among the States and the Union Territories is as follows [Art. 80(2) and the Fourth Schedule]:

Andhra Pradesh, 18; Assam, 7; Bihar, 16; Goa, 1; Chhattisgarh, 5; Gujarat, 11; Haryana, 5; Jharkhand, 6; Kerala, 9; Madhya Pradesh, 11; Maharashtra; 19; Karnataka, 12; Orissa, 10; Punjab, 7; Rajasthan, 10; Tamil Nadu, 18; Uttar Pradesh, 31; Uttaranchal, 3; West Bengal, 16; Jammu and Kashmir, 4; Nagaland, 1; Delhi, 3; Himachal Pradesh, 3; Manipur, 1; Pondicherry, 1; Tripura, 1; Meghalaya, 1; Mizoram, 1; Arunachal Pradesh, 1; Sikkim, 1; Total 233.

The representatives of a State in Rajya Sabha are elected by the elected members of the State Legislative Assembly in accordance with the system of proportional representation by means of a single transferable vote [Arts. 80(1)(b) and 80(4)]. This method of election ensures that only such members are chosen for Rajya Sabha as are cognisant with the needs and attitudes of the State concerned. It also underlines the idea that Rajya Sabha represents the States as such.

However, in order to be eligible to be elected to the Council of States, a person need not be a representative of the State beforehand nor an elector or a voter registered nor a resident in the State itself. It is only when he is elected to represent the State that he becomes a representative of the State. Therefore, the word "representative" simply means a person chosen by the people or by the elected Members of the Legislative Assembly to represent their several interests in one of the Houses of Parliament.[9]

The system of proportional representation helps in giving due representation to minority groups as well. As all the Union Territories do not have Legislatures of their own, the method of electing members of Rajya Sabha from a Union Territory has been left to be prescribed by Parliament by law [Art. 80(5)].

As regards the nominated members, objection was taken in the Constituent Assembly to the nominative principle on the ground that it fundamentally mars the principle of election; that it militates against the symmetry of the Constitution of our legislative bodies; and that the presidential nominations might be criticised on the ground of favouritism. But the objection did not prevail and the nominative principle was adopted with a view to give representation to certain non-political interests which might not otherwise get any representation in Parliament.[10]

In making nominations to Rajya Sabha, the President acts on the advice of the Council of Ministers. Further, the Courts do not interfere with the presidential

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8. See, *infra*, p. 37.
9. *Kuldip Nayar v. Union of India*, (2006) 7 SCC 1, at page 88 et seq : AIR 2006 SC 3127.
10. VII *CAD* 1200, 1221; AUSTIN, *THE INDIAN CONSTITUTION; CORNERSTONE OF A NATION*, 156-163 (1966).

power to make nominations.[11] There is no difference of status between the elected and the nominated members of Rajya Sabha, except that the former do, and the latter do not, participate in the election of the President of India.[12]

Rajya Sabha is a continuing body and is not subject to dissolution [Art. 83(1)] One-third of its members retire every two years [Art. 83(1)], and their seats are filled up by fresh elections and presidential nominations. This rotational system ensures continuity of Rajya Sabha while still enabling each State Legislative Assembly to elect periodically a few members to the House so that the prevailing party strength and contemporary views and attitudes in the State are reflected therein. Consequently, Rajya Sabha does not get stale and remains in touch with the current problems of the community due to the periodic infusion of fresh blood.

It will be illuminating to compare the composition of Rajya Sabha with that of the upper chambers in England and some federations.

(a) HOUSE OF LORDS

The House of Lords is one of the oldest chambers of the world. Its composition is not, however, particularly rational as there is no elective or popular element involved in it. It consists mostly of hereditary peers created by the Crown on the advice of the Ministers, and had been characterised as the 'common fortress of wealth' as most of its members were either landlords or leaders of trade and industry, who inherit the 'peerage' and the right to sit in the House from their ancestors.

Nowadays, peerage is also conferred for 'political and public service' on retired Ministers and former members of the House of Commons who wish to take leave of active politics but do not wish to snap their relationship with Parliament completely. Due to this factor, the traditional aristocratic character of the House is being gradually diluted. Because of its preponderantly hereditary composition, and lack of responsibility to the electorate, the House was regarded as an "indefensible anachronism," in the modern democratic era.[13] It was logically indefensible, and an anachronism that a House consisting primarily of unelected hereditary peers should have a significant role to play in democratic government.

A few steps have been taken to rationalise its structure to some extent. With the passing of the House of Lords Act, 1999 the number of members who are hereditary life peers has been considerably reduced. Currently, the number is 92 out of a total membership of 721. The old rule barring a woman peeress from sitting in the House has been abrogated. Provision has been made to confer life peerage. Life peers can sit and vote in the House. A life peerage may be conferred on a woman. This had made it possible to strengthen the House of Lords by nominating politicians and statesmen as life peers, without swelling the ranks of hereditary peers. The Peerage Act, 1963, enables a hereditary peer to renounce his title.

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11. See, *infra*, *GOVERNOR'S POWER TO MAKE NOMINATIONS TO STATE LEGISLATIVE COUNCIL*, Ch. VI.
12. See, *infra*, Ch. III.
13. FINER, *THEORY AND PRACTICE OF MODERN GOVERNMENT*, 407-8 (1956); JENNINGS, *PARLIAMENT*, 381-453 (1970); DE SMITH, *CONSTITUTIONAL LAW AND ADMINISTRATIVE LAW*, 287, 300 (1977); MARRISON, *GOVERNMENT AND PARLIAMENT*, 187 (1954); LASKI, *PARLIAMENTARY GOVERNMENT IN ENGLAND*, 111-138 (1959).

The House is a permanent body in the sense that dissolution of Parliament does not involve the Lords to lose their seats in the House, for they sit under a hereditary or life title and represent no constituency.

As will be seen, Rajya Sabha is composed on an entirely different basis. There is no hereditary principle involved in its composition. It is elected, though indirectly, and thus represents, to some extent, the current public opinion. Its membership is not for life but for six years. Needless to say, an institution like the House of Lords, has no place in a modern democracy.[14]

(b) FEDERATIONS

In some federal countries, the Upper House has been designed so as to reflect the interests or views of the constituent States and provide a means of protecting the States or their inhabitants against improper federal measures.[15]

In the United States, the Senate is composed on, what is known as the federal principle. Each constituent State, irrespective of its size or population, sends two Senators and thus has an equality of representation in the House. On the other hand, the House of Representatives is constituted on population basis.

This 'partly federal, partly national, character of the U.S. Congress resulted from a dispute between the smaller and bigger States at the time of Constitution-making. The smaller States, fearing that they would be overwhelmed by the more populous States, demanded equal representation in the federal legislature. The bigger States saw in equal suffrage the possibility of dominance by a minority of the population. Further, all the States whether big or small shared a common apprehension that the federal centre might unduly encroach on their interests and authority. The final solution was thus a practical compromise : in one House, equality of representation to the constituent States and, in the other, representation according to population. Equal representation in the Senate gives some security to the smaller States that the Central Government would not exercise its powers only in the interests of a few big States.

The Senators are elected by the popular vote of the people in their States. The tenure of a Senator is six years. The Senate is a continuing body and one-third of its members retire every two years.

With the passage of time, the original role of the Senate of guarding the interests of the States as political units has largely disappeared. It now functions more as a national institution rather than as a champion of local interests. This transformation has taken place due to several factors, such as, direct election of the Senators by the people on a State wide franchise, development of strong political parties advocating national programmes, development of a national consciousness and national integration. The Senate is a powerful body and equal representation here gives to the smaller States a voice much greater than what they could otherwise hope to have in federal affairs.

Similarly, in Australia, the thinly populated agricultural States, concerned at the prospect of domination by the larger commercial States, insisted on an upper

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14. LORD CHORLEY, *HOUSE OF LORDS CONTROVERSY*, 1958 Public Law, 216; WADE & PHILLIPS, 184-6 (IX Ed.)

15. BOWIE & FRIEDRICH, *op. cit.*, 4, 7, 8, 55, 62, 71; WHEARE, *FEDERAL GOVERNMENT*, 87 (1964); SCHWARTZ, *AMERICAN CONSTITUTIONAL LAW*, 53-55 (1955).

chamber having an equal number of Senators from each State regardless of its size or population. Thus, each State sends 10 Senators who are elected by means of proportional representation. This ensures that Senate membership will reflect party popularity in the country. A State is treated as a single constituency.

The term of the Senators is six years and half of them rotate every three years. The Senate is subject to dissolution. Because of the growth of strong national parties cutting across State loyalties, the Senate has lost much of its value as a protector of the smaller States and now tends to reflect party views rather than regional interests.

In Canada, Senate is composed on an entirely different principle. Each Province is assigned a fixed, although unequal, number of Senators. Provinces are grouped into regions and there is regional, rather than provincial, parity in the House. The Senators are appointed until the age of 75 by the Governor-General on the advice of the Federal Prime Minister. These appointments are made on party lines in order to ensure Senate approval of government programme. The allegiance of the Senators is usually to the party which appoints them. The fact that the Senate consists of political appointees has made it almost ineffective. The appointive nature of the Senate necessarily makes its role subordinate to the elective House.[16]

Rajya Sabha resembles the American Senate insofar as it is also a continuing body, is not subject to dissolution, and is based on the principle of rotation of members. Rajya Sabha, however, differs from its American counterpart in so far as its members are not elected directly by the people in the States and there is no equality of representation of the constituent States. Rajya Sabha has much larger membership than the Senate.

Rajya Sabha resembles the Australian Senate in so far as both are based on the principle of rotation. But the two Houses differ from each other in several respects. Rajya Sabha is a continuing body and is not subject to dissolution but the Australian Senate can be dissolved to resolve a deadlock between the two Houses; members of the Rajya Sabha are not elected directly by the people in the States as is done in Australia; States do not have parity of representation in the Rajya Sabha whereas each State in Australia has equal representation in the Senate; and Rajya Sabha has a much larger membership than the Australian Senate.

The only common elements between the Canadian Senate and the Rajya Sabha is that in none of these the constituent units have uniform representation, and none is subject to dissolution. In other respects, the two Houses differ radically. In Canada, members are appointed by the Executive; in India, they are elected for six years by the State Legislative Assemblies. The Indian House is bigger than the Canadian House.

The upper chambers in the federations surveyed here have exhibited one common tendency, *viz*., with emergence of national consciousness and national political parties, they have lost much of their assigned role of acting as the protectors of the State rights and by and large they now function as national institutions.

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16. HOGG, *CONSTITUTIONAL LAW OF CANADA*, 9-14 (1997).

C. COMPOSITION OF LOK SABHA

Lok Sabha is the popular chamber and is elected directly by the people.

The maximum strength of Lok Sabha has been fixed at 550 members, of whom not more than 530 are elected by the voters in the States, and not more than 20 represent the Union Territories [Art. 81(1)(a) and (b)] . Members from the States are elected by the system of direct election from territorial constituencies on the basis of adult suffrage [Art. 81(1)(a)].

Every citizen of India who is not less than 18 years of age on a date fixed by Parliament and does not suffer from any disqualification as laid down in the Constitution, or in any law on the ground of non-residence, unsoundness of mind, crime, or corrupt or illegal practice, is entitled to vote at an election for the Lok Sabha [Art. 326][17].

Seats in the House are allotted to each State in such a way that, as far as practicable, the ratio between the number of seats allotted to a State and its population is the same for all the States [Arts. 81(2)(a) and Art. 81(3)]. This provision does not apply to a State having a population of less than six millions [Proviso to Art. 81(2)].

Up to the year 2026, for purposes of Art. 81(2)(a), the 1971 census figures will be used to ascertain the population of a State. This means that the allocation of seats to the States in the Lok Sabha has been frozen at the level of 1971. No revision is to be made therein until the first Census is taken after the year 2026.[18]

Each State is divided into territorial constituencies in such a manner that the ratio between the population of a constituency and the number of seats allotted to it, so far as practicable, is the same throughout the State [Art. 81(2)(b)]. After each census, a readjustment is to be made, by such authority and in such manner as Parliament may by law prescribe, in allocation of seats to the various States in the Lok Sabha as well as in the division of each State into territorial constituencies [Art. 82].

Accordingly, Parliament has enacted the Delimitation Commission Act, 2002, for this purpose.[19] The idea is that the commission will demarcate each state into single member constituencies equal in number to the seats allotted to the State in Lok Sabha. For this purpose, the commission is to use the census figures of the Census of 2001. But, as stated above, there is to be no readjustment of seats among the States in Lok Sabha till the year 2026.[20]

Also, any such re-adjustment will not affect representation in the House until the existing House is dissolved. Further, such readjustment shall take effect from the date specified by the President by order. Until such readjustment becomes effective, election may be held to the House on the basis of territorial constituencies existing before such readjustment [Proviso to Art. 82].

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17. See, *Infra*, Ch. XIX, under 'Elections'.

18. Proviso to Art. 81(3).
See, the 84th Amendment of the Constitution, Constitutional Amendments, *infra*, Ch. XLII.

19. For details see, *infra*, under 'Elections', Ch. XIX.

20. Proviso to Arts. 80(3) and 82 as amended by the Constitution (Eighty-seventh Amendment) Act, 2003 w.e.f. 22.6.2003.

It is for Parliament to prescribe by law the manner in which members to the Lok Sabha are to be chosen from the Union Territories [Art. 81(1)(b)][21]. Provision has been made for reservation of seats in the Lok Sabha for Scheduled Castes and Scheduled Tribes.[22] The President can nominate not more than two members of the Anglo-Indian Community if in his opinion this community is not adequately represented in the House. [Art. 331].

Lok Sabha has been organised on practically similar lines as the lower chambers in Britain, U.S.A., Canada and Australia. The House of Commons in Britain, like the Lok Sabha, is elected directly by the people for five years by adult suffrage. In Australia, the House of Representatives is elected directly by the people for three years from single-member constituencies by preferential vote. All citizens without disabilities have a right to vote and voting is compulsory.[23] Seats in the House are distributed among the States according to population, with a minimum of five to each State.

In Canada, representation in the House of Commons is based on provincial population with some weightage in favour of the smaller Provinces. There is universal suffrage. The normal life of the House is five years.[24] In the U.S.A., the House of Representatives is elected directly by the people for two years. Seats are apportioned among the several States by the Congress on the basis of population.

The U.S. Constitution does not prescribe any voting qualification for election to the House. The regulation of suffrage for the House is within the control of each State subject to the stipulation that this should be the same as that requisite for electors of the most numerous branch of the State Legislature, and that none is to be excluded from voting on the grounds of sex, colour or previous condition of servitude.[25] This pattern differs from that in India where adult suffrage has been prescribed by the Constitution.[26]

D. PARLIAMENTARY MEMBERSHIP—QUALIFICATIONS AND DISQUALIFICATIONS

Only a citizen of India is qualified to be chosen a member of a House of Parliament [Art. 84(a)]. He should not be less than 30 years of age for Rajya Sabha, and 25 years for Lok Sabha [Art. 84(b)]. He should make and subscribe to the prescribed oath or affirmation before a person authorized by the Election Commission for this purpose [Art. 84(a)][27]. He should also possess such other qualifications as Parliament may by law prescribe for this purpose [Art. 84(c)]. He should not suffer from any disqualification prescribed either by the Constitution or a law made by Parliament [Art. 102(1)(e)].

Parliament has prescribed the necessary qualifications and disqualifications for parliamentary membership in the Representation of the People Act, 1951. Thus, a

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21. See, *infra*, , Ch. V, under "Union Territories."
22. *Infra*, under "Safeguards to Minorities", Ch. XXXV.
23. BOWIE and FREIDRICH, *op. cit.*, 30.
24. HOGG, *op. cit.*, 149.
25. SCHWARTZ, *op. cit.*, 54.
26. See, *infra*, Ch. XIX.
27. The form of the oath is set out in the Third Schedule to the Constitution.

person is not qualified to be chosen as a member of Rajya Sabha unless he is an elector for a parliamentary constituency in the concerned State or the Union Territory. To be a member of Lok Sabha, a person should be an elector for some parliamentary constituency in India. Also, he should be a member of any Scheduled Caste or Scheduled Tribe in any State, if he wants to contest a seat reserved for them. A person belonging to the Scheduled Castes or Scheduled Tribes is not, however, disqualified for being elected to a seat not reserved for these castes or tribes. Disqualifications laid down in the Act, stated briefly, are:

(1) corrupt practice at an election;

(2) conviction for an offence resulting in imprisonment for two or more years, or for an offence under certain provisions of the Indian Penal Code [Ss. 153A, 171E and 171F, 505(2) or 505(3)], or of the Representation of the People Act, 1951 [Ss. 125, 135 or 136 (2)(a)], or under the Protection of Civil Rights Act, 1955 or the Commission of the Sati (Prevention) Act, 1987 (3 of 1988); or the Prevention of Corruption Act, 1988 (49 of 1988); or The Prevention of Terrorism Act, 2002 (15 of 2002) or conviction for contravening a law providing for the prevention of hoarding or profiteering or of adulteration of food and drugs and sentenced to imprisonment for not less than six months;

(3) failure to lodge an account for election expenses;

(4) having a subsisting contract for supply of goods to, or execution of any works undertaken by, the government;

(5) being a managing agent, manager or secretary of a corporation in which government has not less than 25 per cent share;

(6) dismissal from government service for corruption or disloyalty to the state.

Some of these disqualifications subsist only for a period of 3 to 6 years[28], but the Election Commission is authorised to remove or reduce this period. Detention of a person under any law pertaining to preventive detention is not a disqualification for membership of Parliament[29] nor is a Member expelled by the legislature *ipso facto* disqualified for re-election.[30]

However, when an electoral candidate is convicted of a criminal offence and the High Court grants stay of such conviction before the last date of filing nomination, the stay would render the order of conviction non-operative from the date of stay and consequently the disqualification arising out of conviction would also cease to operate.[31]

Under Art. 102(1), a person is disqualified from being chosen as, and from being, a member of a House of Parliament if—

(*i*) a competent court has declared him to be of unsound mind [Art. 102(1)(b)]; or

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28. *V.C. Shukla v. Purshottam Kaushik,* AIR 1981 SC 547 : (1981) 2 SCC 84.

29. *Baboolal v. Kankar Mujare,* AIR 1988 MP 15. For discussion on *Preventive Detention, see, infra, Ch. XXVII.*

30. *Raja Ram Pal v. Hon'ble Speaker, Lok Sabha,* (2007) 3 SCC 184, at page 392 : (2007) 2 JT 1.

31. *Ravikant S. Patil v. Sarvabhouma S. Bagali,* (2007) 1 SCC 673 : (2006) 10 JT 578.

(*ii*) he is an undischarged insolvent [Art. 102(1)(c)]; or

(*iii*) he is not a citizen of India, or has voluntarily acquired the citizenship of a foreign State, or is under any acknowledgement of allegiance or adherence to a foreign State [Art. 102(1)(d)];[32] or

(*iv*) he holds an *office of profit* under the Central or the State Government [Art. 102(1)(a)].

(a) OFFICE OF PROFIT

Dependence of a large number of members of Parliament on government patronage would weaken the position of Parliament *vis-à-vis* the Executive; for, such members may be tempted to support the government without considering any problem with an open mind. The rationale behind the Constitutional provision [Art. 102(1)(a)] which debars a holder of an office of profit under the government from being elected to a House of Parliament, is that, as explained by the Supreme Court,[33] there should not be any conflict between the duties and the interests of an elected member and to see that the elected member carries on his duties freely and fearlessly without being subjected to government pressure.

The provision is thus designed to protect the democratic fabric of the country from being corrupted by Executive patronage. It ensures that Parliament does not contain persons who may be obligated to the government, and be amenable to its influence, because they are receiving favours and benefits from it. The provision secures independence of members of Parliament from the influence of the government and thus seeks to reduce the risk of conflict between duty and self-interest in them so that they may discharge their functions and criticise the government, if necessary, without fear or act under governmental pressure.

A similar restriction is imposed by Art. 191(1)(a) in respect of membership in a State Legislature, Art. 243F in respect of Panchayats and Art. 243V in respect of Municipalities.[34] Most of the cases cited below have arisen under Art. 191(1)(a), but these cases are being taken note of here as these are fully relevant to Art. 102(1)(a) as well as both these constitutional provisions are practically identical and in *pari materia*.

The disqualification arises when a person holds an 'office of profit' under the 'Central' or 'State Government'. The expression 'office of profit' has not been defined in the Constitution. It is, therefore, for the courts to explain the significance and meaning of this concept and decide in the context of specific factual situations whether a person is disqualified or not under the above mentioned constitutional provisions.

An 'office of profit' ordinarily means an 'office' capable of yielding some profit to the holder of the office. The disqualification arises when a person—

(i) holds an office;
(ii) the office is *under* the Central or State Government; and
(iii) the office is one of profit.

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32. On Citizenship, see, *infra*, Ch. XVIII.
33. *Ashok Kumar Bhattacharya v. Ajoy Biswas*, AIR 1985 SC 211, 215 : (1985) 1 SCC 151. Also, *Satrucharla Chandrasekhar Raju v. Vyricherla Pradeep Kumar Dev.*, AIR 1992 SC 1959 : (1992) 4 SCC 404.
34. For discussion on "State Legislature", see, *infra*, Ch. VI.

Thus, if a person does not hold an 'office' he is not disqualified even if he is making a profit. For example, a lawyer engaged by the government to appear in a case on its behalf and paid fees by it[35], a person holding a permit to ply buses, or a licensed stamp vendor or deed writer,[36] or a shareholder in a company transporting postal articles and mail bags,[37] holds no 'office' and is thus not disqualified to seek election to a House.

Further, the 'office' should be such to which some pay, salary, or allowance is attached. The word 'profit' connotes the idea of pecuniary gain. If there is really a gain, its quantum or amount is not material; but the amount of money receivable by a person in connection with the office he holds may be material in deciding whether the office really carries any 'profit'. Thus, a member of a government appointed committee, who draws a fee to meet his out-of-pocket expenses to attend committee meetings does not hold an office of profit, as what is paid to him is not by way of profit but only as a compensatory allowance.[38]

In *Jaya Bachchan v. Union of India*[39] it was held that the decisive factor in determining whether one is holding an office of profit or not, is whether the office is capable of yielding a profit or pecuniary gain and not whether pecuniary gain is in fact received or received negligibly by the individual holding that office,

In *Divya Prakash v. Kultar Chand*,[40] the Supreme Court ruled that the post of Chairman of the Board of School Education, Himachal Pradesh, as such, was an office of profit under the State Government as the post carried remuneration. But, as the holder of the office was appointed in an honorary capacity without any remuneration, he was not holding an office of profit and so was not disqualified to be a member of the State Legislature.

Hegde, a member of the Karnataka State Legislative Assembly, was appointed as the Deputy Chairman of the Planning Commission. He drew no salary but only allowances, *e.g.*, travelling allowance, daily allowance, conveyance allowance, house rent allowance, *etc*. A question arose whether Hegde became subject to disqualification. The High Court ruled that Hedge was not disqualified. Though he held an office under the Central Government, it was not one of 'profit' as he was not getting any salary but only allowances. The Court also ruled that Hegde was not disqualified because of the Karnataka Legislature (Prevention of Disqualification) Act, 1956.[41]

The Supreme Court has rationalised this approach as follows in *Madhukar*:[42]

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35. *Kanta Kathuria v. Manak Chand,* AIR 1970 SC 694 : (1969) 3 SCC 268.

36. *Yugal Kishore Sinha v. Nagendra Prasad Yadav*, AIR 1964 Pat. 543; *Banomali Behera v. Markanda Mahapatra,* AIR 1961 Ori 205.

37. *Satya Prakash v. Basir Ahmed Qureshi*, AIR 1963 MP 316. Also, *Brahma Dutt v. Paripurna Nand,* AIR 1972 All 340.

38. *Ravanna Subanna v. Kaggeerappa*, AIR 1954 SC 653; *Shivamurthy Swami Inamdar v. Agadi Sanganna Andanappa,* (1971) 3 SCC 870.

39. (2006) 5 SCC 266 : AIR 2006 SC 2119.

40. AIR 1975 SC 1067 : (1975) 1 SCC 264.

41. *Ramakrishna Hegde v. State of Karnataka,* AIR 1993 Kant 54; *infra,* footnote 90, p. 56.
Under Art. 191(1)(a) [equivalent to Art. 102(1)(a)], the State Legislature can declare by law that an office would not disqualify its holder to be a member of a House of State Legislature. Parliament also has a similar power : see, *infra*, p. 51.

42. *Madhukar v. Jaswant,* AIR 1976 SC 2283 : (1977) 1 SCC 70.

> "After all, all law is a means to an end. What is the legislative end here in disqualifying holders of 'offices of profit under government'? Obviously, to avoid a conflict between duty and interest, to cut out the misuse of official position to advance private benefit and to avert the likelihood of influencing government to promote personal advantage. So this is the mischief to be suppressed. At the same time we have to bear in mind that our Constitution mandates the State to undertake multiform public welfare and socio-economic activities involving technical persons, welfare workers, and lay people on a massive scale so that participatory government may prove a progressive reality. In such an expanding situation, can we keep out from elective posts at various levels many doctors, lawyers, engineers and scientists, not to speak of an army of other non-officials who are wanted in various fields, not as full-time government servants but as part-time participants in people's projects sponsored by government? For instance, if a National Legal Services Authority funded largely by the State comes into being, a large segment of the legal profession may be employed part time in the ennobling occupation of legal aid to the poor. Doctors, lawyers, engineers, scientists and other experts may have to be invited into local bodies, legislautres and like political and administrative organs based on election if these vital limbs of representative government are not to be the monopoly of populist politicians or lay members but sprinkled with technicians in an age which belongs to technology. So, an interpretation of 'office of profit' to cast the net so wide that all our citizens with specialities and know-how are inhibited from entering elected organs of public administration and offering semi-voluntary services in para-official, statutory or like projects run or directed by government or Corporation controlled by the State may be detrimental to democracy itself. Even athletes may hesitate to come into Sports Councils if some fee for services is paid and that proves their funeral if elected to a panchayat. A balanced view even if it involves 'judicious irreverence' to vintage precedents is the wiser desideratum".

However the view expressed by the Karnataka High Court in *Ramakrishna Hegde's* case[43] does not appear to be good law in view of the recent pronouncement of the Supreme Court in *Jaya Bachchan* where it was held that "payment of honorarium, in addition to daily allowances in the nature of compensatory allowances, rent free accommodation and chauffeur driven car at State expense, are clearly in the nature of remuneration and a source of pecuniary gain and hence constitute profit"[44].

For purposes of disqualification, the office in question must be *under* the government. If the office is not under the government, no disqualification will arise. To determine whether a person holds an office under the government, the several tests which are ordinarily applied are:

(i) whether the government makes the appointment;
(ii) whether the government has the right to remove or dismiss the holder of the office;
(iii) whether the government pays the remuneration;
(iv) whether the functions performed by the holder are carried on by him for the government and
(v) whether the government has control over the duties and functions of the holder.[45]

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43. (2006) 5 SCC 266 : AIR 2006 SC 2119.
44. (2006) 5 SCC 266 at page 270 : AIR 2006 SC 2119.
45. *Biharilal Dobray v. Roshan lal Dobray,* AIR 1984 SC 385 : (1984) 1 SCC 551; see, *infra,* footnote 64.

Whether an office to be characterised as one under the government should satisfy all, or one or more of these tests may be decisive of its true nature, has been the subject matter of a number of judicial pronouncements, but no decision lays down conclusively the characteristics of an office under the government. The courts determine from case to case whether the specific office involved may be characterised as an office *under* the government having regard to its various features. As the Supreme Court has observed in *Ashok Kumar v. Biswas*:[46]

> "For determination of the question whether a person holds an office of profit under the government each case must be measured and judged in the light of the relevant provisions of the Act".

The power of appointment, dismissal and control exercised by the government is an important consideration to determine whether the person is holding an office under the government. The fact that he is being paid not out of the government revenues is by itself a 'neutral', and not a decisive, factor as regards the nature of the office. It has been judicially emphasized that payment from a source other than the government revenues is not always a decisive factor as to the nature of the office. The mere fact of appointment to an office by the government may not make the office as one under the government. A person was appointed by the government as chairman of a statutory board. The Supreme Court refused to hold the office as being one 'under' the government as the government did not pay the remuneration and the holder of the office performed no functions for the government.[47]

A government servant is disqualified to be a member of a House. A government servant filed his nomination paper after being relieved from his service. The Supreme Court ruled that he was not disqualified to be a member of Lok Sabha as he was no longer a government servant at the time he submitted his nomination paper.[48]

A Minister either in the Central or State Government is not regarded as holding an office of profit.[49] The term 'Minister' includes a 'Deputy Minister".

A member of Parliament receives such salaries and allowances as may be determined by Parliament by law [Art. 106]. Nevertheless, he does not hold an office of profit under the government. The membership of Parliament is not an office under the government. Accordingly, a sitting member of Lok Sabha is not disqualified from contesting the next general election for Lok Sabha.[50]

A hereditary village office under the Mysore Village Offices Act, 1908, has been held to be an office of profit under the government because, though the office is hereditary to which the eldest heir in the eldest branch of the last holder is entitled to succeed, yet he would not get the office till appointed by the government; and he is removable by, and he works under the control and supervision of the government, and government lands are allotted to the office by way of

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46. AIR 1985 SC 211 at 217 : 1985 (1) SCC 151. See also *Som Lal v. Vijay Laxmi,* (2008) 11 SC 413.

47. *Surya Kant Roy v. Imamul Hak Khan,* AIR 1975 SC 1053 : (1975) 1 SCC 531.

48. *Sitaram v. Ramjibhai,* AIR 1987 SC 1293 : (1987) 2 SCC 262.
Also, *State of Gujarat v. Raman Lal Keshav Lal Soni,* AIR 1984 SC 161 : (1983) 2 SCC 33.

49. Explanation to Art. 102(1).
Also, explanation to Art. 191(1) for State Legislatures : *Shriram Haribhau Mankar v. Madhusudan Atmaram Vairale,* AIR 1968 Bom 219.

50. *Bhagwati Prasad v. Rajeev Gandhi,* AIR 1986 SC 1534 : (1986) 4 SCC 78.

emoluments for services rendered, and some cash allowance is also paid out of the government funds.[51]

The Vice-Chancellor of a University appointed by the Governor in his capacity as the Chancellor of the University,[52] or a member of a State Legislature,[53] or pramukh of a zila parishad,[54] does not hold an office of profit under the government as in none of these cases government has power to appoint or dismiss.

The Jharkhand Area Autonomous Council was created by an Act of the State Legislature. The Chairman of the Council was held to hold an office of profit under the State Government in *Shibu Soren v. Dayanand Sahay*.[55] He was appointed to the post by the State Government and he held his office during the "pleasure of the State". This meant that he could be removed or dismissed by the State. He was receiving an honorarium of Rs. 1750/- p.m. plus daily allowance, rent free accommodation and a car with a driver. All this could not be regarded as compensatory allowance; it amounted to salary and so the office was one of profit. As the person concerned was a member of the Rajya Sabha, the disqualification could be removed only by Parliament,[56] and not by the State Legislature.[57]

An office held under some body juridically distinct from, and independent of, the government is not regarded as an office *under* the government and so does not attract the disqualification under discussion. If, however, the government exercises control over the concerned body, the office held under it may or may not be regarded as an office *under* the government depending on how much control the government exercises over it. Is the concerned body still autonomous, or is it merely an instrumentality of the government? A few examples will illustrate the point.

The accountant-in-charge of a municipality was held not to be disqualified from being a member of the legislature. He was appointed and could be removed by the municipality but, in both cases, subject to the sanction of the government; he was paid out of the municipal funds which the municipality was competent to raise.[58] The government did exercise some control and supervision over the municipality, but still the municipality enjoyed a lot of autonomy. On this point, the Supreme Court observed:

> "Government controls various activities in various spheres and in various measures. But to judge whether employees of any authority or local authorities under the control of the government become government employees or not or holders of office of profit under the government the measure and nature of the control exercised by the government over the employee must be judged in the light of the facts and circumstances in each case so as to avoid any possible conflict between his personal interests and duties and of the government."[59]

It may be pointed out that in case of election of President or Vice-President, the Constitution specifically provides that the candidate is disqualified if he is

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51. *Ramappa v. Sangappa*, AIR 1958 SC 937 : 1959 SCR 1167.
52. *Joti Prasad v. Kalka Prasad*, AIR 1962 All 128.
53. *Ram Narain v. Ram Chandra*, AIR 1958 Bom 25.
54. *Umrao Singh v. Yeshwant Singh*, AIR 1970 Raj 134.
55. AIR 2001 SC 2583 : (2001) 7 SCC 425.
56. See, *infra*, p. 51.
57. See, *infra*, Ch. VI.
58. *Ashok Kumar v. Ajoy Biswas*, AIR 1985 SC 211 : (1985) 1 SCC 151. Also see, *Surya Kant Roy v. Imamul Hak Khan*, AIR 1975 SC 1053 : (1975) 1 SCC 531.
59. *Ashok Kumar, ibid.*

holding an office of profit under a local or any other authority under the control of the Central or the State government.[60] But in case of election as a member of a House of Parliament or a State Legislature, no such disqualification is specifically laid down in the Constitution.[61]

The Durgah Committee is a statutory body, being a body corporate with perpetual succession. Its members are appointed, and are removable, by the government of India. The manager of a school run by the Durgah Committee was held to be not holding an office of profit under the government. The members of the Durgah Committee, the Supreme Court held, were not government servants; the manager was neither appointed, nor was removable, by the government, nor was he paid out of the government revenues. He was holding an appointment under a statutory body and was paid out of the Durgah funds and, therefore, he could not be regarded as holding an appointment under government control.[62]

A teacher in a government aided school does not hold an office under the government, for the school, though under government's control and supervision, still has its own separate personality, property and funds.[63]

But an assistant teacher employed in a basic primary school run by the Board of Basic Education constituted by an Act of the Legislature was held disqualified from being a member of the State Legislature. The Court said : "Even though the incorporation of a body corporate may suggest that the statute intended it to be a statutory corporation independent of the Government, it is not conclusive on the question whether it is really so independent. Sometimes the form may be that of a body corporate independent of the Government but in substance it may be just the alter ego of the Government itself."

The rules framed under the Act laid down that the appellate authority in case of disciplinary proceedings in respect of the teachers in the basic schools were the State Government or government officers depending upon the nature of the posts. Almost the entire financial needs of the Board were met by the Government. After considering the provisions of the Act and the rules made thereunder, the Supreme Court concluded that the Government had direct control over the board and that it was not truly independent of the Government; the board had no separate personality of its own and that every employee of the Board was in fact holding his office under the Government. The subordination of the Board and its employees to the Government was writ large on the face of the Act and the Rules made thereunder. The Act discharged an important responsibility of the Government to provide primary education in the State. The Act empowered the State Government to take over all basic schools being run by the local bodies in the State and to manage them under the Act; as also to administer all matters pertaining to the entire basic education in the State through the Board. The teachers and other employees were to be appointed in accordance with Rules by government appointed officials. The disciplinary proceedings in respect of the employees were subject to the final decision of the State Government. In these circumstances, the post of a teacher under the U.P.

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60. See, *infra*, Ch. III, Sec. A.
61. See, *supra*, p. 42. *See also Shrikant v. Vasantrao*, AIR 2006 SC 918 : (2006) 2 SCC 682. Also see, *infra*, Ch. VI.
62. *Abdul Shakur v. Rikhab Chand*, AIR 1958 SC 52 : 1958 SCR 387.
63. *Govinda Kurup v. S.A. Paul*, AIR 1961 Ker 242.

Basic Education Act was held to be an office of profit under the Government. In the words of the Court:

> "The Board for all practical purposes is a department of the Government and its autonomy is negligible".

Accordingly, the Court ruled that considering the high purposes underlying Art, 191(1)(a), the respondent assistant teacher was holding an office of profit under the State Government and so was disqualified for being chosen as a member of the State Legislative Assembly.[64]

In the case noted below,[65] the facts were as follows: the appellant was appointed as a single teacher in a primary school run by the Integrated Tribal Development Agency (ITDA) by its project officer who was the district collector. The ITDA was a society registered under the Societies Registration Act. The government had some control over the composition of its governing body and the sanctioning of posts. Funds for the activities of the society came from the government and some government officers were *ex officio* members of ITDA. Its object was to provide compulsory education in tribal areas. The appellant was suspended by the tribal welfare officer for some irregularities. The appellant was thereafter elected to the State Legislative Assembly. In an election petition filed against him, the High Court ruled that he was holding an office of profit under the government and so he was disqualified under Art. 191(1)(a) to be elected as a member of the State Legislature. The High Court took the view that although the society appeared to be independent of the state government, in substance, and for all practical purposes, its activities were controlled by government officials—the society's chairman and the project officer were government officials; a majority of the members of its governing body were government officials, society's funds came from government grants. The society was providing free and compulsory primary education to children which was the responsibility of the State Government and the society's teachers were subjected to the Civil Service (Classification, Control and Appeal) Rules of the State Government. But, on appeal, the Supreme Court reversed the High Court. The Supreme Court ruled that the government may have some control over the society which is the appointing authority, but government has no direct control over the teachers themselves. The whole scheme has been set up for the welfare of the tribals. In such a situation, felt the Supreme Court, the question of any conflict between the duties and interests of an elected member of a legislature does not arise since "it cannot be said that he, as a teacher, can be subjected to any kind of pressure by the government which has neither the power to appoint him nor to remove him from service. The Court said, "The right to appoint and right to remove the holder of the office in many cases becomes an important and decisive test."

Distinguishing *Biharilal Dobray*, the Supreme Court has held that the emphasis ought to be "on the nature of the post held and the possibility of conflict between duty and interest of an elected member and to appreciate the same the test is whether the government has power to appoint or dismiss the employee who is being chosen as a legislator".

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64. *Biharilal Dobray v. Roshanlal Dobrary*, AIR 1984 SC 385 : (1984) 1 SCC 551. Also see, *supra*, footnote 45.

65. *Satrucharla Chandrasekhar Raju v. Vyricherla Pradeep Kumar Dev.*, AIR 1992 SC 1959 : (1992) 4 SCC 404.

To apply a "strict and narrow" construction will amount to shutting off many prominent and other eligible persons to contest the elections which forms the fundamental basis for the democratic set-up.

In *Satrucharla,* the Supreme Court has summarised as follows the tests or principles which emerge from the previous case-law to determine whether or not a person holds an office of profit under the government:

(i) The power of the government to appoint a person in office or to revoke his appointment at its discretion.

The mere control of the government over the *authority* having the power to appoint, dismiss or control the working of the officer employed by *such authority* does not disqualify the concerned officer from being a candidate for election as a member of Parliament/State Legislature.

(ii) The payment from out of the government revenue.

Payment from a source other than the government revenue is not always a decisive factor.

(iii) The incorporation of a body corporate and entrusting the functions to it by the government may suggest that the statute intended it to be a statutory corporation independent of the government.

But it is not conclusive on the question whether it is really so independent. Sometimes, the form may be that of a body corporate independent of the government, but, in substance, it may be the just after ego of the Government itself.

(iv) The true test of the determination of the said question depends upon the degree of control, the government has over it, the extent of control exercised by very other bodies or committees, and its composition, the degree of its dependence on the government for its financial needs and the functional aspect, namely, whether the body is discharging any important governmental function or just some function which is merely optional from the time of view of the government.

A company has its own separate identity. In modern times, many corporations and government companies are created to carry on multifarious activities, like the Life Insurance Corporation, State Trading Corporation, *etc*.[66] Usually, the government contributes most of its share, capital and appoints its directors. The government also enjoys power to issue directions relating to the company's working and has over-all control over it. Still, such a body is not a government department and has a distinct personality of its own and has a good deal of autonomy in its day to day working. Therefore, a servant in such a body does not hold an office 'under' the government because the power to appoint and dismiss him and control over his work vest in the company or the corporation itself and not in the government, and the government control is not direct but only indirect.[67] Even the power to determine the question of remuneration payable to the employee was not vested in the government.

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66. For a fuller discussion on Public Sector Undertakings, see, JAIN, *A TREATISE ON ADMINISTRATIVE LAW,* II; *Jain & Jain, PRINCIPLES OF ADM. LAW,* Ch. XXXV (Reprint 1993).

67. *D.R. Gurushantappa v. Abdul Khuddus,* AIR 1969 SC 744 : (1969) 1 SCC 466.

The indirect control of the government arising out of its power to appoint the managing director of the company and to issue directions to the company in its general working does not bring the employees of the company directly under government control.

A person was appointed as part-time chairman by the transport corporation of the State. The government had no power to appoint or remove him from office. He was given a compensatory allowance by the corporation from out of its own funds and not out of government funds. It was held that he did not hold an office of profit.[68]

But the auditor of a government company (in which the government held 100 per cent shares) was held to hold an office of profit under the government. Although the company was a separate entity from the government, yet it was government company in which the government held 100% shares. The auditor was appointed, and was removable, by the government; he performed his functions under the control of the Comptroller and Auditor-General who himself is appointed, and whose administrative powers are controlled by the rules made by the President.

An office of profit *under* the government does not necessarily mean service of government. For holding an 'office of profit' *under* the government, a person need not be in the service of the government and there need not be any relationship of master and servant between him and the government. The fact that the auditor's remuneration was paid not out of the public revenues but by the company which had an entity apart from the government, was held to be not decisive of the question.[69] As the Court emphasized, what needs to be considered is the substance and not the form of the matter.

The Supreme Court has emphasized in *Biharilal Dobray v. Roshanlal Dobray*,[70] that merely because a body is incorporated, it is not conclusive of the question whether the body is really independent of the government. Sometimes, the form may be of a body corporate independent of the government but in substance it may just be the 'alter ego' of the government itself. "The true test for determination of the said question depends upon the degree of control the government has over it, the extent of control exercised by the several other bodies or committees over it and their composition, the degree of its dependence on government for its financial needs and the functional aspect, namely, whether the body is discharging any important governmental function or just some function which is merely optional from the point of view of government".

The Bokaro Steel Plant is under the management and control of the Steel Authority of India Ltd.—a company incorporated under the Companies Act and its shares are owed by the Central Government. Its Chairman and the Board of Directors are appointed by the President of India. The power of appointment and removal of workers vest in the Steel Authority of India Ltd. which also determined their remuneration. The Steel Authority as well as the Bokaro Plant perform non-governmental functions such as manufacturing steel. In this context, the Supreme Court has ruled that the *Khalashis* or meter readers employed by the Bokaro Plant are not subject to the control of the government which neither exer-

68. *K. Prabhakara Rao v. M. Seshagiri Rao,* AIR 1981 SC 658 : (1982) 2 SCC 78.
69. *Gurugovinda Basu v. Sankari Prasad,* AIR 1964 SC 254 : (1964) 4 SCR 311.
70. AIR 1984 SC 385 at 395 : (1984) 1 SCC 551; *supra,* footnotes 45 and 64.

cised the power of appointment nor of removal of these persons. Control over the work of these employees is exercised by the Steel Authority and not by the Central Government. Accordingly, these employees could not be regarded as holding an office of profit under the Central Government.[71]

A clerk employed in Coal India Ltd. has been held to be not disqualified under Art. 102/193 from contesting an election. Coal India is a private limited company incorporated under the Companies Act with 100% share capital owned by the Central Government. It is thus a government company. The President can issue directions to the company as may be considered necessary. The day to day management of the company however vests in a Board of Directors. The company has power to appoint, remove or dismiss its employees who are paid their salaries from the company's funds. The Government exercises no control on appointment, removal, service conditions and functioning of the employee concerned.[72]

A disqualification may arise under a statute outside the Constitution. Thus, the Representation of the People Act debars a person, who holds the office of a managing agent, manager or secretary of a company or corporation in the capital of which a government holds not less than 25% share, from being chosen as a member of the Legislature to which that Government is responsible. Further, a corporation may itself frame a regulation under statutory authority debarring its employees from standing at an election of a legislative body and this constitutes a disqualification.

(b) THE PARLIAMENT (PREVENTION OF DISQUALIFICATION) ACT, 1959

Parliament has power to declare the offices of profit the holders of which would not be disqualified for its membership [Art. 102(1)(a)]. Accordingly, Parliament has enacted the Parliament (Prevention of Disqualification) Act, 1959, which lists the various categories of offices the holders of which would not be disqualified for membership of Parliament.

The Act does not define the term 'office of profit' for the obvious reason that the term occurs in the Constitution and its final interpretation rests with the courts and not with Parliament. In case of an office other than those exempted under the Act, the final word on whether it is an 'office of profit' or not rests with the courts.

In Britain, there is no general theory that a disqualification arises from holding an office of profit under the Crown. There disqualifications are specific and disqualification arises only when a person holds a disqualifying office so declared under a parliamentary legislation.[73] The House of Commons Disqualification Act, 1975, lists the offices the holders of which are disqualified from membership of the House. The position is, however, different in India as there prevails a general disqualification under the Constitution, but specific exemptions may be granted from it under a law of Parliament.[74]

The power of Parliament to grant exemptions has on occasions been exercised to operate with retrospective effect. The Parliamentary (Prevention of Disquali-

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71. *Aklu Ram Mahto v. Rajendra Mahto,* AIR 1999 SC 1259 : (1999) 3 SCC 541.
72. *Pradyut Bordoloi v. Swapan Roy,* AIR 2001 SC 296 : (2001) 2 SCC 19.
73. J.A.G. GRIFFITH'S comments in 20 *Modern L.R.,* 52, 492 (1957); WADE AND PHILLIPS, *op. cit,*. 154.
74. See *infra* p. 53.

fication) Amendment Act, 2006 excludes 45 posts held by Members of Parliament from the operation of Article 102 with retrospective effect from 1959. Now by virtue of the amendment, earlier judicial decisions to the extent that particular offices of profit (now excluded) would disqualify a member of the House, are no longer good law. But judicial pronouncements on the characteristics of an office of profit for the purposes of Article 102 will continue to operate.

Challenge to the constitutionality of the amendment by way of a petition under Article 32 has been repelled. The petitioners contended that a legislation retrospectively removing the disqualification will help a person to continue to be a Member, only if he/she had continued as a Member and his/her seat had not fallen vacant on the reasoning that in instances where the seat had already become vacant on account of incurring a constitutional disqualification, any legislative attempt to revive the membership of the Member whose seat had become vacant, would violate Article 102(1) read with Article 101(3)(a) of the Constitution was rejected.[75] The court held that when the amending Act "retrospectively removed the disqualification with regard to certain enumerated offices, any Member who was holding such office of profit, was freed from the disqualification retrospectively. As of the date of the passage of the Amendment Act, none of the Members who were holding such offices had been declared to be disqualified by the President. Section 4(2) was not attracted and consequently they continued as Members."

In 2004, an Election Petition was filed challenging the election of a candidate who was elected to the Delhi Legislative Assembly in 2003 on the ground that the elected candidate was the Chairman of the Delhi Wakf Board when he was elected. While the challenge was pending decision by the High Court, in 2006, the Wakf Act 1995 was amended by inserting a provision which effectively exempted the office of the Chairperson from being a disqualification for election as a member of the Legislative Assembly. The dismissal of the petition by the High Court was affirmed in appeal.[76]

(c) JOINT COMMITTEE ON OFFICES OF PROFIT

Every day government appoints committees and sets up statutory or non-statutory bodies. The membership of such bodies does not entail a disqualification if the member does not get any remuneration but only a compensatory allowance. As new and new bodies are created daily, the question as to the membership of which of these bodies would or would not be a disqualification for parliamentary membership is a matter demanding constant review. To meet this need, a Joint Committee on Offices of Profit has been constituted.

The Committee consists of ten members from the Lok Sabha and five members from the Rajya Sabha. The function of the Committee *inter alia* is to undertake a continuous scrutiny of composition and character of various government appointed bodies and report to both Houses as to the membership of which of these bodies ought or ought not to disqualify a person for membership of Parliament. The Committee generally applies two tests in deciding whether a member of a body ought to be exempted from disqualification—

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75. *Consumer Education and Research Society v. U.O.I.*, (2009) 9 SCC 648.
76. *Mohd. Akram Ansari v. Chief Election Commissioner*, (2008) 2 SCC 95 : (2007) 14 Scale 30.

(*i*) what are the emoluments or allowances attached to the membership;

(*ii*) what is the nature of the functions of the body?

If a member of a body gets only a compensatory allowance and the body exercises merely an advisory function, then no disqualification would arise. But if the allowance given is more than compensatory allowance, and/or the body exercises executive and financial powers and is in a position to wield influence and patronage, then its membership would not be exempted from disqualification.

From time to time, the Joint Committee has submitted reports to both Houses giving its recommendations on proposals to nominate a member of the House to a particular office namely whether a nomination would fall foul of Article 102. The role of the Committee is only advisory and the recommendations do not give protection from disqualification under the law until the recommendations are given statutory effect by amending the Parliament (Prevention of Disqualification) Act, 1959. However, the Joint Committee was not consulted before the Act was amended by the Parliamentary (Prevention of Disqualification) Amendment Act, 2006.

Recently, a Joint Committee of both Houses has been set up to examine the constitutional and legal provisions relating to an office of profit.[77]

(d) DECISION ON DISQUALIFICATION

A disqualification for parliamentary membership may either exist when a person seeks to become a member of a House, or may arise after he has become a member. He is not entitled to be chosen as a member of a House in the former case and will cease to be a member in the latter case. If a disqualified person is elected, the Constitution lays down no procedure to declare the election void. That is a matter which can be dealt with by a law of Parliament. Section 100(1)(a) of the Representation of People Act, 1951, enables the High Court to declare an election void if a disqualified candidate is elected.

The constitutional scheme is that a person shall be disqualified from continuing as a Member of Parliament if he/she holds any disqualifying office of profit. Such a disqualification can result in the vacation of his/her seat when the Member admits or declares that he/she is holding the disqualifying office of profit. However, if he/she does not make a voluntary declaration about the same, the question of whether he/she is disqualified or not, if raised, shall have to be referred for a decision by the President of India and the same will be made after obtaining the opinion of the Election Commission of India. The question as to whether a particular Member has incurred a disqualification can be referred for the decision of the President by any citizen by means of making an application to the President. It is only after the President decides that the Member has incurred an alleged disqualification that the particular Member's seat would become vacant.[78]

The words "if any question arises as to whether a Member of either House of Parliament has become subject to any disqualifications" conclusively show that the question of whether a Member has become subject to any disqualification

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77. See *Raja Ram Pal v. Speaker, Lok Sabha*, (2007) 3 SCC 184, 462 : (2007) 2 JT 1.
78. *Consumer Education and Research Society v. UOI*, (2009) 9 SCC 648.

under clause (1) of Article 102 has to be decided only by the President. Such a question would of course be a mixed question of fact and law. The Constitution provides the manner in which that question is to be decided. The Court was of the view that it is only after such a decision is rendered by the President, that the seat occupied by an incumbent member becomes vacant. The question of a person being disqualified under Article 102(1) and the question of his seat becoming vacant under Article 102(3)(a) though closely interlinked, are distinct and separate issues.[79]

Article 103 [Art. 192 in case of a State Legislature][80] lays down a procedure for dealing with the situation when a sitting member of a House becomes subject to a disqualification mentioned in Art. 102(1) [Art. 191(1) in case of a State Legislature]. When such a question arises, it is referred to the President [or the Governor in case of a State Legislature] and his decision is final.

However, in deciding the matter, the President [or the Governor] neither consults his Council of Ministers, nor decides the matter himself. He has to forward the question to the Election Commission for its opinion and act according to the opinion received.[81] In effect, therefore, the matter is decided by the Election Commission though the decision is announced in the name of the President [or the Governor]. The Commission holds a proper enquiry before giving its opinion.[82]

A member found to have become disqualified, *ipso facto* ceases to be a member of the House and his seat becomes vacant [Art. 101(3)(a)]. Art. 103 applies to a case of a sitting member becoming subject to a disqualification after his election, and under it the President [or the Governor] and the Election Commission have no jurisdiction to enquire into a member's disqualification existing prior to his election.

When a person who has incurred a disqualification offers himself/herself as a candidate and is subsequently elected and if no one objects and if the Returning Officer accepts the nomination and if no election petition is filed challenging the election, then he/she would continue as a Member in spite of the disqualification.[83]

In respect of the disqualification on the ground of holding an office of profit, the vacancy of the seat would become operative only when the President decides the issue on the subject of the alleged disqualification and declares that a particular Member has incurred the same. Such a decision may be made either on the basis of an adjudication where the question is disputed, or on the basis of an admission by the Member concerned.[84]

Upon a proper construction of the provisions of Articles 101 to 103, it is evident that a declaration by the President under Article 103(1) in the case of a disqualification under Article 102(1) and a declaration by the Speaker or the Chairman under Para 6 of the Tenth Schedule in the case of a disqualification under Article 102(2) is a condition precedent for the vacancy of the seat. If Article

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79. *Consumer Education and Research Society v. U.O.I.*, (2009) 9 SCC 648.
80. *Infra*, Ch. VI.
81. For discussion on "Election Commission", see, *infra*, Ch. XIX.
82. *Brundaban v. Election Commission*, AIR 1965 SC 1892 : (1965) 3 SCR 53; *Election Commission v. N.G. Ranga*, AIR 1978 SC 1609 : (1978) 4 SCC 181.
83. *Consumer Education and Research Society v. U.O.I.*, (2009) 9 SCC 648.
84. *Consumer Education and Research Society v. U.O.I.*, (2009) 9 SCC 648.

101(3)(a) is interpreted otherwise, it will lead to absurd results thereby making it impossible to implement or enforce the relevant provisions of the Constitution or the RP Act.[85]

In *Saka Venkata Rao*,[86] the respondent was convicted and sentenced to a term of seven years rigorous imprisonment in the year 1942. He was released on the occasion of celebration of the Independence Day on August 15, 1947. He contested election for the State Assembly in 1952. Being disqualified for five years, he appealed to the Election Commission for waiver of his disqualification.

Pending the decision of the Election Commission, he was elected. Thereafter the Election Commission rejected his appeal. The Speaker then referred to the Governor the question of his disqualification. The Supreme Court decided that Arts. 190(3) and 192(1) [Arts. 101(3) and 103(1)] go together and provide a remedy when a member incurs a disqualification after he is elected as a member. Art. 192(1) contemplates only a sitting member incurring the disability while so sitting. Art. 190(3) does not apply to the pre-existing disqualification. The Supreme Court thus rejected the contention that Arts. 190(3) and 192(1) include within their scope the pre-existing disqualification as well. In the instant case, as Venkata Rao was already disqualified prior to his nomination for election, no action could be taken against him under Art. 192.

The Supreme Court has clarified the legal position obtaining under Arts. 103(1) and (2) as well as under Arts. 192(1) and (2). The language of both these provisions is verbatim except that in Art. 102, the decision is to be made by the President in relation to a member of a House of Parliament, and in case of a member of a State Legislature, it is the Governor who has to make the decision.

In *Brundaban Nayak*, the question was regarding the interpretation of Art. 192 which applies *ipso facto* to Art. 103. The appellant was elected to the Orissa Assembly and was appointed as a Minister. The respondent (No. 2) applied to the Governor alleging that the appellant had incurred a disqualification subsequent to his election. The Governor forwarded the complaint to the Election Commission for opinion.

The appellant sought quashing of the inquiry by the Election Commission on the ground that it was incompetent and without jurisdiction. The Supreme Court ruled that under Art. 192(1) what was required was that a question should arise and how it arises or by whom it is raised or in what circumstances it is raised, are not relevant for the purpose of the application of the clause. All that is relevant is that a question of this type mentioned by the clause should arise. It is not necessary that the question be raised on the floor of the House. Such a question as is contemplated by Art. 192(1) "shall be decided by the Governor and Governor alone; no other authority can decide it nor can the decision of the said question as such fall within the jurisdiction of the courts.

The stipulation in Art. 103(2) and Art. 192(2) that the President/Governor "shall act" according to such opinion leaves no room for doubt that the President/Governor has no discretion in the matter but to act according to the opinion

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85. *Consumer Education and Research Society v. U.O.I.*, (2009) 9 SCC 648.
86. *Election Commission v. Saka Venkata Rao*, AIR 1953 SC 210 : 1953 SCR 1144.

of the Election Commission.[87] The decision on the question raised under Art. 192(1) or 103(1) has no doubt to be pronounced by the Governor/President, but that decision has to be in accordance with the advice of the Election Commission. The opinion of the Election Commission is a *sine que non* for the President/Governor to give a decision on the question whether a member of a House has incurred a disqualification. On this point, the Supreme Court has recently observed:[88]

> "It is thus clear on a conjoint reading of the two clauses of Art. 192 that once a question of the type mentioned in the first clause is referred to the Governor, meaning thereby is raised before the Governor, the Governor and the Governor alone must decide it but this decision must be taken after obtaining the opinion of the Election Commission and the decision which is made final is that decision which the Governor has taken in accordance with the opinion of the Election Commission. In effect and substance the decision of the Governor must depend on the opinion of the Election Commission and none else, not even the Council of Ministers. Thus, the opinion of the Election Commission is decisive since the final order would be based solely on that opinion".

In an earlier case,[89] the Supreme Court had observed in the context of Art. 103(2) that the President was bound to seek and obtain the opinion of the Election Commission and only thereafter decide the issue in accordance therewith. In other words, it is the Election Commission's opinion which is decisive. The opinion of the Election Commission is a *sine qua non* for the Governor or the President, as the case may be, to give a decision on the question whether or not the concerned member of the House of the Legislature of the State or either House of Parliament has incurred a disqualification.

It was argued in *Ramakrishna Hegde v. State*,[90] that since the order in question was made by the Governor acting without the aid and advice of the Council of Ministers, the order could not be questioned because of Art. 361.[91] The Governor could not be impleaded as a party to the writ petition as his action could not be challenged because of the immunity enjoyed by him and the opinion of the Election Commission became merged with the Governor's opinion. Rejecting the argument, the High Court ruled that in effect the decision was made by the Election Commission although the formal order was made by the Governor. The decision of the Election Commission is a *sine qua non* for the Governor to give a decision on the question of disqualification of a member of the State Legislature. The Election Commission was the second respondent to the writ petition.

The High Court referred to *Brundaban Nayak v. Election Commission*,[92] where the Supreme Court had said that the decision of the Election Commission was "in substance decisive" in such a matter. Under Art. 192, though the decision on the question raised is to be pronounced by the Governor, he actually acts according to the opinion of the Election Commission. The decision of the Governor de-

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87. *Brundaban Nayak v. Election Commission of India,* AIR 1965 SC 1892 : (1965) 3 SCR 53; *Election Commission of India v. N.G. Ranga,* AIR 1978 SC 1609 : (1978) 4 SCC 181.
88. *Election Commission of India v. Dr. Subramaniam Swamy,* AIR 1996 SC 1810 : (1996) 4 SCC 104.
89. *Election Commission of India v. N.G. Ranga, supra,* footnote 87.
90. *Supra,* footnote 41.
91. See, *infra,* Ch. III and Ch. VII.
92. *Supra,* footnote 87.
Also see, *Election Commission v. Ranga,* AIR 1978 SC 1609 : (1978) 4 SCC 181.

pends on the opinion of the Election Commission and none else, not even that of the Chief Minister. Thus, it is the Election Commission which decides the matter though the decision is announced formally in the Governor's name.[93] The Governor has no choice but to pass the order in accordance with the opinion of the Election Commission. The Court, therefore, ruled that the writ petition could be maintained even in the absence of the Governor being a party to the proceedings when the Election Commission was itself before the court.

Further, the Supreme Court has ruled in *Election Commission v. Subramanian Swamy*,[94] that the Election Commission acts in a *quasi*-judicial capacity while adjudicating upon the disqualification of a sitting member of a House of State Legislature or Parliament. This means that the Election Commission has to follow the principles of natural justice. One of these principles is the rule against bias.[95] Therefore, if one of the members is disqualified because of the rule against bias, he should not participate in the decision.

In *Swamy*, a complaint of disqualification filed by Subramaniam Swamy against Jayalalitha, a member of the Tamil Nadu Assembly, was referred to the Election Commission by the Governor. The Chief Election Commissioner, Seshan, was held to be disqualified to participate in the decision because Swamy's wife, a lawyer, was engaged as counsel in a case filed by Seshan. The Supreme Court therefore ruled that the Chief Election Commissioner should call a meeting of the Commission and then recuse himself from participating in the decision, leaving the two other members, to decide the case. If the two Commissioners reach a unanimous verdict, that will be the decision of the Commission to be communicated to the State Governor. If, however, the two members fail to reach such a decision, then the Chief Election Commissioner will have to give his opinion on the basis of the ground of necessity. The majority decision would then be conveyed to the Governor.[96]

A significant question which remains unanswered so far as regards Art. 192 [as well as Art. 103] is that when the Governor [or the President, as the case may be] receives a representation against a member of the State Legislature [or Parliament] that he has become subject to a disqualification, is the Governor [or the President] obliged to refer the same to the Election Commission for its opinion, or the Governor [or the President] can exercise some discretion in the matter and can scrutinize for himself whether there is a *prima facie* case against the member or not?

This question arose in Tamil Nadu.[97] Subramaniam Swamy submitted a representation to the Governor to the effect that the Chief Minister had become subject to a disqualification as a member of the State Legislature. The Governor kept the representation pending for nearly four months without taking any action thereon.

Swamy then filed a writ petition in the Supreme Court to issue a writ directing the Governor to refer the representation to the Election Commission. Before the Court could hear the matter and decide one way or the other, the Governor *suo*

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93. Also see, *K. Haja Shareff v. Governor of Tamil Nadu*, AIR 1985 Mad 55.
94. AIR 1996 SC 1810 : (1996) 4 SCC 104.
95. For a detailed discussion on this Rule, see, JAIN, *A TREATISE ON ADM. LAW, I*, 405-447 (1996); JAIN, *CASES* Ch. X.
96. AIR 1996 SC 1810 at 1817 : (1996) 4 SCC 104.
97. *Election Commission v. Subramaniam Swamy*, AIR 1996 SC 1810 : (1996) 4 SCC 104.

motu referred the representation to the Election Commission for inquiry and report. Had the Governor waited for some time more, the Court would have had occasion to decide the question about the Governor's actual role in the matter.

It seems that under Art. 192 [or Art. 103], the effective decision-making power has been given to the Election Commission, and, therefore, it should be for the Election Commission itself to decide whether the representation is frivolous or not, or whether any inquiry is called for or not. The Governor's role is confined only to seeking the advice of, and acting on, the advice of the Election Commission. His role is, therefore, merely formal. He has a discretion coupled with a duty. This is as it should be. Otherwise, if decision-making power is left to the Governor, the decision will be subject to political pressures.

From the observations made by the Supreme Court in the above mentioned cases, it becomes rather clear that the Court regards it as obligatory on the part of the Governor/President to seek the advice of the Election Commission whenever a question is raised, and brought to his notice, about the disqualification of a sitting member of the Legislature/Parliament. The use of the words "shall obtain" in Arts. 103(2) and Art. 192(2) means that it is obligatory for the President/Governor to obtain the opinion of the Election Commission. "Obtaining the opinion of the Election Commission is, therefore imperative. It is equally imperative for the Governor to act according to such opinion."[1]

The Supreme Court has clarified that the power conferred on the President under Art. 103 (as well as of the Governor under Art. 192)[2] is not to be regarded as the power to remove a member of Parliament (State Legislature in case of the Governor) The function of the President (Governor) under Art. 103 is adjudicatory in nature. If the President (Governor) holds, onthe advice of the Election Commission, that a member has become subject to a disqualification, the member is treated as having ceased to be a member of the House on the date when he became subject to such disqualification.[3]

It is evident from the decision in *P.V. Narasimha Rao*,[4] that when the President adjudicates on the subject of whether a Member was disqualified or not and gives a finding that he/she is disqualified, he/she is merely deemed to have ceased being a Member from the date that he/she had incurred the disqualification. It follows that a Member continues to be one until the decision of the President and when the outcome of the decision is that he/she is disqualified, it relates back to the date when the said disqualification was incurred. If the President holds that the Member has not incurred the disqualification, the person continues as a Member.[5]

It has been stated above that Art. 103 or 192 does not apply when a disqualified person gets elected to a House of Parliament or the State Legislature. The remedy in such a case, as discussed later,[6] is filing an election petition against the person concerned. But what happens if his election is not questioned through an

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1. *Ibid*, at 1815.
2. See, *infra*, Ch. VI.
3. *P.V. Narasimha Rao v. State (CBI/SPE)*, (1998) 4 SCC 626 : 1998 SCC (Cri) 1108. Also see, *infra*, Sec. L.
4. *P.V. Narasimha Rao v. State*, (1998) 4 SCC 626 : 1998 SCC (Cri) 1108.
5. *Consumer Education and Research Society v. U.O.I.*, (2009) 9 SCC 648.
6. *Infra*, Ch. XIX under Elections.

election petition within the statutory limitation period. Such a situation arose in *K. Venkatachalam v. A. Swamickan.*[7]

A person who was disqualified was elected to the Tamil Nadu Assembly. No election petition was filed against him and the limitation period for the purpose expired. Thereafter, a writ petition was filed in the High Court under Art. 226 for declaration of his election as invalid. The Supreme Court ruled that the High Court could declare his election void as he had no basic constitutional and statutory qualification. There was no other mechanism available for the purpose. Action could not be taken against him under Art. 192 [Art. 103] as he incurred the disqualification prior to his election. Art. 226 is couched in the widest possible terms.[8] The Court also directed the State Government to recover from him penalty under Art. 193 [Art. 104] according to which he is liable to pay a penalty of Rs. 500 a day on which he sits and votes.[9]

(e) CRIMINALISATION OF POLITICS

The increasing nexus between criminals and politics threatens the survival of any true democracy. In India, the Election Committee's official publication 'Electoral Reforms (Views and Proposals)' highlighted the need to amend the Representation of the People Act, 1951 to debar antisocial and criminal elements making inroads into the electoral and political fields. It said that the criminalization of politics had reached a stage where the law breakers had become law makers.

The view was reiterated by the Law Commission in its 179th Report which also recommended an amendment of the Representation of the People Act, 1951 by providing that framing of charges for offences punishable with death or life imprisonment, should disqualify a candidate for five years or until acquittal, whichever event happens earlier. It also recommended that a candidate seeking to contest an election must furnish details regarding any pending criminal case, including a copy of the FIR/Complaint and also furnish details of all assets possessed whether by the candidate, spouse or dependent relations. No action was taken on the recommendation by the Government because of a lack of consensus amongst the political parties.

It is in this environment of inaction of the government, Parliament and political parties, the matter was first brought before the Delhi High Court through a PIL writ petition. Basing itself on the thesis that under Art. 19(1)(a) of the Constitution,[10] guaranteeing freedom of speech and expression, the right to get information is also guaranteed. The right to information is an integral part of the freedom of speech and expression. Accordingly, the High Court ruled that a candidate while filing his nomination for election to Lok Sabha or a State Legislature should give full information in an affidavit about his past criminal record, financial status etc.[11]

The Central Government appealed to the Supreme Court against the High Court verdict. On appeal, the Supreme Court has more or less reiterated what the

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7. AIR 1999 SC 1723 : (1999) 4 SCC 526.
8. See, *infra*, Ch. VIII, Secs. D and E for discussion on Art. 226.
Also see, *infra*, Ch. XIX, under "Elections".
9. *Infra*, p. 61.
10. See, *infra*, Ch. XXIV.
11. AIR 2001 Del 126.

Delhi High Court has said. The Supreme Court has ruled that the Election Commission should call for information from each candidate on affidavit regarding his past criminal record, his financial assets (including those of his spouse or dependants), his liabilities to public sector bodies and educational qualifications.[12] It may be noted that these are not in any disqualifications of the candidate. The idea underlying the direction is that if the electors have full information about the antecedents of a candidate, they will be in a better position to decide as to whom to give vote. Subsequent to the decision of the Supreme Court in Association of Democratic Reform [*supra*], the Representation of the People Act, 1951 was amended[13] by inserting Section 33-A which requires a candidate to furnish information whether he is accused of any offence punishable with imprisonment of two years or more in a pending case in which charges have been framed by a Court of competent jurisdiction and whether he has been convicted and sentenced to imprisonment for one year or more. Failure to file an affidavit, filing a false affidavit or concealing information is punishable under Section 125-A. As far as the declaration of assets is concerned, Parliament chose to partially implement the decision of the Supreme Court by requiring an elected and not a candidate standing for election, to declare his assets.[14] Section 33-B provided that a candidate was not liable to disclose or furnish any such information, in respect of his election, which was not required to be disclosed or furnished under the Act or the rules made thereunder notwithstanding anything contained in any judgment, decree or order of any court or any direction, order or any other instruction issued by the Election Commission. In other words, a candidate is not required to disclose (a) the cases in which he is acquitted or discharged of criminal offence(s); (b) his assets and liabilities; and (c) his educational qualification. The section was held to be unconstitutional in *People's Union for Civil Liberties (PUCL) v. Union of India*,[15] on the ground that the voter had a fundamental right under Art. 19(1)(a) to be aware of the antecedents of his candidate.

E. OTHER PROVISIONS REGARDING PARLIAMENTARY MEMBERSHIP

(a) SIMULTANEOUS MEMBERSHIP

No person can be a member of both Houses of Parliament at one and the same time. Parliament is authorised to provide by law for vacation by a person, who is chosen a member of both the Houses, of his seat in one House [Art. 101(1)].[16]

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12. *Union of India v. Association of Democratic Reforms*, (2002) 5 SCC 294 : AIR 2002 SC 2112.
13. The Representation of the People (Third Amendment) Act, 2002 (Act 72 of 2002).
14. Sec. 75A of The Representation of the People Act, 1951.
15. (2003) 4 SCC 399, at page 433 : AIR 2003 SC 2363.
16. The Representation of the People Act, 1951, provides that a person so chosen who has not taken his seat in either House may intimate the Election Commission within ten days from the publication of the later of the results as to the House he desires to serve in, and thereupon his seat in the other House falls vacant. In default of such an intimation, his seat in the Rajya Sabha becomes vacant. A sitting member of the Lok Sabha or Rajya Sabha vacates his seat when he is chosen a member of the Rajya Sabha or Lok Sabha respectively.

No person can be a member of Parliament and a State Legislature simultaneously. If a person is so elected, then at the expiry of such period as the President may by rules specify, his seat in Parliament becomes vacant, unless he has previously resigned his seat in the State Legislature [Art. 101(2)].[17]

Parliament has also provided that if a person is elected to more than one seat in a House then unless he resigns within the prescribed period all but one of the seats, all the seats become vacant.[18]

(b) TERMINATION OF MEMBERSHIP

A member of the Rajya Sabha may resign his seat by writing to the Chairman, and that of the Lok Sabha, by writing to the Speaker. The seat falls vacant when the resignation is accepted by the Chairman/Speaker who is not to accept the resignation if he is satisfied that it is not voluntary or genuine [Art. 101(3)(b)].

A House of Parliament may declare a seat vacant if a member absents himself from all its meetings for a period of sixty days without its permission, no account being taken of any period during which the House is prorogued or adjourned for more than four consecutive days [Art. 101(4)].

(c) COMMITTEE ON ABSENCE OF MEMBERS

Lok Sabha has a Committee on Absence of Members to consider all applications from members for leave of absence from sittings of the House, to examine every case when a member has been absent for sixty or more days from the sittings of the House and to report whether the absence should be condoned, or the seat of the member declared vacant by the House. Rajya Sabha has no such committee, but the seat of a member becomes vacant because of his absence when the House passes a motion for the purpose.

The seat of a member in a House does not become vacant automatically by his absence, but the House has power to declare it vacant. This is different from the case of a member becoming subject to a disqualification when his seat becomes vacant automatically.

(d) TAKING OF OATH

A member of a House of Parliament, before taking his seat in the House, has to make and subscribe an oath or affirmation before the President, or a person appointed by him for this purpose. Until a duly elected candidate takes the oath, he cannot participate in the proceedings of the House as he is not regarded a member thereof [Art. 99].[19]

(e) PENALTY

A person is liable to a penalty of Rs. 500 for each day he sits or votes as a member in a House :

(*i*) before taking the prescribed oath; or

(*ii*) when he knows that he is not qualified to be a member of the House, or is disqualified for being its member; or

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17. Also see, The Prohibition of Simultaneous Membership Rules, 1950.
18. Sec. 70 of the R.P. Act, 1951.
19. Also see, Third Schedule to the Constitution.

(*iii*) when he knows that he is prohibited from sitting or voting in the House by virtue of any law made by Parliament [Art. 104].

(f) SALARY

Members of a House of Parliament are entitled to receive such salaries and allowances as may be determined by Parliament by law [Art. 106][20]

F. ANTI-DEFECTION LAW

The politics of defection has been the bane of the parliamentary system in India. The vice of defection has been rampant in India for quite some time, especially at the state level. Defection means floor-crossing by a member of one political party to another party.

Defection causes government instability, for a government may be toppled over due to the defection of some of its supporters to the opposition party converting it from a minority into a majority party. Defection is undemocratic as it negates the electoral verdict. A party which fails to get majority in the House through election may yet be able to manoeuvre a majority in the House and form the government by inducing defections from other parties. Thus, the party which may have won a majority through election, and got the mandate from the people to form the government, may yet fail to do so because a few of its members defect from the party.

It is one thing for a member to change his political affiliation out of conviction because he may conscientiously disagree with the policies of the party to which he belongs. In such a case, if he leaves the party with whose support he has been elected to the House, he ought to resign his membership of, and seek fresh election to, the House. But such principled defections are rare. Most of the defections take place out of selfish motives as the defectors hope to be appointed ministers in the Council of Ministers to be formed with their support. This is very well illustrated by the jumbo size Kalyan Singh government installed in 1997 in Uttar Pradesh formed by the BJP with the support of defectors from the Congress Party and the Bahujan Samaj Party. Almost all the defectors were appointed as ministers and, thus, the Council of Ministers had 94 Ministers, which was an unprecedented event in itself. Such unprincipled defections are morally wrong, opportunist and indicative of lust for power. It involves breach of faith of the electorate.

It was realized that if the evil of political defection was not contained, it would undermine the very foundations of democracy in India and the principles which sustain it. It was therefore thought necessary to enact a law to suppress the vice of defection.

The Constitution (Fifty-second Amendment) Act[21] changed four Articles of the Constitution, *viz.* 101(3)(a), 102(2), 190(3)(a) and 191(2), and added the Tenth Schedule thereto. This Amendment is often referred to as the anti-defection law.

Under Art. 102(2),[22] a person is disqualified to be a member of either House of Parliament if he is so disqualified under the Tenth Schedule.

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20. Also see, The Salaries and Allowances of Members of Parliament Act, 1954.
21. For provisions of the Constitution Amendment Act, see, *infra*, Ch. XLII.
22. *Supra*, Sec. D.

Under Para 2 of the X Schedule, if a member voluntarily gives up his membership of, or votes or abstains from voting, in the House against the direction[23] issued by, the party on whose symbol he or she was elected, then he or she would be liable to be disqualified from membership.

In view of Explanation (a) to para 2(1) of Schedule X, the member concerned would be deemed to belong to the Indian National Congress Party by which he was set up as a candidate for contesting the election of MLC in the year 1998. On facts the Supreme Court held that it could not be said that the finding arrived at by the Chairman of the Legislative Council that he gave up the membership of the Indian National Congress Party to which he belonged is one which could not reasonably and possibly have been arrived at.[24]

The nature and degree of inquiry required to be conducted for various contingencies contemplated by para 2 of Schedule X may be different. Under para 2(1)(a) the inquiry would be a limited one. But the inquiry required for the purpose of para 2(1)(b) may, at times, be more elaborate involving several factual aspects.[25]

On the plain language of para 2 of Schedule X, the disqualification comes into force or becomes effective on the happening of the event. Under para 6, the final authority to take a decision on the question of disqualification of a member of the House vests with the Chairman or the Speaker of the House. Their role is only in the domain of ascertaining the relevant facts. Once the facts gathered or placed show that a member of the House has done any such act which comes within the purview of para 2(1) (2) or (3) of the Schedule, the disqualification will apply and the Chairman or the Speaker of the House will have to make a decision to that effect. Para 7 of Schedule X excludes the jurisdiction of the court in respect of any matter connected with disqualification of a member of a House under the Schedule. That provision being in the Constitution itself, unlike a statutory provision, affects the power of judicial review conferred on the High Courts and the Supreme Court under Article 226, respectively.[26]

Since the Speaker is involved in an adjudicating process, fairness demands that generally the member in fault should be given some opportunity of explaining his position. However, the complaint of violation of natural justice will not succeed if the member concerned has not suffered any prejudice. For example, in *Mahachandra Prasad Singh*,[27] the Chairman, Legislative Council who belonged to Indian National Congress was alleged to have incurred disqualification under para 2(1)(a) of the Tenth Schedule by contesting a parliamentary election as an

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23. In *Kihota Hollohan*, see below, the Supreme Court has adopted a restrictive view of the 'direction' issued by a party "the violation of which may entail disqualification". Such a direction should pertain to two matters, *viz.*, (1) a vote on motion of confidence or no confidence in the government; (2) where the motion under consideration relates to a matter which is an integral policy and programme of the political party on the basis of which it approached the electorate. This has been done with a view to maintain freedom of speech of the members in the House guaranteed by Arts. 105(1) and 194(1).
See, *infra*, Sec. L, under "Parliamentary Privileges".

24. *Mahachandra Prasad Singh v. Chairman, Bihar Legislative Council*, (2004) 8 SCC 747 : AIR 2005 SC 69.

25. *Mahachandra Prasad Singh v. Chairman, Bihar Legislative Council*, (2004) 8 SCC 747: AIR 2005 SC 69.

26. *Mahachandra Prasad Singh v. Chairman, Bihar Legislative Council*, (2004) 8 SCC 747: AIR 2005 SC 69.

27. *Mahachandra Prasad Singh v. Chairman, Bihar Legislative Council*, (2004) 8 SCC 747: AIR 2005 SC 69.

independent candidate. The Chairman took into consideration a letter from the leader of Indian National Congress in the Legislative Council to the effect that the said MLC had ceased to be a member of the said party for violating party discipline by contesting the parliamentary election as an independent candidate. The petitioner did not dispute the facts but rather admitted them in his writ petition. In such circumstances, non supply of copy of the said letter to the MLC held caused no prejudice to the Member of Legislative Council and hence, was not violative of any principles of natural justice.

Under Para 3, no disqualification is incurred in cases where a split from, or merger of a party in, another party is claimed. In the event of a split, at least one-third of its members must decide to quit or break away. In the case of a merger, the decision should have the support of not less than two-thirds of the party members.

Paragraph 3 of the Tenth Schedule clearly states that from the time of the split, the breakaway faction will be deemed to be a separate political party for purposes of the anti-defection law. All that the Speaker is required to do is to ascertain whether the group consists of not less than one-third of the members of the legislature party. If this requirement is fulfilled, the Speaker is bound to hold that the members concerned cannot be disqualified.[28]

Paragraph 3 of the Tenth Schedule as it originally stood provided that no disqualification would be incurred in cases where there is a split of at least one third of the members of the original party. The entire paragraph has been omitted from the Tenth Schedule by The Constitution (Ninety-first Amendment) Act, 2003.[29] Paragraph 4 protects mergers of parties provided that the decision to merge is supported by not less than two thirds of a merging party.

The question of disqualification under Sch. X is to be determined by the Speaker of the Lok Sabha, or the Chairman of the Rajya Sabha, as the case may be, but he is to take notice of an alleged defection not *suo motu*, but only when a petition in writing is received from a member. Para 6 of the Xth Schedule renders the decision of the Speaker as final.

In terms of para 2 of the Tenth Schedule the act of disqualification occurs on a member voluntarily giving up his membership of a political party or at the point of defiance of the whip issued to him.The date of disqualification is the date on which the act takes place and not the date on which the Speaker takes a decision in that regard.[30]

Under para 7 of the Schedule, no Court has jurisdiction to decide the question of disqualification of a member of a House under Sch. X.

Para 8 authorises the Chairman/Speaker of a House to make rules for "giving effect to the provisions of Schedule X. Rule 7(7) provides that the procedure to

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28. In *Rajendra Singh Rana v. Swami Prasad Maurya (supra)*, the Supreme Court construing para 3 held that the scheme of Articles 102 and 191 and the Tenth Schedule, does not permit the determination of the question of split or merger separately from a motion before the Speaker seeking a disqualification of a member or members concerned nor does the Speaker have an independent power to decide that there has been a split or merger of a political party as contemplated by paragraphs 3 and 4 of the Tenth Schedule to the Constitution.

29. See *infra*.

30. *Rajendra Singh Rana v. Swami Prasad Maurya*, (2007) 4 SCC 270 : AIR 2007 SC 1305.

be followed by the Speaker shall be the same as adopted in privilege cases by the Committee of Privileges.[31] A reasonable opportunity must be allowed to the member against whom a complaint has been made to represent his case, and to be heard in person. At times, the Speaker may refer a case of defection to the Committee of Privileges for inquiry. This process takes quite some time and, therefore, defection does not have any immediate effect. The jurisdiction of the courts is barred in matters connected with the disqualification of members.

(a) KIHOTA HOLLOHON

Explaining the rationale underlying the X Schedule, the Supreme Court has stated that the provisions of the X Schedule give recognition to the role of the political parties in the political process. A political party goes before the electorate with a particular programme; it sets up candidates at the election on the basis of such programme; a candidate is therefore elected on the basis of the party programme. The underlying premise of the X Schedule is that political propriety and morality demand that if a member of a legislature, after the election, changes his political affiliation and leaves the political party which had set him up as a candidate at the election, then he should give up his seat in the legislature and contest election again under the banner of the new party adopted by him.

The constitutionality of the Anti-Defection law has been upheld by the Supreme Court in a 3 : 2 decision in *Kihota Hollohon v. Zachilhu*[32]. But, at the same time, the Court has ruled that the Speaker's order under the law disqualifying a member of the legislature on the ground of defection is subject to judicial review.

The majority view is that the main provisions of the X Schedule are intended to provide a "remedy for the evil of unprincipled and unethical political defections." Para 7 of the X Schedule barring judicial review affects Articles 136, 226 and 227 of the Constitution[33] and, thus, is required to be ratified by half the State Legislatures in accordance with Art. 368(2) of the Constitution.[34] As it has not been so ratified, it would be constitutionally invalid. But, para 7 contains a provision which is independent of, and stands apart from, the X Schedule's main provisions. The remaining provisions of the X Schedule are severable from para 7 as they could stand independently of para 7 and are complete in themselves, workable and not truncated, by excision of para 7.[35]

The majority has upheld the validity of para 2 of the 52nd Amendment. This provides for disqualification on defection of a member from one political party to another. These provisions, the majority has ruled, do not violate any rights or freedoms guaranteed to the legislators under Arts. 105 and 194 of the Constitution.[36] In the words of the majority Judges:[37]

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31. See, *infra*, Sec. L(ii)(h).
32. AIR 1993 SC 412 : 1992 Supp (2) SCC 651. The majority consisted of M.N. VENKATACHALIAH, K.J. REDDY, and S.C. AGRAWAL, JJ. The minority was constituted by L.M. SHARMA and J.S. VERMA, JJ.
33. For discussion on these Articles, see, Chs. IV and VIII, *infra.* These constitutional provisions deal with judicial review.
34. For Art. 368(2), see, *Infra*, Ch. XLI, under "Amendment of the Constitution".
35. For the doctrine of severability, see, Chs. XX and XL.
36. For Art. 105, see, Sec. L, *infra;* for Art. 194, see, *infra*, Ch. VI.
37. AIR 1993 SC at 436 : 1992 Supp (2) SCC 651.

> "The provisions are salutary and are intended to strengthen the fabric of Indian parliamentary democracy by curbing unprincipled and unethical political defections."

While rejecting the contention that the entire Xth Schedule, even after the exclusion of para 7, would be violative of the basic structure of the Constitution[38] in so far as the provisions in the Schedule affect the democratic rights of the elected members of the legislatures and, therefore, of the principles of parliamentary democracy, the majority Judges have ruled that the Speaker/Chairman acts as a 'tribunal' adjudicating upon rights and obligations and his decision in a defection case would thus be open to judicial review under Arts. 136, 226 and 227, and that the finality clause in para 6 of the Schedule does not exclude the jurisdiction of the courts under these Articles of the Constitution. However, judicial review would not cover any stage prior to the making of a decision by the Speaker/ Chairman. "The only exception for any interlocutory interference being cases of interlocutory disqualifications or suspensions which may have grave, immediate and irreversible repercussions and consequences."

The majority has affirmed that the Speaker's order would be open to judicial review on the grounds of jurisdictional errors based on violation of constitutional mandate, *mala fides*, non-compliance with rules of natural justice and perversity. The Judges have also rejected the contention that the investiture of adjudicatory functions in the Speaker/Chairman is by itself invalid on the ground of political bias and lack of impartiality. The majority view on this point is:[39]

> "The Chairmen or Speakers hold a pivotal position in the scheme of parliamentary democracy and are guardians of the rights and privileges of the House. They are expected to and do take far reaching decisions in the functioning of parliamentary democracy. Vesture of power to adjudicate questions under the Xth Schedule in such constitutional functionaries should not be considered exceptionable".

VENKATACHALIAH, J., observed in this connection :

> "It would, indeed be unfair to the high traditions of that great office to say that the investiture in it of this jurisdiction would be vitiated for violation of a basic feature of democracy. It is inappropriate to express distrust in the high office of the Speaker, merely because of the Speakers are alleged, or even found, to have discharged their functions not in keeping with the great traditions of the high office..."

The minority view, on the other hand, was that the assent of the President to the 52nd Amendment was *non est*, null and void as the Bill needed to be ratified by half the States and that has not been done. The Bill ought to have been presented to the President only after such ratification. As the Constitution has not been amended in accordance with Art. 368(2), the doctrine of severability could not apply to the 52nd Amendment.[40] Further, the Speaker cannot be given the role of the 'sole' arbiter in the defection cases as it would be against the basic structure of the Constitution. The Speaker depends continuously on the support

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38. For discussion on the doctrine of 'Basic Features' or 'Basic Structure' of the Constitution, *see*, *infra*, Ch. XLI.
39. AIR 1993 SC at 453.
40. On this question, see, *infra*, Ch. XLI.

of the majority party in the House, and so he cannot be regarded as an independent adjudicatory authority. On this aspect, the minority Judges have observed:[41]

> "Democracy is a part of the basic structure of the Constitution and free and fair elections with provision for resolution of disputes relating to the same as also for adjudication of those relating to subsequent disqualification by an independent body outside the House are essential features of the democratic system in our Constitution. Accordingly, an independent adjudicatory machinery for resolving disputes relating to the competence of members of the House is envisaged as an attribute of this basic feature."

Therefore, according to the minority judgment, all the decisions rendered by the several Speakers hitherto must also be declared a nullity and liable to be ignored.

An outstanding feature of the majority decision is to introduce judicial review of a Speaker's decision in a defection matter under Schedule X. The Supreme Court has stated on this point as follows:[42]

> "This Court has held that the Speaker while deciding the question of disqualification of a Member of the State Legislative Assembly [or of Parliament] under the Tenth Schedule to the Constitution acts as a statutory authority, in which capacity the Speaker's decision is subject to judicial review by the High Court and this Court."

But this also opens the way for Legislature-Court confrontation which breaks out from time to time between the Courts and State Legislatures on the question of legislative privileges.[43]

(b) SUBSEQUENT DEVELOPMENTS

The purpose underlying the Anti-Defection law is to curb defections, but, at the same time, not to come in the way of democratic realignment of parties in the House by way of merger of two or more parties, or a split in an existing party. The Anti-Defection Law has been hailed as a bold step to clean public life in India, but, in course of time, certain defects therein have become apparent which have very much compromised the effectiveness of the law to achieve its objectives.

The law as it stood originally was not able to prevent defections in toto. Bulk defections and splits which were permitted and in a sense encouraged by paragraph 3 of the Tenth Schedule, destabilised governments. The decision whether there was a split or not was left to the Chairman or the Speaker of the House whose view in the matter was final under paragraph 6. Apart from the very real possibility of the Chairman or Speaker being politically biased, defections and splits took place not because of a change of ideology but because of a lust for power and to serve selfish interests. In almost all cases defectors were rewarded with ministerships.

In October 1997, 22 members of the Congress party and 12 members of the Bahujan Samaj Party defected from their Parties and supported the confidence

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41. AIR 1993 SC at 457 : 1992 Supp (2) SCC 651.
42. *I. Manilal Singh v. H. Borobabu Singh,* AIR 1994 SC 505, 506 : 1994 Supp (1) SCC 718, *Mahachandra Prasad Singh v. Chairman, Bihar Legislative Council,* 2004 (8) SCC 747, 757.
43. See, *infra,* Sec. L. Also, Ch. VI, *infra.*

motion in the BJP (Bhartiya Janta Party) Government to give it a majority in the U.P. Legislative Assembly. Later, all the defectors were made Ministers and the Council of Ministers came to have 94 members. The leader of BSP complained to the Speaker that the 12 MLAs who had defected from the Party ought to be disqualified from membership of the House. The Speaker procrastinated and ultimately decided that there was a split in BSP and that 1/3rd members of the Party (numbering 23 MLAs) had split and hence the defecting MLAs (12 in number) had not incurred the disqualification. The fact is that the claim that 23 and not 12 MLAs had split from BSP was never substantiated but the Speaker took recourse to some technical procedural arguments and came to his conclusion. It may be noted that the Speaker belonged to BJP. The Speaker's decision was appealed from before the Supreme Court.[44] The appeal was heard by a Bench of three Judges. Of the three Judges, THOMAS, J. held that the decision of the Speaker was perverse and that there was in fact no split within the meaning of paragraph 3 of the Tenth Schedule. Consequently the defecting members stood disqualified without any scope for the Speaker being asked to take a fresh decision. SRINIVASAN, J. on the other hand upheld the decision of the Speaker saying that all relevant material had been considered and that at best it could be said that two conclusions were possible and the Speaker had chosen one of them. Although it was not necessary for SRINIVASAN, J. to decide the issue of remand for fresh disposal by the Speaker, he held that if the decision of the Speaker is set aside as a result of judicial review, the matter must be left to the Speaker to redecide the issue. Punchhi, CJ did not voice any final view but opined that the matter should be referred to the Constitution Bench for decision. The difference of opinion was left unresolved by the Constitution Bench which disposed of the appeal finally as infructuous in November, 2004. Following the Mayawati decision, in 1999 the Law Commission of India in its 170th Report on "Reform of Electoral Laws" recommended omission of paragraph 3 of the Tenth Schedule. The same view was expressed by the National Commission to Review the Working of the Constitution (NCRWC) which additionally recommended that a defector should be penalized by debarring him/her from holding any public office as a Minister or any other remunerative political post for at least the duration of the remaining term of the existing legislature or until the next election whichever is earlier. Both recommendations were accepted by Parliament. By the Constitution (Ninety-first Amendment) Act, 2003 paragraph 3 of the Tenth Schedule was omitted. Article 164 was amended by the introduction of clause (1B) disqualifying defectors from being appointed as Ministers for the period recommended by NCRWC. Art. 361B was also introduced by the 2003 Amendment Act, disqualifying defectors from holding any remunerative political post for the same period**.**

In 2007, another Constitution Bench in *Rajendra Singh Rana v. Swami Prasad Maurya,*[45] in effect upheld THOMAS J.'s view. In that case the Speaker had decided that certain members were not disqualified on the ground of defection. The Supreme Court set aside the decision as unconstitutional, *inter alia,* because it was based on no evidence. The Court did not remand the matter for a fresh decision by the Speaker but itself decided the issue and because the term of the As-

44. *Mayawati v. Markendeya Chand,* AIR 1998 SC 3340 : (1998) 7 SCC 517.
45. (2007) 4 SCC 270 : AIR 2007 SC 1305.

sembly was yet to expire, issued a declaration that the concerned members stood disqualified with effect from 27 August, 2003.[46]

In this context, the Supreme Court has considered an important question.[47] A person set up by a political party as a candidate gets elected to a House of legislature and is thereafter expelled by the party for any reason. He thus becomes an "unattached" member. If thereafter he joins another political party, will he incur disqualification under the X Schedule. The Supreme Court has answered the question in the affirmative. The Court has ruled that there is nothing like an "unattached" member under the X Schedule. "Such an arrangement and labelling has no legal bearing so far as the X Schedule is concerned". If such a member were to escape the rigour of the law, it will defeat the very purpose underlying the X Schedule, viz. to curb the evil of defection which has polluted the Indian democratic system.

Whether a disqualification event has occurred has to be determined by the Speaker on the basis of material placed before him. A mere claim that there has been a split would not be enough.[48]

The same yardstick is applied to a person who is elected as an independent candidate, *i.e.* a member elected without being set up as a candidate by any political party, and who wishes to join a political party after the election.[49]

When an independent Member is alleged to have joined a political party, the test to be applied is whether the member has given up his independent character on which he was elected by the electorate. This has to be determined on appreciation of material on record and conduct of the member by the Speaker. No hard and fast rule can be laid down when the answer is dependent on facts of each case. The substance and spirit of anti-defection provisions are the guiding factors.[50]

It seems that the Anti-Defection Law has stirred up more controversies than it has been able to solve. For example, the Meghalaya Speaker suspended the voting rights of five independent members before the House was due to take up no confidence motion against the government. Later the Speaker disqualified five members of the opposition and even ignored the stay order which these members had obtained from the Supreme Court. The Supreme Court asked the State Governor to include the disqualified members in the trial of strength in the House. The stage was thus set for a confrontation between the Court and the Legislature. The situation was however saved by the imposition of the President's rule in the State and the dissolution of the State Legislature.[51]

A sorry state of affairs in Goa is disclosed by the factual situation in *Dr. Kashinath G. Jalmi v. The Speaker*.[52] Naik assumed office of the Chief Minister of

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46. *Ibid* page 305.
47. *G. Viswanathan v. Speaker, T.N. Legislative Assembly*, AIR 1996 SC 1060 : (1996) 2 SCC 353. See also *Mahachandra Prasad Singh v. Chairman (Supra)*.
48. *Jagjit Singh v. State of Haryana*, (2006) 11 SCC 1 : AIR 2007 SC 590.
49. *Jagjit Singh v. State of Haryana*, 2006 (13) Scale 335, 369 : AIR 2007 SC 590 : (2006) 11 SCC 1.
50. *Jagjit Singh v. State of Haryana*, (2006) 11 SCC 1 : AIR 2007 SC 590.
51. On this point see, *infra*, Ch. XIII.
52. AIR 1993 SC 1873 : (1993) 2 SCC 703. See, JAIN, *CASES AND MATERIALS ON INDIAN ADM. LAW*, II, 1410-1412.

Goa on 25-1-91. On 15-2-91, Speaker Sirsat disqualified Naik from the membership of the House on the ground of defection. On 4-3-91, Sirsat was removed from Speakership and the Deputy Speaker functioning as Speaker reviewing the order earlier made by Sirsat set aside the order. In the instant case, the Supreme Court quashed the order made by the Deputy Speaker on the ground that there was no inherent power of review vested in the Speaker.

There arose a very bad case of confrontation between the Supreme Court and the Speaker of the Manipur Assembly. The Speaker disqualified several MLAs' under the Anti-Defection Law. On the application of one of the aggrieved MLAs', the Supreme Court invalidated the Speaker's order. The Speaker refused to obey the Court order arguing that he was immune from the Court process being the Speaker. Ultimately, contempt of Court proceedings were initiated against him. The Court sent him notice to appear before it, but he refused to appear before the Court. After several adjournments, at last, on February 5, 1993, the Court directed the Central Government to produce the Speaker before it even by using minimum force against him, if necessary. The Court held as "totally misconceived" the contention of the Speaker that he was immune from the Court process. The Court observed in this connection:

> "It is unfortunate that a person who holds the constitutional office of a Speaker of Legislative Assembly has chosen to ignore the constitutional mandate that this country is governed by the rule of law and what the law is, is for this Court to declare in discharge of its constitutional obligation which binds all in accordance with Art. 141 of the Constitution[53] and Art. 144 then says that all authorities are to act in aid of the orders made by this Court[54] .....the contemner has chosen to ignore the obvious corollary of rule of law."

Ultimately, the Speaker was made to appear before the Court and, thereafter, the Court dropped the matter against him.

These unsavoury incidents which have occurred in the wake of the Anti-Defection Law show that there is need to review the law as there are several lacunae therein. It is necessary to review the law so that the lacunae therein may be removed and the malady of defection may be effectively rooted out from the body polity. It is high time that the law is revised suitably so as to take care of the many questions which need clarification.

While there is need to have a law to root out the malady of defection from the body polity, there is also need to ensure that the question of disqualification arising as a result of defection be decided objectively, on merits, without any political considerations, and expeditiously. It should also be clearly laid down that the decision-maker would be subject to the ultimate control of the Supreme Court so as to rule out any argument that the Speaker is subject to no one in this matter and that he can decide the question as he likes according to his whims and fancies. Law must be made certain on the several questions which have been thrown up during the several years of the working of the law.

The difficulty in implementing the law has been that the Speakers have not always exercised their power to decide whether or not a member has earned disqualification or not as a result of 'defection' objectively and impartially. The reason for this malady was rightly diagnosed by the minority Judges in *Kihota* as the

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53. See, *infra,* Ch. IV.
54. *Ibid.*

Speakers' depend continuously on the majority support in the House. Therefore, if a member defects from a smaller party to a bigger party, and the Speaker belongs to the bigger party, an impartial adjudication on the defecting member's disqualification becomes extremely improbable. There has been suspicion in the public mind that the power is at times exercised by the concerned Speaker keeping in view political expediency. The majority judges placed the Speaker on a high pedestal but generally and subject to certain notable exemption[55] this does not accord with the real facts of political life in India.

A very serious question to think about is whether the power to disqualify a member on the ground of defection should continue to vest in the Speaker, or should it be vested in some independent body outside the House. It appears from the tenor of the Supreme Court's decisions that it may not accept vesting of such decision-making power solely in the Speaker. Some sort of judicial review is called for of the Speaker's decision because it has been proved again and again that a Speaker is a political creature and may not always be able to deal with the situation in an objective manner.[56]

In *Jagjit Singh* a challenge to the decision of the Speaker to disqualify a member for defection without complying with the principles of natural justice in as much as the member was not granted sufficient time to file a reply to meet the case against him was repealed. This was a case specific decision. But it appears that the Supreme Court proceeded on the basis that the principles of natural justice would apply as otherwise the Court ought to have rejected the argument and not explore whether on facts sufficient time had been given to the member or not.[57]

The Speaker of the Legislature is a political creature and therefore, generally he is not impartial. Most of the times he takes a view which is in the interest of the party to which he belongs. Suggestions have, therefore, been made that the Act should be amended to bar all defections—individual or group—and that the function to decide upon the question of disqualification arising out of defection should be taken away from the Speakers and be vested in the Election Commission which is an autonomous, non-political, non-partisan body.

As mentioned above, the minority view in *Kihota Hollohon* was that as the Speaker depends for his tenure on the majority in the Legislature, he does not satisfy the requirement of an "independent adjudicatory authority". Subsequent events in various legislatures have proved this assertion of the minority Judges right. The high ethical standard which was set up by the majority Judges in *Kihota Hollohon* is seldom reached by the Speakers in India. The confidence placed by the majority Judges in the "high traditions" of the "high office of the Speaker" have, in practice, been found to be misplaced.

This situation can be rectified, and the Anti-Defection Law made more effective, if the adjudicatory function is vested in the Election Commission. On the lines of Arts. 102 and 192,[58] the President in case of Parliament, and the Governor in case of a State Legislature, may refer the matter to the Election Commis-

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55. See below under section H(a).
56. *Jagjit Singh v. State of Haryana,* 2006 (13) SCALE 335, 370-371.
57. *Jagjit Singh v. State of Haryana,* (2006) 11 SCC 1 : AIR 2007 SC 590.
58. See, *supra,* Sec. D. for Art. 102; for Art. 192, see, *infra,* Ch. VI, Sec. B.

sion. This seems to be the only way to avoid politically motivated decisions by the Speakers when members defect from one party to another.

A number of other related issues also need clarification as they have a bearing on the question of defection. Some of these questions are: whether defiance of the party whip may be regarded as 'dissent' or 'defection' in a parliamentary democracy? It has been argued that in case of conflict between the interests of the nation or loyalty to the electorate or the party principles and the legislature party boss's directive, the member's duty is the former.

The Anti-Defection Law and the rules framed thereunder do not provide for the expulsion of a member from his party for his activities outside the House. A practice has, however, grown to declare such a member which is expelled from a party as 'unattached', but he continues to be a member of the House notwithstanding the Anti-Defection Law.

Proceedings in respect of disqualification of a Member are comparable neither to a trial in a court of law nor departmental proceedings for disciplinary action.[59]

Defection is not only anti-democratic but even a form of corruption for underlying motivation is personal gain and not any conscientious change of heart on the part of the defecting legislator. At the election, people vote for a particular candidate on the basis of the party he belongs to at the time of his election. It is reasonable to contend that if the legislator seeks to change his political affiliation after election, he must resign his membership of the legislature and seek fresh endorsement by the voters on the basis of his newly chosen platform.

One aspect of the Anti-Defection Law needs to be noted. Until 1985, there was no explicit reference in the Constitution to political parties although they have always been existence in the country. The X Schedule introduced in 1985 acknowledges the existence of the political parties and seeks to protect their integrity by banning defection from one party to the other.

There is no provision in the Tenth Schedule to the effect that until a petition which is signed and verified in the manner laid down in CPC for verification of pleadings is made to the Chairman or the Speaker of the House, he will not get the jurisdiction to give a decision as to whether a member of the House has become subject to disqualification under the Schedule. There is no lis between the person moving the petition and the member of the House who is alleged to have incurred a disqualification. It is not an adversarial kind of litigation where he may be required to lead evidence. Even if he withdraws the petition it will make no difference as a duty is cast upon the Chairman or the Speaker to carry out the mandate of the constitutional provision viz. the Tenth Schedule.[60]

G. MEETING OF PARLIAMENT

(a) SUMMONING

The power to summon a House of Parliament to meet is formally vested in the President [Art. 85(1)]. In actual practice, however, the decision to convene a

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59. *Jagjit Singh v. State of Haryana,* (2006) 11 SCC 1 : AIR 2007 SC 590.
60. *Mahachandra Prasad Singh v. Chairman, Bihar Legislative Council,* (2004) 8 SCC 747.

House is taken by its Leader in consultation with his Cabinet colleagues, the Speaker, and probably the leaders of the opposition groups.[61]

A notification convening a House is issued under the President's signature in the Official Gazette and summons to individual members are issued by its Secretary.

Each House is to meet in such a way that six months do not intervene between its last sitting in one session and its first sitting in the next session [Art. 85(1)]. This means that Parliament must meet at least twice a year. However, the period of six months does not apply in the event of premature dissolution of the Lok Sabha.[62]

(b) PRESIDENT'S ADDRESS

At the commencement of the first session of Parliament, whether after the general election to the Lok Sabha, or every year, the President addresses both Houses of Parliament assembled together and informs Parliament of the causes of its summons [Art. 87(1)].

The President's address fulfils two functions. First, it underlines responsibility of the Government to Parliament for it consists of the Government's review of the international and internal situation and a statement of its general policy together with an indication of its legislative programme for the ensuing session. Secondly, it provides a solemn yet simple ceremony with which the session of a House begins.

The practice of the President addressing Parliament has been adopted in India from Britain where the Monarch addresses a new session of Parliament.[63]

The President's speech is prepared by the Cabinet and announces in outline Government's plans for the principal business of the ensuing session. The President's address is thus in reality the Government's address delivered through the President.[64]

Each House has to make provision by its rules of procedure for allotment of time for discussing the matters referred to in the Presidential address [Art. 87(2)]. In this discussion, members may raise any question of general policy, public administration and political situation. This discussion provides an opportunity for a general discussion of national affairs. The great merit of the debate on the Address from the point of view of the private members is that the field of argument

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61. For details of Parliamentary Procedure, see, KAUL AND SHAKDHAR, *PRACTICE AND PROCEDURE OF PARLIAMENT*, (ed. G.C. Malhotra, V Ed.); SUBHASH KASHYAP, *PARLIAMENTARY PROCEDURE*, (2000).

62. In re Special Reference No.1 of 2002 : (2002) 8 SCC 237, 284 : AIR 2003 SC 87.

63. MORRISON, *GOVERNMENT AND PARLIAMENT*, 75

64. Shri R. VENKATARAMAN (former President of India) in his memoires criticises the practice of Presidential address in the following words :

"I had always held the view that the address by the President and Governors (see, *infra*, Ch. VI) at the commencement of the first session of the legislature every year was a British anachronism. First, the address was prepared by the government and contained only its views and the President and the Governors were mere mouth pieces. While this is a fact, very often the President or Governors were criticized on the contents of the address, creating a wrong public impression about these dignitaries. Further, disorderly behaviour during these addresses marred the dignity of the high offices...During Rajiv Gandhi's time, I had written to him to amend the Constitution deleting this meaningless formality."

R VENKATARAMAN, *MY PRESIDENTIAL YEARS*, 476.

is virtually unlimited, and one can talk about anything under the sun and yet be in order.

According to the rules of the two Houses, the debate on the President's speech is held in the House on a motion of thanks to the President for his speech. Amendments can be moved to this motion. The motion of thanks is regarded as a motion of confidence in the Government. If the motion is defeated, or amended, in spite of the Government's opposition, it may be regarded as a vote of no-confidence in the Council of Ministers resulting in its resignation.

The constitutional provision requiring the President's address at the first session of Parliament is mandatory and Parliament cannot be said to have met, and it cannot transact any business, until this preliminary formality has been gone through.[65] Apart from his obligation to address the first session of Parliament, the President may address either House or both Houses assembled together any time and to require the attendance of the members for that purpose [Art. 86(1)].

(c) POWER TO SEND MESSAGES

The President can send messages to a House whether with respect to a Bill pending in Parliament or otherwise [Art. 86(2)]. The House to which any such message is sent is obligated to consider with all convenient despatch any matter required by the message to be taken into consideration.

The above provision appears to have been taken from America where the President may send messages to Congress. The provision has a utility in that country because of the separation between the Executive and the Congress; President's advisers are not members of the Congress and, therefore, Presidential messages constitute a means of communication between the Executive and the Legislative wings.[66]

But the purpose of the provision enabling the President to send messages to Parliament in India is not clear because the President acts on the advice of the Ministers who are always present in the House and can, therefore, say whatever is necessary for the Government to say.

A view has, however, been expressed that the founding fathers intended this power to be an instrument whereby the President could carry out his constitutional duty to see that the Constitution is obeyed and that the kind of Government it contemplates is continued; that he should be able, when given advice that he cannot in conscience accept, to appeal to Parliament and, incidentally, to the nation. The possibility and the threat of such action by the President is calculated to deter Ministers from tendering improper advice.[67]

This view is not tenable as the action of the President to approach Parliament over the head of the Prime Minister is bound to create a constitutional crisis. It would also be extremely embarrassing for the President if the Lok Sabha sides with the Council of Ministers and does not accept what he suggests in his message. On the whole, therefore, barring an extreme situation, President's power of sending messages to the Houses is not going to be of much use and, in practice, would lie dormant.

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65. *Syed Abdul Mansur v. Speaker, W.B. Leg. Ass.*, AIR 1966 Cal 363.
66. *See*, Ch. III, Sec. E, *infra.*
67. GLEDHILL, *op. cit.*, 117-8.

(d) QUORUM

The quorum of each House has been fixed at one-tenth of its total membership. Parliament may, however, vary this rule by enacting a law [Art. 100(3)]. If at any time during the course of a meeting of a House there is no quorum, the presiding officer is obliged either to adjourn the House or to suspend the meeting until there is a quorum [Art. 100(4)].

The British Parliamentary practice is somewhat different in this respect. No notice of lack of quorum is taken there till the lack of quorum is challenged by a member and only then a meeting of the House may be adjourned. In India, on the other hand, it is the constitutional duty of the occupant of the chair to suspend or adjourn the sitting if there is no quorum. The British practice has this advantage over the Indian practice that formal business can be transacted there without quorum.

It may, however, be noted that if some business is transacted in a House without quorum, its validity may not be open to attack in the courts because of the principle of internal autonomy of the House [Art. 122(1)].[68] The rule regarding quorum is regarded as procedural and so directory and not mandatory.[69]

(e) DECISIONS

Matters are decided in a House by an ordinary majority of votes of the members present and voting at a sitting excluding the Speaker or the Chairman or the person acting as such, who does not vote in the first instance, but has a casting vote in case of an equality of votes [Art. 100(1)].

The Constitution lays down a rule of special, instead of ordinary, majority for certain matters, *viz*.:

Amendment of the Constitution (Art. 368);[70]

Impeachment of the President (Art. 61);[71]

Passing of an address for the removal of a Judge of the Supreme Court [Art. 124(4)];[72]

Removal of a Judge of the High Court [Art. 217(1)(b)];[73]

Removal of the Comptroller and Auditor-General of India [Art. 148(1)],[74]

Removal of the Chief Election Commissioner, [Proviso to Art. 324(5)];[75]

Removal of the Chairman or the Deputy Chairman of the Rajya Sabha [Arts. 67(b) and 90(c)][76];

Removal of the Speaker and the Deputy Speaker of the Lok Sabha [Art. 94(c)];[77]

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68. **S**ee under 'Privileges of Parliament', *infra*., Sec. L.
69. Ruling of the Speaker on April 11, 1955.
70. *Infra.,* Ch. XLI.
71. *Infra.* Ch. III.
72. *Infra,* Ch. IV.
73. *Infra*. Ch. VIII.
74. *Infra*, Sec. J(ii).
75. *Infra,* Ch. XIX.
76. *Infra*, Sec. H.
77. *Infra*, Sec. H.

Passing of a resolution in the Rajya Sabha to create All-India Services (Art. 312)[78]

For authorising Parliament to legislate on matters in the State List (Art. 249).[79]

(f) VACANCY IN A HOUSE

A vacancy in the membership of a House does not render it incapable of acting and discharging its functions. A House has power to act notwithstanding any vacancy in its membership. Proceedings of a House remain valid even though it is discovered later that some person, not qualified or entitled to do so, sat or voted or otherwise participated in the proceedings [Art. 100(2)].

(g) LANGUAGE

The business of Parliament is to be transacted in Hindi or English. This provision is subject to Art. 348 [Art. 120(1)].[80] With the permission of the presiding officer, a member who cannot adequately express himself in either of these languages may address the House in his mother tongue [Proviso to Art. 120(1)].[81]

Art. 120(2) Provides:

> "Unless Parliament by law otherwise provides, this article shall, after the expiration of a period of fifteen years from the commencement of this Constitution, have effect as if the words 'or in English' were omitted therefrom".

Thus, it is up to Parliament to continue use of English in Parliament as long as it likes.

(h) WHO CAN PARTICIPATE IN THE PROCEEDINGS OF A HOUSE?

Only a member of the House can participate in its proceedings. However, every Minister or the Attorney-General has a right to speak and otherwise take part, in the proceedings of either House, a joint sitting of the two Houses, and any parliamentary committee of which he is appointed a member, without being entitled to vote [Art. 88].

A right to vote in a House accrues only to its members. The idea underlying the above provision is that a Minister, though member of one House, can participate in the work of the other House without enjoying a right to vote. Further, in India, a person can remain a Minister for six months without being a member of any House [Art. 75(5)].[82] Such a Minister can participate without voting in the proceedings of both the Houses of Parliament.

H. OFFICERS OF PARLIAMENT

(a) SPEAKER/DEPUTY SPEAKER

The Speaker is the chief officer of the Lok Sabha. He presides at its sittings. His authority and power arise from the fact that his powers are the powers of the House which the House has committed to him for convenience and practical purposes.

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78. *Infra,* Ch. XXXVI.
79. *Infra,* Ch. X.
80. *See, infra,* Ch. XVI.
81. Also see, *infra,* Ch. XVI, Official Language.
82. *See,* Ch. III, Sec. A(iii), *infra.*

The Speaker and the Deputy Speaker are chosen by the House itself from amongst its members [Art. 93]. The Deputy Speaker performs the duties of the Speaker's office when it is vacant. In case the Deputy Speaker's office is also vacant, the Speaker's duties are to be performed by such member of the House as the President may appoint for the purpose till any of the offices is filled by election by the House [Art. 95(1)].

The Deputy Speaker acts as the Speaker when the latter is absent from the House. When both the Speaker and the Deputy Speaker are absent from the House, such person as may be determined by the rules of procedure of the House, and if no such person is present, such other person as may be determined by the House, acts as the Speaker [Art. 95(2)].

The Speaker and the Deputy Speaker remain in office so long as they are members of the House and they vacate their offices as soon as they cease to be its members [Art. 94(a)]. When Lok Sabha is dissolved, the Speaker does not vacate his office until immediately before the first meeting of the House after dissolution [Proviso II to Art. 94]. The Speaker or Deputy Speaker may resign his office by writing to each other [Art. 94(b)].

Any one of them may be removed from his office by a resolution passed by a majority of all the then members of the House [Art. 94(c)]. Such a resolution can be moved only after at least a fourteen days' notice has been given of the intention to move it [Proviso I to Art. 94]. When such resolution is under consideration against the Speaker, he does not preside at the sittings of the House though he may be present. He can, however, participate in the proceedings of the House at such a time and even vote in the first instance though not when there is an equality of votes [Arts. 96(1) and (2)]. Similar is the position of the Deputy Speaker when a resolution against him is under consideration of the House.

The Speaker and the Deputy Speaker are paid such salaries and allowances as are fixed by Parliament by law, and until such a provision is made, as specified in the Second Schedule to the Constitution [Art. 97].

The office of the Speaker enjoys great prestige, position and authority within the House. He has extensive powers to regulate the proceedings of the House under its rules of procedure. The ordinary interpretation of the procedural laws, rules and customs of the House is his function and he allows no debate or criticism of his rulings except on a formal resolution. He is responsible for the orderly conduct of its proceedings and maintains discipline and order in the House.

The Speaker has power to decide finally whether a Bill before the House is a Money Bill or not [Art. 110(3)][83]. The Speaker is not expected to give his rulings on questions of constitutionality of laws as such questions are to be decided finally by the courts.

The Speaker is much more than merely a presiding officer of the House. He is the representative and spokesman of the House in its collective capacity and is the chief custodian of its powers and privileges. According to the majority opinion in *Kihota*:[84]

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83. *Infra*, Sec. J(ii)(c).
84. AIR 1993 SC at 452 : 1992 Supp (2) SCC 651. Also see, *supra*, Sec. F.

> "The office of the Speaker is held in the highest esteem and respect in Parliamentary traditions. The evolution of the institution of Parliamentary democracy has as its pivot the institution of the Speaker. The Speaker holds a high, important and ceremonial office... The Speaker is said to be the very embodiment of propriety and impartiality".

A few constitutional provisions ensure the impartiality and independence of the Speaker and the Deputy Speaker. Their salaries and allowances are to be fixed by Parliament by law [Art. 97], are not subject to the annual vote of Parliament, and are *charged* on the Consolidated Fund of India [Art. 112(3)(b)].[85] There is thus no special opportunity to criticise their work and conduct in Parliament. Further, none of them can be removed from office except by a resolution passed by the House itself.

In Britain, at one time, it was a practice that the re-election of the former Speaker at a general election was not opposed, but in recent years this practice has weakened and the Labour and Liberal candidates have stood against the Speaker. It is customary for the previous Speaker to be re-elected even though his party may no longer be in power.[86] Such a practice is not followed in India.[87]

Owing to the great importance of his office, the Speaker is expected to maintain his impartiality. So, it is a convention in Britain that the Speaker divests himself of his party character by resigning from the party to which he belonged before his election.[88] This convention is not followed strictly in India where the Speaker remains a member of the party though he does not attend or participate in any party meeting except on ceremonial or social occasions.[89]

The position of the Speaker was brought into sharp focus in 2008. Somnath Chatterjee, a member of the Communist Party of India (Marxist)(CPM) was appointed as the Speaker of the Lok Sabha after the Congress led coalition, which was supported by the Left parties, formed the Government at the Centre in 2004. The Left withdrew their support to the Government in 2008 and called upon the Speaker to resign his post. When he did not, the CPM expelled the Speaker from the party. Constitutionally, the Speaker is chosen by the House and does not represent any party. Additionally had the Speaker resigned on the say so of his party, the impartiality of his decisions as Speaker would have been rendered suspect. By not resigning from the Speaker's post even though Left parties had withdrawn support to the government, it was demonstrated that the Speaker's post is above party politics, a position reflecting the British Convention referred to in the preceding paragraph.

(b) CHAIRMAN OF RAJYA SABHA

The presiding officer of Rajya Sabha is known as the Chairman. The Vice-President of India is the *ex officio* Chairman of the House [Art. 89(1)]. The House also elects a Deputy Chairman from amongst its members [Art. 89(2)] who vacates his office as soon as he ceases to be a member of the House [Art.

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85. See, *infra*, Sec. J(ii)(h).
86. WADE & PHILLIPS, 165 (IX Ed.).
87. The Speakers' Conf., Oct. 5, 68, suggested that the political parties accept a convention that the Assembly seat of the Speaker would not be contested by any party.
88. LORD CAMPION, *PARLIAMENT—A SURVEY*, 17 (1955); JENNINGS, *op. cit.*, 65
89. MUKHERJEA, PARL. *PROCEDURE IN INDIA*, 48 (1967). The Speakers' Conf., Oct. 5, 68, suggested that the Speaker should sever his connections with his party.

90(a)]. He may resign his office by writing to the Chairman [Art. 90(b)]. He may be removed from his office by a resolution passed by a majority of all the then members of the House. Such a resolution, however, cannot be moved unless at least a fourteen days' notice has been given of the intention to move it.[90]

The Deputy Chairman performs the duties of the Chairman when that office is vacant, or when the Vice-President is acting as the President of India [Art. 91(1)]. If the office of the Deputy Chairman is also vacant, then the duties of the Chairman are performed by such member of the Rajya Sabha as the President may appoint for the purpose till any of these offices is filled. In the absence of the Chairman from a sitting of the House, the Deputy Chairman, and if he is also absent, such person as may be determined by the rules of procedure of the House, or, if no such person is present, such other person as may be determined by the House, acts as the Chairman [Art. 91(2)].

The Vice-President of India cannot preside over a sitting of Rajya Sabha as its Chairman when a resolution for his removal is under consideration. He has, however, a right to speak and otherwise participate in the proceedings of the House, but cannot vote at such a time [Art. 92].[91] Similarly, the Deputy Chairman cannot preside over a sitting of the House when a resolution for his removal is under consideration [Art. 92], though he has a right to vote and participate in the proceedings.[92]

The salaries and allowances payable to the Chairman and Deputy Chairman are fixed by Parliament by law and, until so fixed, are to be as specified in the Second Schedule to the Constitution [Art. 97]. Under the Rules of Procedure of the House, the Chairman enjoys powers to regulate the proceedings of the House similar to those enjoyed by the Speaker in relation to the Lok Sabha.

(c) PARLIAMENTARY SECRETARIAT

Each House has separate secretarial staff of its own though there may be some posts common to both the Houses. The terms of recruitment and conditions of service of persons appointed to the secretarial staff of a House may be regulated by law by Parliament. Until so regulated, the President of India may, after consultation with the Speaker of the Lok Sabha, or the Chairman of the Rajya Sabha, as the case may be, make rules for the purpose. The rules so made have effect subject to the provisions of any law which Parliament may make [Art. 98].

I. TERMINATION OF PARLIAMENT

(a) PROROGATION

Prorogation puts an end to a session of the House but not to its existence and the same House meets again after prorogation. Prorogation only means that the House ceases to function for a particular period of time.

The power to prorogue a House is vested formally in the President [Art. 85(2)(a)], but he acts in this matter on the advice of the Prime Minister. A Bill or any other business, whether pending in the House or pending the assent of the

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90. Art. 90(c) and proviso.
91. For procedure to remove the Vice-President, see Ch. III, Sec. A, *infra*.
92. Art. 92.

President, does not lapse by the prorogation of the House [Art. 107(3)].[1] Contempt of the House committed in one session can be punished by it in another session.[2]

Several questions have arisen regarding the exercise of power of prorogation of the House by the State Governors[3] and the principles emerging therefrom may be relevant to the prorogation of the House of Parliament by the President.

(b) ADJOURNMENT

An adjournment terminates a sitting of the House. Unlike dissolution or prorogation, it is the act of the House itself.

A House may adjourn for such time as it pleases, and it is in exercise of this power that a House adjourns its sitting from day to day and sometimes over the holidays intervening in the course of the session. A House may also be adjourned *sine die,* that is without naming a day for reassembly. An Adjournment does not affect the incomplete work before the House which may be resumed when the House meets again after adjournment.[4]

(c) DISSOLUTION

Dissolution puts an end to the life of the House. It leads to the election of a new House.

Rajya Sabha is a continuing chamber; it never comes to an end; it is not subject to dissolution and one-third of its members rotate every two years [Art. 83(1)].[5]

Lok Sabha, on the other hand, is not a continuing chamber. Its normal life is five years from the date of its first meeting after the general elections, and the expiry of this period *ipso facto* operates to dissolve the House [Art. 83(2)].[6]

During an emergency, Parliament can make a law to extend the life of Lok Sabha for a year at a time. Such a law may be passed repeatedly each time extending the life of the House for a year, subject to the overall condition that the life of Lok Sabha cannot be extended beyond a period of six months after the emergency comes to an end [Proviso to Art. 83(2) and Art. 352][7]. The idea is that the House may continue for the entire duration of the emergency as it may not be expedient to distract the attention of the nation by parliamentary elections at such a time. But, then, within six months of the emergency coming to an end the House is to be re-elected.

Elections may be held to constitute a new Lok Sabha before the existing Lok Sabha completes its term or is dissolved. The newly elected House would not, of course, start functioning till the existing House comes to an end. Elections for the

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1. *Purushottam Nambudri v. State of Kerala*, AIR 1962 SC 694 : 1962 Supp (1) SCR 753. In the matter of Special Reference No 1 of 2002 (Gujarat Assembly Election matter) : AIR 2003 SC 87, (2002) 8 SCC 237, 278-279. However, all pending notices other than those for introducing Bills, lapse on prorogation.
2. *M.S.M. Sharma v. S.K. Sinha*, AIR 1960 SC 1186 : (1961) 1 SCR 96, *infra*,.
3. Ch. VI, *infra*, for details.
4. See, *infra*, Ch. VI. Also see, *H. Siddaveerapa v. State of Mysore* , AIR 1971 Mys 200.
5. *Supra*, pp. 35-36.
6. *Supra*, pp. 39-40.
7. *See, infra*, Ch. XIII, for Emergency.

new House are held so that it may start functioning as soon as the existing House comes to an end. The life of the new House will start running from the date of its first meeting which will naturally be fixed after termination of the old House.[8]

The power to dissolve Lok Sabha is vested formally in the President [Arts. 83(2) and 85(2)(b)]. This is a significant power, for, by virtue of this power, a new House can be brought into being which may even result in a change of government. When, on what considerations, and under what circumstances can the power to dissolve Lok Sabha be exercised? These questions are of great importance, but, on these points, the Constitution is silent and lays down no norms. The framers of the Constitution thought it better to leave the matter open and lay down no rigid rules so that, as and when the question of dissolution arises, it might be decided in accordance with the circumstances prevailing at the time, and the constitutional conventions operative in the countries with the parliamentary form of government.

Guidance on this question may be sought from Britain where also the Crown has the formal power to dissolve the House of Commons. The position in Britain in this respect, though not entirely free from doubt, appears to be somewhat as follows. It is a well-settled convention that the Crown would not dissolve the House *suo motu*, on his own initiative, without the advice of the Prime Minister. This is in accordance with the principle of responsible government according to which the Crown functions on ministerial advice. The responsibility for dissolution rests with the Prime Minister though he may consult some of his colleagues if he so likes.[9]

When the Council of Ministers enjoys the confidence of the House of Commons, a dissolution is usually asked for before the House runs out its full term. Usually, the House is dissolved sometime in the fifth year and general elections held. The Prime Minister thus has a right to go to the polls at a time most favourable to his party politically, when its stock with the electorate is high, without his having to wait for the efflux of the full term of the House. The Prime Minister thus has it within his power to select the most favourable and opportune moment for dissolving the House and holding a fresh poll.

If the Prime Minister's overall majority in the House is very slender, and he finds it difficult to push his programme through the House, he may ask for dissolution of the House in the hope that his party position would improve after fresh elections. Dissolution may also be resorted to if the Prime Minister feels that he should seek a mandate from the electors on some important matter of policy on which he wishes to embark, but such dissolutions are now rare.

If a Ministry enjoying majority support in the House is defeated on any major issue of policy, it can either resign or seek an endorsement of its policies from the electorate by suggesting dissolution of the House and holding fresh elections. It

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8. *Bholanath Srivastava v. Union of India*, AIR 1963 All 363.

9. JENNINGS, *CABINET GOVERNMENT*, 412-28 (III ed. 1969).

Till, 1918, the practice appears to have been that the advice to dissolve the House of Commons was submitted by the Prime Minister on the decision of the Cabinet. Since 1918, however, the view has come to be held that the responsibility for dissolution must rest with the Prime Minister though he may consult a few of his colleagues, if he so likes, but he is not bound to do so. No dissolution since 1918 has been brought before the Cabinet and each Prime Minister since Lloyd George has assumed a right to give the advice himself : *Ibid.*, 417-19.

appears to be a settled convention that the Crown will grant a dissolution in such a situation even if it were possible to find an alternative Ministry. The justification for this convention is that in modern times a Ministry is the direct result of general elections and that its defeat in the House automatically entitles it to appeal once again to the people.

There have been a number of constitutional precedents to this effect. The nineteenth century in Britain was a period of parliamentary instability when only on one occasion (1868-1873) Parliament ran for its full course. Between 1832 to 1868, defeat of the government in the House led to its dissolution five times and to resignation of the Ministry eight times. In 1859 and 1868, dissolutions were granted even when Parliament was only two to three years old and alternative Cabinets were ready to take office.[10] Lord Melbourne got a dissolution of the House earlier and led a minority ministry. Lord Palmerstone got a dissolution of the House in 1857; Lord Derby in 1859; Disraeli in 1868, and all these Prime Ministers headed minority governments. In 1910, the House of Commons was dissolved just within a year of its electionafter its dissolution earlier in 1909. Thus, there was a double dissolution of the House within a year. In 1923, 1924, 1931, 1951 and 1979, Parliament was dissolved, for political reasons, long before the normal period expired.

Is the Crown bound to grant a dissolution of the House on the request of a Ministry which never had a clear majority, and which is defeated in the House on a major policy matter? The answer to this question is somewhat debatable and is not free from doubt. In 1924, King George V granted dissolution to the Labour Prime Minister, Ramsay Macdonald. There were three parties in the House, Labour, Liberal and Conservative. Their strength was as follows ; Conservatives 261; Labour, 191; Liberal, 155; Others, 8. Although the Conservative Party was numerically the largest party, the King invited Ramsay Macdonald to lead a minority Labour Government. Thus, Labour took office without a majority but with the support of Liberals who subsequently withdrew their support. Liberals and Conservatives were not willing to combine to form government and hence the House was dissolved.[11]

Similarly, Prime Minister James Callaghan's request for dissolution of Parliament was granted by the Queen, despite the fact that he headed a minority government.[12] The type of embarrassment which might be caused to the Crown, if dissolution is refused in such a situation, may be represented by the typical case of Lord Byng, the Governor-General of Canada. At the general election of 1925 in Canada, the Conservative Party secured a small lead over the Liberal Party, but the Liberal Government in office at the time thought that it could carry on with the aid of smaller groups in the House. Threatened by a vote of censure nine months later, the Liberal Prime Minister asked for a dissolution, but Byng refused to oblige on the ground that the Conservative Party could form the government. The Prime Minister thereupon resigned. The Conservatives took office,

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10. KEITH, *CONSTITUTIONAL LAW*, 51-52 (1939).

11. In such a state of parties, according to FINER, the question arose what is the rule for dissolution? "When there is no certainty that a majority government is attainable, ought the minority in office to advise the Crown to dissolve in order to escape from parliamentary difficulties and perhaps improve its electoral position?"
FINER, THE THEORY AND PRACTICE OF MODERN GOVERNMENT, 393 (1965).

12. HILAIRE BARNETT : CONSTITUTIONAL & ADMINISTRATIVE LAW, (5th Edn.) (2004).

but they were defeated in the House within a week and they themselves asked for a dissolution which Byng granted. At the general elections, the Liberal Party obtained a majority and again assumed office and Byng came in for a lot of criticism at his handling of the situation.[13]

If the Prime Minister requests for dissolution and the King refuses it, the Prime Minister may decline to remain in office. The King then must find a new Prime Minister. It is then for the House to decide the question, because if the House refuses to support the new Prime Minister, the King would then be compelled to agree to dissolve the House and this may cause damage to the institution of monarchy in the process.

The question of dissolution has been widely discussed by many scholars in Britain, but, as De Smith says there is no consensus of opinion on the conventional power of the Monarch to require a dissolution of Parliament, or to refuse a request for dissolution.[14] While the general view is that it may be politically expedient for the Crown to accept the advice whenever tendered by the Prime Minister to dissolve the House, yet not a single constitutional lawyer appears to assert unequivocally that the Crown's discretion or prerogative to grant or refuse dissolution has been atrophied by disuse, or been lost irrevocably.[15] Although, for over a hundred years, the Sovereign has never rejected, but has consistently acceded to, the Prime Minister's request to dissolve the House, nevertheless, there has been a persistent tradition, and the view is still propounded, that the Crown may refuse if the circumstances so demand.[16]

The idea is expressed in various ways *e.g.*, that no Constitution can stand a diet of dissolutions which means that successive dissolutions may be refused and, thus, a Ministry which having been defeated in the House asks for and gets a dissolution, and then is defeated at the polls, should not again ask for another dissolution. It has been asserted that the convention that the Monarch would not refuse to grant dissolution is dependent on another convention that there would not be an unreasonable demand for dissolution, implying thereby that the Crown can refuse to grant dissolution if it regards the request unreasonable. Similarly, it is maintained that there is no convention which prevents the Crown from refusing dissolution in exceptional circumstances.[17]

Mackintosh asserts that a request for dissolution will never be refused if the Prime Minister can claim that an election will reveal a definite change of temper among the electorate, or that the government is likely to be strengthened, but dissolution can be refused when an election would neither change party representation in the House of Commons to any appreciable extent nor aid the government in any way. He goes on to illustrate his point by taking an example of there being

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13. EDWARD MCWHINNEY, The Head of State in the Commonwealth Countries, 4 *Vyavahara Nirnaya*, 120 (1955). HOGG: Constitutional Law of Canada (2003) 9.6(d).

14. S.A. DE SMITH, *CONST. AND ADM. LAW*, 51, 102-5, (1977).

15. It is interesting to note that Queen Victoria claimed an unlimited power in this respect. She wrote in a letter, "There was no doubt of the power and prerogative of the sovereign to refuse a dissolution. It was one of the very few acts which the Queen of England could do without responsible advice". *LETTERS OF THE QUEEN VICTORIA*, first series, ed. Benson & Esher, III 364-5 (1907); Keir, *THE CONSTITUTIONAL HISTORY OF MODERN BRITAIN*, 489.

16. E.A. FORSEY, *THE ROYAL POWER OF DISSOLUTION IN THE BRITISH COMMONWEALTH*; B.S. MARKESINIS, *THE THEORY AND PRACTICE OF DISSOLUTION OF PARLIAMENT*; WADE & PHILLIPS, *op. cit*. 226-8; JENNINGS, *op. etc.*, 427.

17. LAWSON & BENTLEY, *CONSTITUTIONAL AND ADMINISTRATIVE LAW*, 107 (1961).

in the House three well-balanced parties, A, B, C, out of which A forms the government relying on the support of B. If later the stock of the government declines and it has no chance of winning an absolute majority in a division in the House, and if the two other parties B and C are not eager to go to the country but are prepared to combine in support of an agreed Cabinet, the Crown would be entitled to refuse dissolution on the request of A, and to commission a new Prime Minister having the support of B and C.[18] Similarly, a doubt has been raised whether the convention as to the right of a Prime Minister defeated in the House on a major issue to get a dissolution would survive the presence of three parties, each with a fair proportion of seats.[19]

JENNINGS takes the view that while the royal prerogative is maintained in theory, and that the Monarch can refuse to accept the Prime Minister's advice in the matter of dissolution, such a royal power can hardly be exercised in practice,[20] and he also fails to see what those circumstances can be when the Monarch may refuse to dissolve except that if the major political parties break up, the whole balance of the Constitution would be altered, and then possibly, the royal prerogative may become important.

O. Hood Phillips also maintains that the opinion which allows a "limited personal prerogative' to the Sovereign, appears to be the better one. He says : "It is more in consonance with the traditions of British parliamentary government".[21]

The underlying idea in this cautious approach of the scholars is that while the Crown, speaking generally, should act on the advice of his Prime Minister, the political situation being extremely varied and diversified, no one can foresee all the situations and be sure that a moment may never arise when the Crown may have to refuse dissolution in the interest of saving the democratic constitutional fabric. However, there are enormous difficulties in the way of the Crown to refuse dissolution when so advised by the Prime Minister. As JENNINGS says: "Thus while the Queen's personal prerogative is maintained in theory, it can hardly be exercised in practice." If the advice is refused, the Prime Minister would have no option but to resign, and the Crown would have no option but to turn to the opposition to form the government. This may involve the Crown in partisan party politics which may injure the Crown as an impartial institution, free from the current political controversies and manoeuvres. In sum, the position appears to be that in Britain the Crown would accept ministerial advice to dissolve the House except, perhaps, in a very exceptional situation.

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18. MACKINTOSH, *THE BRITISH CABINET*, 18 (1977). See also HILAIRE BARNETT, CONSTITUTIONAL AND ADMINISTRATIVE LAW (5th Edn.) p. 136.

19. *Also see*, *infra*, Chs. VI and VII.
For discussion on Lok Sabha, *see*, V JI., *of Inst. of Constitutional & Parliamentary Studies*, 295-376 (1971).

20. *JENNINGS, CABINET GOVERNMENT*, 412-28.

21. O. HOOD PHILLIPS, *CONST. AND ADM. LAW*, 155 (1987).
For a fuller discussion on the Sovereign's power to dismiss, see, *ibid.*, 152-155. He mentions the following factors that would have to be taken into account before the Sovereign could properly refuse a dissolution : (i) the time that had elapsed since the last dissolution; (ii) whether the last dissolution took place at the instance of the present Opposition; (iii) whether the question in issue is of great political importance; (iv) the supply position; (v) whether Parliament is nearing the end of its maximum term; (vi) whether the Prime Minister is in a minority in the Cabinet; (viii) whether there is a minority government; (viii) and perhaps, whether there is a war on.

Dissolution is in effect an appeal to the supreme constitutional authority, namely, the people, and is, thus, the most democratic procedure to determine as to which government will be in office. Dissolution has been characterised as a 'big stick' which the government wields to keep its majority in the House intact. The power can also be used to discipline the opposition. In a multi-party system when parliamentary government is unstable, successive dissolutions of the popular chamber may help in consolidation of parties and ultimate evolution of fewer parties by eliminating the lesser ones.

When the House is dissolved, the Government continues in office; it vacates office when, after the election, it loses its majority in the House. In such an eventuality; it must resign.[22]

On the basis of the above, it may perhaps be safe to say that, normally speaking, the President will grant a request for dissolution of Lok Sabha as and when made by the Prime Minister enjoying majority support in the House.

In theory, it may be asserted that a Prime Minister defeated in the Lok Sabha ought to be granted dissolution irrespective of his party position and be permitted to seek the verdict and mandate from the people to whom ultimately the government is responsible and who in the last resort decides as to which government should rule. Refusal to dissolve the House at a time when no government is stable, leads to all kinds of combinations and permutations amongst the various political parties. It is quite possible that several dissolutions of the Lok Sabha may help in consolidation of parties and evolution of two or three national parties. Multiple political parties make parliamentary form of government unstable.

But, in India, from a practical point of view, it remains a moot question whether a Prime Minister defeated in the House would be granted dissolution irrespective of his party position. On the whole, there prevails a feeling in India that frequent elections ought not to be held because of the expense involved. There is inherent resistance to mid-term dissolution of the Lok Sabha. Not only the people do not want to go to the polls often, but even the members of the Legislature do not want to lose their privileges before the full five-year term is over.

During the last thirty years, Lok Sabha has witnessed several premature dissolutions, the reason being that no political party has been able to secure a stable majority in the House. In November, 1969, the ruling Congress Party broke up. Consequently, the Government lost its majority. On the advice of the Prime Minister, on December 27, 1970, the President dissolved the Lok Sabha elected in February, 1967. The Lok Sabha was thus dissolved fourteen months before its full term would have run out.

Several interesting features of this dissolution may be noted. First, the request to dissolve the Lok Sabha was made by the Cabinet, of course, on the initiative of the Prime Minister and not by the Prime Minister alone. Secondly, the Prime Minister was heading at the time a minority government, but it had not been defeated in the Lok Sabha on any question. The Government, to start with, had a small majority but because of a split in the party it lost that majority. The Prime Minister asserted that the sole consideration to make the request was government's desire to seek a fresh mandate from the people to enable the Government to effectively implement its programme. Lastly, the opposition parties had con-

22. For further discussion on this point, see, *infra*, Ch. III.

tended that the head of a minority government had no right to recommend dissolution of the Lok Sabha but the President rejected this contention.

In 1975, emergency was imposed in India under Art. 352. The emergency was revoked in 1977 and elections were held to the Lok Sabha. The Congress Party which was responsible for imposing the emergency was routed. Morarjee Desai, leader of the United Front, a coalition of several parties, which secured a majority in the House became the Prime Minister. He resigned in July, 1979, when the United Front broke away and Charan Singh, leader of the breakaway group, became the Prime Minister in 1979.

In 1979, Lok Sabha was dissolved after only two years of its existence on the advice of a Prime Minister [Chaudhury Charan Singh][23] who headed a minority government from the very beginning and who never faced the House.[24] He was installed in office with the outside support of the Congress Party. When the Congress Party withdrew its support, Lok Sabha was dissolved. When elections were held to Lok Sabha in 1980, a stable government did emerge at the Centre.[25]

In 1990, the V.P. Singh Government was defeated on the floor of Lok Sabha on a confidence motion. In anticipation of the impending defeat of the government on the floor of Lok Sabha, a question was hotly debated in public, *viz.*, would the President be bound to accept the advice of the defeated Prime Minister to dissolve the House? However, no conclusive answer emerged to this question as the Prime Minister resigned, without seeking dissolution of the House, as the public mood in the country at the time was against such a step.[26]

Thereafter, the Chandra Shekhar Ministry was installed in office in November, 1990. Chandra Shekhar headed a minority party but managed a majority in Lok Sabha with the help of the Congress Party. After four months, in March, 1991, the Congress withdraw its support and, consequently, Prime Minister Chandra Shekhar resigned his office, and the House was dissolved on the advice of the Prime Minister. There was the added circumstance at the time that no viable alternative government could possibly be installed.[27]

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23. *See*, next Chapter, for discussion on the appointment of Chaudhary Charan Singh as the Prime Minister.

24. *Also see*, *infra*, Chs. VI and VII. For discussion on the dissolution of Lok Sabha, see, *V JI. of Inst. of Constitutional & Parliamentary Studies*, 295-376 (1971).

25. For full facts, *see*, *infra*, Ch. III, Sec. I(c).

26. Shri R. VENKATARAMAN, who was the President at the time, refers to this episode in his memories entitled *MY PRESIDENTIAL YEARS*, at 431. He observes: "It was becoming increasingly clear that V.P. Singh would lose the vote of confidence. I therefore started consulting legal experts regarding the courses open to me after the vote. One immediate possibility was a recommendation for the dissolution of the House by the Prime Minister. Whether the advice of a defeated Prime Minister is binding on the Crown in England, is not free from doubt."

He mentions that in England for nearly a hundred years, the Crown has never refused to accept the advice of the Prime Minister before or after his defeat in the House if he wanted to appeal to the people. VENKATARAMAN then refers to the scholastic opinion in Britain according to which the Crown may refuse to accept the advice for dissolution under certain circumstances. Finally he says : "It appeared to me that it was safer to go with the British precedent of accepting the Prime Minister's recommendation rather than rely on erudite and eminent textbook writers."

27. *See*, R. VENKATARAMAN, *op. cit.*, 491.

He observes : "I did not base the dissolution of the Lok Sabha solely on recommendation of the outgoing Prime Minister but on the other factor also, namely, that no political party had come forward to form a government..."

Then, again, as a result of the general election held in May, 1996, no party emerged in majority in the Lok Sabha. The House was badly fractured and split three ways as follows : United Front, 177 seats; Congress, 140 seats and Bhartiya Janta Party, 162 seats. With the help of the Congress support, the leader of the United Front took office in 1996.

On 4th December, 1997, the House was dissolved within two years of its election, as Prime Minister Gujaral lost his majority support in *Lok Sabha*. Gujaral headed a minority government but it stayed in office with the support of the Congress Party from outside. The Prime Minister resigned and the Government fell when the Congress Party withdrew its support to the Government. The outgoing Cabinet recommended that Lok Sabha be dissolved and a fresh mandate be obtained from the people. Again, there was the added circumstance that there was no prospect of installing an alternative government at the time.

President Narayanan did not accept the advice of the Prime Minister straightaway but explored the possibility of installing an alternative government, and dissolved the House only when he realised that there was no such possibility.[28]

In the communique issued by the President dissolving Lok Sabha, it was stated that the President had gone through the arduous exercise of consulting the leaders and representatives of major political parties including the ruling party with a view to explore the possibility of forming a government which was "lawful, viable and enjoy a reasonable prospect of stability." But it became clear that "no political combination in the Lok Sabha" was in a position to form such a government. The communique also stated that the recommendation made by the Council of Ministers "converged with the President's own process of deduction."

The communique thus makes it amply clear that the decision to dissolve Lok Sabha was based not merely on the advice of Council of Ministers but also on the President's own appraisal of the situation as well. The President considered the matter from all angles. It thus becomes amply clear that in the matter of dissolution of Lok Sabha, the advice of the outgoing Ministry to dissolve the House is not binding on the President. He will try to explore the possibility of having an alternative stable government.[29]

Again, in 1997, the elections resulted in a hung Parliament as no party secured a clear majority in Lok Sabha. A coalition government of several parties, of which BJP was the major component, was installed in office in March, 1998. This government being a coalition of several parties could not be characterised as a stable government because of the internal pulls and pressures of its component units. This government fell in April, 1999, as it was defeated in Lok Sabha on a vote of no confidence by one vote. The President sought to explore the possibility of an alternative government but when he failed in this enterprise, Lok Sabha was dissolved and fresh elections held. Thereafter, a new coalition government took office in October, 1999, under Shri Atal Behari Vajpayee as the Prime Minister. That government remained in power till the next general elections five years later. The government which was formed in 2004 was also a coalition under the

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28. The Presidential Order dissolving the House was challenged through a writ petition in the Andhra Pradesh High Court, but it was dismissed : *D.S.N.V. Prasad Babu v. Union of India*, AIR 1998 AP 140.

29. *A writ petition* challenging the dissolution of Lok Sabha was dismissed by the Andhra High Court in *D.S.N.V. Prasad Babu v. Union of India*, AIR 1998 AP 140.

Prime Ministership of Manmohan Singh. The 2009 General Elections has also resulted in a coalition Government at the Centre, albeit with different political partners.

Thus, in India, it remains doubtful at present whether frequent elections to Lok Sabha may result in one single political party securing a majority in the House in the forseeable future. Perhaps, for some time to come, India is destined to have coalition government rather than a single party government. It remains a moot point whether the clause that the President 'shall act" on the advice of the Council of Ministers binds the President to dissolve the House as and when the Prime Minister requests for it. On the whole, on the basis of the practice followed so far, it may be said that, dissolution will not be granted automatically on the advice of the Prime Minister who has lost confidence of the House. The President will first explore if there is a possibility of formation of an alternative government. The public mood is against frequent elections in the country. Only when no alternative government is possible, Lok Sabha will be dissolved.

(d) EFFECT OF DISSOLUTION ON BUSINESS PENDING IN THE HOUSE

When the Lok Sabha is dissolved :

(1) a Bill pending in Rajya Sabha which has not been passed by the Lok Sabha does not lapse [Art. 107(4)];

(2) a Bill pending in the Lok Sabha lapses [Art. 107(5)];

(3) a Bill passed by the Lok Sabha but pending in the Rajya Sabha lapses [Art. 107(5)], but it would not lapse if in respect of it a joint session of the two Houses has already been called by the President [Art. 108].[30]

A joint sitting of the two Houses may still be held in spite of the dissolution of Lok Sabha, if it has been convened already before Lok Sabha stands dissolved.[31]

(4) A Bill passed by both Houses but pending assent of the President does not lapse with the dissolution of the Lok Sabha.[32]

(5) Dissolution of the House does not wipe out contempt proceedings in the House. The new House constituted after election can punish for contempt of the House dissolved.[33]

J. FUNCTIONS OF PARLIAMENT

Parliament is a deliberative and a legislative body. Its functions are multifarious which are divisible under the following heads :

(*i*) Legislation;

(*ii*) Control of Public Finance;

(*iii*) Deliberation and Discussion;

(*iv*) Control of the Executive;

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30. For a joint session see, *infra*, Secs. J(i)(b) and K(i).
31. *Ibid.*
32. *Purushottam Nambudri v. State of Kerala*, AIR 1962 SC 694 : (1962) Supp (1) SCR 753; In re Special Reference No. 1 of 2002 : (2002) 8 SCC 237; AIR 2003 SC 87.
33. *A.M. Paulraj v. Speaker, T.N. Legislative Assembly*, *infra*, Ch. VI.

(*v*) Removal of certain high Officials; and

(*vi*) the Constituent function.

Heads (*i*), (*ii*) and (*iii*) are discussed below. As to head (*iv*), in a parliamentary form of government, the Executive being responsible to Parliament, an important function of Parliament is to control the Executive, criticise, supervise administration, and influence governmental policies. Practically, every activity of Parliament, whether legislative or deliberative, is oriented towards this end. This aspect is discussed in the next Chapter.

As to head (*v*), Parliament has power to impeach the President [Art. 61][34] and remove from office the Vice-President of India [Art. 67, proviso (b)],[35] Judges of the Supreme Court[36] and the High Courts,[37] the Chief Election Commissioner [Art. 324(5)][38] and Comptroller and Auditor-General of India [Art. 148(1)].[39] All these matters are discussed at the proper places.

The Constituent function of Parliament is discussed later in this book.[40]

(i) LEGISLATION

Making laws is Parliament's major pre-occupation. Changing and complex socio-economic problems constantly demand new laws and, thus, Parliament spends a good deal of its time on legislative activity.

(a) PROCEDURE

An ordinary Bill, *i.e.*, a Bill other than a Money or a Financial Bill, may originate in either House of Parliament [Art. 107(1)]. It becomes an Act when it is passed by both Houses and is assented to by the President [Arts. 111(1) and 107(2)].

The procedure for passage of a Bill in a House is contained in the rules of procedure of each House. Usually, a Bill passes through three stages, popularly known as readings, in a House.

The first is the introduction stage. By convention no discussion takes place at this stage unless the Bill is very controversial, *e.g.*, this convention has been broken when the Preventive Detention Bill has been introduced. Then comes the consideration stage which has two parts—one, a general discussion of the principles and provisions of the Bill (details of the Bill are not discussed at this stage); two, its clause by clause consideration. The general discussion takes place on a motion either that the Bill be taken into consideration; or, that it may be referred to a select committee; or, that it be circulated for eliciting public opinion.

An important Bill is usually referred to a select committee of the House or to a joint select committee of both Houses. After the report of the committee is presented to the House, the Bill is discussed clause by clause. Amendments to

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34. Ch. III, Sec. A(i)(h), *infra.*
35. Ch. III, Sec. A(ii), *infra.*
36. Art. 124(2), Proviso (*b*); Ch. IV, *infra.*
37. Art. 217(1), Proviso (*b*); Ch. VIII, *infra.*
38. Ch. XIX, *infra.*
39. *See, infra,* p. 108 *et seq.*
40. *See,* Ch. XLI, *infra,* under "Amendment of the Constitution".

clauses may be moved at this stage. At the final or the third reading stage, after a brief general discussion, the Bill is finally passed.

After its passage in one House, the Bill is transmitted to the other House where it undergoes more or less a similar procedure.

(b) JOINT SESSION

In the area of ordinary legislation, the two Houses of Parliament enjoy co-ordinate power. A Bill has to be passed by the two Houses in an identical form before it can be submitted to the President for his assent [Art. 107(2)].

If a Bill passed by one House is amended by the other House, the amended Bill is sent back to the originating House for its concurrence with the amendments so made. Usually, the two Houses agree and finally pass the Bill in the same form.

It may, however, happen at times that the two Houses do not agree on a Bill and a deadlock may ensue between them. Such a deadlock is resolved through a joint session of the two Houses. Thus, when a Bill passed by one House and transmitted to the other House:

(*i*) is rejected there; or

(*ii*) the two Houses disagree as to the amendments to be made to the Bill; or

(*iii*) if the other House does not pass it for more than six months,

the President may summon a joint session of both the Houses [Art. 108(1)]. While reckoning the period of six months, no account is to be taken of any period during which the House to which the Bill has been sent is prorogued or adjourned for more than four consecutive days [Art. 108(2)].

After the President notifies his intention to summon a joint session of the two Houses, none of the Houses can proceed further with the Bill [Art. 108(3)]. No joint session can be called if the Bill has already lapsed by the dissolution of the Lok Sabha as discussed above [Arts. 108(1) and 107(5)][41]; but the joint session may be held if the Lok Sabha is dissolved after the President has notified his intention to summon such a session [Art. 108(5)].

If the Bill passed by one House is not passed by the other House with amendments and returned to the originating House, no amendments can be proposed to the Bill at a joint session other than those which might have become necessary by the delay in the passage of the Bill [Art. 108(4), proviso (a)]. If, on the other hand, the Bill has been passed by the other House with amendments and returned to the originating House, then only such amendments, and in addition, such other amendments as are relevant to the matters with respect to which the Houses have not agreed, may be proposed at the joint sitting [Art. 108(4), proviso (b)]. In all cases, the decision of the presiding officer as to what amendments are admissible at the joint sitting is final [Art. 108(4)].

At the joint sitting, the Speaker of the Lok Sabha, or in his absence, such person as may be determined by rules of procedure, is to preside [Art. 118(4)]. The rules of procedure with respect to joint sittings of the two Houses are to be made

41. *Supra*, Sec. I(c).

by the President after consulting the Chairman of the Rajya Sabha and the Speaker of the Lok Sabha [Art. 118(3)][42]. A Bill passed with or without amendments, by a majority of all the members present and voting in the joint session, is deemed to have been passed by both the Houses [Art. 108(4)].

Since the commencement of the Constitution, the provision regarding the joint session of the two Houses has been invoked only a few times. The first joint session of the two Houses was held on May 6 and 9, 1961, to pass the Dowry Prohibition Bill regarding certain provisions of which there was disagreement between the two Houses. The Congress Party was in majority at the time in both the Houses. Being a social measure, the Government did not take a definitive stand on the points in controversy and left the matter to the judgment of the members, hence the deadlock. Had the Government given guidance on the Bill, no deadlock would have ensued as the members do usually accept Government leadership. It is for this reason that the provision for joint session has been so rarely invoked so far.

Another joint session of the two Houses of Parliament was held on May 16, 1978 to enact the Banking Service Commission (Repeal) Bill. The political complexion of the two Houses differed very sharply at the time. In the general election held for Lok Sabha in 1977, the Congress Party was routed and the Janata Party enjoyed a majority in Lok Sabha . But the Congress Party still dominated the Rajya Sabha. The Bill had earlier been passed by the Lok Sabha but was later rejected by the Rajya Sabha and so a joint session had to be called to override the inter-House difference of opinion as regards the Bill. The Bill was approved in joint session. The third joint session was held on March 26, 2002. The Prevention of Terrorism Bill, 2002 was approved by Lok Sabha by a margin of more than 100 votes but it was defeated in Rajya Sabha by 15 votes. The joint session was held to break the inter-House deadlock on the Bill and it was passed in the joint session.

(c) PRESIDENT'S ASSENT

Parliament cannot legislate without the concurrence of all its parts, and, therefore, in addition to the two Houses, assent of the President is also required for a Bill to become law, for the President is a part of Parliament [Art. 79]. When a Bill passed by both Houses is sent to the President for assent—

(i) he may either give or withhold his assent therefrom [Art. 111], or,

(ii) may send it back to the Houses for reconsideration and for considering the desirability of introducing such amendments as he may suggest [Proviso to Art. 111].

When a Bill is so returned, it is the duty of each House to reconsider it accordingly, and if it is passed again by the Houses with or without amendments, and presented to the President for assent, the President 'shall not withhold assent therefrom' [Proviso to Art. 111].

Thus, if the President refuses to give his assent to a Bill in the first instance, there is no way to override his veto and the Bill will be dead. If, however, he does not veto the Bill but refers it to the Houses for reconsideration, his power of veto is gone.

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42. Also see, *Appendix* I to the Rules of Procedure and Conduct of Business in Lok Sabha (1957).

These are formal powers of the President which he exercises on ministerial advice.[43] The President may veto a Bill on ministerial advice but it is inconceivable that a government would wish to veto a Bill for the passage of which it has been responsible and, therefore, the President rarely exercises his veto power. In a parliamentary democracy, consent of the Head of the State to a Bill passed by Houses of Parliament is deemed to be a mere formality. A similar power held by the British Crown has not been used for a very long time and is now regarded as having fallen into disuse.

The Presidential power to refer a Bill back to the Houses for reconsideration is meant to be used in a situation where, after the passage of a Bill by the two Houses, some important developments take place necessitating amendments in the Bill as passed, or where the Ministry finds later that some unwanted provisions have crept into the Bill, or if the government finds that due to haste or oversight, a Bill passed by the two Houses contains some provision which goes contrary to the intention of Parliament. In such a situation, President's power to refer a Bill back to the Houses enables the Houses to reconsider the Bill and effect necessary modifications therein according as the situation demands.

Constitutional history was made in India when the President returned a Bill to the government unsigned with the suggestion that its flaws be rectified. This was the first time after the Constitution came into force that a Bill was received back by the government without the President's assent. The Bill to amend the Post Office Act was passed by both Houses of Parliament in 1986. The Bill contained a provision authorising the Central or State Government, or any authorised officer, if satisfied that it was necessary to do so in the interests of public safety or tranquility, the sovereignty or integrity of India, the security of the state, friendly relations with foreign states or public order or for preventing incitement to the commission of any offence, or on the occurrence of any public emergency, to intercept or detain any mail. Objection to this clause was widespread in the country. The clause was too sweeping in nature as it undermined the Fundamental Rights of the people. The clause sought to vest the government with wide and sweeping powers in the matter of interception of the mail. Fears had been expressed that the power could be used for political purposes. Even the Law Commission had expressed its views against such a broad power of interception of mail.[44] The clause in question appeared to come in conflict with Art. 19(2).[45] The clause was too broad, too vague, and too drastic. There was strong public reaction against this clause which was characterised as draconian. The President under the Constitution had two options; (1) to give assent to the Bill; (2) to send it back to Parliament with a message to reconsider the Bill. Parliament would have then reconsidered the Bill. In adopting either of these options the President would have acted against the advice of the Council of Ministers which was a party to the passage of the Bill in the two Houses. Instead of following these constitutional options, the President sent the Bill to the Law Ministry seeking certain clarifications. In a formal sense, the action of the President, though unique, did not amount to the withholding of the assent as envisaged in Art. 111. In that case, he would have sent the Bill back to Parliament with a message to reconsider it. Instead, the President sent the Bill back to the Government so that the Government might reconsider

43. *Infra*, Ch. III.
44. LAW COMMISSION, *REPORT*, (1986).
45. *Infra*, Ch. XXIV.

the matter and move to suitably amend the Bill. The President acted in this matter on his own initiative and not on the advice of the Council of Ministers as envisaged by Art. 74(1).[46] In course of time, taking into consideration the public protests against the Bill, the Government allowed the Bill to lapse without bringing it before the Houses for reconsideration.[47]

A different outcome took place with regard to the Parliament (Prevention of Disqualification) Amendment Bill, 2006. The Bill was passed in the background of a challenge to the appointment of Jaya Bachchan, a cinema artist and Member of the Rajya Sabha on the ground that she held an office of profit as she had been appointed Chairperson of the Uttar Pradesh Film Development Council by the government of that State. The Challenge was upheld and Ms.Bachchan was disqualified by the President on the basis of the opinion of the Election Commission under Art. 103(2). Her plea to the Supreme Court challenging the disqualification was rejected.[48]

This led to a spate of complaints against other members of the Houses of Parliament including persons who belonged to the ruling coalition. While the complaints were pending the opinion of the Election Commission, the Parliament (Prevention of Disqualification) Amendment Bill, 2006, which in effect sought to render the complaints before the Election Commission substantially infructuous, was passed by both Houses and sent to the President, Abdul J. Kalam, for his assent. The President returned the Bill to Parliament under Article 111 raising various points and requesting that the Bill be reconsidered. There was heated debate both publicly and within Parliament on the appropriateness of the Bill. Nevertheless, the Bill was passed again without any changes by the majority and re-sent to the President for his assent under the proviso to Art. 111. The President gave his assent to the Bill on 18th August, 2006.[49]

(d) PRIVATE MEMBERS' BILLS

An important characteristic of the parliamentary system is that the Cabinet is predominant and virtually monopolizes business in Parliament. So long as the Cabinet holds a majority in the Lok Sabha, the government is in control of the House. It is the government which determines what shall be discussed in each House, when shall it be discussed, how long the discussion shall take place and what the decision shall be. Practically, all Bills which ultimately pass through Parliament are sponsored by Ministers who are under the constant pressure of organised opinion of all kinds seeking redress or relief through legislation.

A private member, *i.e.*, a member who is not a Minister, though theoretically authorised to sponsor a private member's Bill in the House, in practice, there is little chance of its passage without government's support. The powers of private members are thus rigidly limited and not much scope is left for their individual enterprise and initiative. Most of the parliamentary time is occupied by government Bills. In the Lok Sabha, private members have only two and a half hours on each Friday at their disposal. In the Rajya Sabha, the whole of Friday is reserved for this business unless the Chairman directs otherwise.

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46. *See, Infra,* Ch. III, Sec. B.
47. *See,* R. VENKATARAMAN, *MY PRESIDENTIAL YEARS,* 42, 84, 335.
Also, *MEMOIRS OF GIANI ZAIL SINGH,* (VII President) 276-279 (1997).
48. *Jaya Bachchan v. Union of India,* (2006) 5 SCC 266 : AIR 2006 SC 2119.
49. See *supra* pages 53, 54.

There is a practical reason for the passing of the initiative from the private member to the government in matters of legislation. The problem before a modern government is a problem of time. Therefore, the time of Parliament has to be used to the best advantage which needs planning of work. There are always a number of government Bills waiting for passage by Parliament. Consequently, the private members' Bills have been downgraded to afford priority to government business. It is felt that if a matter is important enough to be embodied in a Bill, then the responsibility for its passage should rest with government.

A private member's Bill can originate in any House and after its passage in both Houses it needs President's assent to become law. Under its rules of procedure, Lok Sabha has a Committee on Private Member's Bills and Resolutions consisting of 15 members nominated by the Speaker for a year. The function of the committee, generally speaking, is to examine the private members' Bills after they have been introduced in the House and classify them according to their nature, urgency and importance and allocate time for their discussion.

(ii) CONTROL OF PUBLIC FINANCE

(a) FOUR PRINCIPLES

A government cannot exist without raising and spending money. Parliament controls public finance which includes granting of money to the administration for expenses on public services, imposition of taxes and authorisation of loans. This is a very important function of Parliament. Through this means Parliament exercises control over the Executive because whenever Parliament discusses financial matters, government's broad policies are invariably brought into focus. The Indian Constitution devises an elaborate machinery for securing parliamentary control over finances which is based on the following four principles.

The first principle regulates the constitutional relation between the Government and Parliament in matters of finance. The Executive cannot raise money by taxation, borrowing or otherwise, or spend money, without the authority of Parliament.

The second principle regulates the relation between the two Houses of Parliament in financial matters. The power of raising money by tax or loan and authorizing expenditure belongs exclusively to the popular House, *viz.*, Lok Sabha. Rajya Sabha merely assents to it. It cannot revise, alter or initiate a grant. In financial matters, Rajya Sabha does not have co-ordinate authority with Lok Sabha which has the real control in this area. Thus, financial powers have been concentrated in Lok Sabha and Rajya Sabha plays only a subsidiary role in this respect.

The third principle imposes a restriction on the power of Parliament to authorize expenditure. Parliament cannot vote money for any purpose whatsoever except on demand by Ministers.

The fourth principle imposes a similar restriction on the power of Parliament to impose taxation. Parliament cannot impose any tax except upon the recommendation of the Executive.

Each of these principles is discussed below.[50]

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50. See, *MAY, THE LAW, PRIVILEGES, PROCEEDINGS AND USAGES OF PARLIAMENT*, 700(1976); LLBERT, *PARLIAMENT*, 76, 77 (1953); MORRISON, *BRITISH PARLIAMENTARY DEMOCRACY*, 60-94(1961); KAUL AND SHAKDHER, *PRACTICE AND PROCEDURE IN PARLIAMENT*, Ch. XXIX (2000).

(b) NO TAX WITHOUT AUTHORITY OF LAW

The principle that the Executive has no power to impose any levy upon the people without the sanction of the Legislature is contained in Art. 265 which states: "No tax shall be levied or collected except by authority of law". This constitutional provision applies both to the Central as well as the State spheres.

Art. 265 forbids the state from making any unlawful levy. The bar imposed by Art. 265 is absolute. Art. 265 protects the citizen from any unlawful levy.

The word 'tax' has been used in Art. 265 in a comprehensive sense as including any impost—general, special or local.[51] A tax cannot be levied or collected merely by an executive fiat or action without there being a law to support the same.[52]

Art. 265 uses two words "levy" and "collect". "Levy" means the assessment or charging or imposing tax. "Collect" means physical realisation of the tax which is levied or imposed. The stage of collection of tax comes after the levy of the same.

There appears to be a difference of opinion among the High Courts regarding the exact significance of the word 'law' in this Article. One view is that 'law' means a statutory law, *i.e.*, an Act of Legislature and, therefore, a levy or collection of tax by usage is ruled out. The other view is that 'law' does not mean statute law alone and that a customary levy is not ruled out, *e.g.*, a levy on land imposed under a custom as an incident of the possession of any property or holding an office.[53] But a customary collection in respect of goods taken out of a village, or brought within, for purposes of sale, is not valid as it is not related to the holding of some land or office.[54] It will be seen that under the second view some customary levies may be held valid while these would not be valid under the first view.

A mere resolution of a House is not sufficient to impose a tax. For this purpose, the Legislature has to enact a law. A law for levying a tax may be made with retrospective effect.[55] Under Art. 265, not only the levy but also the collection of a tax must be sanctioned by law. A tax may have been validly levied, but it can be collected only in accordance with the law. The procedure to impose the liability to pay a tax has to be strictly complied with, otherwise the liability to pay tax cannot be said to be according to law.[56]

Article 265 also gives protection against executive arbitrariness in the matter of tax collection. Arbitrary assessment of a tax does not amount to collection of tax by authority of law.[57] The imposition cannot exceed what the statute authorises. The tax imposed must fall within the four corners of the law. Therefore, where the statute authorises levy of a tax on the basis of trade, assessment of the tax on the total income of the assessee is unjustified.[58]

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51. Art. 366(28).
52. *State of Kerala v. Joseph*, AIR 1958 SC 296 : 1958 KLT 362.
53. *Wadhwani v. State of Rajasthan*, AIR 1958 Raj 138.
54. *Guruswami Nadar v. Ezhumalai Panchayat*, AIR 1968 Mad 271.
55. *Shri Prithvi Cotton Mills v. Broach Borough Municipality*, AIR 1970 SC 192 : (1969) 2 SCC 283.
56. *Khurai Municipality v. Kamal Kumar*, AIR 1965 S C 1321 : (1965) 2 SCR 653.
57. *M. Appukutty v. STO*, AIR 1966 Ker 55.
58. *Phani Bhushan v. Province of Bengal*, 54 CWN 177; *Union of India v. Bombay Tyre International Ltd.*, AIR 1984 SC 420; *State of Rajasthan vs. Rajasthan Chemist Association.* AIR 2006 SC 2699 : (2006) 6 SCC 773.

The Constitution imposes several limitations on the power of Parliament and the State Legislatures to levy taxes. A tax levied by a law infringing any of these restrictions will be a tax without the authority of law and hence invalid. The term 'law' in Art. 265 means a "valid law". Art. 265 thus gives protection against imposition and collection of a tax except by authority of a valid law.[59] A law imposing a tax should be within the legislative competence of the legislature concerned; it should not be prohibited by any provision of the Constitution or hit by a Fundamental Right.[60]

In India, the Executive is empowered to issue ordinances. An ordinance has the same effect as a law of the Legislature.[61] It is possible therefore to levy a tax through an ordinance, but it is very much deprecated and, in practice, use of an ordinance to levy tax is rare.[62]

The right conferred by Art. 265 can be enforced through proper court proceedings. Therefore, if a tax-payer is made to pay an unconstitutional tax, he can recover the amount paid by bringing a civil suit. The writ jurisdiction of the High Court can also be invoked if a tax is sought to be levied without a valid law or without following the mandatory provisions of law.[63]

When a tax is held to be void as being unconstitutional or illegal on any ground, ordinarily speaking, the tax collected by the state would become refundable.[64] The state cannot retain an unconstitutional tax as the levy would be without the authority of law and contrary to Art. 265 of the Constitution. But there are several Supreme Court cases[65], discussed later,[66] where the Court in exercise of its discretionary power to mould relief,[67] may hold the tax invalid prospectively and not retrospectively. This means that while the state can retain the proceeds of the tax already collected before the date of the judgment of the court, the state could not collect the tax thereafter. The court may also refuse refund of tax if the tax-payer has already reimbursed himself by passing the tax burden to a third party.[68] Acknowledging the complexities the court observed that where the re-

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59. *Firm Ghulam Hussain Haji Yakoob v. State of Rajasthan,* AIR 1963 SC 379 : (1963) 2 SCR 255.

60. *Chhotabhai Jethabhai v. Union of India,* AIR 1962 SC 1006 : 1962 Supp (2) SCR 1.
For discussion on Fundamental Rights, see, *infra,* Chs. XX-XXXIII.

61. *Zila Parishad, Moradabad v. Kundan Sugar Mills,* (1968) I SCJ 641 : (1968) 1 SCR 1 : AIR 1968 SC 98.

62. *See, infra,* Chs. III and VII for discussion on the power of the government to issue ordinances.

63. *Poona City Municipal Corp. v. Dattatraya N. Deodhar,* AIR 1965 SC 555 : (1964) 8 SCR 178; *B.K. Bhandar v. Dhamangaon Municipality,* AIR 1966 SC 249 : (1965) 3 SCR 499; *U.P. Pollution Control Board v. Kanoria Industrial Ltd.,* AIR 2001 SC 787 : (2001) 2 SCC 549. On the power of the High Courts to issue writs, see, *infra,* Ch. VIII.

64. See, *U.P. Pollution Control Board, supra,* note 16.
Also see, *HHM Ltd. v. Administrator, Bangalore City Corp.,* AIR 1990 SC 47. *Salonah Tea Co. Ltd. v. Superintendent of Taxes, Nowgong,* AIR 1990 SC 772 : (1988) 1 SCC 401.

65. See, *Synthetics & Chemicals Ltd. v. State of Uttar Pradesh,* AIR 1990 SC 1927 : (1990) 1 SCC 109; *Belsund Sugar Col Ltd. v. State of Bihar,* AIR 1999 SC 3125 : (1999) 9 SCC 620; *Somaiya Organics (India) Ltd. v. State of Uttar Pradesh,* AIR 2001 SC 1723 : (2001) 5 SCC 519.

66. See, *infra,* Ch. XL, under "Prospective Overruling" and "Unconstitutionality of a Statute".
Also see, M.P. JAIN, *A TREATISE ON ADMINISTRATIVE LAW,* II, under "Restitution".

67. *Infra,* Chs. IV and XXXIII.
On "Moulding Relief", also see, Ch. VIII, *infra.*

68. *Mafatlal Industries Ltd. v. Union of India,* (1997) 5 SCC 536 : (1996) 11 JT 283.

cipient of the refund need not necessarily be the taxpayers the court is faced with the difficulty in refunding a huge amount to a large number of persons who suffered illegal taxation and are not identifiable or where there is a finding of unjust enrichment, the court may direct the body which has made such illegal collection to hand over equivalent amount to a voluntary or a charitable organization.[69]

(c) MONEY BILLS

From the point of view of parliamentary procedure, the Constitution distinguishes between (*i*) Money Bill, (*ii*) Financial Bill and (*iii*) an ordinary Bill involving expenditure.

A Money Bill is a Bill which contains *only* provisions dealing with the following matters : (*a*) the imposition, abolition, remission, alteration or regulation of any tax; (b) the regulation of the borrowing of money or the giving of any guarantee by the Government of India or the amendment of the law with respect to any financial obligations undertaken by that Government; (*c*) the custody of the Consolidated Fund or the Contingency Fund of India, the payment of moneys therein or withdrawal of moneys therefrom; (*d*) the appropriation of money out of the Consolidated Fund of India; (*e*) the declaring of any item of expenditure as being a charge on the Consolidated Fund of India, or increasing any such amount; (*f*) the receipt of money on account of the Consolidated Fund of India or the Public Account of India, or the custody or issue of such money or the audit of the accounts of India or of a State; or (*g*) any matter incidental to any of the matters specified above [Art. 110(1)]. A Bill is a Money Bill when it deals *only* with the matters specified above, and not with any other extraneous matter. Thus, a notification issued by the Ministry of Environment and Forests in exercise of the powers conferred by sub-section (3) of Section 3 of the Environment (Protection) Act, 1986 constituting an authority for the purpose of management of money received towards compensatory afforestation and other monies recoverable by the Central Government for non-forestry uses of forest land is not a Money Bill under either Art. 110 or Art. 199.[70]

A Bill which makes provisions for any of the above-mentioned matters, and *additionally* with any other matter, is called a Financial Bill [Art. 117(1)]. A Financial Bill is thus really a Money Bill to which some other matter has also been tacked on.

Further, a Bill is neither a Money Bill nor a Financial Bill if it deals only with—(*i*) the imposition of fines or other pecuniary penalties; or, (*ii*) the demand of payment of fees for licences or fees for services rendered, or (*iii*) imposition, abolition, remission, alteration, or regulation of any tax by any local authority or body for local purposes [Arts. 110(2) and 117(2)]. The last clause excludes all municipal taxation from the scope of a Money or Financial Bill.[71]

As regards the exclusion of 'licence fee' from the purview of a Money or a Financial Bill, it is necessary to interpret the term 'licence-fee', somewhat restrictively, for there are examples of taxes being collected through licences, *e.g.*, ex-

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69. *State of Maharashtra v. Swanstone Multiplex Cinema Private Limited*, (2009) 8 SCC 235 : AIR 2009 SC 2750.

70. *T.N. Godavarman Thirumulpad (87) v. Union of India*, (2006) 1 SCC 1 at page 28 : AIR 2005 SC 4256.

71. *Corporation of Calcutta v. Liberty Cinema*, AIR 1965 SC 1107 : (1965) 2 SCR 477.

cise duties. It cannot be the purpose of the Constitution to exclude a tax-measure from the definition of a Money or a Financial Bill merely because the tax is sought to be collected or levied in the form of licence-fees. Therefore, the expression 'licence-fee' would mean only a 'fee' collected through a licensing system and not a 'tax'.[72]

(d) PARLIAMENTARY PROCEDURE IN MONEY BILLS

A Money Bill originates in Lok Sabha only; it cannot be introduced in Rajya Sabha [Art. 109(1)]. It cannot be introduced or moved except on the recommendation of the President [Art. 117(1)]. However, Presidential recommendation is not necessary for moving an amendment providing for reduction or abolition of any tax.

After its passage in Lok Sabha, the Money Bill is transmitted to Rajya Sabha for its consideration and recommendations. Rajya Sabha is allowed a period of 14 days for this purpose from the date it receives the Bill [Art. 109(2)]. If Rajya Sabha fails to return a Money Bill with its recommendations within 14 days allowed to it, the Bill is deemed to have been passed by both Houses at the expiry of that period [Art. 109(5)].

Lok Sabha is free to accept or reject any recommendation made by Rajya Sabha relating to the Money Bill. If Lok Sabha accepts any recommendation, the Bill is then deemed to have been passed by both the Houses in the modified form. If Lok Sabha rejects all recommendations of Rajya Sabha, the Bill is deemed to have been passed by both Houses in the form originally passed by Lok Sabha without any change [Arts. 100(3) and (4)]. In financial matters, therefore, the powers of Rajya Sabha are only recommendatory, and the final word rest with the Lok Sabha because it is elected by the people and so it represents the people.

The decision of the Speaker of Lok Sabha is final on the question whether a particular Bill is a Money Bill or not [Art. 110(3)]. While sending a Money Bill to Rajya Sabha for consideration, or presenting it to the President for assent, the Speaker endorses on it a certificate that it is a Money Bill [Art. 110(4)]. The certificate is conclusive of the question that a Bill is a Money Bill.

Two incidents are common between a Money and a Financial Bill. First, both originate only in Lok Sabha and not in Rajya Sabha. Secondly, neither can be introduced without the recommendation of the President [Art. 117(1)]. In all other respects, a Financial Bill is treated like any other ordinary Bill by both Houses; Rajya Sabha has full power to effect amendments in it and a deadlock between the two Houses will have to be resolved through the procedure of the joint session.[73] Thus, Lok Sabha has much greater control over a Money Bill than a Financial Bill.

The stipulation that a Financial Bill should not originate in Rajya Sabha is necessary to safeguard the position of Lok Sabha, for, otherwise, it would have been quite possible for Rajya Sabha to originate a Bill, in essence a Money Bill, by adding something else to it so as to save it from being labelled as a Money Bill; and Lok Sabha's control over finance would thus have been greatly weakened.

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72. For a discussion on the difference between a 'tax' and a 'fee' *see*, *infra*, Ch. XI.
73. *Supra*, Sec. J(i)(b).

The distinction between a Money Bill and a Financial Bill is also necessary to protect the position of Rajya Sabha. Rajya Sabha does not possess co-ordinate power with Lok Sabha in case of a Money Bill. Lok Sabha could possibly bypass Rajya Sabha even in case of an ordinary Bill by adding some financial clauses to it and thereby characterising it as a Money Bill. It is, therefore, stipulated that a Money Bill ceases to be so if some other matter is added to it in which case it becomes necessary for both Houses to agree to it.

It will be seen that the procedure for passing a Money Bill differs substantially from that used to pass an ordinary Bill. Whereas an ordinary Bill can be introduced in any House, a Money Bill can be introduced only in Lok Sabha. Then, while consent of Rajya Sabha is not necessary for passage of a Money Bill, it is necessary for passing an ordinary Bill. Lastly, a Money Bill can be introduced only on the President's recommendation while this is not so in case of an ordinary Bill.

An ordinary Bill, though not a Money or a Financial Bill, may yet, if enacted and put into effect, involve expenditure from the Consolidated Fund of India. Such a Bill is to be passed by the two Houses as an ordinary Bill, the only difference being that it cannot be passed by a House unless the President recommends it to the House for consideration [Art. 117(3)]. Under the rules of the two Houses, a financial memorandum is to accompany a Bill involving expenditure drawing attention to the clauses involving expenditure.

(e) PRESIDENT'S ASSENT

Presidential assent is necessary to make a Money Bill or a Financial Bill legally effective after its passage in the two Houses. The position in this connection is much the same as in case of an ordinary Bill, except that the President has no power to refer a Money Bill back to the Houses for reconsideration [Art. 111].[74]

It has been contended that the President cannot withhold assent from a Money Bill.[75] But this opinion does not appear to be sound in view of the phraseology of Art. 111.

(f) EXECUTIVE'S RESPONSIBILITY IN FINANCIAL MATTERS

A leading tenet of parliamentary control of finances is that money is granted by Lok Sabha only on demand by the Executive, and that no proposal for imposing a tax, or for appropriating public revenue, can be made in the House without the recommendation of the Executive. Nor can amendments to government's proposals be in order if they have the effect of increasing a tax or imposing an additional charge on the revenue.

There are several reasons underlying this rule which places the responsibility for suggesting measure of taxation and expenditure on the government. If the privilege to suggest expenditure is given to private members, there is a danger that they may suggest expenditure so as to benefit the particular interests of the constituents they represent in Parliament, and the allocation of funds may take place on a sectional, rather than national, basis. Being both the collector and

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74. *See, supra,* Sec. J(i)(c).
75. SEERVAI, *CONSTITUTIONAL LAW OF INDIA*, 834.

spender of money, the Executive is in a much better position to allocate the available resources among competing needs on an integrated and planned national basis.

This rule making the Executive responsible for proposing measures of taxation and spending is concretised through several constitutional provisions. Thus, no demand for a grant can be made except on the President's recommendation [Art. 113(3)]. Lok Sabha may refuse any demand or reduce its amount but cannot increase it [Art. 113(2)]. A Financial Bill or a Money Bill, or an amendment thereto, is not to be moved without the President's recommendation, but no such recommendation is necessary to move an amendment to reduce or abolish any tax [Proviso to Art. 117(1)]. Further, a Bill which when enacted and put into operation would involve expenditure from the Consolidated Fund of India[76] is not to be passed by a House unless the President has recommended its consideration to that House [Art. 117(3)].

(g) PARLIAMENTARY CONTROL ON APPROPRIATIONS

CONSOLIDATED FUND

No expenditure can be incurred by the Government without the sanction of Parliament.

The pivot, the foundation stone, of parliamentary control over appropriations is the Consolidated Fund of India out of which all government expenditure is met. Parliamentary control over appropriations is ensured by the rule that money cannot be withdrawn from the Consolidated Fund without an Appropriation Act [Art. 114(3)]. No moneys can be appropriated out of the Consolidated Fund except in accordance with law and for the purposes and in the manner provided in the Constitution [Art. 266(3)].

The idea of Consolidated Fund arose in Britain sometime around 1787. Originally Parliament voted taxes to the King leaving him free to collect and spend it on such purposes as he liked. Often money was spent for purposes other than those for which the King had asked it. Parliament retained no control after having voted the taxes. At a later stage, Parliament started to follow the procedure of levying a tax and appropriating its proceeds to a specific purpose. The result was that when it came to passing the Budget, practically no money was left for general purpose, as all taxes had been appropriated to specific purposes. To avoid this situation, it became necessary to collect into one fund all revenues raised by taxes or received in other ways, without being appropriated to any particular purpose, so that when Parliament came to decide upon the Budget, it had with it a fund which it could disburse.

A Consolidated Fund is thus necessary in order to prevent the proceeds of taxes from being frittered away by laws made by Parliament for specific purposes without regard to the general needs of the people. The Consolidated Fund is single unified account for all government departments. It is like a reservoir, a national till, into which all government receipts flow.

In India, the Fund is formed of all revenue receipts of the Central Government; all loans raised by it by issuing treasury bills, loans or ways and means

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76. For explanation of Consolidated Fund, see, below.

advances : all moneys received by the Central Government in repayment of its loans [Art. 266(1)], and any fees or other moneys taken by the Supreme Court [Art. 146(3)]. Thus, practically, all moneys raised by the Central Government for its expenditure form part of the Fund. From the Fund are excluded the sums payable into the Contingency Fund,[77] and the receipts from taxes and duties which have been assigned wholly or partly to the States for their expenditure.[78]

Parliament is empowered to regulate by law such matters as the custody of the Consolidated Fund, payment of moneys therein and withdrawal of money therefrom. Till Parliament enacts a law for the purpose, these matters may be regulated by rules made by the President [Art. 283(1)].

PUBLIC ACCOUNT

Besides the Consolidated Fund of India, there is the Public Account of India in which are credited all public moneys, other than those put in the Consolidated Fund, received by or on behalf of the Government of India [Art. 266(2)]; all moneys received by or deposited with any officer employed in connection with the affairs of the Union, in his capacity as such, other than revenues or public moneys raised or received by the Government of India [Art. 284(a)], and all moneys received or deposited with the Supreme Court to the credit of any cause, matter, account or persons [Art. 284(b)].

Matters like the custody of public moneys, other than those credited to the Consolidated Fund and the Contingency Fund, received by or on behalf of the Government of India, their payment into the Public Account of India and the withdrawal of such moneys from that Account, may be regulated by Parliament by law, and until such a law is made, by rules made by the President [Art. 283(1)].

No Appropriation Act is needed to withdraw money from the Public Account. The reason being that none of the moneys placed in this Fund really belongs to the Central Government and the payments made into this Fund are largely in the nature of banking transactions.

(h) EXPENDITURE CHARGED ON THE CONSOLIDATED FUND

Public expenditure is divided into two distinct categories, namely,

(1) expenditure *charged* on the Consolidated Fund; and

(2) charges granted by Parliament on an annual basis.

The former category comprises charges of a permanent nature, or charges which it is desirable to keep above controversial party politics. Parliamentary control over these items is very limited as these can be discussed, but not voted upon, in Parliament. An estimate of the charged expenditure is presented to Parliament but no demands for grants are made for them. These items are incorporated in the Appropriation Act.

The following items of expenditure are *charged* on the Consolidated Fund of India [Art. 112(3)]:

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77. For explanation of this term, see, *infra*, p. 106.
78. Ch. XI, *infra.*

(a) the emoluments and allowances of the President and other expenditure relating to his office;

(b) the salaries and allowances of the Chairman and the Deputy Chairman of the Rajya Sabha and the Speaker and the Deputy Speaker of the Lok Sabha;

(c) debt charges for which the Indian Government is responsible;

(d) the salaries allowances and pensions payable to or in respect of Judges of the Supreme Court;

(e) the pensions payable to the Judges of the Federal Court; and

(f) the Judges of the High Courts;

(g) any sum of money needed to satisfy any judgment, decree or award of any court or arbitral tribunal;

(h) the salary, allowances and pensions payable to the Comptroller and Auditor-General of India;

(i) any other expenditure declared by this Constitution or by Parliament by law to be so charged [Art. 112(3)(g)]. Thus Parliament may by law declare any other expenditure to be charged on the Consolidated Fund of India.

Several other constitutional provisions have charged several items of expenditure on the Consolidated Fund of India, viz.:

(a) the administrative expenses of the Supreme Court including all salaries, allowances and pensions payable to or in respect of officers and servants of the Court [Art. 112(3)(d)(i) and Art. 146(3)];

(b) the administrative expenses of the office of the Comptroller and Auditor-General, including all salaries, allowances and pensions payable to or in respect of persons serving in that office [Art. 112(3)(e) and Art. 148(6)][79]

(c) sums prescribed by law by Parliament as grants-in-aid for States in need of assistance [Art. 275(1)],[80]

(d) sums of money required for making loans to the States [Art. 293(2)]; and

(e) the expenses of the Union Public Service Commission including any salaries, allowances and pensions payable to its members or staff [Art. 322].[81]

In addition to the above, Parliament may by law declare any other expenditure to be *charged* on the Consolidated Fund of India [Art. 275(3)(g)].

(i) ANNUAL APPROPRIATIONS

An important mechanism for securing parliamentary control over appropriations is the principle of annuality. Most of the appropriations made by Parliament are on an annual basis. The Executive thus comes before Parliament every year to ask for grants for the ensuing year so that Parliament gets an opportunity of

79. *Infra*, p. 108.
80. *See, infra*, under Federalism, Ch. XI.
81. *Infra*, Ch. XXXVI.

reviewing, criticising and discussing the activities and policies pursued by the Government during the preceding year.

The parliamentary process to make annual appropriations passes through several stages. The first stage is the presentation of an annual financial statement, popularly known as the Budget.[82] The formal obligation to cause the annual financial statement to be laid before both Houses has been cast on the President [Art. 112(1)]. The Budget is presented by the Finance Minister on the last working day in February every year. It is the statement of the estimated receipts and expenditure of the Government of India for the following year (April 1 to March 31). The Expenditure charged on the Consolidated Fund of India is shown separately from other expenditure, and expenditure on revenue account is distinguished from all other expenditure [Art. 112(2)].

In Britain, the Budget is presented only to the House of Commons and not to the House of Lords. In India, it is presented to Lok Sabha and is laid before Rajya Sabha. A general discussion is held on the Budget in each House. Members may discuss the Budget as a whole or any question of principle involved therein. At this stage no motion is moved nor is the Budget submitted to the vote of the House.

Then comes the stage of submitting demands for grants to the Lok Sabha for approval. The estimates of expenditure charged on the Consolidated Fund of India are open to discussion but not to a vote in Parliament [Art. 113(1)].[83] All other items of expenditure contained in the Budget are submitted to the Lok Sabha in the form of demands for grants.

Lok Sabha has power to assent to, reject or reduce, but not to increase, the amount of any demand [Art. 113(2)]. Also, as already noted, no demand for grant can be made except on the recommendation of the President, which, in effect, means that only a Minister may move a demand in Lok Sabha. Thus, a member can neither suggest any new expenditure, nor propose an increase in a demand over and above what the government suggests [Art. 113(3)][84]. A member has, therefore, very limited opportunity to distort the Budget. He can only move cut motions to reduce the amount of a demand and through such motions he may criticise the Government, discuss policy questions, criticise the administration, discuss the conduct of the Executive and suggest economy in government expenditure.[85]

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82. A separate Railway Budget is presented by the Minister of Railways a few days before the General Budget.

83. *Supra*, p. 101.

84. *Supra*, pp. 99-100.

85. There are three kinds of cut motions:

(*i*) Disapproval of Policy Cut—its form is 'That the amount of the demand be reduced to Re. 1-.' It represents disapproval of Policy underlying the demand under consideration. In this way, the whole policy of the Ministry to which the grant relates can be discussed and members may even advocate alternative policies.

(*ii*) Economy Cut—its form is 'That the amount of the demand be reduced by a specified amount', the amount being equivalent to the economy which the member moving the cut thinks may be effected. By moving such a cut, ways and means to effect economy in the expenses of a Ministry can be discussed.

(*iii*) Token Cut—its form is 'That the amount of the demand be reduced by Rs. 100.' This kind of cut motion is used to ventilate a specific grievance.

KAUL AND SHAKDHAR, *PRACTICE AND PROCEDURE OF PARLIAMENT*, 713 (2000).

Cut motions though freely moved by members when demands for grants are being considered in Lok Sabha, are seldom pressed to the point of voting, for the government would always use its majority to defeat such a motion, the reason being that acceptance of a cut motion would amount to expressing lack of confidence in the government and would almost inevitably involve the resignation of the government. Cut motions are used only as a device to raise discussion on the conduct and policies of the Executive and the demands moved by government are invariably accepted by the House after a discussion.

The demands for grants are discussed, but not voted upon, in Rajya Sabha and no 'cut motions' are moved there. It is the exclusive privilege of Lok Sabha to grant money demanded by government. The process of discussing the demands in the Houses is very useful as in this way the whole area of the government activities can be probed into by the members of Parliament and thus the concept of responsible government becomes a reality to some extent.

Since 1993, with a view to make parliamentary control over government expenditure more effective, a number of departmentally related standing committees are constituted. Each committee considers the demands for grants of the concerned ministry and makes a report to the House which then considers the demands for grants in the light of these reports.[86]

(j) APPROPRIATION ACT

No money can be withdrawn from the Consolidated Fund of India without an Appropriation Act being passed in accordance with the procedure laid down in the Constitution for the purpose [Arts. 114(1), (2) and (3)]. The sanction given by Lok Sabha to the demands for grants does not by itself authorise expenditure without the passage of an Appropriation Act. Therefore, after the demands have been discussed in both Houses of Parliament, and have been assented to in Lok Sabha, an Appropriation Bill is introduced in Lok Sabha.

The Appropriation Bill provides for appropriation out of the Consolidatd Fund of all moneys required to meet the grants assented to by Lok Sabha and the expenditure charged on the Consolidated Fund, and in no case the amount under each head can exceed what was shown previously in the Budget [Art. 114(1)(b)]. No amendment can be proposed to this Bill in any House of Parliament so as to vary the amount or alter the destination of any grant previously agreed to by Lok Sabha or to vary the amount of an expenditure charged on the Consolidated Fund. The decision of the presiding officer as to whether an amendment is admissible or not under this clause is final [Art. 114(2)]. The idea behind these restrictions is that the grants already voted upon in the Lok Sabha should not be disturbed later.

The Appropriation Bill goes before both Houses of Parliament for consideration, but being a Money Bill, the power of Rajya Sabha to deal with it is very restricted.[87] The passing of the Appropriation Bill completes the parliamentary process of authorisation of expenditure. The Appropriation Act plays an important role in the parliamentary control of public finance. It authorises the issue of money from the Consolidated Fund of India for the expenditure of the Central Government and limits the expenditure of each department to the sums set out

86. KAUL AND SHAKDHER, *op. cit.*, 706.
87. *Supra*, p. 98.

therein, thus ensuring not only that the expenditure does not exceed the sum voted but that it is incurred only for the purposes authorised.

(k) FINANCE ACT

The last stage in the chain of annual parliamentary financial procedure is reached when Parliament enacts the Finance Act to effectuate government's taxation proposals for the ensuing year.

The taxes imposed in India are partly permanent and partly temporary. Only a few taxes are levied on a permanent basis and their renewal every year is not necessary. In order to maintain parliamentary control over the Executive, some of the important taxes are imposed on a yearly basis, as for example, the income tax which is the most fruitful source of revenue is renewed every year. The Finance Act seeks to renew the annual taxes, impose new taxes and make necessary adjustments in the permanent taxes with a view to raise revenue necessary to meet the appropriations made out of the Consolidated Fund of India for the ensuing financial year.

The government's taxing proposals are first contained in the Budget. The Finance Bill embodying these proposals is introduced in the Lok Sabha immediately after the conclusion of the Finance Minister's Budget speech. The Bill is not proceeded with immediately but is kept pending till the passage of the Appropriation Act. A motion may then be made in the Lok Sabha for referring the Finance Bill to a select committee and the debate ensuing thereon generally covers a very wide ground. The Bill is taken up for consideration after the select committee has made its report.

The Finance Bill may be a Money Bill or a Financial Bill according as it deals with the matters of taxation exclusively or with some other matters also.[88] The passage of the Finance Act is essential to raise the necessary revenue because of Art. 265.[89] Ordinarily, the taxes sought to be levied by the Finance Act can be collected only after its enactment, but, in order to avoid leakage of revenue, the Government is empowered, under the Provisional Collection of Taxes Act, 1931, to start collection of duty of customs and excise at the new proposed rates immediately from the date the Finance Bill is introduced in the Lok Sabha.[90]

(l) VOTES ON ACCOUNT

No expenditure can be incurred out of the Consolidated Fund without parliamentary authorization expressed through an Appropriation Act. It usually becomes difficult to go through the various stages—from the presentation of the Budget to the passage of Appropriation Act—in Parliament before the new financial year starts on April 1.

Each financial year is a watertight compartment and, therefore, just after a financial year ends, and till the new Appropriation Act is passed for the ensuing year, funds are needed to carry on the administration. This situation is met by taking recourse to votes on account,[91] *i.e.*, Parliament allows a lump sum grant to the Executive to cover expenditure for a short period of two to three months, so

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88. For distinction between a 'Money Bill' and a 'Financial Bill', see, *supra*, p. 97.
89. *Supra*, p. 95.
90. *Albert David Ltd. v. Union of India*, AIR 1966 Cal 101.
91. 4 *Jl. Parl. Inf.*, 125 (1958); Art. 116(1)(*a*).

that Parliament may discuss the Budget and pass the Appropriation Act without being unduly rushed.

(m) VOTES OF CREDIT

In addition, votes of credit may be used in times of emergency when Parliament may vote a lump sum without allocating it to any particular object. Lok Sabha has power to make a grant for meeting an unexpected demand upon the resources of India when on account of the magnitude or indefinite character of the service, the demand cannot be stated with usual details [Art. 116(1)(b)].

(n) EXCEPTIONAL GRANT

Lok Sabha is also authorised to make an exceptional grant which forms no part of the current service of any financial year [Art. 116(1)(c)]. After the Lok Sabha assents to any of these grants, Parliament has to enact a law to withdraw moneys from the Consolidated Fund. In making these grants and passing the law, the procedure prescribed for making annual appropriations is to be followed [Art. 116(2)].

(o) SUPPLEMENTARY GRANTS

It may be that during a financial year, the money sanctioned by the Annual Appropriation Act for a particular service may prove to be inadequate, or that supplementary or additional expenditure is needed on some new service not contemplated at the time when the Budget was presented, or, that money has been spent on a service in excess of the amount granted for the year. In such cases, supplementary grants are made by Parliament before the end of the financial year.

The Finance Minister places before Parliament a statement showing the estimated amount of that expenditure or a demand of such excess. The demands are discussed in both Houses and such of them as are not charged on the Consolidated Fund of India are then assented to in Lok Sabha. Thereafter, a supplementary Appropriation Act containing the demands sanctioned by Lok Sabha as well as the expenditure charged on the Consolidated Fund is passed. The procedure outlined above in relation to annual demands and appropriations applies to supplementary demands and appropriations as well [Art. 115].

(p) CONTINGENCY FUND

It may become necessary during a financial year to spend some money on a service which was not foreseen at the time of presentation of the Budget. There may not be enough time to convene Parliament to secure its sanction for incurring the expenditure. The Contingency Fund is meant to be used in such a contingency. This Fund is in the nature of an imprest and is used to defray expenditure pending, and in anticipation of, Parliamentary sanction. Money is spent from this Fund without prior parliamentary approval; later, *ex post facto* parliamentary sanction is secured for the expenditure incurred, and an equal amount of money is transferred to this Fund from out of the Consolidated Fund.

It is for Parliament to establish the Contingency Fund and to determine the sums which may be paid into it from time to time. The Fund is placed at the disposal of the President so that advances may be made out of it for the purpose of meeting unforeseen expenditure pending parliamentary authorization of the

same. The Contingency Fund of India Act, 1950, has created the Fund with a sum of 50 crores of rupees, and has vested its custody in a Secretary of the Ministry of Finance on behalf of the President.

The existence of this Fund in no way exonerates the Executive from submitting all excess expenditure to Parliament for sanction, nor does it commit Parliament to approving the expenditure simply because it has been met out of the Contingency Fund. Parliamentary control over the expenditure is thus not diluted by the creation of the Fund.

(q) PARLIAMENT'S POWER TO REGULATE FINANCIAL PROCEDURE

Each House of Parliament has power to make rules for regulating its financial procedure and conduct of business subject to the provisions of the Constitution [Art. 118(1)]. In addition, Parliament may for the purpose of timely completion of financial business make a law to regulate the procedure of, and the conduct of business in, each House of Parliament in relation to any financial matter, or in relation to any Bill for the appropriation of moneys out of the Consolidated Fund of India [Art. 119]. Any such law will prevail over, in case of inconsistency with, any rule made by a House under its rule-making power.

(r) BORROWING

It is not always possible for the Government to find through taxation all the money needed for public expenditure. It may have to resort to borrowing from time to time. Art. 292 empowers the Central Government to borrow money upon the security of the Consolidated Fund of India within such limits, if any, as Parliament may fix from time to time by law and the Government may give guarantees for its loan within the limits so fixed.

This constitutional provision is of a permissive nature as it does not obligate the Executive to obtain statutory authorization from Parliament to borrow funds, but it gives the necessary power to Parliament, if it so desires, to control borrowing activities of the Central Government by fixing quantitative limit thereon. This power has not been exercised by Parliament so far. The position, therefore, is that the Central Government today borrows money entirely on its executive authority without seeking a mandate from Parliament for the purpose.

The practice in the U.K., however, differs from that in India. Whenever the British Government desires to borrow money, a resolution authorising the Treasury to issue the loan is passed by the House of Commons. No such specific resolution is needed in India.

The power to raise funds by borrowing is an important weapon in the hands of the Central Government and if parliamentary control over public finance is to be complete, it is essential for Parliament to take suitable action to define the limits and conditions subject to which loans can be raised by the Central Government. The Government does not, however, favour this course of action. Because of planning, Government has to resort to borrowing and deficit financing extensively. If a ceiling is placed on borrowing, it will make things rigid as the ceiling cannot be crossed without amending the law and this may delay matters.

All borrowings during the year are shown in the Budget and approval of the Budget by Parliament might be regarded as approval of the Government's borrowing programme as well. The money borrowed by the Government becomes

part of the Consolidated Fund of India out of which appropriations are made only by Parliament by law.

(s) COMPTROLLER AND AUDITOR-GENERAL

The Comptroller and Auditor-General (C.A.G.) is appointed by the President, *i.e.*, the Central Executive [Art. 148(1)]. He takes a prescribed oath before assuming his office [Art. 148(2)]. His salary and other conditions of service have now been prescribed in an Act of Parliament.[1]

Neither his salary nor his rights in respect of leave of absence, pension, or age of retirement can be varied to his disadvantage after his appointment [Art. 148(3)]. He can be removed from his office in the same way as a Judge of the Supreme Court [Art. 148(1)].[2] He is not eligible to hold any office under the Central or any State Government after he ceases to hold the office of the Comptroller and Auditor-General [Art. 148(4)]. The administrative expenses of his office, including all salaries, allowances and pensions payable to him or in respect of persons serving in his office, are charged on the Consolidated Fund of India.[3]

The President may make rules, after consultation with Comptroller and Auditor-General, regulating the conditions of service of persons serving in the Indian Audit and Account Department. This rule-making power is, however, subject to the "Constitution and any law made by Parliament [Art. 148(5)]." Interpreting the scope of the rule-making power, the Supreme Court has ruled that these rules cannot be made with retrospective effect.[4]

Adequate precautions have thus been taken to render the Comptroller and Auditor-General independent of, and immune from, the influence of the Executive. It was very necessary to do so in order to enable him to discharge his important functions without fear or favour.

The Constitution does not specifically prescribe his functions but leaves the matter to be dealt with by Parliament. He is to perform such duties and exercise such powers in relation to the accounts of the Union and the States and of any other authority or body as may be prescribed by law by Parliament [Art. 149].

Under the Act of 1971,[5] Parliament has prescribed two types of functions for him. As an accountant, he compiles the accounts of the Union and the States. These accounts are to be kept in such form as the President may prescribe on the advice of the Comptroller and Auditor-General [Art. 150]. As an auditor, he audits all the receipts and expenditure of the Union and State Governments and ascertains whether moneys disbursed were legally available for, and applicable to, the service or purpose to which they have been applied and whether the expenditure conforms to the authority which governs it.

Audit plays an important role in the scheme of parliamentary financial control. Parliament appropriates specific sums for specific purposes. Audit ensures that the Executive keeps within the sums allotted and the purposes authorised. It is

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1. The Comptroller and Auditor-General (Duties, Powers and Conditions of Service) Act, 1971, fixes his salary equal to that of a Supreme Court Judge. The tenure of his office is fixed at six years.
2. For the procedure to remove a Judge of the Supreme Court, *see, infra,* Ch. IV, Sec. B.
3. Arts. 112(3)(*e*) and 148(6); *supra*, p. 102.
4. *Accountant-General v. S. Doraiswamy*, AIR 1981 SC 783 : (1981) 4 SCC 93.
5. *Supra*, footnote 1.

absolutely necessary that some independent person should scrutinise the government spending and check whether it has been in accordance with parliamentary intentions. In the absence of such a scrutiny parliamentary control over appropriations may be frustrated. He also satisfies himself on behalf of Parliament as to the wisdom, faithfulness and economy of the expenditure.

Audit is, therefore, directed towards discovering waste or extravagance. He can disallow any expenditure violating the Constitution or any law and he thus upholds the Constitution and the laws in the field of financial administration. It is his duty to challenge any improper exercise of discretion by authorities and comment on the propriety of the sanctions and expenditure.[6]

The Comptroller and Auditor-General performs a very useful function. He secures the accountability of the Executive to Parliament in the field of financial administration. He helps in making legislative control over the Executive more effective by a sort of retrospective, an *ex post facto*, examination of the expenses incurred. It is because of the great importance of his functions that the Comptroller and Auditor-General has been given a status comparable to that of a Judge of the Supreme Court. He submits his reports to the President or the Governor in case of the Central or State accounts respectively. These reports are placed before Parliament or the concerned State Legislature [Art. 151].

In Britain, this officer performs a dual function. As Auditor-General, he audits and examines the Government accounts to ensure that each payment has been applied to the purpose for which it was appropriated by Parliament and not to any other purpose. The audit reports prepared by him are presented direct to the House of Commons and not to the government and so he is regarded as an officer of the House. He is appointed by the Crown on an address by the House of Commons which is moved by the Prime Minister with the agreement of the chairman of the Public Accounts Committee.

As Comptroller, he controls issue of money out of the Consolidated Fund by ensuring that nothing is taken out of it without due parliamentary authority. He would not allow issue of money for an unauthorised purpose; any excesses over parliamentary grants are prevented, and parliamentary control is thus made more effective.[7]

In India, this aspect of the Comptroller's functions has not yet been developed. Here he acts mainly as an auditor and points out the irregularities after the expenses have been incurred. He does not have that preliminary control over the issue of public money as his British counterpart has. Audit only constitutes a post-expenditure check.

The Constitution has left it to Parliament to enact a law to strengthen the position of the Comptroller and Auditor-General and equate him with his British counterpart. But this has not been done so far. Another weakness of the Indian system is the combination of the dual functions of Audit and Accounts in the same hands. Such a combination lessens the responsibility of the Administration

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6. MUKHERJEA, *PARLIAMENTARY PROCEDURE IN INDIA*, 326; A.K. CHANDA, *INDIAN ADMINISTRATION*, 239(1967).

7. WADE AND PHILLIPS, *op. cit*., 273; WHEARE, *GOVERNMENT BY COMMITTEE*, 129 (1955); SHAKDHER, COMPTROLLER AND AUDITOR-GENERAL OF INDIA AND THE U.K., 4. *JI. of Parl. Inf*., 102; O. Hood Phillips, *CONSTITUTIONAL & ADM. LAW*, 226 (VII Ed., 1887).

to render accounts. Accounting is essentially an executive function and must be under the control of the Executive head of the department. Auditing is a kind of *quasi*-judicial function, which involves a checking of the financial transactions of the executive authorities. A combination of these two essentially distinct functions involves a kind of contradiction, for the officer compiling the accounts has also to certify as to their correctness.

The prevalent system was introduced by the British in the pre-Independence days on grounds of economy and expediency. It is out of tune with the modern context and can be justified no longer. Although opinions have been expressed from time to time to dissociate the two functions,[8] nothing has been done in this direction and *status quo* has been maintained so far.

(t) PARLIAMENTARY FINANCIAL COMMITTEES

In addition to all the institutional and procedural apparatus which the Constitution creates for ensuring parliamentary control over the Executive in financial matters, the Lok Sabha further has created two committees under its rules.

PUBLIC ACCOUNTS COMMITTEE

The Public Accounts Committee in India is a close replica of the British model.[9] It consists of fifteen members elected by Lok Sabha every year from amongst its members. A Minister cannot be its member. Seven members of the Rajya Sabha are also associated with the committee. A member of the opposition acts as its chairman.

The committee examines the accounts showing the appropriations of the sums granted by Parliament for government's expenditure. The committee also examines the accounts of the government corporations and autonomous and semi-autonomous bodies. The committee has power to hear officials or take evidence connected with the accounts under examination. The reports made by the Auditor-General would not be of much use if the Houses were to have no organ to examine these reports. It is with this in view that the Public Accounts Committee has been instituted. The committee functions on the basis of the audit reports made by the Comptroller and Auditor-General.

The basic purpose of the committee is to see that the grants made to the various departments are used only for the purposes set out in the estimates. The committee thus reviews the transactions of the departments after the Budget has been executed with a view to ensure that money is spent as Parliament intended, that due economy is exercised and that no waste or extravagance or losses occur in expenditure.

The committee is not an executive body, and has no power to disallow any item or to issue an order. Its reports are technically made to Prliament. The reports have no force in themselves but they carry great weight and influence and the government usually accepts its recommendations. A beneficial result of the activities of the committee is that it reminds the officials that their actions are subject to scrutiny on behalf of Parliament and this is a great check on the slackness, negligence or absolutism of the Executive.

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8. Third Report of the Public Accounts Committee, 1952-53.
9. MUKHERJEA, *op. cit.*, 312; O. HOOD PHILLIPS, *supra*, footnote 7, at 227.

ESTIMATES COMMITTEE

The Estimates Committee consists of 30 members elected by Lok Sabha for one year from amongst its members. A Minister cannot be its member. Unlike the Public Accounts Committee, members of Rajya Sabha are not associated with the Estimates Committee.

The committee is authorised to take evidence connected with the estimates under examination. The committee presents its reports to the House. The committee, like its counterpart in Britain, examines the details of the estimates presented to Lok Sabha in the Budget with a view to secure economy and efficiency in administration, but it does not go so much into the policy which is regarded as government's responsibility. However, it can suggest alternative policies with a view to ensure efficiency and economy in the administration.

GENERAL FEATURES OF THE TWO COMMITTEES

The two committees, mentioned above, make parliamentary control of public finance more effective. Because of its large membership, pressure of work and inexpert character, Lok Sabha is hardly in a position to go into minute details and exert effective financial control over government. The committees being smaller bodies can scrutinise the government expenditure and estimates more thorougly than the House could ever do. Another advantage of the committees is that they directly contact the executive officers who spend money. They can call for evidence and documents. Discussion in these committees cuts across party lines.

After submitting their recommendations, the committees insist on a statement from the government showing which of these have been implemented, and to give its reasons for those not implemented. On the basis of the government's statements, the committees issue a second report discussing whether the action taken on their recommendations is adequate or not. The reports of these committees are of great value in checking laxity of administration and irregularity in expenditure. Though these reports are not discussed or formally adopted by the House, nevertheless, these reports carry the same weight and authority as if they have been so adopted.[10]

(iii) DELIBERATION AND DISCUSSION

The Houses of Parliament are constantly engaged in discussion, deliberation, debating public issues, shaping and influencing government policy and ventilating public grievances. This is constantly done through legislation, control of public finance, and debate on the President's address.[11] Debates of real value take place during discussion on appropriations when every branch of government administration runs the gauntlet of parliamentary criticism.[12]

Members of Parliament put questions to Ministers to obtain information on matters of public importance. Parliamentary questions provide a check on the day

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10. WADE & PHILLIPS, *op. cit.*, 192; JENNINGS, *op. cit.*, 303-316, 332-7; MAY, *op. cit.*, 672, 675; WHEARE, *op. cit.* 205, *et seq*; MUKHERJEA, *op. cit.*, 305, 312; SHAKDHER, Two Estimates Committees 6 *JI. of PARL. Inf.*, 76 (1960); CHANDA, *op. cit.*, 170, 180: R.N. AGGARWAL, *FINANCIAL COMMITTEES OF THE INDIAN PARLIAMENT* (1966); B.B. JENA, *PARLIAMENTARY COMMITTEES IN INDIA*, 125-198 (1966).

11. *Supra*, pp. 73, 89, 94.

12. *Supra*, pp. 103, 104.

to day administration and help in securing redress of individual grievances. Stressing the importance of this procedure, ILBERT observes: "There is no more valuable safeguard against maladministration, no more effective method of bringing the searchlight of criticism to bear on the action or inaction of responsible Ministers and their subordinates. A Minister has to be constantly asking himself not merely whether his proceedings and the proceedings of those for whom he is responsible are legally or technically defensible, but what kind of answer he can give if questioned about them in the House and how that answer will be received."[13]

In addition, the rules of each House provide for many other procedural techniques for raising discussion on public issues in the House. A discussion may be raised by a member moving in the House a resolution on a matter of general public interest; by raising half an hour discussion on a matter of sufficient public importance which has been the subject of a recent question in the House and the answer to which needs elucidation on a matter of fact; by raising a discussion on a matter of urgent public importance for short duration. From time to time, Ministers make statements of policy in the Houses. Specific aspects of government policy are debated from time to time.

An adjournment motion, *i.e*. a motion for adjournment of the business of the House, may be moved by a member in the Lok Sabha for discussing a definite matter of urgent public importance. If the Speaker holds the motion in order and 50 members of the House support it, theordinary time table of the day is suspended, and a full debate is held on the subject. Such a motion is very rarely admitted by the Speaker for it involves an element of censure of the government. The advantage of the procedure is that once the Speaker agrees that the matter raised is definite and urgent, a debate is almost assured for howsoever overwhelming the government majority in the House may be, it cannot prevent a discussion as even the weakest opposition may muster at least 50 votes.

In Rajya Sabha, the procedure by way of an adjournment motion is not available but a similar purpose is served through a motion for papers.[14]

Elaborate discussion may take place in Lok Sabha on a motion of no confidence in the Council of Ministers. Such a motion cannot be discussed in Rajya Sabha, for according to Art. 75(3), the Council of Ministers is collectively responsible only to Lok Sabha.[15]

Petitions may be submitted to a House on a Bill introduced there; and to, Lok Sabha, in addition, on any other matter connected with pending business or on a matter of general public importance. Each House has a Committee on Petitions to which petitions are forwarded for consideration and report.

(iv) PARLIAMENTARY COMMITTEES

Under its rules of procedure and conduct of business, each House has instituted an elaborate committee system with a view to better organize its work and discharge its functions effectively. The committee system helps in conserving the

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13. ILBERT, *PARLIAMENT*, 98.
14. *KAUL AND SHAKDHER, PRACTICE AND PROCEDURE OF PARLIAMENT*, Ch. III (2000).
15. Ch. III, *infra.*

time of the House, increasing expertise and enables the House to exert some control over the government.

Parliament discusses policy, but it is in the committees that details can be discussed, administrators made to give evidence and matters examined thoroughly. On the floor of the House, discussions are on party lines. In a committee, the atmosphere is informal and business-like almost free of party politics.

Lok Sabha has the following committees:—

(*i*) Committee on Private Members' Bills and Resolutions;[16]

(*ii*) Committee on Petitions;[17]

(*iii*) Committee on Public Accounts;[18]

(*iv*) Committee on Estimates;[19]

(*v*) Committee on Leave of Absence from Sittings of the House;[20]

(*vi*) Committee of Privileges;[21]

(*vii*) Committee of Subordinate Legislation;[22]

(*viii*) Business Advisory Committee is nominated by the Speaker and has 15 members including the Speaker who is its chairman. Its main function is to recommend the allocation of time for discussion of various stages of such government Bills and other government business as may be referred to it by the Speaker in consultation with the Leader of the House.

The committee consists of members from all sections of the House. Its decisions are reported to the House which may accept them by passing a motion to that effect. The committee helps in better planning of work of the House. As it arrives at agreed decisions, wastage of the time of the House in unnecessary wrangling over allocation of time is avoided.

(*ix*) Committee on Government Assurances: Its function is to scrutinise the assurances given by the Ministers in the House from time to time and to report to what extent these assurances have been implemented and whether the implementation has taken place within the minimum time necessary for the purpose.

The committee consists of 15 members nominated by the Speaker. A Minister cannot become its member. Its report is presented to the House.

The committee has sprung up because of the desire of the members to keep a check on the promises which Ministers usually make on the floor of the House. The committee reports on the gap between prom-

16. *Supra*, pp. 93, 94.
17. See above.
18. *Supra*, p. 110.
19. *Supra*, p. 111.
20. *Supra*, p. 61.
21. *Infra*, Sec. L.
22. JAIN, *A TREATISE ON ADMINISTRATIVE LAW*, I, 142-52.

ise and fulfilment and is a manifestation of the parliamentary mood of watchfulness over the government, and thus plays an important role.

(*x*) Rules Committee considers matters of procedure in Lok Sabha, and recommends amendments to its Rules. It consists of 15 members nominated by the Speaker who is its *ex officio* Chairman.

(*xi*) General Purposes Committee: The Speaker is its *ex officio* Chairman. Its function is to advise on such matters concerning the affairs of the House as the Speaker may refer to it from time to time.

(*xii*) House Committee is nominated by the Speaker. Its function is advisory and it deals with all questions relating to residential accommodation for members of Lok Sabha.

(*xiii*) Committee on Public Undertakings examines the working of the public undertakings mentioned in a schedule to the Rules of the House.

Besides the above, select committees are appointed by the House on an *ad hoc* basis from time to time to scrutinise the provisions of important Bills. A select committee can hear expert evidence and representatives of various interests affected by the Bill and suggest amendments to it. Its report is placed before the House. A select committee performs a very useful function as it thoroughly scrutinises the Bill and discusses the underlying policy in an informal atmosphere away from the public gaze.

Lok Sabha may constitute a committee for any other specific purpose. A committee of Lok Sabha has power to send for persons, papers and records and to take evidence on any matter. The government, however, has the privilege to decline to produce a document before the committee on the ground that its disclosure will be prejudicial to the safety or interest of the state.

Rajya Sabha also has several committees, *viz*., Business Advisory Committee, Committee on Petitions,[23] Committee of Privileges,[24] Rules Committee, Committee on Subordinate Legislation,[25] all practically similar to their counterparts in Lok Sabha.

Besides, Rajya Sabha also appoints select committees on Bills and may appoint any other committee for any other purpose.

There are some Joint committees consisting of members of both the Houses, such as, Library Committee, Committee on the Welfare of the Scheduled Castes and Scheduled Tribes[26], Committee on Empowerment of Women[27]. From time to time, joint select committees for scrutinising Bills are appointed by the two Houses.

Besides, some parliamentary committees are appointed under statutory provisions, as for example, a joint committee functions under the Salaries and Allowances of Parliament Act, 1954, for the purpose of making rules under the Act.[28] Reference has already been made to the Joint Committee of the two Houses on Offices of Profit.[29]

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23. *Supra*, p. 113.
24. *Infra*, Sec. L.
25. *Supra*, footnote 22.
26. *Infra*, Ch. XXXV.
27. *Ibid.*
28. *Supra*, p. 61.
29. *Supra*, pp. 52, 53.

K. INTERRELATION OF THE HOUSES

The fact that Parliament is bi-cameral gives rise to the problem of inter-relationship between the two Houses. This topic can be considered under the following several heads:

(i) LEGISLATIVE PROCESS (OTHER THAN MONEY BILLS)

The two Houses enjoy co-ordinate power in this area.[30] A deadlock between them in respect of a Bill is resolved through their joint session. This method recognises in theory the equality of the two Houses.

As a hypothesis, Lok Sabha with 545 members can always have its way in a joint session over Rajya Sabha with its 250 members but, in practice, this may not always be so. Lok Sabha can prevail over Rajya Sabha only if most of its members support its stand in the joint session. But, as both the Houses are divided into political parties, usually, members of one political party in both Houses may be expected to go by the party loyalty and vote in one way irrespective of their loyalty to the House to which they belong. It may so happen that the combined strength of the ruling party in the two Houses may be less than that of the Opposition parties, and in such an eventuality the result of a joint session may be quite embarrassing to the government.

The device of joint session to resolve the inter-House deadlock has been adopted in India, with some adaptation, from Australia. In Australia, an ordinary Bill needs the assent of both Houses to become a law. If a Bill is passed twice by the Lower House, and rejected twice by the Upper House, a deadlock ensues. Both Houses are then dissolved and if the deadlock persists even after fresh elections, a joint session of both Houses is summoned.

The position in India differs from that in Australia in two respects: (1) after deadlock, the Houses in India are not dissolved but are continued in operation; and (2) a Bill does not have to be passed by Lok Sabha and rejected by Rajya Sabha twice before a joint session is called.

In Britain, it needs the assent of both Houses to pass a Bill (other than a Money Bill). In case of difference of opinion between the two Houses, it is the House of Commons which ultimately prevails. The House of Lords has only a suspensory veto over public Bills for a maximum period of one year.

The procedure to resolve the inter-House deadlock in India differs from that in Britain. While India has the procedure of the joint session, in Britain the efflux of time resolves the differences between the two Houses.

In the United States, the two Houses enjoy co-equal legislative powers, and one House cannot override the other House. Legislation can originate in any House but the consent of both Houses is necessary before a Bill becomes law. The U.S. Constitution has no provision for breaking an inter-House deadlock. The practice is for each House to appoint a committee and the two committees then negotiate and reach a compromise which each House invariably accepts.

In Canada, there is a formal equality between two Houses in matters of legislation, and both Houses should agree before a Bill can become a law. In case of a deadlock, the Executive may appoint four or eight new Senators. But this pro-

30. *Supra*, Sec. J(i).

vision has never been utilised because of the compliant attitude of the Senate.[31] Being a nominated body, it is largely insignificant and a political non-entity. Rajya Sabha, however, is much more of a living organism.

(ii) FINANCIAL LEGISLATION

In financial matters, the effective power rests with the Lok Sabha. The reason for this inequality between the two Houses is that Lok Sabha being directly elected, it represents the people who provide the money through taxation, whereas Rajya Sabha is not such a representative body. Lok Sabha has full control over a Money Bill which can become law without Rajya Sabha's concurrence, and, therefore, no deadlock can arise between the two Houses in this case.[32]

Similar is the position in Britain. The House of Lords has no effective power to interfere with taxation or financial matters. The House of Commons has complete control over a Money Bill.

In the U.S.A., both Houses are co-equal in financial matters except that a bill to raise revenue originates in the House of Representatives and not in the Senate. The Senate, however, has power to amend such a Bill, while Rajya Sabha does not have any such power.

In Australia, assent of both Houses is needed to pass a Money Bill though it may originate only in the Lower House. The Senate has power to reject a Money Bill, but cannot amend it, though it may request the Lower House to amend it and the House may or may not accept any of the Senate's recommendations. In practice, however, Senate's power to reject Money Bills, and submit requests for amendments now seem almost equivalent to the power to amend since the Lower House, when faced with the alternative of rejection of a Money Bill by the Senate, or accepting its requests for amendments, would generally prefer the latter course. In case of a deadlock, the usual provision of double dissolution applies. In India, Rajya Sabha cannot reject a Money Bill and there cannot be a deadlock between the Houses in this regard.

In Canada, the Lower House has exclusive power to initiate tax and appropriation measures but the Senate has power to amend such bills. In case of a deadlock, the usual provision available in case of ordinary legislation applies.

(iii) OTHER AREAS

(a) IMPEACHMENT

In Britain, the Commons can impeach any person before the Lords for any crime or political misdemeanour, but this institution has now fallen into disuse with the emergence of the concept of ministerial responsibility.[33]

In the U.S.A., an impeachment is tried by the Senate on charges preferred by the House of Representatives; the President, Vice-President and civil officers including federal judges can be impeached for treason, bribery and other high crimes. Thus, in U.K. and U.S.A., the power to initiate proceedings for impeachment lies with the popular chamber, and impeachment is tried in the Upper Chamber.

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31. DAWSON, *GOVERNMENT OF CANADA*, 282, 295 (1970).
32. *Supra,* Sec. J(ii).
33. WADE AND PHILLIPS, *op. cit.*, 97-8.

There is no provision for impeachment in Canada and Australia.

In India, on the other hand, the resolution to impeach the President may be moved in either House and the impeachment will be tried in the other House and, thus, both Houses enjoy co-equal status in this respect.[34]

(b) REMOVAL OF A JUDGE OF THE SUPREME COURT OR A HIGH COURT

Both Houses enjoy co-equal power in this respect as a resolution to dismiss a Judge is to be passed by each House [Arts. 124 and 217][35].

(c) ELECTION OF THE PRESIDENT:

An elected member of each House of Parliament has the same number of votes for election of the President.[36]

(d) ELECTION OF VICE-PRESIDENT

He is elected by members of both Houses assembled in a joint meeting [Art. 66(1)].[37]

(e) REMOVAL OF THE VICE-PRESIDENT

The resolution to remove the Vice-President is to be passed by both Houses though there is a slight difference in their respective roles.

The resolution should first be passed by Rajya Sabha, whose Chairman the Vice-President is, by a majority of all its then members; it becomes effective when later Lok Sabha agrees to it by a simple majority [Art. 67].[38]

(f) CONTROL OF THE EXECUTIVE

While both Houses control the Executive through criticism and discussion, *etc*., it is the Lok Sabha which plays a predominant role in this respect.[39]

The same is the case in Britain, Australia and Canada. In America, the form of government being presidential, no question of its direct responsibility to any House arises.[40]

(g) AMENDMENT OF THE CONSTITUTION

Both Houses have co-equal power in the matter of passing a Bill to amend the Constitution. The Constitution has no provision to break an inter-House deadlock over a proposed constitutional amendment [Art. 368][41].

(h) DECLARING A STATE MATTER AS BEING OF NATIONAL IMPORTANCE

Lok Sabha has absolutely no power in this respect [Art. 246(1)]. Only Rajya Sabha can pass a resolution to this effect. Presumably, the power has been given to the Rajya Sabha in its character of a House representing the States.[42]

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34. *Infra*, Ch. III, Sec. A(i).
35. Chs. IV and VIII, *infra*.
36. *Infra*, Ch. III, Sec. A(i).
37. *Infra*, Ch. III, Sec. A(ii).
38. *See*, *infra*, Ch. III, Sec. A(ii).
39. Ch. III, Sec. B, *Infra*.
40. Ch. III, Sec. E, *infra*.
41. *Infra*, Ch. XLI.
42. *Supra*, Sec. A, Ch. X, *infra*.

(i) PRESIDENTIAL ORDINANCE

President's ordinance is laid before both Houses and it lapses if both Houses pass a resolution disapproving it [Art. 123(2)].[43] The power of the two Houses is therefore co-ordinate in this matter.

(j) DECLARATION OF AN EMERGENCY

A declaration of emergency is laid before both Houses and it cannot remain in force for more than one month unless, before the expiry of that period, it is approved by both Houses [Art. 352(2)].[44]

(k) FAILURE OF CONSTITUTIONAL MACHINERY IN A STATE:

A proclamation of failure of constitutional machinery in a State is laid before both Houses and it ceases to operate after two months if in the meantime it is not approved by both Houses [Art. 356(3)].[45]

(iv) ASSESSMENT OF THE ROLE OF RAJYA SABHA

From the above, it is clear that Rajya Sabha is not a non-entity and is very much of a living organism. In some matters, its powers are inferior to, but in many other matters, it stands *pari passu* with, Lok Sabha. In the matter of declaring a State subject as being of national importance it has even an exclusive power. However, in the context of the totality of the government process in the country, Rajya Sabha is less powerful than Lok Sabha.[46]

Because of the fact that the Executive is responsible to Lok Sabha and not to Rajya Sabha, power seeks to gravitate to Lok Sabha. A majority of Ministers belong to Lok Sabha and government is more sensitive to the criticism made and views expressed in that House. Lok Sabha has the effective financial power. It is elected by the people directly on adult franchise and thus it reflects in a more representative manner the current public opinion. Rajya Sabha, on the other hand, being based on a very restricted franchise, does not command so much of public appeal and representative character as does the Lok Sabha.

However, the status of Rajya Sabha is comparatively superior to that enjoyed by the Upper Chamber in Britain and Canada. Because the Senate in Australia has substantial powers in financial matters, it may be said to occupy a more significant position than does Rajya Sabha.

The strongest Upper Chamber is the Senate in the U.S.A., because, in addition to its practically co-ordinate powers with the Lower House in financial and other legislation (without there being a method to break an inter-House deadlock except negotiation), it also has certain powers which the other House does not possess, *viz*., the power to approve treaties and high appointments made by the President.

The existence of two chambers having co-ordinate authority in several matters does create the possibility of complex constitutional situation arising at

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43. Ch. III, Sec. D(ii)(d) *infra.*
44. *See, infra,* Ch. XIII.
45. *See, infra,* Ch. XIII.
46. Ch. III, Sec. B, *infra.*

times. In India, however, not many complications have arisen so far, and the relationship between the two Houses has been, on the whole, smooth. The Indian parliamentary system will work well if one political party has majority in both Houses.

So long as the Congress Party enjoyed majority in both Houses, the system worked without much difficulty. But, now, that the government has majority in Lok Sabha and not in Rajya Sabha, where the opposition enjoy majority support, stresses and strains between the two Houses arise from time to time. Such a situation arises because while all the members of Lok Sabha are elected at one and the same time, all the members of Rajya Sabha are not elected at one time. Nearly 1/3 members of Rajya Sabha retire every two years. This means that while Lok Sabha reflects the present day public mood, it taken six years for Rajya Sabha to fully adjust to the present public mood and political realities. In the meantime, the situation may cause political embarrassment to the government if on a specific measure, Lok Sabha supports it, but Rajya Sabha refuses to support it.

What will the government do if the two Houses do not agree on a matter in which both Houses enjoy co-ordinate power? Rajya Sabha is not subject to dissolution; the government cannot act till both Houses agree and it is responsible to the Lower House and not to the Upper House. Except legislation and money matters, the Constitution does not prescribe any machinery to break the deadlock between the Houses. The only practical way out for the government would be to seek to promote some sort of a compromise between the two Houses. This phase appeared for a while during the Janata Government regime when the government enjoyed majority in Lok Sabha but was in a minority in the Rajya Sabha.

The present-day coalition government has a majority in Lok Sabha but not in Rajya Sabha. This is a source of embarrassment to the government at times. For example on the 12th February, 99, the President issued a proclamation under Art. 356 [see head (XI) above] for the State of Bihar. The Government in the State was dismissed and presidential rule was imposed. This proclamation was approved by Lok Sabha but the Central Government did not place it in Rajya Sabha as the Government did not have majority in that House and it became clear that the House would not approve the proclamation. Consequently, the Central Government revoked the proclamation on March 8 resulting in the restoration of the former Government in office in the State.

L. PARLIAMENTARY PRIVILEGES

With a view to enabling Parliament to act and discharge its high functions effectively, without any interference or obstruction from any quarter, without fear or favour, certain privileges and immunities are attached to each House collectively, and to the members thereof individually.

Members of Parliament have been given somewhat wider personal liberty and freedom of speech than an ordinary citizen enjoys for the reason that a House cannot function effectively without the unimpeded and uninterrupted use of their services. Privileges are conferred on each House so that it may vindicate its authority, prestige and power and protect its members from any obstruction in the

performance of their parliamentary functions.[47] Legislative privileges are deemed to be essential in order to enable the House to fulfil its constitutional functions, to conduct its business and maintenance of its authority.

In India, parliamentary privileges are available not only to the members of a House but also to those who, though not members of a House, are under the Constitution entitled to speak and take part in the proceedings of a House or any of its committees. These persons are Ministers and the Attorney-General.[48]

The privileges of a House have two aspects—(i) external, and (ii) internal. They refrain anybody from outside the House to interfere with its working. This means that the freedom of speech and action are restricted to some extent. The privileges also restrain the members of the House from doing something which may amount to an abuse of their position.[49]

Article 105 defines the privileges of the two Houses of Parliament. This constitutional provision does not exhaustively enumerate the privileges of the two Houses. It specifically defines only a few privileges, but, for the rest, it assimilates the position of a House to that of the House of Commons in Britain. The endeavour of the framers of the Constitution was to confer on each House very broad privileges, as broad as those enjoyed by the House of Commons which possesses probably the broadest privileges as compared to any other legislature in the world.

It may be noted that under Art. 194, in the matter of privileges the position of State Legislatures is the same as that of the Houses of Parliament. Therefore, what is said here in the context of Art. 105 applies *mutatis mutandis* to the State Legislatures as well.[50] Questions regarding legislative privileges concerning State Legislatures have been raised frequently before the courts and these judicial pronouncements are as relevant to Art. 105 as to Art. 194 and a number of these cases are cited here.

(i) PRIVILEGES EXPRESSLY CONFERRED BY THE CONSTITUTION

(a) FREEDOM OF SPEECH

The essence of parliamentary democracy is a free, frank and fearless discussion in Parliament. For a deliberative body like a House of Parliament, freedom of speech within the House is of utmost significance. To enable members to express themselves freely in the House, it is essential to immunize them from any fear that they can be penalised for anything said by them within the House.

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47. For a detailed study of Parliamentary Privileges, see : MUKHERJEA, *PARLIAMENTARY PROCEDURE IN INDIA*, 350-407 (1967); *Privileges Digest* (Lok Sabha Secretariat)*; Journal of Parliamentary Information*; HIDAYATULLAH, PARLIAMENTARY PRIVILEGES : PRESS AND THE JUDICIARY, 2 JI. of *Constitutional and Parl. Studies*, I (April-June, 1968); Report of the Select Committee on Parliamentary Privilege (House of Commons, 1967); DE SMITH, *CONSTITUTIONAL & ADMN. LAW*, 316-332 (1971); CAMPBELL, *PARLIAMENTARY PRIVILEGE IN AUSTRALIA* (1966); ERSKINE MAY, *PARLIAMENTARY PRACTICE*; JAIN, M.P., *PARLIAMENTARY PRIVILEGES AND THE PRESS*, (1984); see also *P. Sudhir Kumar v. Speaker, A.P. Legislative Assembly*, (2003) 10 SCC 256 : (2002) 2 Scale 254.

48. Arts. 88, 105(4); *supra*, 61.

49. See SAMARADITYA PAL—LAW OF CONTEMPT (2006); JAGDISH SWARUP—CONSTITUTION OF INDIA, 2nd Edn., Vol. 2, Ed.L.M. SINGH (2006).

50. Ch. VI, *infra.*

The rule of freedom of speech and debate in Parliament became established in Britain in the 17th century in the famous case of *Sir John Eliot*.[51] Eliot was convicted by the Court of King's Bench for seditious speeches made in the House of Commons. The House of Lords reversed this decision on the ground *inter alia* that the words spoken in Parliament should only be judged therein. Finally, the Bill of Rights, 1688, laid down that the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place outside Parliament. A member may thus say whatever he thinks proper within the House and no action can be brought against him in any court for this.

In India, the freedom of speech in Parliament has been expressly safeguarded by Arts. 105(1) and (2). Art. 105(1) says: "Subject to the provisions of this Constitution and to the rules and standing orders regulating the procedure of Parliament, there shall be freedom of speech in Parliament". The corresponding constitutional provision for the State Legislatures is Art. 194(1).[52]

Article 105(1) secures freedom of speech in Parliament to its members. This freedom is "subject to the provisions of this Constitution". These words have been construed to mean subject to the provisions of the Constitution which regulate the procedure of Parliament.[53], i.e. Arts. 118 and 121.

Article 105(2) confers immunity in relation to proceedings in courts. It says that no member of Parliament is liable to any 'proceedings' in any court "in respect of" anything said, or any vote given in Parliament, or a committee thereof. The word 'proceedings' means any proceeding civil, criminal or even writ proceedings.[54] Nothing said within a House is actionable or justiciable.

This freedom is, however, subject to the provisions of the Constitution. A constitutional restriction imposed by Art. 121 on this freedom is that no discussion can take place in any House with respect to the conduct of a Supreme Court or a High Court Judge in the discharge of his duties except when a motion for his removal is under consideration. This provision is very essential to protect the integrity of the judiciary so that it can function without being subjected to political pressures and criticism which it cannot meet or answer publicly. However, the question whether a member has contravened Art. 121 while speaking in the House is one for determination by the presiding officer of the House and not for the court.[55]

Further, the rules of procedure of a House somewhat curtail the members' freedom of speech so that the freedom may not degenerate into an unrestrained licence of speech. There, however, prevails an absolute immunity from any court action against a member for anything said within the House. If a member exceeds the limits imposed on this freedom by the Constitution or the rules of procedure of the House, he can be dealt with by the Speaker, or the House itself, but not by a court. A person aggrieved by a speech of a member in the House has no remedy

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51. 3 State Trials, 294.
52. See, Ch. VI, *infra.*
53. See, *M.S.M. Sharma v. Sinha* (1) AIR 1959 SC 395, 408-9 : 1959 Supp (1) SCR 806; *Keshav Singh's* case, AIR 1965 SC 745, 76.
54. *A.K. Subbiah v. Karn. Leg. Council, infra,* footnote 57, *infra*.
55. *Ibid.*
The corresponding provision for the State Legislatures is Art. 194(2).

in the courts.[56] A statement made in the House derogatory to the High Court does not amount to its contempt even though in making the statement the provision of the Constitution is infringed.[57]

The Rajya Sabha has decided that a Parliament member cannot be questioned in any court or any place outside Parliament for any disclosure he makes in Parliament. The reason is that if such questioning is permitted, it would amount to interference with his freedom of speech in Parliament.[58] The Lok Sabha Committee on Privileges has held on August 12, 1970 that it amounts to contempt of the House and a breach of its privilege if a person were to file a suit for damages in a court against a member of Parliament for what he says on the floor of the House.

The principle underlying Arts. 105(1) and 105(2), can be illustrated by reference to *Tej Kiran.*[59] The plaintiffs were disciples of Jagadguru Shankaracharya. In March, 1969, at the World Hindu Religious Conference held at Patna, Shankaracharya made certain remarks concerning untouchability. On April 2, 1969, a discussion took place in Lok Sabha in which certain derogatory words were spoken against Shankaracharya. His disciples filed a suit for damages against six members of the House. The High Court rejected the plaint and the plaintiffs came before the Supreme Court by way of appeal.

The Supreme Court dismissed the appeal. Referring to Art. 105(1), the Court emphasized that whatever is said in Parliament, i.e. during the sitting of Parliament and in the course of the business of Parliament, is immunized. "Once it was proved that Parliament was sitting and its business was being transacted, anything said during the course of that business was immune from proceedings in any court".[60] It is of the essence of parliamentary democracy that people's representatives should be free to express themselves without fear of legal consequences. The members are only subject to the discipline of the Speaker and the House in the matter. The courts have no say in the matter and should really have none.

Two very significant questions concerning parliamentary privileges have been decided by the Supreme Court in *P.V. Narsimha Rao v. State.*[61] These questions arose in the following factual context. The Narsimha Rao Government at the Centre did not enjoy majority in Lok Sabha in 1993. A vote of no-confidence was moved against the Government by the opposition parties. To avert defeat on the floor of the House, certain members of the ruling party gave large sums of money to a few members of the Jharkhand Mukti Morcha (JMM) to vote against the motion on the floor of the House. Consequently, the no-confidence motion was defeated in the House with 251 for and 265 against. Two questions arose for the consideration of the Supreme Court in the instant case:

(a) whether by virtue of Arts. 105(1) and 105(2), a member of Parliament can claim immunity from prosecution before a criminal court on a charge of bribery in relation to the proceedings in Parliament?

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56. *Jagdish Gandhi v. Leg. Council, Lucknow,* AIR 1966 All. 291.
57. *Surendra v. Nabakrishna,* AIR 1958 Ori. 168; *A.K. Subbiah v. Karnataka Leg. Council,* AIR 1979 Kant. 24.
58. XII Report of the Committee of Privileges, Rajya Sabha, Dec. 6, 68; R.S. Debates, Dec. 20, 68.
59. *Tej Kiran Jain v. Sanjiva Reddy,* AIR 1970 SC 1573 : (1970) 2 SCC 272; AIR 1971 Del 86.
60. AIR 1970 SC at 1574. Also see, *Church of Scientology v. Johnson-Smith,* [1972] 1 Q.B. 522.
61. AIR 1998 SC 2120 : (1998) 4 SCC 626.

(b) whether a member of Parliament is a 'public servant' under the Prevention of Corruption Act, 1988?

The five Judge Bench deciding the case split 3 : 2

On the first point, the majority view is that ordinary law does not apply to acceptance of bribery by a member of Parliament in relation to proceedings in Parliament. The Court gave a very broad interpretation to Art. 105(2). On behalf of the majority, BHARUCHA, J., has stated :

> "Broadly interpreted, as we think it should be, Art. 105(2) protects a Member of Parliament against proceedings in Court that relate to, or concern, or have a connection or nexus with anything said, or a vote given, by him in Parliament"[62]

The majority has ruled that while the bribe-givers (who are also members of Parliament) can claim no immunity under Art. 105(2), the bribe-takers stand on a different footing. The alleged bribe-takers are said to have received monies "as a motive or reward" for defeating the no-confidence motion and, thus, the nexus between the bribe and the non-confidence motion is explicit. The majority Judges have insisted that to enable members to participate fearlessly in Parliamentary debates, members need the wider protection of immunity against all civil and criminal proceedings that "bear a nexus to their speech or vote".

The reason for such a broad view is that otherwise a member who makes a speech or cast a vote that is not to the liking of the powers that be may be troubled by a prosecution alleging that he has been paid a bribe for the purpose. But a member who is alleged to have accepted bribe but has not voted cannot enjoy immunity under Art. 105(2). Also, the members of the House who have given the bribe do not enjoy any immunity from prosecution. On this view, the majority held that the four JMM members who had taken the money and voted against the motion were not guilty of corruption. But one member (Ajit Singh) who had taken the money but did not vote was held liable to be prosecuted.

But the minority Judges expressed the view, (per S.C. AGRAWAL, J.) narrowly interpreting Art. 105(2), that the immunity under the Article which can be claimed is "the liability that has arisen as a consequence of the speech that has been made or the vote that has been given in Parliament'.[63]

The minority Judges have argued that the criminal liability incurred by a Member of Parliament who has accepted bribe for speaking or giving his vote in Parliament in a particular manner arises independently of the making of the speech or giving of vote by the member and such liability cannot be regarded as a liability "in respect of anything said or any vote given in Parliament".[64]

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62. *Ibid*, at 2182.
63. *Ibid*, at 2147.
64. In 1972, in the U.S.A., the Supreme Court has decided in *U.S. v. Brewster*, (1972) 33 L.Ed, 2d. 507, by majority (6:3) that the charter of absolute freedom given to the members of the Congress cannot be regarded as a charter for corruption. It amounts to preventing the basic concept behind the charter of freedom. Members cannot sell themselves. On the other hand, the minority took the view that if such freedom was not guaranteed to the members of the legislatures, then they may feel constrained in the matter of speaking or voting on the floor of the House. The threat of prosecution may have a chilling effect on the right of free speech in the House. The *Brewster* case was widely referred to by the Judges in the *Narsimha* opinion. The majority in *Narsimha* followed the minority opinion in *Brewster* whereas the minority in *Narsimha* went by the majority view in Brewster.

In the view of the author, the minority view is preferable to the majority view which may open the gate for corruption among members of Parliament (or of the State Legislatures). When a member casts a vote after accepting money it is a travesty of a free vote. Nothing which promotes corruption in any sphere of life ought to be given constitutional protection.

It is true that the House can hold a member accepting bribe for voting in a particular manner guilty of its contempt, but the House has very limited penal power (see below). Another difficulty is that with the present politicisation in the country, any action against a guilty member will become politicised, dividing the House on political lines.

The members of Parliament who represent the people must set a very high standard of rectitude than ordinary people. A much more serious aspect of the matter is that since the life of the government depends on the majority support in the House, any government may be destablised by interested persons by bribing the MPs.

On the second question mentioned above, all the Judges are agreed that a member of Parliament or a State Legislature is a 'public servant' under S. 2(c) of the Prevention of Corruption Act, 1988, because he holds an office and he is required and authorised to carry out a public duty, viz., effectively and fearlessly representing his constituency.

Under S. 19(1) of the Prevention of Corruption Act, a public servant cannot be prosecuted for certain offences without the sanction of the competent authority, i.e., the authority competent to remove him from office. In case of a member of Parliament/State Legislature, there exists no such authority capable of removing him.[65] Therefore, the majority view is that a member can be prosecuted for such offences without such sanction, but after obtaining the permission of the Chairman/Speaker of the concerned House, as the case may be.

This part of the ruling is not palatable. Speaker is a political creature and it is difficult to visualise that he would use this power in an objective, impartial and a non-partisan manner.

The minority view is that a member cannot be prosecuted for such offences for which sanction of the competent authority is needed. In any case, all judges have urged Parliament to make suitable provision for the purpose and remove the lacuna in the law.

In a recent decision the Supreme Court held that a special Judge exercising jurisdiction under the provisions of the West Bengal Criminal Law Amendment (Special Courts) Act, 1949, cannot take cognizance of an offence against a member of the State Legislative Assembly when he had ceased to be an MLA, though the offence was alleged to have been committed when he was a sitting MLA.[66]

WORDS SPOKEN OUTSIDE A HOUSE

A member is protected for what he says within the House, but not for words spoken outside the House except when these are spoken in the essential perform-

65. See, *supra*, note 53; *Election Commission v. Subramaniam Swamy*, AIR 1996 SC 1810.
66. *State of W.B. v. Shyamadas Banerjee*, (2008) 9 SCC 45, at page 47.

ance of his duty as a member, *e.g*., a conversation on parliamentary business in a Minister's private house.

This view arises out of an extended meaning given to the term "proceedings in Parliament" used in the Bill of Rights.[67] Though the relevant Article in the Constitution confers the freedom of speech in Parliament, or a committee thereof, yet it may be possible to claim the freedom on an extended basis on the analogy of the House of Commons. But letters written by M.P.s to Ministers are not privileged.[68]

A member who publishes outside Parliament a slanderous speech made by him within Parliament is not protected from a court action.[69]

(b) PUBLICATIONS UNDER PARLIAMENTARY AUTHORITY

In Britain, in *Stockdale v. Hansard*,[70] a book containing defamatory matter against the plaintiff published under the authority of the House of the Commons, was held to enjoy no privilege and damages were awarded to the plaintiff against the publisher. As a consequence thereof, the Parliamentary Papers Act, 1840, was passed which made the publication of any reports, papers, votes, or proceedings of a House of Parliament, ordered by the House, completely privileged whether the publication was only for the use of the members of Parliament, or for a wider circulation.

On the same basis, in India, under Art. 105(2), no person is to be liable to any proceedings in any court in respect of the publication of any report, paper, votes or proceedings by or under the authority of a House of Parliament. Thus, all persons connected with the publication of proceedings of a House are protected if the same is made under the authority of the House itself. This Article does not protect publications made without the authority of the House.

To explain the true scope of Arts. 105(1) and 105(2), reference may be made to the Supreme Court case *Dr. Jatish Chandra Ghosh v. Hari Sadhan Mukerjee*.[71] A member of the State Legislature gave notice of his intention to ask certain questions in the Assembly. The Speaker disallowed the questions. Nevertheless, the member published the disallowed questions in a local journal. A government servant filed a complaint (under Ss. 500 and 501, I.P.C.) against the member as well as the editor, printer and publisher of the journal that the member concerned had published false and scandalous imputations against him with a view to harming his reputation. The matter ultimately came before the Supreme Court.

The Court ruled that the said publication did not fall within the scope of Art. 194(2) [equivalent to Art. 105(2)][72] as it was neither under the authority of the House nor "anything said or vote given by a member of the Assembly." Immunity of a member of a House for speeches made by him in the House does not extend to publication thereof by him outside the House. A member has an abso-

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67. DE SMITH, PARLIAMENTARY PRIVILEGE AND THE BILL OF RIGHTS, 21 *Mod. L.R.,* 477-82 (1958).
68. *The Strauss* case, 2. *Privileges Dig*., 107-41 (1958).
69. *Jatish Chandra v. Hari Sadhan Mukherjee,* AIR 1961 SC 613 : (1961) 3 SCR 486.
70. (1839) L.J. (N.S.) Q.B. 294.
71. *Supra*, footnote 60.
72. Art. 194 defines the privileges of the State Legislatures, see, *infra,* Ch. VI. Arts 105 and 194 are similar in phraseology.

lute privilege in respect of what he says within the House but has only a qualified privilege in his favour even in respect of what he says himself in the House if he causes the same to be published in the public press. The Court left open the question whether disallowed questions can be said to form part of the proceedings of a House of Legislature.

A wider privilege is however available in Britain. In the course of a debate in the House of Lords, allegations disparaging to the character of the plaintiff were spoken. A faithful report of the debate was published in the *Times*. The plaintiff sued the *Times* for libel. In *Wason v. Walter*,[73] the court dismissed the action saying that the advantage to the community from publication of the proceedings of a House "is so great, that the occasional inconvenience to individuals arising from it must yield to the general good". Therefore, a fair and faithful report of the proceedings of a House is not actionable in Britain. Publication of a garbled or partial report, or of detached parts of proceedings, with intent to injure an individual, is not entitled to protection.

Article 105(2) does not confer such a protection. A newspaper not being a publication authorised by the Legislature was not protected if it published a faithful report of a debate in a House which contained matter disparaging to the character of an individual, or amounting to the contempt of court.[74]

Reference may be made in this connection to *Suresh Chandra Banerji v. Punit Goala*.[75] A member made a speech in the W.B. Legislative Assembly. A newspaper published a report of the proceedings of the House including the speech. The complainant filed a complaint before the chief presidency magistrate against the newspaper alleging that the said speech contained matter highly defamatory to him and the newspaper by publishing the speech had defamed him. The Calcutta High Court ruled that the member who had made the speech in the House could not be prosecuted for uttering the words complained of . But as the reports of the said speech in the newspaper were not published by or under the authority of the State Assembly, Art. 194(3) [Art. 105(3) in case of Parliament] had no application whatsoever. The High Court refused to apply *Wason v. Walter* principle to India. The Court stated : "We have to apply the criminal law of the land and unless reports of the proceedings in a Legislative Assembly are given a privilege by Indian Law then we cannot possibly extend the principle of *Wason v. Walter*... to proceedings in this country". The offence of defamation is dealt with under Ss. 499 and 500 of the Indian Penal Code.

This state of law came to be regarded as unsatisfactory as it was felt that many advantages would accrue to the community if the newspapers were enabled to publish reports of proceedings of Parliament in good faith. Accordingly, Art. 361-A now enacts that no person shall be liable to any proceedings, civil or criminal, in any court in respect of the publication in a newspaper of a substantially true report of any proceedings of either House of Parliament or the Legislative Assembly, unless the publication is proved to have been made with malice.[76]

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73. LR 4 QB 73 (1868).
74. *Jatish Chandra v. Hari Sadhan,* AIR 1956 Cal. 436; *Surendra v. Nabakrishna,* AIR 1958 Ori 168.
75. AIR 1951 Cal 176.
76. *C.K. Daphtary v. O.P. Gupta,* AIR 1971 SC 1132.

This immunity does not apply to the publication of any report of the proceedings of a secret sitting of any House of Parliament or of the State Legislature.

A similar immunity is extended to broadcast on the air. The protection is available only to the newspapers and air broadcasts and not to any other type of publication like a pamphlet or booklet.[77] It may be noted that the immunity extends only to a 'report' of the proceedings of the House and not to an 'article' or 'comment' on the proceedings.

(c) RULE-MAKING POWER

Each House of Parliament in India is authorised, subject to the provisions of the Constitution, to make rules for regulating its own procedure and conduct of business. A rule made by a House is not valid if it infringes any provision of the Constitution [Art. 118(1)].

The procedure of a House is thus regulated by—(1) the provisions of the Constitution; (2) rules of procedure and conduct of business made by the House; (3) directions issued by the Speaker/Chairman from time to time under those rules, and (4) conventions, traditions or past practices of the House.

(d) INTERNAL AUTONOMY

It is very necessary for the proper working of Parliament that each House is able to discharge its functions without any outside interference. In Britain, the courts do not interfere with what takes place inside the House.[78] The House has an exclusive right to regulate its own internal proceedings and to adjudicate upon matters arising there. It enjoys complete autonomy within its own precincts. "What is said or done within the walls of Parliament cannot be enquired into in a court of law."[79] But, it was also stated by STEPHEN, J. : "I know of no authority for the proposition that an ordinary crime committed in the House of Commons would be withdrawn from the ordinary course of criminal justice".

On the other hand, this immunity has been taken to such an extent that in *R. v. Graham Campell*,[80] the court refused to convict members of the Kitchen Committee for breach of the licensing law for selling liquor without a licence in the precincts of the House of Commons saying that a tribunal would feel "an invincible reluctance to interfere" in a matter within the area of the internal affairs of the House.

On the same basis, under Art. 122(1), internal autonomy has been conferred on the House of Parliament in India as well. The validity of any proceedings in Parliament cannot be called in question on the ground of any alleged irregularity of procedure. A House has absolute jurisdiction over its own internal proceedings. Further, under Art. 122(2), no officer of Parliament who is empowered by or under the Constitution—

(*i*) to regulate the procedure or conduct of business, or

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77. An Act was first enacted in 1956, but was repealed in 1976 to curb the freedom of the press in the wake of the emergency declared in 1975. The Act was re-enacted in 1977 after the emergency came to an end in March, 1977. Now it is a constitutional provision. For Emergency Provisions, see, *infra*, Part IV, Ch. XIII.

78. WADE AND PHILLIPS, *op. cit*., 204, 206.

79. LORD COLERIDGE, C.J., in *Bradlaugh v. Gossett*, 12 QBD 271 (1884).

80. (1935) 1 KB 594.

(*ii*) to maintain order in Parliament,

is subject to the jurisdiction of any court in respect of the exercise by him of those powers. Thus, each House of Parliament has freedom from judicial control in its working.

The validity of proceedings within a House cannot be called in question in a court even if the House deviates, or does not strictly follow, or suspends its own rules of procedure. Each House reserves to itself the power to suspend any rule of procedure in its application to a particular business before it.[81]

The courts do not interfere with the functioning of the Speaker inside the House in the matter of regulating the conduct of business therein by virtue of powers vested in him.[82] For example, the Speaker cannot be sued for damages for wrongful arrest by a person who is arrested on his warrant to answer a charge of contempt of the House, but is later released by the court, as the Speaker acts in this matter in performance of his duties connected with internal affairs of the House.[83]

A High Court would not issue prohibition to restrain the Committee of Privileges to consider a privilege matter.[84] A High Court would not issue a writ under Art. 226 to a House of Parliament or the Speaker or any of its officers, to restrain the House from enacting any legislation even if it may be *ultra vires* Parliament. The courts would not interfere with the legislative process in a House either in the formative stages of law-making, or with the presentation of the bill as passed by the Houses of Parliament to the President for his assent.[85]

A member of a House cannot be restrained from presenting any bill, or moving a resolution in the House.[86] It is only when a bill becomes a law that the courts would adjudicate upon its constitutional validity. The immunity available to a House from judicial process also applies to a committee of the House, for a committee is only an agency or instrument through which the House functions.[87]

While the courts do not interfere with the working of a House on the ground of irregularity of procedure, they may scrutinize the proceedings of the House on the ground of illegality or unconstitutionality.[88]

In *In re under Art. 143 of the Constitution of India*[89] commenting on Art. 212(1) applicable to the State Legislatures [which is equivalent to the present Article 122(1)],[90] the Apex Court has stated:

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81. *M.S.M. Sharma v. Sinha,* AIR 1960 SC 1186 : 1959 Supp (1) SCR 806; *Jai Singh v. State of Haryana,* AIR 1970 P&H 379; *K.A. Mathialagan v. P. Srinivasan,* AIR 1973 Mad. 371; *S.V. Sirsat v. Legislative Assembly of State of Goa,* AIR 1996 Bom. 10.

82. *Surendra v. Nabakrishna,* AIR 1958 Ori. 168.

83. *Homi D. Mistry v. Nafisul Hassan,* ILR 1957 Bom. 218.

84. *C. Subramaniam v. Speaker, Madras Legislative Ass.,* AIR 1969 Mad. 10.

85. *Bihar v. Kameshwar,* AIR 1952 SC 252; *K.P. K. Thirumulpad v. State of Kerala,* AIR 1961 Ker. 324; *Ramachandra Rao v. A.P. Regional Comm.,* AIR 1965 AP 306; *L.N. Phukan v. Mohendra Mohan,* AIR 1965 Ass. 74; *Jagdish Gandhi v. Leg. Council,* AIR 1966 All. 291.

86. *Hem Chandra v. Speaker, Legislative Ass.,* AIR 1956 Cal. 378.

87. *Ramchandra Rao v. A.P. Regional Committee, supra,* footnote 85.

88. *A.J. Faridi v. Chairman, U.P. Legislative Council,* AIR 1963 All. 75; *Syed Abdul v . State of W.B. Leg. Ass.,* AIR 1966 Cal. 363; *Ram Lal Chauhan v. T.S. Nagi,* ILR 1979 H.P. 371; *Om Parkash Chautala v. State of Haryana,* AIR 1998 P&H 80; *S. Ramachandran, M.L.A. v. Speaker, T.N. Legislative Assembly,* AIR 1994 Mad. 332.

89. *Keshav Singh's* case, AIR 1965 SC 745; see, *infra,* p. 147 *et seq.*

90. *Infra,* Ch. VI.

> "Art. 212(1) seems to make it possible for a citizen to call in question in the appropriate court of law, the validity of any proceedings inside the legislative chamber, if his case is that the said proceedings suffer not from mere irregularity of procedure, but from an illegality. If the impugned procedure is illegal and unconstitutional, it would be open to be scrutinised in a court of law, though such scruntiny is prohibited if the complaint against the procedure is not more than this that the procedure was irregular".

It is the duty of the courts to keep the Executive and the Legislative within the confines of the powers conferred on them by the Constitution.

In *State of Punjab v. Sat Pal Dang*,[91] a ruling given by the Speaker adjourning the House, when he was powerless to do so because of an Ordinance, was declared to be "null and void" and of "no effect" as the Speaker had acted contrary to law and constitutional injunction. The Supreme Court held as unfounded the claim that whatever the Speaker's ruling may be, it must be treated as final. Points of order can be raised in the House only in relation to interpretation and enforcement of procedural matters. Speaker's ruling on the validity of the Ordinance could not be regarded as final and binding. A Speaker cannot act contrary to law and constitutional injunctions.

The validity of the proceedings of a House of Parliament cannot be challenged on the ground that a number of members were in preventive detention. This question relates to the validity of the proceedings of the House and pertains to the internal domain of the House and is thus non-justiciable.[92]

Many provisions in the Constitution lay down procedure to be followed by the Houses of Parliament in several matters. Some of these provisions may be regarded by the courts as merely directory and not mandatory, the breach of which would amount only to procedural irregularity (curable under Art. 122) which would not vitiate the action taken by the House. Thus, the provision that the certificate that a bill is a Money Bill is to be granted by the Speaker, is only directory and if the certificate is granted by the Deputy Speaker who presides over the House, and the Upper House acting on it proceeds with the bill as a Money Bill, the resultant Act is not bad constitutionally.[93] Similarly, a Money Bill passed without following the procedure laid down for passing a Money Bill [Art. 109] cannot be questioned on the ground of irregularity of procedure.[94]

(ii) OTHER PRIVILEGES

The above-mentioned specific privileges have been expressly conferred on the Houses of Parliament by the Constitution. But the Constitution does not exhaustively enumerate all the privileges of Parliament.

Originally Art. 105(3) said that other powers and privileges of a House, its members or Committees would be the same as those of the House of Commons in Britain on the date of the commencement of the Constitution. The constitutional provision was so framed deliberately because the privileges of the House

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91. AIR 1969 SC 903.
92. *Indira Nehru Gandhi v. Raj Narain*, AIR 1975 SC 2299, 2343 : 1975 Supp SCC 1.
93. *State of Punjab v. Dang*, AIR 1969 SC 903.
94. *Mangalore Ganesh Beedi Works v. State of Mysore*, AIR 1963 SC 589 : 1963 Supp (1) SCR 275.
For procedure to pass a Money Bill, see, *supra*, pp. 97-99.

of Commons could not be exhaustively catalogued.[1] On this basis, the two Houses of Parliament came to enjoy a number of privileges.

In course of time, a feeling grew in the country that it was anomalous for the Constitution of a sovereign country to contain explicit references to a foreign country. Accordingly, Art. 105(3) has now been amended by the 44th Amendment of the Constitution in 1978[2]. Art. 105(3) as it stands now has two aspects, viz.:

(1) The powers, privileges and immunities of each House of Parliament, its members and committees "shall be such as may from time to time be defined by Parliament by law."

(2) Until so defined, "shall be those of that House, and of its members and committees immediately before the coming into force of section 15 of the Constitution (Forty Fourth Amendment) Act, 1978".

This means that all the privileges available to a House on that date will continue until Parliament makes a law. The 44th Constitutional Amendment came into force on the 20th June, 1979.[3]

Although a direct reference to the House of Commons has been dropped from the second part of Art. 105(3), indirectly it may still be relevant to refer to its privileges, whenever a question arises about parliamentary privilege in India. For to find out what were the privileges of the House at the date of enforcement of the 44th Amendment, it would still be necessary to find out what were the privileges of the House of Commons on January 26, 1950. This position can change only when Parliament enacts a law defining its present privileges.

The privileges at present enjoyed by a House by virtue of Art. 105(3) are as follows.

(a) FREEDOM FROM ARREST

A member cannot be arrested on a civil proceeding within a period of 40 days before and 40 days after a session of the House. The object of this privilege is to secure the safe arrival and regular attendance of members on the scene of their parliamentary duties. The privilege extends only to civil arrest and not to arrest on a criminal charge,[4] or for contempt of court, or to preventive detention.[5] The reason to exempt preventive detention from the scope of parliamentary privilege is that privileges of Parliament are granted for the service of the country and not to endanger its security.

A detenu has no right to attend meetings of Parliament.[6] A House of Parliament, however, has a right to receive immediate information about the arrest of

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1. *See*, VIII *CAD* 149.
2. *See, infra*, Ch. XLII.
3. *See, infra*, Ch. XLII, for further details of this Amendment.
4. *Goudy v. Duncombe*, 74 R.R. 706; May, *op. cit.*, 103-6.
5. *Captain Ramsay's* case, The Committee of Privileges of House of Commons (1940). Also, *Ansumali v. State of West Bengal*, AIR 1952 Cal. 632, 636.
6. *Ananda v. Chief Secretary, Government of Madras*, AIR 1966 SC 657 : (1966) 2 SCR 406. Also, the *Dasrath Deb* case and the *Deshpande* case, *Reports of the Committee of Privileges*, Lok Sabha (1952). The Privilege Committee of the House of Commons has ruled in 1970 that a member of the House imprisoned for a criminal matter has no right to attend a meeting of the House.

any of its members, or about the offence and conviction, if any, of the member after trial. According to the Lok Sabha Rules, when a member is arrested on a criminal charge or sentenced to imprisonment by a court, or detained by an executive order, the committing judge, magistrate or executive authority should immediately intimate to the Speaker the fact of arrest, conviction or detention, its reasons, and the place of detention or imprisonment.

The fact of release of the arrested member after conviction on bail pending an appeal or otherwise, is also to be notified to the Speaker. The Speaker reads out in the House the communications received by him under these rules. Failure to intimate to the House the detention of one of its members amounts to a breach of the privilege of the House.[7]

A member of the Legislature arrested or detained has a right to correspond with the Legislature, to make representations to the Speaker and the Chairman of the Committee of Privileges, and the executive authority has no right to withhold such correspondence.[8] The House may also obtain information about the condition of the member under detention, the treatment meted out to him and other facilities afforded to him by putting questions to the government.[9]

(b) INQUIRIES

A House has power to institute inquiries and order attendance of witnesses, and in case of disobedience, to bring witnesses in custody to the bar of the House.

A person charged with contempt and breach of privilege, can be ordered to attend to answer it, and if there is a wilful disobedience of the order, the House has power to take the person into custody, and the House alone is the proper judge when these powers are to be exercised.[10]

A committee of the House also has power to send for persons, papers and records and to administer an oath or affirmation to a witness examined before it. To present any obstruction to the inquiring function of the House, the following are treated as breach of its privilege : to tamper with a witness in regard to the evidence to be given before the House or a committee; to deter or hinder any person from appearing as a witness; molestation of any witness on account of his evidence, etc.

(c) DISCIPLINARY POWERS OVER MEMBERS

A House of Parliament has power to enforce discipline, to punish its members for their offending conduct in the House, or to expel a member who conducts himself in a manner unfit for membership or for unbecoming behaviour whether inside or outside the House.[11]

Expulsion vacates the seat of the member but does not disqualify him from being re-elected. The House may reprimand or suspend a member from the House and use such force as may be absolutely necessary for the purpose.

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7. *In re Anandan*, AIR 1952 Mad 117.
8. 12 *Privilege Dig*., 101 (1967).
9. *Deshpande and Dasrath Deb* cases (1952), *supra*, footnote 6.
10. *Howard v. Gossett*. 10 Q.B. 359 (1846).
For the position in the U.S.A. on this point *see*, CONSTITUTIONAL LIMITATIONS UPON INVESTIGATING POWER OF THE U.S. CONGRESS, *JI. of Parl. Inf.*, 33 (1958) .
11. WADE AND PHILLIPS, *op. cit*., 205; MAY, *op. cit*., 139 (20th Ed.).

The jurisdiction of the House over its members, and its right to impose discipline within its walls, is absolute and exclusive.

The Courts do not interfere with a resolution of the House directing expulsion or suspension of a member.[12] Mudgal, a member of Lok Sabha, used to receive monetary benefits in exchange for services rendered as a member of the House such as putting questions in the House, moving amendments to bills and arranging interviews with the Ministers, etc. This conduct was regarded as derogatory to the dignity of the House and inconsistent with the standards which Parliament was entitled to expect from its members. Accordingly, Prime Minister Nehru moved a resolution in the House to expel Mudgal. While the resolution was being discussed, Mudgal resigned from the House. The House thereafter adopted an amended resolution declaring that Mudgal had deserved expulsion.[13]

Rajya Sabha expelled Subramanian Swamy on the 15th November, 1976, for conduct "derogatory to the dignity of the House and its members, and inconsistent with the standards which the House expects from its members…."

Suspension of members from the House is a matter of daily occurrence. Members are often suspended by a House for persistently flouting the authority of the Speaker, or for casting reflections on the impartiality of the Chair, or for defiance of the Chair. The Speaker/Chairman has power to suspend a member from the House for a day for grossly disorderly conduct. If a member disregards the authority of the Chair, or abuses the rules of the House by persistently and wilfully obstructing its business, the Speaker/Chairman may name the defaulting member, and then by a motion of the House the member is suspended for a specified number of days which may not exceed the rest of the session.[14] The House has power to terminate suspension when it so desires.[15]

Giving of wrong information deliberately to the House is regarded as a breach of discipline by the member concerned. There have been occasions when the Speaker has reprimanded the members for indulging in undignified conduct, like a walk-out from the House on the occasion of the ceremonial opening of Parliament by the President.[16]

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12. *Bradlaugh v. Gossett, supra,* footnote 79; *Jai Singh v. State of Haryana,* AIR 1970 P.H. 379; *Yogenara Nath v. State of Rajasthan,* AIR 1967 Raj, 123; *Yeshwant Rao v. State of Madhya Pradesh Leg. Ass.,* AIR 1967 MP 95; *K. Anbazhagan v. Secretary, T.N. Legislative Assembly, infra*; *Om Parkash Chautala v. State of Haryana,* AIR 1998 P&H 80.

But *see, Hardwari Lal v. Election Comm.*, I.L.R. 1977 (2) P. & H. 269, where the Punjab and Haryana High Court ruled that a State Legislature has no power to expel its members from the House. This judicial view is untenable.

13. MORRIS-JONES, *op. cit.*, 251; 12 *Privileges Dig.*, 54.

Also see, ENID COMPBELL, Expulsion of Members of Parliament, 21 *UTLJ* 15 (1971).

14. Lok Sabha suspended Maniram Bagri for seven days in its session in March 1983.

15. Walk-outs, raising of slogan on the floor of Lok Sabha, and disruption of its proceedings have become matters of daily occurrence. This has lowered the dignity of the House in the public eyes. To preserve its dignity and maintain decorum in the House, a code of conduct for the Lok Sabha and Rajya Sabha members has been evolved. The code contains the do's and do'nts for the members. A violation of the code by a member will subject him to such punishment as admonition, reprimand, censure, directing him to withdraw from the house, or his suspension.

The Times of India, dt. Nov. 26, 2001, p-1, *The Hindustan Times,* dt., Nov. 28, 2001, p. 1.

16. L.S. DEB., February 18, 1963; L.S. DEB., February 28, 1968; 9 *Jl. of Parl. Inf.*, 20-25 (1963).

Indira Gandhi was held guilty of breach of privilege of Lok Sabha on the charge that while she was the Prime Minister she caused "obstruction, intimidation, harassment" to, and caused false cases instituted against, some officials who were collecting facts about Sanjay Gandhi's Maruti Ltd. to enable the Minister to reply to a question tabled in the House. She was expelled from the House as well as sentenced to imprisonment which ended with the prorogation of the House a week later. She again became the Prime Minister in 1980. On May 7, 1981, the Lok Sabha rescinded its earlier resolution characterising it as politically motivated.

The propriety of this resolution is not beyond a shadow of doubt. In adjudicating on privilege matters, the House acts in a judicial capacity and sanctity and finality should attach to a judicial decision. This concept has been undermined by this resolution. Lok Sabha has undermined its own dignity and prestige by showing that the House treats its own decisions on privilege matters as of a political nature.

In *Raja Ram Pal*,[17] the Supreme Court had to again deal with the question of powers, privileges and immunities of the Legislatures and in particular the power to expel a Member of Parliament (MP). The case related to a telecast by a TV channel of a programme on 12th December, 2005 based on sting operations conducted by it depicting 10 MPs of the Lok Sabha and one of the Rajya Sabha accepting money, directly or through middlemen, as consideration for raising certain questions in the House or for otherwise espousing certain causes for those offering the lucre. The Presiding Officers of both the Houses made enquiries through separate committees. The report of the inquiry concluded that the evidence against the 10 MPs was incriminating. The report was laid on the table of the House, a motion was adopted by Lok Sabha resolving to expel the 10 MPs and notification was issued by the Lok Sabha notifying the expulsion of the 10 MPs. Similar process was also followed in the Rajya Sabha. It was contended on behalf of the MPs that the expulsion was malafide and the result of a predetermination of the issue and for this purpose relied on the declaration made by the Speaker on the floor of the House that 'nobody would be spared". The MPs also argued that the circumstances do not warrant the exercise of the power of expulsion.

In the above context the Supreme Court framed three questions which arose for decision in the case:—

1. Does the Supreme Court, within the constitutional scheme, have the jurisdiction to decide the content and scope of powers, privileges and immunities of the legislatures and its Members ?
2. If the first question is answered in the affirmative, can it be found that the powers and privileges of the legislatures in India, in particular with reference to Article 105, include the power of expulsion of its Members ?
3. In the event of such power of expulsion being found, does the Supreme Court have the jurisdiction to interfere with the exercise of the said power or privilege conferred on Parliament and its Members or committees and, if so, is this jurisdiction circumscribed by certain

17. *Raja Ram Pal v. Hon'ble Speaker, Lok Sabha* , (2007) 3 SCC 184 : (2007) 2 JT 1.

limits ? In other words if the power of expulsion exists, is it subject to judicial review and if so, the scope of such judicial review ?

In answering these questions the Constitution Bench went into the history of the parliamentary privileges in England as well as the application of the principles decided by the Supreme Court in U. P. Assembly case.[18] The Court explained the difference between disqualification and expulsion by saying that while disqualification strikes at the very root of the candidate's qualification and renders him or her unable to occupy a Member's seat, expulsion deals with a person who is otherwise qualified, but in the opinion of the House is unworthy of membership. The Court rejected the submission that the provisions of Article 101 or 102 restrict in any way the scope of Article 105(3). After a close analysis of the Articles 102, 103, 104 and 105, and several English authorities and texts, the majority after perusal of the enquiry report found that there was no violation of any of the fundamental rights in general and Articles 14, 20 or 21 in particular. The majority was of the view that proper opportunity to explain and defend had been given to the MPs. These observations and findings imply that the Court has affirmed the justiciability issue and consequently its power of judicial review]

(d) FREEDOM FROM JURY SERVICE

Members of Parliament are exempted from jury service. Members may decline to give evidence and appear as a witness in a court of law when Parliament is in session. These privileges are founded on the paramount right of the House to the attendance and service of its members.

(e) PRIVACY OF DEBATES

A House of Parliament has a right to exclude strangers from its proceedings and hold its sittings in camera. This power may be used by the House to go into secret session for reasons of national security. The Speaker/Chairman may, whenever he thinks fit, order the withdrawal of strangers from any part of the House.

(f) PUBLICATION OF PROCEEDINGS

There was a time when the House of Commons used to prohibit publication of its proceedings by passing resolutions. Even as late as 1762, the House of Commons characterised in a resolution the publication of its proceedings as "a high indignity to and a notorious breach of the privilege of this House."

The reasons for this attitude was that there was no adequate protection against arbitrary kings, and members of the House could come to grief for doing plain speaking in the House. In such a situation, secrecy of parliamentary debate was considered necessary not only for the due discharge of the responsibilities of the members but also for their personal safety. This object could be achieved by prohibiting publication of any report of the debates and proceedings of the House and also by excluding strangers from the House and holding debates behind closed doors.

In course of time, the House gave up this practice, and even encouraged publication of its proceedings as it became conscious of the advantages to be derived from a full and clear account of its debates. In 1836, the House of Commons pro-

18. AIR 1965 SC 745.

vided for the publication of parliamentary papers and reports, which led to the famous case of *Stockdale v. Hansard.* But, as the old resolutions were not rescinded, it was still technically a breach of privilege to publish a report of any proceeding of the House or any of its committees.

The House did not, however, entertain any complaint in respect of publication of any of its proceedings except when such proceedings were conducted within closed doors, or when such publication was expressly prohibited by the House or by any committee, or in case of wilful misrepresentation, or any other offence in relation to such publication. Breach of privilege of the House was occasionally raised in case of misreporting or publication of inaccurate or garbled versions of speeches in the press.

On July 16, 1971, the House of Commons passed a resolution waving its privilege as regards the publication of its proceedings. Such publication is no longer to be regarded as a breach of privilege of the House except when the proceedings have been conducted within closed doors or in private, or when such publication has been expressly prohibited by the House.

In India, however, the position in this respect remains as it was in Britain before 1971. The Houses of Parliament in India still enjoy the same power as the House of Commons did before 1971 in this respect.

In the *Searchlight* case,[19] the Supreme Court has ruled that publication of inaccurate or garbled version of speeches delivered in the House, or misreporting the proceedings of the House amounts to a breach of privilege of the House.

The Court has also held that publication by a newspaper of a portion of a member's speech in the House which the Speaker had ordered to be expunged would amount to breach of privilege of the House for which it can take action against the offending party. The effect in law of the order of the Speaker to expunge a portion of the speech of a member may be as if that portion had not been spoken. A report of the whole speech in such circumstances, though factually correct, may, in law, be regarded as perverted and unfaithful report of a speech, i.e, publishing the expunged portion in derogation of the orders of the Speaker passed in the House may, *prima facie,* be regarded as constituting a breach of privilege of the House.

Besides the above, the Houses in India have claimed a few more privileges with respect to the publication of their proceedings. Following constitute breach of privilege of a House.

(i) Disclosing the proceeding of a secret session of the Parliament.

(ii) Misrepresentation of a report of a parliamentary committee by a newspaper.

(iii) Misreporting or misrepresenting the speech of a member of a House of Parliament.

(iv) Misreporting or misrepresentation of the proceedings of the House.

(v) Report or the conclusions of a committee of the House ought not to be publicized, disclosed or referred to by anyone before the same are presented to the concerned House.

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19. *M.S.M. Sharma v. Sinha,* AIR 1959 SC 395 : 1959 Supp (1) SCR 806; *also,* 12 *Privileges Dig.,* 35.

(vi) No document, or paper presented to a committee should be published before the committees report is presented to the House.

Reference may be made in this connection to *Phukan.*[20] There a case of breach of privilege of the House arose because the newspaper published the report of the enquiry commission when it was under the active consideration of a committee of the House.

Had the report of the enquiry commission been published before it reached the committee, no case of breach of privilege would have arisen because the enquiry commission cannot be regarded as an organ of the House as it is appointed by the government under an Act of Parliament—The Commissions of Inquiry Act, 1952.

(vii) Premature publication of proceedings of a committee of a House, or the report, or the conclusions arrived at by the committee, or the proceedings of a meeting thereof before the committee completes its task and presents its report to the House.

(viii) Premature publication of motions tabled before the House.[21]

It may be observed that the above legislative privileges do somewhat adversely affect the freedom of the press as the press is not free to publish the proceedings of a House freely; the press has to take care not to publish anything which may amount to a breach of privilege of any House. This results in substantial restriction on the freedom of the press.

(g) POWER TO PUNISH FOR CONTEMPT

A House has power to punish a person, whether its member or outsider, for its 'contempt' or 'breach of privilege'. A House can impose the punishment of admonition, reprimand, suspension from the service of the House for the session, fine and imprisonment.[22]

This power to commit for contempt is truly described as the 'keystone of parliamentary privilege' for it is used by the House to protect its privileges, punish their violation, and vindicate its authority and dignity.

The grounds on which a person can be held guilty of contempt of the House are vague, uncertain and indefinite as these have not been defined anywhere. The scope of the phrases 'contempt of the House' and 'breach of privilege' is very broad and covers a variety of situations when the House can take action. Generally speaking, a case of contempt of House arises when any act or omission obstructs or impedes it in the performance of its functions, or which obstructs or impedes any member or officer of the House in the discharge of his duties, or which has a tendency, directly or indirectly, to produce such results.[23]

There is no closed list of classes of offences punishable as contempt of the House as new ways of obstructing a House or its Members in performing their

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20. *L.N. Phukan v. Mohendra Mohan,* AIR 1965 A&N 75.
21. For a detailed discussion on these privileges, see, M.P. JAIN, *PARLIAMENTARY PRIVILEGES AND THE PRESS,* Ch. 7.
22. *Hardwari Lal v. Election Commission of India,* ILR (1977) 2 P&H 269.
23. WADE AND PHILLIPS, *op. cit.*; 206; MAY, *op. cit.*, 136; *Report of Press Commission,* 418-431 (1954); 12 *Privileges Digest,* 31-40, 105; *Report of the Select Committee,* 95-108.

functions may manifest themselves.[24] Comments in newspapers or statements made by individuals casting reflections on the proceedings of the House, or, on the character or conduct either of the members collectively, or of individual members, and thereby lowering their prestige in the eyes of the public;[25] comments on the officers of the House casting reflections on them; comments tending to bring Parliament into disrespect and disrepute; premature publication of a report of a meeting of a committee of the House before it is presented to the House;[26] any attempt by improper means, *e.g.*, intimidation, threats or coercion, to influence members of the House;[27] misreporting or misrepresentation of the proceedings of the House or of the speech of a member in the House[28]; deliberately telling a lie or misleading the House by a member[29], are some of the instances of what have been regarded as amounting to contempt of the House.

It is for the House to decide whether any particular factual situation amounts to its contempt or not. The right of the House to punish for its contempt is analogous to the right of a superior court to punish for its contempt,[30] and in fact was justified in early days in Britain by a reference to the mediaeval concept of Parliament being the highest court in the land.

In modern times, however, the phrase 'breach of privilege' is very much in vogue, as it is more flexible and broader a concept than the phrase 'contempt of the House'. 'Breach of privilege' means not only breach of a recognised and accepted privilege of the House but also any action, which though not breach of a specific privilege, yet undermines the dignity or authority of the House[31], or tends to obstruct the House or an individual member thereof, in the discharge of the constitutional functions. The main advantage of the term 'breach of privilege' lies in the fact that it enables the House to uphold its dignity, defend itself against disrespect and affronts which could not be brought, or could be brought, only by implication under any accepted specific privilege.

Questions of breach of privilege are invoked every day in the Houses. A few cases may be mentioned here to illustrate the point. Publishing an article undermining the very foundations of parliamentary system of government[32], casting aspersions on the impartiality of the Speaker[33], attributing *mala fides* to him in the discharge of his duties in the House in a writ petition before a High Court[34], ridiculing a member of a House for a speech delivered by him in the House,[35] constitute breach of privilege of the House. To characterise Parliament as star

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24. *Report of the Select Comm.*, 97 (1967).
25. *The Sinha case,* Lok Sabha (1952).
26. *The Sundarayya case*, *Lok Sabha* (1952). While a committee of Parliament is holding its sittings from day to day, its proceedings should not be published nor any document or papers presented to the committee or the conclusions to which it may have arrived at referred to in the Press. *Also,* 12 *Privileges Dig.* 17.
27. 12 *Privileges Dig.*, 6.
28. *Ibid,* 13, 99, 110.
29. *Ibid,* 33.
30. On Contempt of Court, see, Chs. IV and VIII, *infra.*
31. The case of John Junor, *JI of Parl. Inf.*, 75 (1957).
32. *Ibid,* 185.
33. The *Blitz case,* ILR 1957 Bom 239; 12 *Privileges Digest,* 30.
34. *Committee of Privileges* (Third Lok Sabha), *IV and VII Reports;* 12 *Privileges Digest,* 1-5 (1967).
35. *The Times of India,* Aug. 20, 61, 1.

chamber amounts to a gross breach of privilege as it casts grave reflection on the institution of Parliament.[36]

In 1964, during discussion in the Maharashtra Legislative Assembly, a few members severely criticised the Bombay Municipal Corporation. The Corporation passed an adjournment motion to record its strong resentment against the speeches made in the Assembly. The Assembly held that the Corporation had committed a breach of privilege and contempt of the House since the tone and the content of the speeches made by the councillors as also the passing of the adjournment motion affected the dignity and authority of the House. The freedom of speech of the members of the Assembly being an important right, any interference with this right constitutes a breach of privilege. The House therefore decided to levy a fine of Rs. 10,000 on the Corporation if it did not rescind its offending resolution. The councillors who had participated in the discussion on the adjournment motion in the Corporation were to be admonished unless they apologised unconditionally to the House.[37]

On December, 9, 1970, the Speaker of the Lok Sabha admonished a senior government servant for "having deliberately misrepresented the facts and given false evidence before the Public Accounts Committee."

The punishments which a House may impose on non-members for its contempt or breach of privilege are admonition, reprimand, imprisonment and fine. The punishment by way of 'reprimand' or 'admonition' to the offending party is more commonly resorted to. In such a case, the Speaker of the House summons the wrongdoer to the bar of the House and admonishes or reprimands him.

The House of Commons does not enjoy the power to impose fines, though the Select Committee has suggested that it should have this power because at times a mere rebuke might appear to be an inadequate penalty whilst imprisonment might be too harsh, and also because this is the only penalty which can be imposed on corporations.[38] In India, the position is not clear though, as stated above, the Maharashtra Legislature did impose a fine on the Bombay Corporation for breach of its privilege.

Members of the House may, in addition, be suspended or expelled from the House as noted earlier.[39] Imprisonment for contempt of the House can be imposed by a House but it can only be till the close of the existing session, and the prisoner is entitled to be released automatically when the House is prorogued or dissolved. If the House passes an order detaining a person for its contempt for a fixed term, the unexpired portion of the sentence would lapse as soon as the session during which the order was made comes to an end by prorogation or dissolution.[40] The punishment of imprisonment for breach of privilege or contempt of the House is awarded very rarely and only in extreme situations when the privilege offence is regarded to be very serious.

The Select Committee of the House of Commons has accepted that the complaint of 'uncertainty' made against the power of the House to commit for its

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36. *Committee of Privileges* (Fourth Lok Sabha), *IV Report*, 205.
37. *The Case of Bombay Municipal Corporation, Report of the Privileges Committee, II Maharashtra Leg. Ass.*, April, 1966.
38. *Report*, xlviii.
39. *Supra*, p. 132.
40. *Sushanta Kumar Chand v. Speaker, Orissa Legislative Assembly*, AIR 1973 Ori. 111.

contempt is 'justified', and to mitigate this, the Committee has emphasized that Parliament should use its power as sparingly as possible and only to protect itself, its members and its officers, to the extent absolutely necessary for the due execution of its powers.[41] Consequently, the Committee has suggested that in an ordinary case where a Member has a remedy in the courts he should not be permitted to invoke the penal jurisdiction of the House in lieu of that remedy. Further, the House should be reluctant to use its penal powers to stifle criticism, however strong or unjustified the criticism may appear to be, as such criticism is the life and blood of democracy. But the House would be justified in using its penal powers if the criticism is liable to become an improper obstruction to the functioning of Parliament.

Usually, the House drops the action against a person infringing its privileges if he apologies to the House and accepts his mistake. A House is not vindictive; it uses its powers only to vindicate its dignity and honour, or to protect the dignity and honour of its members, or protect them against vilification as members. If a satisfactory apology is not forthcoming from the guilty party, then the House may proceed to punish him.

Prorogation of the House does not put an end to a privilege matter pending before it. The House can again take up the matter when it meets after prorogation. The Supreme Court has argued that prorogation is not dissolution; the House remains the same; only the sessions of the House are interrupted by prorogation.[42]

It is also beyond doubt now that a matter of breach of privilege of the House could be raised, after the dissolution of the House; in the next House. The point came into sharp focus in Lok Sabha in November, 1977, when a privilege motion was raised in the Sixth Lok Sabha against Indira Gandhi for her conduct in the Fifth Lok Sabha. The Privileges Committee ruled that the motion could be raised. "The dissolution of Lok Sabha does not imply discontinuity of the institution of Parliament...the Lok Sabha possesses the power to punish a breach of privilege and contempt of the earlier Lok Sabha." The House agreeing with the recommendation of the committee decided to imprison Indira Gandhi till the prorogation of the House and also expelled her from the membership of the House.[43]

(h) COMMITTEE OF PRIVILEGES

Each House of Parliament has a Committee of Privileges to advise it in matters affecting its powers, privileges and immunities as well as those of its members and committees.[44] The Lok Sabha Committee consists of fifteen members nominated by the Speaker; the Rajya Sabha Committee has ten members nominated by the Chairman.

The necessary reference may be made to the committee either by the Speaker or the Chairman *suo motu*, or by the House upon a motion of a member.

The function of the Committee is to examine every question referred to it and to determine with reference to the facts of each case whether a breach of privilege is involved. If so, what is its nature and what are the circumstances leading to it? It can call for oral and documentary evidence. The committee may administer oath or affirmation to a witness examined before it.

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41. *Report of Select Committee of Parliamentary Privileges*, viii, ix (Dec. 1967).
42. *M.S.M. Sharma v. Shree Krishna Sinha*, AIR 1960 SC 1190 : 1959 (Supp) 1 SCR 806.
43. Also see, KAUL & SHAKHDHER, *PRACTICE AND PROCEDURE OF PARLIAMENT*, 941-51 (1978).
44. JENA, *PARLIAMENTARY COMMITTEES IN INDIA*, 58-71.

The committee may make such recommendations as it may deem fit. It may also state in its report the procedure to be followed by the House in giving effect to the committee's recommendations.[45] The report of the committee is presented to the House concerned which takes appropriate action on it. The recommendation of the committee is not binding on the House which may accept, modify or even reject the same.

The Committee of Privileges exercises an essentially adjudicatory function. This committee has a special obligation to discharge its functions objectively with a judicial approach and in a non-political or non-partisan manner because, in a way, in deciding whether its privilege has been infringed or not, the committee is acting as a judge in its own cause. The procedure of the committee ought to conform with the canons of natural justice. Whenever some one is arraigned before the committee for breach of parliamentary privilege, it is necessary that he be given a full and fair opportunity to defend himself and explain his conduct. In this connection, the comment made by the Second Press Commission may be taken note of.[46]

> "We are of the view that the rules of business of the House of Parliament and State Legislatures in India dealing with the procedure for taking action against alleged breaches of privilege, etc. should be reviewed and necessary provisions incorporated therein to provide for a reasonable opportunity to alleged contemners to defend themselves in the proceedings for breach of privilege..."

(iii) PRIVILEGES AND FUNDAMENTAL RIGHTS

There has been some confusion on the question whether the Fundamental Rights[47] control in any way the privileges which the Houses enjoy under Art. 105(3). Which is to prevail in case of a conflict between such a privilege and a Fundamental Right?

This question arose for the first time in *Gunupati*.[48] In one of its issues, the *Blitz* published a news item casting derogatory aspersions on the Speaker of the U.P. Legislative Assembly. The Speaker referred the matter to the Committee of Privileges of the House for investigations and report. The committee summoned D.H. Mistry, editor of the *Blitz,* to appear before it to clarify the position. Mistry neither appeared before the committee nor did he send any reply. Thereafter, the Assembly adopted a resolution authorising the Speaker to issue an arrest warrant against Mistry with a view to enforcing his presence before the House to answer the charge of breach of privilege. Accordingly, the Speaker issued the warrant and, consequently, Mistry was arrested in Bombay on the charge of committing contempt of the U.P. Legislative Assembly. He was brought to Lucknow and was lodged in a hotel for a week without anything further being done in the matter. In the meantime, a petition for a writ of *habeas corpus* was moved in the Supreme Court on his behalf on the ground that Mistry's Fundamental Right under Art. 22(2) had been violated. Art. 22(2) envisages that a person arrested must be produced before a magistrate within 24 hours of his arrest. The Supreme Court accepted the contention that as Mistry had not been produced before a magistrate,

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45. Rules 314 and 315 of the Rules of procedure of the Lok Sabha.
46. *Second Press Comm. Report,* I, 58 (1982).
47. Arts. 12 to 35 of the Constitution; See, *infra,* Chs. XX-XXXIII.
48. *Gunupati Keshavram Reddy v. Nafisul Hasan,* AIR 1954 SC 636 : 1954 Cri LJ 1704. For further discussion on this case, see, *infra,* Ch. VI.

his Fundamental Right under Art. 22(2) was infringed and, accordingly, the Court ordered his release.[49]

This pronouncement created the impression that the Fundamental Rights would control parliamentary privileges. However, in the *Searchlight* case,[50] the Supreme Court held by a majority that the privileges enjoyed by a House of Parliament under Art. 105(3) [or a House of State Legislature under Art. 194(3)], were not subject to Art. 19(1)(*a*) and, therefore, a House was entitled to prohibit the publication of any report of its debates or proceedings even if the prohibition contravenes the Fundamental Right of Speech and Expression of the publisher under Art. 19(1)(*a*).[51]

The ruling in *Gunupati* was held not binding as it was not 'a considered opinion' on the subject. The Court argued that Art. 105(3) [or Art. 194(3)] was not declared to be 'subject to the Constitution', and, therefore, it was as supreme as any provision of the Constitution including the Fundamental Rights. Any inconsistency between Arts. 105(3) [or Art. 194(3)] and 19(1)(*a*) could be resolved by 'harmonious construction' of the two provisions, and Art. 19(1)(*a*) being of a general nature must yield to Art. 105(3) [or Art. 194(3)] which was of a special nature.

The factual situation in *Searchlight* was as follows: A member of the Bihar Legislature made a speech on the floor of the House. The Speaker ordered certain portions of the speech to be expunged. The *Searchlight* however published the entire speech containing the expunged portion as well. The House referred the question of breach of its privilege by the newspaper to its Committee of Privileges. When the committee summoned the editor of the *Searchlight* to answer the charge of breach of privilege, he moved a writ petition in the Supreme Court under Art. 32 claiming that the said notice and the proposed action by the committee infringed his Fundamental Right to freedom of speech and expression guaranteed by Art. 19(1)(a). But, as stated above, the Supreme Court rejected the Editor's contention.[52]

The petitioner also contended that the proceedings before the Committee of Privileges threatened his Fundamental Right under Art. 21 as well.[53] According to Art. 21, no person can be deprived of his personal liberty otherwise than in accordance with the procedure established by law. The editor's contention was that the proceedings before the Committee of Privileges violated Art. 21. The Court also rejected this contention. The Court argued that the House can make rules under Art. 118 in case of a House of Parliament, or Art. 208 in case of a House of the State Legislature.[54] Therefore, the rules made by the House regulating the procedure for enforcing its powers, privileges and immunities would fulfil the requirement of Art. 21.

After the above decision, the Committee of Privileges proceeded to consider the case of breach of privilege against the editor of the *Searchlight.* Again, the

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49. For discussion on Art. 22(2), see, *infra,* Ch. XXVII.
For writ of *habeas corpus*, see, *infra*, Ch. VIII.
50. *M.S.M. Sharma v. Sinha (I)*, AIR 1959 SC 395 : 1959 Supp(1) SCR 806.
51. For discussion on Art. 19(1), see, *infra,* Ch. XXIV.
52. For discussion on Art. 32, see, Ch. XXXIII.
53. For discussion on Art. 21, see, *infra,* Ch. XXVI.
54. For Rule-making power of a House, see, *supra*, p. 127.

editor came before the Supreme Court under Art. 32 in effect seeking a reconsideration of its earlier decision. He again repeated his argument that the State Legislature could not claim a privilege contrary to Art. 19(1)(a) which included the freedom of publication and circulation. He also claimed that the privileges conferred on the Assembly under Art. 194(3) [Art. 105(3) in case of a House of Parliament] were subject to Art. 19(1)(a). Thus, *Searchlight* II[55] raised substantially the same questions as had been agitated in *Searchlight* I. The Court however refused to reconsider its earlier decision. Thus, the Court in a way reaffirmed the propositions of law laid down by it in *Searchlight* I .

Though the Supreme Court in the *Searchlight cases* was concerned specifically with the question of applicability of Art. 19(1)(*a*) to the area of legislative privileges, an impression got around, because of certain observations made by the Court and the way the Court treated the earlier case of *Gunupati* that, perhaps, all Fundamental Rights were so inapplicable. Reconsidering the question of mutual relationship between the Fundamental Rights and legislative privileges in the *Keshav Singh* case[56], the Supreme Court held that the *Searchlight* case excluded only Art. 19(1)(*a*), and not other Fundamental Rights, from controlling the legislative privileges.[57] The Court held that Art. 21 would apply to parliamentary privileges and a person would be free to come to the Court for a writ of *habeas corpus* on the ground that he had been deprived of his personal liberty not in accordance with law but for capricious or *mala fide* reasons. The Court argued in this connection : Art. 226 confers on the High Court the power to issue a writ of *habeas corpus.* A person may complain, under Art. 21, that he has been deprived of his personal liberty not in accordance with law but for malicious or *mala fide* reasons. The Court will then be bound to look into the matter. Therefore, an order of the House punishing a person for its contempt cannot be final and conclusive. The court can go into it.

The Supreme Court left open the question whether any other Fundamental Right would apply to legislative privileges as it was not pertinent to the issues in hand.

Later, disposing of the *Keshav Singh* case, the Allahabad High Court held that when the Legislature acts under the rules framed by it laying down the procedure for enforcing its power to commit for contempt, that would be compliance of Art. 21 requiring procedure to be laid down by law for deprivation of personal liberty. It was also held that Art. 22(2) has no application when a person has been adjudged guilty of contempt of the House and has been detained in pursuance of such an adjudication.[58]

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55. *M.S.M. Sharma v. S.K. Sinha*, II, AIR 1960 SC 1186 : 1959 (Supp) 1 SCR 806.

56. AIR 1965 SC 745.
For further discussion on this case, see, *infra.*

57. The Chief Justice observed on this point:
"Therefore, we do not think it would be right to read the majority decision as laying down a general proposition that whenever there is a conflict between the provisions of the latter part of Art. 194(3) [Art. [105(3)] and any of the provisions of the fundamental rights..., the latter must always yield to the former. The majority decision, therefore, must be taken to have settled that Art. 19(1)(a) would not apply, Art. 21 would".
See, AIR 1965 SC at 765.

58. *Keshav Singh v. Speaker, Leg. Assembly*, AIR 1965 All. 349. Also see, *infra*, footnote 86.

Thus, the position appears to be that it is wrong to suppose that no Fundamental Right applies to the area of legislative privileges. Some Fundamental Rights, like Art. 19(1)(*a*), do not apply. Perhaps, Arts. 19(1)(*b*) to 19(1)(*g*) would also not apply. On the other hand, some Fundamental Rights, *e.g.*, Art. 21 do apply, while the position with regard to others, *e.g.*, Arts. 22(1) and 22(2), is not clear.

There is, however, no doubt that if Parliament were to enact a law defining its privileges,[59] as is envisaged by Art. 105(3), then such a law would not be free from the controlling effect of the Fundamental Rights. Such provisions of the law as contravene Fundamental Rights would be invalid.[60]

The Supreme Court has specifically accepted this position in *Searchlight* I[61], viz., that if a law were to be made by Parliament or a State Legislature under Art. 105(3) or Art. 194(3) to define its privileges then such a law would be subject to Art. 19(1)(a). Such law would be one made in exercise of its ordinary legislative powers under Art. 246. Consequently, if such a law takes away or abridges any of the Fundamental Rights, it will contravene the peremptory provisions of Art. 13(2),[62] and, thus, such a law would be void to the extent of such contravention.

(iv) PRIVILEGES AND THE COURTS

The question of Parliament-court relationship often arises in privilege matters. This involves several postulates:

(1) Who, whether the court or the legislature, decides whether a particular privilege claimed by a House exists or not?

(2) When a privilege is held to exist, is a House the final judge of how, in practice, that privilege is to be exercised?

(3) Can the courts go into the question of validity or propriety of committal by a House for its contempt or breach of privilege?

(4) Can the courts interfere with the working of the Committee of Privileges?

In Britain, there has been a good deal of controversy and animosity in the past between the House of Commons and the courts on these questions. Difficulties arose because the parliamentary privileges are largely uncodified and are based on the non-statutory common law. There was a time in the British History when the position of the House of Commons had not been stabilised as it had to fight against the Monarch as well as the House of Lords for its recognition, and the judges at times gave opinions which the House did not like. Therefore, controversies arose between the House and the courts.

In 1689, the House of Commons called two judges of the King's Bench to its bar to explain their conduct and later these judges were ordered to be imprisoned. Their fault was that, seven years earlier, they had ordered Jay to be released from the custody of the Sergeant at arms of the House.[63]

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59. Art. 246, Entry 74, List I, *infra*, Ch. X; *Searchlight* case, *supra*; *Keshav Singh's* case, *supra*.

60. *See*, further under "Codification of Privileges".
Also see, *C. Subramaniam v. Speaker, L.A.*, AIR 1969 Mad. 10.

61. *Supra*, p. 141.

62. For discussion on Art. 13, see, *infra*, Ch. XX.

63. *Jay v. Topham*, 12 St. Tr. 821.

The most notable controversy between the House of commons and the courts in a privilege matter was *Stockdale v. Hansard* in the early nineteenth century.[64]

The era of legislative–judiciary conflict in matter of privileges is now past in Britain. A balance between the two institutions has now been established along the following lines:

(1) The courts recognise the common law privileges;

(2) A new privilege can be created for the House only by a law passed by Parliament and not merely by a resolution of one House;

(3) Whether a particular privilege claimed by a House exists or not is a question for the courts to decide. The courts have the right to determine the nature and limits of parliamentary privileges, should it be necessary to determine the same;[65]

(4) When a privilege is recognised as being existent, the question whether it has been infringed or not in a particular set of circumstances is a question for the House to determine. The courts do not interfere with the way in which the House exercises its recognised privileges.

The position, therefore, is that while the courts deny to the House of Commons the right to determine the limits of its own privileges, they allow it exclusive jurisdiction to exercise its privileges within the established limits.

As regards committal by the House of Commons for its 'contempt' or 'breach of privilege', the present position appears to be that if the House mentions specific grounds for holding a person guilty of its contempt or breach of privilege, and the warrant ordering imprisonment is a speaking warrant, then the courts can go into the question whether in law it amounts to a breach of privilege; whether the grounds are sufficient or adequate to constitute "contempt" or "breach of privilege" of the House. But if the warrant putting the contemner under arrest mentions contempt in general terms, but does not mention the specific grounds on which the House has held that its contempt has been committed, then the courts have nothing to go into, and they cannot question the same in any way. To this extent, therefore, the powers of the House would appear to be autocratic. The point was clearly established in the case of *Sheriff of Middlesex*.[66] The House of Commons confined the sheriff into custody: the warrant did not mention the facts constituting the contempt of the House. The court refused to issue the writ of *habeas corpus* to discharge the Sheriff from imprisonment saying that "if the warrant merely states a contempt in general terms, the court is bound by it." A very striking case of assertion of parliamentary power to commit for contempt occurred in Australia in 1955. The proprietor and the editor of the 'Banstown Observer' were imprisoned for breach of privilege of the Australian House of Representatives. The High Court of Australia refused to issue the writ of *habeas corpus* saying that it was not entitled to look behind the warrant which was conclusive of what it stated, namely, that a breach of privilege had been committed. The Privy Council characterised the High Court decision as "unimpeachable".[67] The House of Commons has power to commit any person for its contempt and if it issues a general warrant which does not state the grounds on which it regards its

64. *Supra*.
65. *Stockdale v. Hansard*, (1839) 9 Ad. & E. 1; *Supra*, p. 125.
66. (1840) 11 Ad. & E. 273. *Also, Bradlaugh v. Gossett, supra*, footnote 12.
67. *Queen v. Richards*, 92 C.L.R. 157, 164, 171.

contempt having been committed, the courts would be helpless to do anything about the matter. The House of Commons thus has practically an absolute power to commit a person for its contempt, since the facts constituting the alleged contempt need not be stated by it on its warrant of committal and the courts would not go behind the same.[68]

The right of committal through a general warrant can be used by the House to punish a person for its contempt for infringing what it regards as its privilege, even though the courts may not have accepted the same as such. This, thus, means that ultimately it is the view of the House that will prevail in the matter of its privileges. It is thus quite possible that there may be two views as to a privilege of the House. The House may act upon one view while regulating its own proceedings and committing some one for contempt, while the courts may act upon another view when privileges arise in civil disputes.[69]

In the words of KEIR and LAWSON, by conceding to the House of Parliament "the right of committing for contempt without cause shown, the courts have really yielded the key of the fortress, by giving them the power of enforcing against the world at large their own views of the extent of their privileges."[70]

The reason why the courts in Britain have not interfered with the House of Commons in privilege matters is that they have treated the House as a court and its warrant as that of a superior court. But the practice has been that a return has always been made when a person imprisoned under orders of the House has moved a petition for *habeas corpus*. The House accepts the summons from the courts and is represented there.

When the return sets out the general warrant of commitment issued by the House, the courts do not go behind the same as orders of the superior courts are never re-examined. Also, since 1689, there has not been a case of the House taking action against a party, his counsel, or a judge for moving or entertaining a *habeas corpus* petition. Under the *Habeas Corpus* Acts, the courts are bound to entertain petitions for *habeas corpus*, but the courts respect the general warrant of the House and treat it as conclusive answer to the rule *nisi*.[71]

So far as India is concerned, a House of Parliament may claim a privilege if—(*i*) the Constitution grants it specifically; or, (*ii*) it has been created by a law of Parliament; or (*iii*) it was enjoyed by the House under Art. 105(3). This naturally brings the courts into the area of parliamentary privileges. When a question arises whether a particular privilege exists or not, it is for the courts to give a definitive answer by finding out whether it falls under any of the sources mentioned above.

Parliament has not passed any law defining its privileges, and the Constitution specifically grants only a few privileges. Therefore, in the main the question which arises is whether the privilege claimed by the House is one which was enjoyed by the House of Commons on January 26, 1950. This envisages that any privilege claimed by the House of Commons in the remote past but which has later fallen into disuse, cannot be claimed by any House in India, nor can it claim

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68. MAY, *op. cit*, 200; *Select Comm. Report*, 95 (1967).
69. WADE and PHILIPS, *op cit*, 209.
70. KEIR and LAWSON, *CASES IN CONST. LAW*, 255 (1979).
71. HIDAYATULLAH, *op. cit*., 27, 32.

any new privilege which may be conferred on the House of Commons after January 26, 1950.

In a number of cases the courts have decided the question whether a particular privilege claimed by a House exists or not on the basis whether the House of Commons had enjoyed the same on January 26, 1950[72]. Thus, in *Keshav Singh*[73] the Allahabad High Court did assert that it was its duty to find out whether the privilege claimed by the House was a privilege enjoyed by the House of Commons on the date of commencement of the Constitution.

The matter was put in the right perspective by the Supreme Court in *Searchlight* I.[74] On the one hand, the Court decided the general question whether a breach of privilege occurs when a newspaper prints a report on a member's speech including the portions ordered to be expunged by the Speaker. The Court answered the question in the affirmative. But, on the other hand, when the question arose whether the expunged portion had been printed by the newspaper or not, the Court refused to express any opinion on this controversy saying that "it must be left to the House itself to determine whether there has, in fact, been any breach of its privilege". Of course, when once it is held that a particular privilege exists, then it is for the House to judge the occasion and the manner of its exercise and the courts would not sit in judgment over the way the House has exercised its privilege.

Each House of Parliament in India has power to commit a person for its contempt. But the position remains vague on the question whether such committal is immune from judicial scrutiny or not.

The question whether courts can interfere with the power of a House to commit for its contempt arose most dramatically in 1964 in the *Keshav Singh* case,[75] where the U.P. Legislative Assembly claimed an absolute power to commit a person for its contempt and a general warrant issued by it to be conclusive and free from judicial scrutiny.

The question however arises whether such a claim can be accepted in India in view of the fact that, unlike England, India has a written Constitution containing Fundamental Rights, and the doctrine of judicial review of legislative action forms a part of the country's constitutional jurisprudence. *Keshav Singh's* case may be regarded as the high-water mark of legislative-judiciary conflict in a privilege matter in which the relationship between the two was brought to a very critical point,[76] and the whole episode was reminiscent of the conflict between

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72. The *Searchlight* case, *supra; Yeshwant Rao v. State of M.P. Leg. Ass.*, AIR 1967 M.P. 95; *Yogendra Nath v. State of Rajasthan*, AIR 1967 Raj. 123.

73. AIR 1965 All 349; *supra*, footnote 58.

74. *Supra*, footnote 50.

75. AIR 1965 SC 745.

76. A sort of controversy arose between Lok Sabha and the Supreme Court in 1969. Some remarks were made in the Lok Sabha against the Sankaracharya. A suit for damages against the members was filed in the Delhi High Court but was dismissed. An appeal was then filed in the Supreme Court. Notice of lodgement of the appeal was sent to the concerned members and the Speaker. This was debated in the Lok Sabha in Aug. 1969. The Speaker advised the members concerned not to appear before the Court. The Court later explained the position saying that the notice of lodgement of an appeal was not a summons to appear before it.
Tej Kiarn Jain v. Sanjiva Reddy, AIR 1970 S.C. 1573 : (1970) 2 SCC 272; *supra*.

the House of Commons and the judiciary in Britain in 1689 when two Judges were committed by the House.[77]

Keshav Singh printed and published a pamphlet against a member of the State Legislative Assembly. The House adjudged him guilty of committing its contempt and sentenced him to be reprimanded. On March 16, 1964, when the Speaker administered a reprimand to him, he behaved in the House in an objectionable manner. Accordingly, the House directed that he be imprisoned for seven days for committing contempt of the House by his conduct in the House at the time of his being reprimanded by the Speaker. On March 19, 1964, Advocate Solomon presented a petition under Art. 226 to the Allahabad High Court for a writ of *habeas corpus* on behalf of Keshav Singh alleging that his detention was illegal as the House had no authority to do so; he had not been given an opportunity to defend himself and that his detention was *mala fide* and against natural justice. The Court passed an interim bail order releasing Keshav Singh pending a full hearing of the petition on merits. Instead of filing a return to Keshav Singh's petition, the House resolved pre-emptorily that Keshav Singh, Advocate Solomon and the two Judges of the High Court who had passed the interim bail order, had committed contempt of the House and that they be brought before it in custody.

The Judges moved petitions under Art. 226 in the High Court asserting that the resolution of the House was wholly unconstitutional and violated the provisions of Art. 211 [Art. 121 in case of Parliament];[78] that in ordering release of Keshav Singh on the *habeas corpus* petition, the Judges were exercising their jurisdiction and authority vested in them as Judges of the High Court under Art. 226. A full Bench consisting of all the 28 Judges of the High Court ordered stay of the implementation of the resolution of the House till the disposal of the said petition.

Thereafter, the House then passed a clarificatory resolution saying that its earlier resolution had given rise to misgivings that the concerned persons would be deprived of an opportunity of explanation; that it was not so and that the question of contempt would be decided only after giving an opportunity to explain to the Judges. The warrants of arrest against the two Judges were withdrawn, but they were placed under an obligation to appear before the House and explain why the House should not proceed against them for its contempt. The High Court again granted a stay order against the implementation of this resolution. Thus, there emerged a complete legislative-judiciary deadlock.

At this stage, the President of India referred the matter to the Supreme Court for its advisory opinion under Art. 143[79]. By a majority of 6 to 1, the Court held

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77. *Supra*, footnote 63.

78. For Art. 226, see, *infra*, Ch. VIII.

79. *Infra*, Ch. IV.

The Presidential reference framed the following five questions for the Court's advisory opinion.

(i) The first question in substance was whether the High Court was competent to entertain and deal with a petition for *habeas corpus*, and to issue bail, when the petitioner had been committed to imprisonment by the assembly for the infringement of its privileges and for its contempt.

(ii) The second question in substance was whether by ordering release of Keshav Singh on bail the judges had committed contempt of the Assembly.

[Footnote 79 Contd.]

that the two Judges had not committed contempt of the legislature by issuing the bail order. The judges had jurisdiction and competence to entertain Keshav Singh's petition and to pass the orders as they did. The Assembly was not competent to direct the custody and production before itself of the advocate and the judges. The keynote of the Court's opinion is the advocacy of harmonious functioning of the three wings of the democratic state, viz., Legislature, Executive and the Judiciary. The Court emphasized that these three organs must function "not in antinomy nor in a spirit of hostility, but rationally harmonisouly." Only a harmonious working of the three constituents of the democratic state will help the peaceful development, growth and stabilisation of the democratic way of life in this country.

The Court pointed out that Art. 211 debars the State Legislatures [Art. 121 in case of Parliament][80] from discussing the conduct of a High Court Judge. Therefore, on a party of reasoning, one House, a part of the Legislature, cannot take any action against a High Court Judge for anything done in the discharge of his duties. The existence of a fearless and independent Judiciary being the basic foundation of the constitutional structure in India, no Legislature has power to take action under Art. 194(3) or 105(3) against a Judge for its contempt alleged to have been committed by the Judge in the discharge of his duties. The Court also held that the right of the citizens to move the judicature and the right of the advocates to assist that process must remain uncontrolled by Art. 105(3) or Art. 194(3). It is necessary to do so for enforcing the Fundamental Rights and for sustaining the Rule of Law in the country. Therefore, a House could not pass a resolution for committing a High Court Judge for contempt. The Court rejected the contention of the Assembly that it had absolute power to commit a person for its contempt and a general warrant issued by it would be conclusive and free from judicial scrutiny. The Court declared that the House of Commons enjoyed the privilege to commit a person for contempt by a non-justiciable general warrant, *as a superior court of record in the land and not as a Legislature*. Therefore, Parliament and the State Legislatures in India, which have *never been courts*, cannot claim such a privilege.

Even if the House of Commons has this privilege as a legislative organ, Parliament and the State Legislatures in India cannot still claim it because of the existence of the Fundamental Rights and the doctrine of judicial review, particularly, Art. 32, which not only empowers the Supreme Court but imposes a duty on it to enforce Fundamental Rights,[81] and Art. 226 which empowers the High

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[Footnote 79 Contd.]

(iii) The Third question was whether it was competent for the Assembly to direct the arrest of the Judges and their production before the House for rendering explanation for its contempt.

(iv) The fourth question was whether the full bench of the Allahabad High Court was competent to pass interim orders restraining the Speaker and others, from implementing the orders of the Assembly against the Judges and the advocate.

(v) Whether a High Court Judge dealing with the petition challenging the order of a House of the State Legislature imposing punishment for contempt thereby commits contempt of the Legislature. And, also, whether in case it is held that the Judge does commit contempt in the aforesaid situation, is the Legislature competent to take proceedings against such Judge and punish him for contempt?

80. *Supra*, p. 121.

81. For discussion on Art. 32, see, *infra*, Ch. XXXIII.

Courts to enforce these rights.[82] Thus, a court can examine an unspeaking warrant of the House to ascertain whether contempt had in fact been committed.[83] The legislative order punishing a person for its contempt is not conclusive. The court can go into it. The order can be challenged, for instance, under Art. 21, one of the Fundamental Rights which is applicable to the area of a legislative privileges, on the ground that the act of the legislature is *mala fide*, capricious or perverse.[84]

The *Keshav Singh* case represents the high-water mark of legislature-judiciary conflict in a privilege matter in India. The relationship between the two institutions was brought to a very critical point. However, the Supreme Court's opinion in *Keshav Singh* seeks to achieve two objectives.[85] First and foremost it seeks to maintain judicial integrity and independence, for if a House were to claim a right to question the conduct of a judge, then judicial independence would be seriously compromised; the constitutional provisions safeguarding judicial independence largely diluted and the Rule of Law neutralized. The Constitution has sought to preserve the integrity of the judiciary, and by no stretch of imagination could this be compromised in any way. The Supreme Court has sought to promote this value through the *Keshav Singh* pronouncement. In the second place, the Court seeks to concede to the House quite a large power to commit for its contempt or breach of its privilege for, even though the judiciary can scrutinise legislative committal for its contempt, in actual practice, this would not amount to much as the courts could interfere with the legislative order only in very extreme situations.

As has already been seen, Fundamental Rights guaranteed by Arts. 19(1)(*a*) to 19(1)(*g*) do not control legislative privileges. Art. 21 also is not of much importance for the proceedings before the Committee of Privileges of a House are held under the rules of procedure made by the House under its rule-making powers and this would be considered as procedure established by law. It appears doubtful if the courts would interfere when the rules of the House specifically deny a hearing to the person charged for contempt in certain situations, *e.g.*, when the contempt or breach of privilege is committed in the actual view of the House (as happened in *Keshav Singh's* case) for the rules will be applied as procedure established by law under Art. 21.

As a matter of practice, the Committee of Privileges invariably conducts an inquiry and gives the party concerned an opportunity to defend himself before it decides the matter. The charge of *mala fides* against the House is extremely difficult to substantiate and later the Allahabad High Court disposing of *Keshav*

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82. For discussion on Art. 226, see, *infra*, Ch. VIII.
83. *Supra*, footnote 66.
84. For discussion on Art. 21, see, *infra*, Ch. XXVI.
85. For comments on this case, *see* D.C JAIN, JUDICIAL REVIEW OF PARLIAMENTARY PRIVILEGES; FUNCTIONAL RELATIONSHIP OF COURTS AND LEGISLATURES IN INDIA, 9 *JILI* 205 (1967); P.K. TRIPATHI, MR. JUSTICE GAJENDRAGADKAR AND CONSTITUTIONAL INTERPRETATION, 8 *JILI* 479, 532 (1966); D.N. BANERJEE, *SUPREME COURT ON THE CONFLICT OF JURISDICTION BETWEEN THE LEG. ASS. AND THE HIGH COURT OF U.P., AN EVALUATION (1966)*; FORRESTER, PARLIAMENTARY PRIVILEGE—AN INDIAN CONSTITUTIONAL CRISIS, 18 *Parl. Affairs* 196 (64-65); IRANI, COURT AND THE LEGISLATURES IN INDIA, 14 *International and Comparative Law Quarterly*, 950; M.P. JAIN, CONTROVERSY BETWEEN THE JUDICIARY AND THE LEGISLAUTURE, 1 *Conspectus*, 47 (1965); SEERVAI, *CONSTITUTIONAL LAW OF INDIA*, 1175-1184 (1976).

Singh's case[86] refused to infer *mala fides* in the Assembly merely from the fact that the person charged belonged to a political party different from the majority party in the House. Also, the High Court held, dismissing *Keshav Singh's* petition on merits, that whether there had been contempt of the House or not in a particular situation is a matter for the House to decide and the court would not go into the question of propriety or legality of the commitment. Nor would the court go into the question whether the facts found by the Legislature constitute its contempt or not and the court cannot sit in appeal over the decision of the House committing a person for its contempt.

The High Court, however, did go into the question whether the act of the House in the specific situation was *mala fide* or whether there was an infringement of Art. 21, and held in the negative. The sum and substance of the discussion is that although the judiciary has asserted its power to interfere with a legislative committal of a person for its contempt, yet in practice, the grounds on which the judiciary can do so are extremely narrow and restricted. In effect, therefore, it is difficult to get much of a relief from the court when a person is committed by a House for its contempt.

The Supreme Court's opinion in the *Keshav Singh* case, it was suggested by the Speakers of the State Legislatures and Lok Sabha, denied to a House the power to punish for its contempt. This, however, is not a correct view to take of the Supreme Court opinion. It does nothing of the kind. It only denies to a House a power to commit the judges for its contempt; it also denies that a House is free from all Fundamental Rights in a matter of privilege.

These are unexceptionable principles. The first is necessary to maintain the integrity of the judiciary. The second can be justified on the ground that if a law of the Legislature is not immune from the Fundamental Rights, why should an act of only one part of the Legislature claim such an immunity. But, even in this respect, as discussed above, courts have been very circumspect for the susceptibilities of the Legislatures and have held a number of Fundamental Rights inapplicable to privilege matters.

Under Art. 21, courts can scrutinise the legislative action on the ground of *mala fides* or perversity, but these grounds are very difficult to substantiate. The courts are very reluctant to interfere with the internal working of the Legislatures.[87] It appears difficult to argue that even such an extreme ground should not be available to challenge a legislative action. There may be an exceptional case in which a House has exercised its powers not to uphold its dignity but with an ulterior motive, and if it can be established then the courts should be able to say so. After all, a House is a politically oriented organ; it is fragmented in various political parties and there is a possibility, howsoever remote, that the power of the House may be used by the majority party for political aggrandizement.

As the law relating to legislative privileges stands today, a House has power to decide whether or not its contempt has been committed; courts would not interfere with its internal working, or when it imposes a punishment short of imprisonment; in case of imprisonment, courts would interfere only in case of *mala fides* or perversity. On the whole, powers of the House are so broad as to even

86. *Keshav Singh v. Speaker, Legislative Assembly*, AIR 1965 All. 349; see, *supra*, footnote 58.
87. *Supra*, p. 127.

enable it to enforce its own views regarding its privileges. The courts have exhibited an extreme reluctance to interfere with the proceedings of a House in privilege issues. The review power claimed by the Supreme Court in *Keshav Singh* is extremely restrictive and it would be extremely difficult in practice to get much of a relief from the courts in case of committal by a House for its contempt.

Even in the *Keshav Singh* case, the Allahabad High Court considering the petition on merits, after the Supreme Court's opinion, threw it out and refused to interfere with the judgment of the House.[88] The High Court rejected the argument that the facts found by the Assembly against the petitioner did not amount to contempt of the Assembly. The court refused to go into the question of the "correctness, propriety or legality of the commitment". The court observed :

> "This court cannot, in a petition under Art. 226 of the Constitution, sit in appeal over the decision of the Legislative Assembly committing the petitioner, for its contempt. The Legislative Assembly is the master of its own procedure and is the sole judge of the question whether its contempt has been committed or not".[89]

The High Court ruled that neither there was violation of Art. 21 nor of natural justice because the legislature had formulated the rules of procedure to investigate complaints of breach of privileges.

The petitioner had also argued that his committal by the Assembly was *mala fide* as the Assembly was dominated by the Congress party which was hostile to the Socialist Party of which the petitioner was a leading member. The High Court refused to infer *mala fides* from these facts. There was nothing on the record to establish *mala fides* on the part of the Assembly in committing the petitioner. "The mere fact that the person committed for contempt belongs to the party other than the majority party in the Legislature is no indication of the fact that the Assembly acted *mala fide*."[90]

The above observation shows how reluctant the courts are to impute *mala fides* to the Legislative Assembly in the matter of committal by it of a person for its contempt. Reference may also be made in this connection to *Searchlight I.*[91] In that case, an allegation of *mala fides* was raised by the petitioner against the Committee of Privileges. The Supreme Court ruled that the charge was not made out. The Court observed on this point.[92]

> "The Committee of Privileges ordinarily includes members of all parties represented in the House and it is difficult to expect that the Committee, as a body, will be actuated by any *mala fide* intention against the petitioner. Further the business of the Committee is only to make a report to the House and the ultimate decision will be that of the House itself. In the circumstances, the allegation of bad faith cannot be readily accepted".

The Courts have taken the view that as a House has power to initiate proceedings for breach of its privileges, it must be left free to determine whether in fact breach of its privileges has occurred or not. The courts have thus refused to give

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88. *Supra*, footnote 86.
89. *Supra*, footnote 86 at 355.
90. *Ibid*, at 356.
91. *Supra*, footnote 50.
92. AIR 1959 SC at 412.

any relief at the inquiry stage in a privilege matter by the Privileges Committee of a House.[1]

The Courts do not like to interfere with the proceedings of the House, or the Committee of Privileges in the matter of adjudication whether the privilege of the House has been infringed. Thus, in *Searchlight I*,[2] the Committee of Privileges, Bihar Legislative Assembly, served a notice on the petitioner calling upon him to show cause why appropriate action should not be recommended against him for breach of privilege of the Speaker and the Assembly. The petitioner came to the Supreme Court under Art. 32 seeking a writ of prohibition against the committee restraining it to proceed further in the matter. The Court rejected the petition holding that it was for the House to decide on the advice of the Committee of Privileges whether there was a breach of privilege or not in the circumstances of the case.

Again, in *Subramanian*,[3] the Madras High Court refused to issue a writ of prohibition against the Committee of Privileges. In pursuance of a resolution passed by the Assembly, the Speaker had issued a notice to Subramanian to show cause why he should not be held to have committed contempt of the House. Subramanian filed a petition in the High Court under Art. 226 for the issue of a writ of prohibition restraining the Speaker from proceeding further in the matter. Refusing to interfere in the matter at this stage saying that the court was concerned, "purely and simply, with a notice to the petitioner to show cause..." "[I] it is clearly premature, and even impossible, to judge now, upon the matter of the alleged contempt itself."[4] The petitioner was asking the court to issue prohibition restraining the Speaker from proceeding further virtually on the "ground of absence of an *ab initio* jurisdiction". This was merely the state of assumption of jurisdiction. Therefore, the court refused to issue the writ as Art. 194(3) [or Art. 105(3)] invests the Speaker empowered by a resolution of the legislature, "with the right to call upon a third party, like the petitioner, to show cause why he should not be held to have committed a breach of the privilege of the Legislature, by way of contempt."[5] A writ of prohibition need not be issued to stifle the very exercise of that jurisdiction.[6]

There have been frequent conflicts between the courts and the legislatures in the matter of privileges. This has happened much more frequently in the case of the State Legislatures rather than in the case of Houses of Parliament. These cases are taken note of in the discussion under Art. 194.[7] One or two cases may however be mentioned here to illustrate the point.

In *Tej Kumar Jain*, a suit for damages was filed in the Delhi High Court against some members of Lok Sabha for remarks made by them on the floor of the House against Sankaracharya, but the court dismissed the suit. Thereafter, an appeal was filed in the Supreme Court against the High Court decision. A notice of lodgement of the appeal was sent to the concerned members and the Speaker

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1. *Jagdish Gandhi v. Legislative Council*, AIR 1966 All. 291. *L.N. Phukan v. Mohendra Mohan*, AIR 1965 Ass. 75.
2. *M.S.M. Sharma v. S.K. Sinha*, AIR 1959 SC 395 : 1959 Supp (1) SCR 806; *supra*, footnote 50.
3. *C. Subramanian v. Speaker, Madras Legislative Assembly*, AIR 1969 Mad. 10.
4. *Ibid*, at 12.
5. *Ibid*, at 13.
6. For Writ of Prohibition, see, *infra*, Ch. VIII.
7. *See, infra*, Ch. VI, Sec. H.

advising them to appear before the Supreme Court either in person or by an advocate. At this stage, a question of privilege was raised in the House and the matter was debated in Aug., 1969. The Speaker advised the members concerned not to appear before the Supreme Court otherwise they may themselves be guilty of breach of privilege of the House. Later while delivering its decision in the case, the Court explained the position. The Court stated that as the suit for damages was for Rs. 26,000, an appeal lay to the Supreme Court under Art. 133 on the High Court granting a certificate for the purpose.[8] The appellant has to take out a notice of lodgement of appeal to inform the respondents so that they may take action considered appropriate or necessary. Thereafter, the Court could proceed to hear the appeal. "The notice which is issued is not a summons to appear before the Court. It is only an intimation of the fact of the lodgement of the appeal. It is for the party informed to choose whether to appear or not".[9]

A summons is different from such a notice. If a summons is issued to a defendant and he does not appear, the Court may proceed *ex parte* and may even regard the plaintiff's claim to be admitted. This consequence does not flow in case of notice of lodgement of appeal.[10]

After this clarification, the matter was discussed again by the House. The Speaker then ruled that whether the Court issued a summons or a notice, it made no difference, as ultimately the privileges of the House were involved.

This shows how jealously the House seeks to defend its own privileges and to be the final judge thereof and does not brook any judicial interference in this respect. In the States, the Houses have often asserted that they are the sole judge of their privileges. For example, in *Keshav Singh*, to which a reference has already been made, when hearing was being held before the Supreme Court on the presidential reference under Art. 143, the Assembly, whose claim to the privilege was *sub-judice*, did not want to submit to the Court's jurisdiction on the plea that the House, and not the Court, is the final judge of its own privileges. The U.P. Legislative Assembly made it clear to the Supreme Court that by appearing in the hearing on the reference, the House was not submitting to the Jurisdiction of the Court in respect of the area of controversy and that it was not submitting "its powers, privileges and immunities" for the opinion and decision of the Supreme Court. The House asserted that it was the sole and exclusive judge of its own powers, privileges and immunities and its decisions were not examinable by any other court or body; and whatever the Court may say would not preclude the House from deciding for itself the points referred to the Court under reference. The House maintained : "It is the privilege of the House to construe the relevant provisions of Art. 194(3) and determine for itself what its powers privileges and immunities are".

(a) When the question arises whether a recognised and established privilege of the House has been breached or not in the context of the specific factual situation, it is for the House to decide the question. The courts do not interfere with such a decision of the House except in the rare case of *mala fides* etc.

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8. See, *infra*, Ch. IV, Sec. C(iv) for Appellate Jurisdiction of the Supreme Court.
9. AIR 1970 SC at 1575.
10. *Ibid.*

(b) But when the question is whether a privilege exists or not, then it appears that it is a matter for the courts to decide, for a privilege is claimed by a House under a constitutional provision. It is the constitutional function of the Supreme Court and the High Courts to interpret constitutional provisions.[11] No legislature can claim any such power.

(c) A House cannot claim an entirely new privilege even in Britain, this position is recognised. India is different from Britain as in India legislative privileges flow from the written Constitution, whereas in Britain, the same flow from common law.

(d) In Britain, the rule that the House is the final judge of its privileges arose when the House of Commons was locked in a struggle with an arbitrary Monarch, and had little confidence in the judges who then held office during the Crown's pleasure. That period was very different from the present position prevailing in India when legislative privileges are claimed mostly against the people, especially, the press. A democratic House functioning under a written Constitution cannot claim uncontrolled power to be a judge in its own cause.

(e) In a written Constitution, the interpretation of the Constitution is ultimately in the hands of the courts. In Britain, the House of Commons always files a return in the court whenever committal by it is in question.[12] While the House has not relinquished expressly its claims to be the sole judge of the extent of its privileges, in practice, judicial rulings on these matters are treated as binding.[13]

(f) A democratic legislature and an independent judiciary are two pillars of a democratic system. Both have to function in co-operative spirit to further the cause of Rule of Law in the country.

(v) CODIFICATION OF PRIVILEGES

In the wake of *Keshav Singh's* case, two rather inconsistent ideas were brought into bold relief. On the one hand, the Speakers wanted the Constitution to be amended so as to concede an absolute power to a House to commit any one for its contempt. On the other hand, there arose a demand for codification of legislative privileges.

As to the first, considering the matter dispassionately there is hardly any justification for changing the *status quo* in favour of the Legislatures. The ambit of their power to commit for contempt is quite broad, and their functioning has not been hampered in the past in the absence of any broader power. The U.S. Congress does not enjoy any such power; a case of contempt of a House is

11. See, Ch. XL, *infra*, under "Constitutional Interpretation".
12. ENID CAMPBELL, *PARLIAMENTARY PRIVILEGES IN AUSTRALIA*, 9 (1966).
13. *Ibid*, 6.

tried by the courts under ordinary law, but this has not obstructed the Congress in its working.[14]

The demand for absolute power to commit a person for breach of privilege of a House raises several significant questions. In a democratic country having Rule of Law, should any forum, howsoever august it may be, have an unrestricted power to infringe the rights and liberties of the common man? Why should a popularly elected democratic legislature be hyper-sensitive to public criticism? When a law made by the legislature as a whole is subject to judicial review, why should not an act of only one House (which is only a part of the Legislature) be exempt from judicial review?

A legislative privilege is usually exercised against a member of the public.

While the case for enlarging the powers of the Houses has not been substantiated, there are a few very serious objections against doing so. In a democracy, no forum, howsoever august, should have an unrestricted power to infringe people's freedom. The comparison between courts and legislatures in this regard is not to the point. It is the judiciary's traditional function to protect people's rights. While the courts *are non-political*, a legislature *is essentially a political body*, being fragmented into a number of political parties; and may at times be tempted to act on political considerations. One could even raise the spectre of an intolerant majority in a House becoming oppressive and using the power of the House to commit for its contempt to stifle criticism of the government.

The democratic process of government is based on freedom of speech and expression and no House needs to be oversensitive to public criticism. Legislative privileges adversely affect the rights of the people and, therefore, such privileges must be kept within a very narrow bound. If a House could order the arrest of a High Court Judge, it could as well order the arrest of a Supreme Court Judge, or of a Central Minister, on the allegation of its contempt and one can only imagine the results when the Centre and the States are controlled by different, often antagonistic, political parties. The House of Commons invokes its penal power very sparingly, and when it does so, it rarely goes beyond admonishing the offending persons.

On the other hand, a strong case has been made out for codifying legislative privileges, especially the circumstances which constitute contempt of the House. This area at present suffers from too much ambiguity and lacks precision and articulation. The press has often complained against the exercise of penal powers by the legislatures, and it has been particularly insistent on the codification of privileges as too often it has to bear the brunt of legislative displeasure.[15]

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14. *Marshall v. Gordon*, 243 U.S. 521 (1917).

The House has been conceded the power of 'self-preservation', i.e. "the right to prevent acts which, in and of themselves, inherently obstruct or prevent the discharge of legislative duty or the refusal to do that which there is an inherent legislative power to compel in order that legislative functions may be performed". *Ibid.* at 542. Undoubtedly, the scope of legislative privileges in the U.S. is extremely limited and scope of judicial review much broader than in the U.K. or India.

15. According to the Press Commission, some of the privilege cases disclose oversensitiveness on the part of the legislatures to even honest criticism, *Report*, 425-431. The Press Council has stated that the present undefined state of the law of privileges has placed the press in an unenviable position in the matter of comments on the proceedings of the legislatures; *Second Annual Report*; 28 (1967).

Also see, *First Press Commission Report*, I, 421 (1954); *Report of the Second Press Commission*, I, 53.

Keshav Singh's case itself represents a conflict between the citizen's freedom of speech and legislative privileges. Often members of the Legislatures use their freedom of speech to make allegations on the floor of the House against outsiders who have no remedy to vindicate their reputation. An outsider cannot refute the allegations on the floor of the House, nor can he bring a court action against the member concerned.[16] The point is that while the rights and privileges of the M.P.s are important and should be upheld, the rights of the ordinary citizens should also be safeguarded. To some extent, legislative privileges are an anachronism in a democratic society.

Another trend is to use privilege motions by members of the opposition as a technique for achieving the political purpose of harassing the Ministers and damaging their image in the public eyes. Motions for breach of privilege are raised on the technical ground that a particular Minister has given wrong information to the House and has thus sought to mislead it.[17] Though most of these motions are thrown out by the House, the discussion usually assumes a political complexion and becomes a matter of trial of strength between the ruling and the opposition parties. Privilege motions are also moved at times against officials on the ground that they behaved disrespectfully towards members of the House. There thus exists a lot of flexibility, vagueness and uncertainty regarding what actually constitutes, and new grounds are invoked every day for alleging, a breach of privilege or contempt of the House.

Theoretically, codification of privileges appears to offer several advantages: it will make things certain and one can know surely and exactly what the privileges of the Houses are in India. Codification in the area is advocated to remove ambiguity so that the press is not unduly stifled in saying what it thinks needs to be said. In a democracy, free discussion should be the norm, and its restriction only an exception.

JUSTICE SUBBA RAO in *Searchlight* I[18] has strongly pleaded for codification of privileges instead of keeping "this branch of law in a nebulous state, with the result that a citizen will have to make a research into the unwritten law of privileges of the House of Commons at the risk of being called before the bar of the Legislature."

The clear emphasis of Art. 105(3), as well as of Art. 194(3), is on the legislature defining its privileges through law. The framers of the Constitution were anxious to confer plenary powers on the Houses in India in this respect. They felt that legislative privileges should be definitised not in a hurry but after giving some thought to the matter. The power was thus left to the Legislatures to define their privileges through their own legislation. The supporters of codification argue that if legislative power to punish for contempt of the House is carefully defined in respect of such matters as grounds constituting contempt, procedure and persons against whom such power may be exercised, it will be a safeguard against any misuse of power and will promote the Rule of Law.

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16. *Lok Sabha Deb*., Feb. 15, 1968; *Tej Kiran Jain, supra*.

17. The Speaker of the Lok Sabha has ruled that the mere fact that a minister has made an incorrect statement does not constitute a breach of privilege. A breach of privilege arises only when he makes a statement in the House which he knows to be false.
12 *Privileges Digest* 8 (1967). *Also see*, XXVI *Privileges Digest*, 8, 18 (1981).

18. *Supra*, Sec. L(iii).

While codification of legislative privileges, especially of the circumstances which constitute contempt of a House, is eminently desirable from the point of view of the press and the people, it has a few snags from the point of view of the Legislatures. It will place restriction on the power of a House to deal with privilege matters in the way it likes and it would lose its present-day flexibility of approach. It will be difficult to define all situations when questions of contempt of a House or breach of its privilege may occur as new situations arise every day.

While the legislative privileges at present are not subject to many Fundamental Rights, a statute enacted to define them would be subject to judicial review with respect to its compatibility with the Fundamental Rights.[19] While, at present, by and large, the courts are excluded from the area of legislative privileges, the law defining the same would inevitably draw the courts into picture as questions of statutory interpretation will have to be decided by them.

Under Art. 19(1)(*a*), read with Art. 19(2), no restriction can be imposed on the freedom of speech and expression with respect to 'contempt of the legislature', as in Art. 19(2) while the term 'contempt of courts' occurs, the term 'contempt of legislature' is missing. The difficulty can be got round by making 'contempt of legislature' a criminal offence, but to do so would be to bring the courts into the picture as they would try and punish the crime. To make a Legislature itself a judge in the privilege cases, it appears necessary to amend Art. 19(2) and add 'contempt of the legislature' therein.[20]

Because of these factors, Parliament and the State Legislatures are extremely reluctant to codify their privileges and the prospect of codification is thus extremely dim. Short of codification, an effort may be made to definitise privileges through declaratory resolutions. This course of action would remove some uncertainty from the area while at the same time the Houses would not lose their flexibility of approach. It is also necessary that the Houses use their penal powers with restraint and circumspection and review and tighten up their rules of procedure so as to discourage unsubstantial privilege motions from being moved, and also to guarantee adequate procedural safeguards to those against whom privilege cases are enquired into. This much each House owes to itself and to the public.

In this connection, it may be illuminating to take note of some developments in Britain in the area of parliamentary privileges. In 1965, the whole range of parliamentary privileges, their need, justification, present form and scope, was brought under examination by a Select Committee of the House of Commons which reported in 1967.[21]

The Committee's approach was to remove the uncertainty from the area of parliamentary privileges and also to balance the interests of the citizen and the Press with those of the House, its members and officers. It recommended abolition of

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19. The Supreme Court has asserted in *Searchlight* I that a law defining legislative privileges would be subject to the Fundamental Rights and such a law contravening any Fundamental Right would be void to the extent of such contravention. See, *supra.*
A similar assertion has been made by the Supreme Court in its advisory opinion in *Keshar Singh, supra.* Also, *C. Subramanian v. Speaker, Madras Legislative Assembly,* AIR 1969 Mad. 10, 12.

20. *Infra*, for a discussion on Art. 19(1)(*a*), Ch. XXIV.

21. SILLS, Report of the Select Committee on Parliamentary Privileges, 31 *Mod. L.R.* 435 (1968).

obsolete and out of date rules, such as, immunity of members from civil arrest[22] and old resolutions of the House prohibiting reporting of its proceedings.[23] It suggested relaxation of the rules against reporting of proceedingsbefore parliamentary committees about which the general principle should be that the proceedings should be open and reportable unless the public interest clearly requires otherwise. It also suggested a restricted use of its penal jurisdiction by the House to punish for its contempt.[24]

The Committee accepted that "there is justice in the criticism that some members have in the recent past been over-sensitive to criticism and ever ready to invoke the penal jurisdiction of the House in respect of matters of relative triviality or which could as effectively be dealt with by the exercise of remedies open to the ordinary citizen,"[25] yet the Committee rejected the suggestion that the "categories of contempt" be codified, since "new forms of obstruction, new functions and new duties may all contribute to new forms of contempt," and the House should not be inhibited in its power to deal with them. However, the committee suggested that the House should give effect to the basic principles regarding its contempt by adopting by resolution a set of rules as guidance for the future exercise of its penal jurisdiction so that much of the uncertainty and confusion of the present day could be removed.

As regards investigation of complaints of contempt, the Committee suggested that the person against whom a complaint is being investigated should be entitled as of right to attend proceedings of the Privilege Committee, to be represented by a lawyer, to call witnesses, and be paid for legal aid, if necessary. The Committee further suggested that the House should have power to impose imprisonment for a fixed term and to impose fines because in certain cases admonition may be less, and imprisonment may be more, than what the needs of the case may call for and in case of corporations, fines are the only form of punishment which can be imposed.

In the light of the above, it may be worthwhile for a Parliamentary Committee to study the privileges of the Legislatures in India and formulate some norms and guidelines for being followed by the various Houses in this area.[26]

M. SUPREMACY OF THE INDIAN PARLIAMENT

SUPREMACY OF BRITISH PARLIAMENT

The keystone, the dominant characteristic, of the British Constitution is the doctrine of 'sovereignty' or 'supremacy' of Parliament. This means that Parlia-

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22. *Supra*, p. 130.
23. *Supra*, pp. 134, 135.
24. *Report*, at ix and x.
25. In order to curtail the exercise of its privilege jurisdiction, the House of Commons decided on 6 February, 1978, to follow the rule "that its penal jurisdiction should be exercised (a) in any event as sparingly as possible, and (b) only when the House is satisfied that to exercise it is essential in order to provide *reasonable protection for* the House, its members or its officers, from such improper obstruction or attempt or threat of obstruction as is *causing* or *is likely to cause substantial interference* with the performance of their respective functions."
See, Committee of Privileges, *First Report*, H.C. (U.K.) 376 (1977-78); XXV *Jl. of Parl. Inf.* 227 (1979).
26. For further comments on this aspect, see, Jain, *PARLIMENTARY PRIVILEGES & THE PRESS*, 102-112.

ment has the 'right to make or unmake any law whatever;' that it can "legally legislate on any topic whatever which, in the judgment of Parliament, is a fit subject for legislation," that no person or body in Britain has a right to override or set aside a law of Parliament, that courts have no jurisdiction to declare an Act of Parliament void, *ultra vires* or 'unconstitutional', and that there is "no power which, under the English Constitution, can come into rivalry with the legislative sovereignty of Parliament."[27] Parliament is not regarded as a delegate of the people and it is not legally bound by any mandate. The British Constitution is not written and there is nothing like a fundamental law of the country. Therefore, the power of Parliament to legislate is legally unrestricted, and it can change even a constitutional principle by the same ordinary process as it enacts an ordinary law.

Politically, however, Britain has a responsible government with an elected House of Commons which reflects contemporary public opinion, social morality or consciousness. Parliament does not therefore ordinarily do anything which a large number of people oppose.[28] But from a legal, and not political, point of view there is no fetter or restraint on the British Parliament to make any law. Whatever Parliament enacts as law is law and its validity is not subject to any higher principles or morality, national or international law.

Britain has no doctrine of unconstitutionality of parliamentary legislation and a law enacted by Parliament cannot be questioned or challenged in a court on any ground. The function of the courts is primarily to interpret the law enacted by Parliament and apply it to the factual situations coming before them for adjudication. The courts are not to scrutinise a law with reference to any fundamental norm, although, in the process of statutory interpretation, the courts do bring in certain concepts of their own and interpret the law accordingly. When the courts are faced with several alternative interpretations of a statutory provision, they would adopt the view which appears to them to be fair and just and it may be that, at times, the judicially-adopted alternative may not accord with what Parliament wanted to enact. While the courts do not enjoy the power to declare an Act of Parliament to be invalid they certainly have the power to interpret the same[29]

EFFECT OF EUROPEAN COMMUNITY LAW

It may however be observed that the entry of Britain in the European Common Market has somewhat compromised the traditional concept of sovereignty of

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27. DICEY: *LAW AND THE CONSTITUTION*, 39-40, 70 (1965); JENNINGS, *LAW AND THE CONSTITUTION*, 57, 144 (1959); HEUSTON, *ESSAYS IN CONSTITUTIONAL LAW*, 1 (1964); SCHWARTZ, *AMERICAN CONSTITUTIONAL LAW*, 49 (1965); WADE and PHILLIPS, *op. cit*., 65-83; DE SMITH, *CONSTITUTIONAL & ADMINISTRATIVE LAW*, 63-93 (1977).

28. In the modern state there exist organized interest groups reflecting the views of every trade, profession or business. This has led to the practice of prior consultation before a measure is introduced in Parliament. Neither Government nor Parliament can disregard organised public opinion in promoting legislation and thus the political supremacy of Parliament, distinct from its legal omni-competence, as a law making organ, has become more and more unreal. All legislation is a compromise of conflicting interests. JENNINGS observes, "Parliament passes many laws which many people do not want. But it never passes any law which any substantial section of the population violently dislikes."
JENNINGS, *op. cit*., 148. *Also*, DE SMITH, *op. cit*., 90; WADE, *INTRODUCTION TO DICEY'S LAW OF THE CONSTITUTION*, lxvii, ixx.

29. JENNINGS. *PARLIAMENT*, 1-12 (1970); KEIR and LAWSON, *CASES IN CONST. LAW*, 1 (1979); CF. GRAY, 'SOVEREIGNTY OF PARLIAMENT TO-DAY, 10 *Univ. of Toronto L.*J., 54 (1053-54).
Also see *infra*, Ch. XL.

Parliament. The British Parliament has enacted the European Communities Act, 1972, making European Community Law automatically applicable in Britain even in the face of any law to the contrary. "The general effect of the European Communities Act is to override *existing* domestic law sofar as is inconsistent therewith, and to impose a presumption of interpretation that *future* statute law is to be read subject to Community Law for the time being in force. Parliament is expected to refrain from passing legislation inconsistent with Community Law."[30]

POSITION IN INDIA

The Indian Parliament differs from its British counterpart in a substantial manner. Politically speaking, the Indian and British Parliaments are both subject to similar restraints as both have parliamentary form of government. But, legally speaking, whereas the power of the British Parliament is undefined that of the Indian Parliament is defined, fettered and restrained. India's Constitution is written; it is the fundamental law of the land; its provisions are enforceable by the courts and it cannot be changed in the ordinary legislative process. The Indian Parliament has therefore to function within the constraints of the Constitution from which its legislative powers emanate.

By Art. 245(1), the legislative power of Parliament has been specifically made 'subject to the provisions of the Constitution'.[31] The fundamental law contains many rules and restrictions which Parliament has to observe in its working. For example, there are restrictions regarding the subjects on which Parliament can legislate, and a law made beyond the assigned subjects is bad;[32] there are Fundamental Rights guaranteed to the people of India, and a law made in contravention thereof is unconstitutional.[33]

Parliament exercises sovereign power to enact laws. No outside power or authority can issue a direction to enact a particular piece of legislation.[34]

The doctrine of parliamentary sovereignty as it obtains in England does not prevail here except to the extent and in the fields provided by the Constitution. The entire scheme of the Constitution is such that it ensures the sovereignty and integrity of the country as a republic and the democratic way of life by parliamentary institutions based on free and fair elections.[35]

Parliament may delegate legislative power up to a point and beyond that limit, delegation will not be valid;[36] constitutional provisions guaranteeing freedom of trade and commerce also impose some restrictions on the parliamentary legislative power.[37] In addition, parliamentary taxing power is subjected to a few more

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30. O. HOOD PHILLIPS, *CONST. & ADM. LAW*, 72 (1987).
In several cases, the British courts have ruled that Community law prevails over the local statutes made by the British Parliament. See, for example, *Garland British Rail Engineering Ltd.*, [1983] 2 AC 751; *McCarthys v. Smith*, [1979] I.C.R. 785.

31. *Infra*, Ch. X.

32. *Infra*, Ch. X.

33. Art. 13(2); Part V, *infra*, Chs. XX to XXXIII.

34. *Union of India v. Prakash P. Hinduja*, (2003) 6 SCC 195 : AIR 2003 SC 2612.

35. *People's Union for Civil Liberties v. Union of India*, (2003) 4 SCC 399 : AIR 2003 SC 2363.

36. *See*. Sec. N., *infra.*

37. Arts. 301-307; *infra*, Ch. XV.

restrictions, *e.g.*, under Art. 289, property and income of a State are exempt from Union taxation.[38]

The Indian Parliament is the creature of the Constitution. Therefore, a parliamentary law to be valid must conform in all respects with the Constitution. It is for the courts to decide whether an enactment is constitutional or not and they have the power to declare a parliamentary enactment void if it is inconsistent with a provision of the Constitution. The courts would refuse to give effect to any unconstitutional law.[39] There are procedures laid down in the Constitution through which courts may be invited to scrutinise legislation and ascertain if a constitutional restriction has been transgressed by Parliament in enacting a law.[40]

Contrasting the British Parliament with a legislature like the Indian Parliament, DICEY called the former as "sovereign" and the latter as "subordinate" or non-sovereign.[41] These terms are misleading as they create a false impression that the Indian Parliament is subordinate to some external authority or that India is not yet an independent country. A much better way to characterise the constitutional position of the Indian Parliament is to say that it is "sovereign within its powers".[42] Though its freedom of action is controlled by the Constitution, yet within the sphere and limits allowed to it, its powers are plenary, and it may pass laws of any sort.

Parliament has been assigned a place of importance in the governmental structure of the country. It is the source of all central legislation because legislative power of the Union has been assigned to it. If parliamentary legislation does not infringe any constitutional limit, then the function of the courts is only to interpret and apply the law; courts cannot then go into the policy or wisdom of legislation. The courts cannot declare a statute unconstitutional simply on the ground of unjust or harsh provisions, or because it is supposed to violate natural, social or political rights of citizens unless it can be shown that such injustice is prohibited, or such rights are protected, by the Constitution.

A Court does not declare an Act void because in its opinion it is opposed to the spirit supposed to pervade the Constitution but not so expressed in words. Legislative power is restricted only by the Constitution and not by any promise which the government may have undertaken, Parliament is fully competent to legislate no matter whether it would be contrary to the guarantee given, or any obligation undertaken, by the government.[43]

It is difficult on any general principles to limit the omnipotence of the sovereign legislative power by judicial interposition except in so far as the Constitution gives that authority.[44] It will thus be correct to say that within the permissible limits, the Indian Parliament is as omni-competent as the British Parliament. If no fetter is to be found in the Constitution itself, Parliament is competent to make a law even if it is contrary to the guarantee given, or obligation undertaken, by the government.[45]

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38. Ch. XI, *infra.*
39. Ch. XL, *Infra.*
40. Chs. IV and VIII, *infra.*
41. DICEY, *op. cit.*, 87-137.
42. *See* JENNINGS, *CONSTITUTIONAL LAWS OF THE COMMONWEALTH,* Vol I, 49 (1957).
43. *Umeg Singh v. State of Bombay,* AIR 1955 SC 540 : (1955) 2 SCR 164.
44. MAHAJAN, J., in the *Gopalan* case, AIR 1950 SC 27, 80 : 1950 SCR 88.
45. *Umeg Singh v. State of Bombay*, AIR 1955 SC 540 : (1955) 2 SCR 164; *State of Kerala v. Gwalior Rayon Silk Mfg. Co.,* (1973) 2 SCC 713 : AIR 1973 SC 2734; *also,* IRANI, COURTS AND LEGISLATURES IN INDIA, 14 *Int. and Comp. L.Q.*, 950 (1965).

Article 245(2) specifically provides that no law made by Parliament is to be invalid on the ground of its extra-territorial operation.[46] Nor is there any restriction on its power to amend, delete or obliterate a statute, or to give it prospective or retrospective effect,[47] or even to levy a tax retrospectively,[48] except in so far as it is banned by Fundamental Rights like Arts. 20(1), 14 or 19 (1)(g).[49] A tax law not contravening a constitutional prohibition, such as, Art. 14, cannot be declared invalid merely because it imposes double taxation,[50] or that it is confiscatory or expropriatory in nature, as such a power is "incidental to the power to levy the tax."[51]

If a law is struck down by the courts as being invalid for an infirmity, Parliament can cure the same by passing another law by removing the infirmity in question.[52] A law cannot however overrule a court decision.[53] As is discussed later, the courts have developed certain techniques by which they can by-pass the question of adjudicating the constitutionality of statutes.[54]

A law passed by Parliament can neither be invalidated on the ground of non-application of mind nor that of *mala fides. Mala fides* or ulterior motives attributed to Parliament in making a law within its competence can never make such law unconstitutional. The Supreme Court has observed: "The legislature, as a body, cannot be accused of having passed a law for an extraneous purpose... Even assuming that the executive, in a given case, has an ulterior motive in moving a legislation, that motive cannot render the passing of the law *mala fide.* This kind of 'transferred malice' is unknown in the field of legislation."[55]

While the courts can declare a statute unconstitutional when it transgresses constitutional limits, they do not enquire into the propriety of exercising the legislature power. It is assumed that the legislative discretion has been properly exercised. The courts do not scrutinise the motives of the legislature in passing a

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46. *Infra,* Ch. X.

47. See, *Rashid Ahmed v. State of Uttar Pradesh,* AIR 1979 SC 592 : (1979) 1 SCC 596; *K. Nagaraj v. State of Andhra Pradesh,* AIR 1985 SC 550 : (1985) 1 SCC 523; *Dahiben v. Vasanji Kevalbhai,* (1995) Supp. (2) SCC 295 : AIR 1995 SC 1215; *State of Tamil Nadu v. Arooram Sugar Ltd.,* AIR 1997 SC 1815 : (1997) 1 SCC 326.

48. *India v. Madan Gopal,* AIR 1954 SC 158 : 1954 SCR 541; *Udai Ram Sharma v. Union of India,* AIR 1968 SC 1138.

49. For a discussion on these Articles, *see,* Fundamental Rights, Chs. XXV, XXI and XXIV, *infra.*

50. *Avinder Singh v. State of Punjab,* AIR 1979 SC 321, *Govt. of A.P. v. Hindustan Machine Tools,* AIR 1975 SC 2037.

51. *Sundarajan and Co. v. State of Madras,* AIR 1956 Mad. 298, at 300. But, *see,* under Art. 14, *infra,* Ch. XXI.

52. *Rai Ramkrishna v. State of Bihar,* AIR 1963 SC 1667; *Jaora Sugar Mills v. State of Madhya Pradesh,* AIR 1966 SC 416; *Shri Prithvi Cotton Mills Ltd. v. Broach Borough Municipality,* AIR 1970 SC 192; *Tirath Ram v. State of Uttar Pradesh,* AIR 1973 SC 405 : (1973) 3 SCC 585; *M/s Hindustan Gum & Chemicals Ltd. v. State of Haryana,* AIR 1985 SC 1683 : (1985) 4 SCC 124 : AIR 1992 SC 522. Also see, Ch. XL, *infra.*

53. *In re the Cauvery Water Disputes Tribunal,* 1992 AIR SCW 119 : AIR 1992 SC 522; *infra,* Ch. XIV, Sec. E; *G.C. Kanungo v. State of Orissa,* AIR 1995 SC 1655 : (1995) 5 SCC 96; *S.R. Bhagwat v. State of Mysore,* AIR 1996 SC 188 : (1995) 6 SCC 16.
For further discussion on this point, see, Ch. XL, *infra.*

54. *Infra,* under 'Constitutional Interpretation', Ch. XL.

55. *K. Nagaraj, supra,* footnote 47, at 566. Also, *G.C. Kanungo v. State of Orissa,* AIR 1995 SC 1655 : (1995) 5 SCC 96.
For discussion on the concepts of "non-application of mind" and "*mala fides", see,* JAIN, *A TREATISE OF ADM. LAW,* I, Ch. XIX, 890-928, 959-963; *CASES & MATERIALS ON INDIAN ADMN. LAW,* III, 2306-16; 2068-2135. Also, *infra,* Ch. XL.

statute.[56] The propriety, expediency and necessity of a legislative act are for the determination of the legislative authority concerned and are not for determination by the courts.[57]

COMPARISON WITH AMERICAN CONSTITUTION

In this respect the Indian Parliament corresponds with the American Congress. Each country has a written Constitution which is the fundamental law of the land. Each is a federation and in each Fundamental Rights have been guaranteed to the people. Thus, the American Congress, like the Indian Parliament, cannot enact a law which is against the Bill of Rights or which contravenes the scheme of distribution of powers or other constitutional provisions. The written Constitution is supreme and, therefore, a law made by the Congress, in order to be valid, must be in conformity with its provisions. If it is not so, the courts will intervene and declare the law to be unconstitutional and void. In practice, however, it is only rarely that the courts in India or the U.S.A. would hold a statutory provision to be unconstitutional.

N. DELEGATION OF LEGISLATIVE POWER

This topic falls more appropriately under Administrative Law. Here the topic is discussed in bare outlines.

NECESSITY

In every democratic country, in modern times, relatively only a small part of the total legislative output is enacted by the legislature. A large bulk of legislation is issued as delegated legislation, in the form of rules, regulations or bye-laws. These are made by various administrative authorities under powers conferred on them by the legislature. In such a case, the authority acts as the delegate of, and within the framework of the power conferred by, the Legislature. In India, as elsewhere, the mechanism of delegated legislation is used extensively. Practically, every statute passed by Parliament or a State Legislature confers rule-making power on the government or on some other administrative agency.

Many reasons have contributed to this development. The role of the state has undergone a change over time. The *laissez-faire* state of the 19th century has given place to the welfare state. Vast technological developments have taken place. This has enormously increased the work of government necessitating a mass of legislation. Consequently, legislatures are faced with a great load of work as they have on the anvil many more bills than what they can conveniently dispose of.

To save its time, the legislature concentrates on defining the essential principles and policies in the legislation and leaves the task of enunciation of details to the administration. Besides, many socio-economic schemes undertaken by government are very technical and complicated; the Legislature is hardly competent to work out their details and so the matter has necessarily to be left to the professional administrators.

The mechanism of delegated legislation permits a certain amount of flexibility and elasticity in the area of legislation. It is much easier to make necessary ad-

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56. *Gurudevdatta VKSSS Maryadit v. State of Maharashtra*, AIR 2001 SC at 1986-87 : (2001) 4 SCC 534.

57. *T. Venkata Reddy v. State of Andhra Pradesh*, AIR 1985 SC 724, 731 : (1985) 3 SCC 198.

justments in delegated legislation if circumstances so demand, than to secure an amendment of the statute through the legislature. Moreover, many serious situations arise frequently like labour disputes precipitating strikes and lockouts, internal commotion and external aggression, epidemics and floods. To meet such situations, it becomes necessary to keep the government armed with powers, including those of legislation, so that it may take effective action without loss of time.[58]

LIMITS

An important question to consider in this area is whether under the Indian Constitution, there is any limit on the power of Parliament, or a State Legislature, to delegate its legislative power to the executive. No such question arises in Britain because of the doctrine of 'Sovereignty of Parliament.'[59] As the British Parliament can pass any legislation it thinks necessary and proper, it can delegate any amount of its law-making power. The position in the U.S.A. is different. The Congress functions under a written Constitution and so its powers are not uncontrolled. Also, the doctrine of Separation of Powers which operates there stands in the way of a mix up of legislative and executive powers.[60] But realities of the situation have asserted themselves and delegated legislation has come into vogue. The American courts have evolved the principle that the Congress can delegate legislative powers to the executive subject to the stipulation that it lays down the policies and establishes standards while leaving to the administrative authorities the making of subordinate rules within the prescribed limits.

The operation of this principle may be illustrated by reference to two cases, one, in which delegation was held bad and the other where it was held good. In *Panama Refining Co. v. Ryan*,[61] the Supreme Court held the delegation invalid because "the Congress has declared no policy, has established no standards, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited." In *Yakus v. U.S.*,[62] on the other hand, the Supreme Court held the delegation valid because the Congress had prescribed sufficiently definite standards to guide the discretion of the delegate. The pivot around which the whole delegation problem hinges in the U.S.A. is whether the 'legislative standard' is to be found in the delegating statute. In practice, however, it does not amount to much of a restriction on the Congress for, many a time, courts have held even 'vague' and 'general' standards to be sufficient to uphold delegations. A practical utility of the rule, however, is that courts have the last word and can declare the delegation excessive or unwarranted if they *feel* it to be so in a statute. In Britain, the last word rests with Parliament and not with the courts.

In India, on the question of delegation of its legislative power by a legislature to the executive, the position is very much similar to that in the U.S. A. The prevailing

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58. WADE PHILLIPS, *op. cit.*, 29, 605-612; *REPORT OF THE COMMITTEE ON MINISTERS' POWERS*, (1931); H.W.R. WADE, *ADMINISTRATIVE LAW*, 847-893 (1988). JAIN & JAIN, *PRINCIPLES OF ADMINISTRATIVE LAW*, 25-101 (1979); JAIN, *A TREATISE ON ADM. LAW*, I, Ch. IV (1996); JAIN, *INDIAN ADM. LAW-CASES & MATERIALS, I*, Ch. III (1994). This book is cited herein after as *CASES I*.
59. *Supra*, Sec. M.
60. *Infra*, Ch. III, Sec. E.
61. 293 US 388, *CASES*, I, 30.
62. 321 US 414; *CASES*, I, 35.

principle is that essential powers of legislation, namely, the function of laying down legislative policy in respect of a measure and its formulation as a rule of conduct, cannot be delegated. The legislature must declare the policy of the law and the legal principles which are to control any given cases and must provide a standard to guide the officials or the body in power to execute the law.[63]

The application of this principle to concrete fact situations can be illustrated with reference to some cases on both sides. In *Raj Narain v. Chairman, Patna Administration Committee*,[64] was involved Section 3(1)(*f*) of the Patna Administration Act which authorised the Bihar Government to "extend to Patna, provisions of any section of" Bihar and Orissa Municipal Act, 1922, "subject to such restrictions and modifications" as the government might think fit. The government picked out the section relating to the assessment of taxes from the Act and applied it to Patna in a modified form. The Supreme Court held Section 3(1)(*f*) valid subject to the stipulation that when a Section of an Act was selected for application, whether it was modified or not, it must be done so as not to effect any change of policy in the Act regarded as a whole. The notification in question was held invalid as it effected a radical change in the policy of the Act which was that no municipality competent to tax could be thrust upon a locality without giving its inhabitants a chance of being heard and objecting to it. This policy, the Court held, could not be changed by the delegated authority.[65]

In *Devi Das Gopal Krishan v. State of Punjab*,[66] a provision enabling the government to lavy sales tax at such rates as it deemed fit was held bad, but another provision enabling government to levy sales tax at rate not exceeding 2% was held valid.

The Minimum Wages Act has been enacted with a view to provide for fixing minimum wages in employments mentioned in a schedule annexed to the Act. Section 27 authorises the State Government to add to this schedule any other employment in respect of which the government thinks that the minimum wages should be fixed. The provision contains no principle on which the government is to select the industries for applying the Act. Yet, the Supreme Court held Section 27 valid in *Edward Mills v. Ajmer*[67] saying that the legislative policy was apparent on the face of the enactment, which was fixation of minimum wages with a view to obviate the chance of exploitation of labour in such industries where by reason of unorganised labour, or want of proper arrangements for effective regulation of wages, or for other causes, the wages of the labourers were very low. It is interesting to note that the test for selecting industries to be included in the schedule, which the Court propounded, was nowhere mentioned in the Act but was formulated by the Court itself to uphold the Act.[68]

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63. In re *Delhi Laws Act* case, AIR 1951 SC 332 : 1951 SCR 747 ; *Cases*, I, 39; *Gwalior Rayon Mills v. Asstt. Commr. of Sales Tax*, AIR 1974 SC 1660 : (1974) 4 SCC 98; Jain, *Cases*, I, 48.

64. AIR 1954 SC 569; *Cases*, I, 101.

65. Also see, *Lachmi Narain v. Union of India*, AIR 1976 SC 714 : (1976) 2 SCC 953; *Ramesh Birch v. Union of India*, AIR 1990 SC 560 : 1989 Supp (1) SCC 430.

66. AIR 1967 SC 1895 : (1967) 3 SCR 557; *Cases*, 95; *Also, V. Nagappa v. Iron Ore Mines Cess Commr.*, AIR 1973 SC 1374 : (1973) 2 SCC 1.

67. AIR 1955 SC 25, 32 : (1955) 1 SCR 735; *Cases*, I, 106.

68. The same principle has been applied in *Mohmed Ali v. Union of India*, AIR 1964 SC 980; *Cases*, I, 117; *Jalan Trading Co. v. Mill Mazdoor Union*, (1966) Labour L.J., 546; *Cases*, I, 118.

In *Bhatnagars & Co. v. Union of India*,[69] Section 3(1)(*a*) of the Imports and Exports (Control) Act, 1947, which authorises the Central Government to prohibit or restrict the import or export of goods of any specified description, was held valid. Curiously, however, the Supreme Court found the policy not in the Act itself but in its predecessor which was no longer operative. The Act states no policy, but it is an extremely important piece of legislation by which the whole of India's foreign trade is regulated. In its anxiety, therefore, to uphold the Act, the Court took recourse to the fiction of finding the policy in the repealed Act. Through this process, though the Act was saved, yet the efficacy of the principle requiring a delegating statute to contain a policy was very much diluted.

In *Banarsi Das v. State of Madhya Pradesh*,[70] a provision enabling the government to levy a tax on those items which the Act had exempted was held valid. It was argued against the provision that it was a matter of policy as to what goods should be taxed or exempted from taxation which the legislature alone could decide and not leave it to a delegate. The Court, however, stated that it was not unconstitutional for the legislature to leave it to the executive to determine details relating to the working of taxation laws, such as the selection of persons on whom the tax is to be levied, the rates at which it is to be charged in respect of different classes of goods and the like.

As regards delegation of legislative power on municipal bodies, the courts take a very liberal view. Broad delegations of powers to them have been upheld, the ground being that they are representative bodies. For instance, in *G.B. Modi v. Ahmedabad Municipality*,[71] the Supreme Court has upheld a provision conferring power on municipal corporations to levy tax on lands and buildings even though no maximum rate at which the corporation could tax was fixed. In welfare legislation, too, the courts favour a wider delegation of legislative power.[72]

Some statutes which directly established bodies corporate e.g. Major Port Trusts Act, 1963 confers power on the Central Government to issue binding directions to the Board of Trustees. It has been held that such a power does not extend to amend the regulations made by Port Authorities when statute itself confers powers on the Port authorities to make regulation relating to specified matters. The rule making power of the Central Government under Section 111 is to be exercised by the Central Government only in regard to the administration of the Port Trusts and such power must be construed strictly.[73]

CONCLUSION ON DELEGATION

It is no use multiplying cases on delegation of legislative power, as the topic is discussed more extensively and elaborately in the area of Administrative Law.[74] It is sufficient to state here that delegated legislation has come to stay. It is rec-

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69. AIR 1957 SC 478 : 1957 SCR 701; *CASES*, I, 59.
70. AIR 1958 SC 909 : 1959 SCR 427; *CASES*, I, 70.
71. AIR 1971 SC 2100. *Also see*, *Avinder Singh v. State of Punjab*, AIR 1979 SC 321; *Corporation of Calcutta v. Liberty Cinema*, AIR 1965 SC 1107; *CASES*, I, 124; *Municipal Corporation of Delhi v. Birla Cotton Spinning and Weaving Mills*, AIR 1968 SC 1232 : (1968) 3 SCR 251; *CASES*, I, 132.
72. *Registrar, Co-op. Societies v. K. Kunjabmu*, AIR 1980 SC 350, 352 : (1980) 1 SCC 340; *CASES*, I, 77.
73. *A. Manoharan v. Union of India*, (2008) 3 SCC 641 : (2008) 2 SCALE 616.
74. See JAIN & JAIN, *op. cit.*, 29-55. Also, JAIN, *A TREATISE ON ADM. LAW*, Ch. IV; JAIN, *INDIAN ADM. LAW, CASES & MATERIALS*, Ch. III (1994).

ognised on all hands that the modern complex socio-economic problems cannot be met adequately without resorting to delegated legislation. The courts invariably reiterate the principle that the power delegated should not be unguided and uncontrolled and that the Legislature must lay down legislative policy and principles subject to which the delegate is to exercise its power.[75]

But it is only rarely that a statutory provision is declared invalid on the ground of excessive delegation,[76] and the judicial insistence on policy is more symbolic than real or effective. Usually, the courts lean in favour of the validity of the delegating legislation, and have upheld very broad delegations. Instead of looking at the legislation with a critical eye to find out the 'policy', the courts have adopted a liberal attitude and have at times themselves supplied or articulated the policy if one is not discernible on the face of the statute.[77] Even broad delegations of taxing power have been upheld.[78] For long, in democratic countries, taxation has been regarded a close preserve of the legislature, but by conceding broad delegations even in this area legislative responsibility has been eroded to some extent.

While it is inevitable that legislatures be allowed to delegate legislative powers on the executive,[79] and that is perhaps the only way in which modern complex socio-economic problems can be tackled successfully, yet the important consideration should not be lost sight of that if the delegate is given too broad power, he may use it in a way not contemplated by the legislature. The reason behind the judical insistence that the Legislature should state the policy while delegating legislative power is the anxiety that the delegate be kept within limits, that the delegate should function only to further the policy of the legislature and not supplant or modify it himself which will amount to usurping the function of the legislature. To effectuate this idea, it is necessary that, as far as possible, the legislature states the policy in clear and articulate terms so that it may be easy for the courts to ascertain whether the delegate is acting within, or exceeding, the scope of authority conferred on him. If the legislature uses very wide language to delegate power then it becomes difficult to control the delegate.

CONTROL OF DELEGATED LEGISLATION

The practice of the Legislature delegating to the Executive power to make rules or regulations, though inevitable in a modern state, nevertheless, is open to a few serious objections. It entails, to some extent, an abandonment of its legislative function by the Legislature. The so-called details which are left to executive determination are often matters of principle. Many a time, the legislature delegates powers without mentioning clearly the standards subject to which those

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75. *See, Gwalior Rayon, supra*, note 88; See also *Consumer Action Group v. Tamil Nadu,* (2000) 7 SCC 425, 438 : AIR 2000 SC 3060.
Also see, *The Quarry Owners Association v. State of Bihar,* AIR 2000 SC 2870 : (2000) 8 SCC 655.

76. *Harakchand v. Union of India,* AIR 1970 SC 1453 : (1969) 2 SCC 166, is one example of a delegation being held excessive; and so invalid, *Cases,* I, 97.

77. *Bhatnagars, supra,* note 69.

78. *See, N.C.J. Mills Co. v. Asstt. Collector, Central Excise*, AIR 1971 SC 454.

79. The Supreme Court has reiterated the inevitable need of delegated legislation in *Tata Iron & Steel Co. v. Workmen,* AIR 1972 SC 1917 : (1972) 2 SCC 383.

powers are to be exercised; sometimes standards mentioned are extremely vague and, thus, for all practical purposes, executive assumes uncontrolled and unguided power. In practice, the Legislature is not in a position to supervise effectively the use of delegated powers by the delegate. Sometimes, delegation is indulged in such broad and general terms that the courts become helpless to afford any relief against harsh or unreasonable executive action.

The system of delegated legislation adds considerably to the powers of the executive and correspondingly weakens the status of the legislature. Lastly, promulgation of rules by the executive lacks that publicity, discussion and consideration which usually accompany the passage of legislation through the legislature in a democratic country, and thus is lost that safeguard of liberty which depends upon the law-making power being exercised by the elected representatives of the people who will be affected by the laws that are made. Self-government is endangered when the representatives of the public do not effectively control the making of the laws which the people must obey. The basic problem in the area of delegated legislation therefore is that of controlling the delegate in exercising its legislative powers.

The most effective method to control delegated legislation is through the doctrine of *ultra vires* which means that a court can declare delegated legislation *ultra vires* if it falls outside the limits of the power to make delegated legislation which may have been conferred on the delegate. Delegated legislation is thus subject to judicial control.[80]

Another method of exercising this control is through the delegating legislature itself and for this purpose legislatures have established committees on subordinate legislation. Each House of Parliament has such a committee.[81] This is in recognition of the fact that as the legislature delegates power on the Administration, it is for it to ensure that the power is exercised properly. But this matter falls more appropriately within the area of Administrative Law rather than under the Constitutional Law.[82]

80. *Kunj Behari Lal v. State of Himachal Pradesh*, AIR 2000 SC 1069 : (2000) 3 SCC 40.
For detailed discussion on the doctrine of *ultra vires*, see, JAIN, *TREATISE, I, infra,* footnote 82, Ch. V, 93-135; Jain, *Cases*, I, Ch. IV.

81. For details see, JAIN and JAIN, *op. cit.*, 69-79; M P. JAIN, PARLIAMENTARY CONTROL OF DELEGATED LEGISLATION, 1964 *Public Law*, 33, 152.
Also see : *The Quarry Owners Ass. v. State of Bihar*, AIR 2000 SC 2870 : (2000) 8 SCC 655.

82. *See*, M.P. JAIN, *EVOLVING INDIAN ADMINISTRATIVE LAW*, 8-43 (1983); JAIN, *A TREATISE OF ADMINISTRATIVE LAW*, I, Ch. VI, 142-150; JAIN, *CASES & MATERIALS ON INDIAN ADMINISTRATIVE LAW*, Ch. IV.

CHAPTER III

CENTRAL EXECUTIVE

SYNOPSIS

Articles 52 to 78 of the Constitution deal with the Central Executive.

The Central Executive consists of the President and the Council of Ministers headed by the Prime Minister. It is of the parliamentary type in so far as the Council of Ministers is responsible to the Lok Sabha.

The President is the head of the State and the Formal Executive. All Executive action at the Centre is expressed to be taken in his name. According to Art. 53(1) : "The executive power of the Union shall be vested in the President and shall be exercised by him directly or through officers subordinate to him in accordance with this Constitution".[1]

The Constitution formally vests many functions in the President but he has no function to discharge in his discretion, or in his individual judgment. He acts on ministerial advice and, therefore, the Prime Minister and the Council of Ministers constitute the real and effective executive.

The structure of the Central Executive closely resembles the British model which functions on the basis of unwritten conventions. In India, however, some of these conventions have been written in the Constitution[2], *e.g.*, provisions regarding appointment, tenure and collective responsibility of the Ministers. But some matters are left to conventions, as for example, the Cabinet, and the concept of Minister's responsibility for the acts of his subordinates.

A. ADMISSION TO THE EXECUTIVE ORGANS

(i) PRESIDENT

(a) ELECTION

In the Preamble to the Constitution,[3] India is declared to be a "Sovereign Socialist Secular Democratic Republic". Being a republic, there can be no hereditary monarch as the head of State in India, hence the institution of the President.

The President is elected not directly by the people, but by the method of indirect election. The constitution-makers were faced with the question whether the President should be elected directly by the people or not. Ultimately, they chose the indirect elective procedure so as to emphasize the ministerial character of the executive that the effective power resides in the Ministry and not in the President as such.

It would have been anomalous to have the President elected by adult suffrage directly by the people and not to give him any real and substantive power. Also

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1. For comments on Art. 53, see, *infra*, Sec. B.
2. On conventions, see, Ch. I.
Reference to conventions has been made at several places in this Chapter.
Also see, Ch. XL, *infra.*
3. *Supra*, Ch. I.
Also see, Ch. XXXIV, *infra.*

the method of direct election would have been very costly and energy consuming. There was also the fear that a directly elected President may emerge, in course of time, as a centre of power in his own right. Therefore, the framers of the Constitution thought that it would be adequate to have the President elected indirectly. On the other hand, the framers of the Constitution did not want the President to be elected merely by Parliament alone as that would have been a very narrow basis, and Parliament being dominated by one political party would have invariably chosen a candidate from that party.[4] In that case, the President would not have commanded national consensus by an electoral college, consisting of the elected members of both Houses of Parliament and of the State Legislative Assemblies [Art. 54],[5] in accordance with the system of proportional representation by means of single transferable vote by secret ballot [Art. 55(3)].[6] The votes cast by all members of the electoral college are not of uniform value. Votes are apportioned amongst them according to the following two principles:

(1) As far as practicable, there is uniformity in the scale of representation of the different States at the presidential election [Art. 55(1)]. To achieve this result, a member of the electoral college from a State Legislative Assembly has as many votes as are obtained by the following formula [Art. 55(2)(*a*)]:

$$\frac{\text{State Population}}{\text{Total Number of elected members in the State Legislative Assembly}} \times \frac{1}{1{,}000}$$

This formula secures to a member of a State Legislative Assembly votes in the ratio of the population of the State and, thus, a smaller State having a relatively larger Legislature cannot swamp the votes of a larger State,[7] having comparatively a smaller legislature.

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4. IV *CAD*, 713, 733-736.
Also see, AUSTIN, *The Indian Constitution*, 121 (1966).

5. Originally, the elected members of the Legislative Assemblies of Union Territories were not included in the electoral college to elect the President. In *S.K. Singh v. V.V. Giri*, AIR 1970 SC 2097, the Supreme Court had ruled that the term 'State' in Art. 54 did not include Union Territories.
After the above pronouncement, the Constitution (Seventieth Amendment) Act, 1992, added an explanation to Art. 54 saying that the term "State" in Arts. 54 and 55 includes the National Capital Territory of Delhi and the Union Territory of Pondicherry. Thus, the elected members of the Legislative Assemblies of Delhi and Pondicherry now have become part of the electoral college.
For explanation of the term "Union Territories", see, *infra*, Chs. V and IX.
For the Constitution Amendment, see, Ch. XLII, *infra*.

6. The system of proportional representation ensures that the successful candidate is returned by an absolute majority of votes. If there are more candidates than two, it may be that by the simple majority rule, the person getting less than 51 per cent of votes cast, in the election may be declared elected; whereas, on the principle of proportional representation by the system of transferring votes, a candidate is finally declared elected by an absolute majority: IV *CAD* 880.
For a comment on the system of electing the President, see, BALKRISHNA, *Election of the President of India*, VII, *Jl* of *Constitutional and Parliamentary Studies*, (*JCPS*), 33 (1973).

7. Up to the year 2026, the figures of the State Population ascertained in the 1971 census will be taken for this purpose. Thus, increase in State population after 1971 is not going to increase its votes at the election of the President. See, S. 2 of the Constitution (Eighty-Fourth Amendment) Act, 2001.
If after taking the multiples of 1000, the remainder is not less than 500, then the vote of each member is increased by one [Art. 55(2)(*b*)].

(2) There is a parity of votes between the elected members of the Houses of Parliament, and of the State Legislative Assemblies, so that the former command the same number of votes in the electoral college as the latter. This result is achieved by the following formula which gives the number of votes available to a member of Parliament in the electoral college [Art. 552)(*c*)]:[8]

$$\frac{\text{Total number of votes assigned to the members of the State Legislative Assemblies in the Electoral College}}{\text{Total number of elected members of the two Houses of Parliament}}$$

In its advisory opinion in *In re, Presidential Poll*,[9] the Supreme Court has ruled that the election of the President can be held when a State Assembly has been dissolved under Art. 356 and its members are unable to participate in the election.[10]

Article 71(4) protects President's election from being challenged on the ground of the existence of any vacancy for whatever reason among the members of the electoral college electing him. The language of this provision is wide enough to cover vacancies arising in the electoral college because a State Assembly is dissolved.

(b) DISPUTES CONCERNING PRESIDENTIAL ELECTION

All doubts and disputes arising in connection with the election of the President are to be decided by the Supreme Court whose decision is final [Art. 71(1)].

The Supreme Court has held that it would not entertain any petition challenging the Presidential election before the completion of the election process and declaration of the result.[11] The reason for this stand is that if a doubt or dispute arising in connection with the election of a President is brought before the Court before the whole election process is concluded, then conceivably, "the entire election may be held up till after the expiry of five years' term which will involve a non-compliance with the mandatory provisions of Art. 62."[12]

Under Section 14 of the Presidential and Vice-Presidential Elections Act, an election can be called into question either by a candidate at such election or by 10 or more electors. The Supreme Court has therefore held that a person who is neither a candidate nor an elector could not file a petition to challenge the Presidential election.[13]

If the election of a person as President is declared void by the Supreme Court, acts done by him in exercise and performance of the powers and duties of that office before the Court's decision are not invalidated [Art. 71(2)].

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8. A fraction exceeding one-half is counted as one and a fraction less than one-half is to be disregarded [Art. 55(2)(*c*)].

9. AIR 1974 SC 1682 : (1974) 2 SCC 33. For advisory opinion of the Supreme Court, see, *infra*, Ch. IV, Sec. F.

10. For Art. 356, see, *infra*, Ch. XIII.

11. *N.B. Khare v. Election Commission*, AIR 1957 SC 694 : 1957 SCR 1081.

12. For Art. 62, see, *infra*, pp. 173, 174.

13. *N.B. Khare v. Election Commission*, AIR 1958 SC 139 : 1958 SCR 648.
For other challenges to the election of the President see, *Babu Rao Patel v. Zakir Hussain*, AIR 1968 SC 904 : (1968) 2 SCR 133; *S.K. Singh v. V.V. Giri*, AIR 1970 SC 2097 : (1970) 2 SCC 567.

(c) THE PRESIDENTIAL AND VICE PRESIDENTIAL ELECTIONS ACT, 1952

Subject to the provisions of the Constitution, Parliament is empowered to enact legislation to regulate any matter connected with the election of the President [Art. 71(3)]. Accordingly, Parliament has enacted the Presidential and Vice-Presidential Elections Act, 1952 to carry out the purposes of Art. 71(1).

The Act lays down that a candidate can be nominated when at least 10 voters propose him and ten voters second him and he deposits a sum of Rs. 2500. These provisions have been held to be not inconsistent with Art. 58 which deals only with qualifications for the eligibility of a candidate. Art. 58 has nothing to do with nomination of a candidate.[14] These provisions are completely covered by Art. 71(1).[15]

A petitioner must come within the four corners of the Act to have *locus standi* to challenge the Presidential election and to be able to maintain the petition.[16]

(d) QUALIFICATIONS FOR PRESIDENTIAL CANDIDATE

A candidate for the President's office should be a citizen of India, of at least thirty five years of age, and qualified to be elected as a member of the Lok Sabha [Art. 58(1)].

Further, he should not be holding any office of profit under the Central or State Government, or under any local or other authority subject to the control of any of these governments. The President or Vice-President of India, or the Governor of a State, or a Minister in the Central or State Government, is not disqualified to stand for the office of the President on the ground that he holds an office of profit [Art. 58(2)].

This restriction is broader than that under Art. 102,[17] as it even disqualifies the holder of an office of profit under a local or other authority which may be subject to governmental control from contesting for the President's office. In the case of Parliament, the disqualification extends only to the holding of an office of profit under the Central or State Government,[18] and not to the holding of office of profit under local or other authority.

A person who is or has been the President is eligible for re-election to that office if he fulfils the necessary conditions for this purpose as mentioned above [Art. 57].

(e) WHEN TO HOLD PRESIDENTIAL ELECTION

Election to the President's office must be held before the expiry of the tenure of the President in office [Art. 62(1)].

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14. For Art. 58, see below.
15. See above for Art. 71(1).
16. *Charan Lal Sahu v. N. Sanjeeva Reddy,* AIR 1978 SC 499 : (1978) 2 SCC 500.
Also see, *Charan Lal Sahu v. Fakruddin Ali Ahmed,* AIR 1975 SC 1288 : (1975) 4 SCC 832. *Charan Lal Sahu v. Giani Zail Singh:* (1984) 1 SCC 390: *Charan Lal Sahu v. K.R.Narayanan,* (1998) 1 SCC 56; AIR 1998 SC 1506*; Charan Lal Sahu v. A.P.J. Abdul Kalam,* (2003) 1 SCC 609 : AIR 2003 SC 548.
17. *Supra,* Ch. II.
18. *Abdul Shakur v. Rikhab Chand,* AIR 1958 SC 52 : 1958 SCR 387; *Gurushanthappa v. Abdul,* AIR 1969 SC 744; see *supra,* Ch. II., Sec. D(a).

If the office falls vacant by death, resignation or removal or otherwise, then election to fill the vacancy should be held within six months from the date of the occurring of the vacancy. The person so elected as the President is entitled to remain in office for the full term of five years from the date he assumes charge of his office [Art. 62(2)].

(f) OTHER CONDITIONS OF THE PRESIDENT'S OFFICE

Before entering upon his office, the President has to subscribe to an oath or affirmation in the prescribed form in the presence of the Chief Justice of India, or in his absence, of the senior-most Judge of the Supreme Court available at the time [Art. 60].

The President cannot hold any other office of profit [Art. 59(2)]. He cannot be a member of a House of Parliament or a State Legislature and if a member at the time of election, he automatically vacates his seat as soon as he assumes charge of the President's office [Art. 59(1)].

The President is entitled to the free use of his official residence and also to such emoluments, allowances and privileges as Parliament may determine by law [Art. 59(3)].[19]

The allowances and emoluments of the President cannot be diminished during his term of office [Art. 59(4)].

(g) TENURE

The normal tenure of the President is five years from the date on which he enters upon his office [Art. 56(1)], but he continues to hold office even thereafter till his successor enters upon his office [Art. 56(1)(*c*)].

The President may resign his office before the expiry of his normal tenure of five years by writing to the Vice-President [Art. 56(1)(*a*)]. The Vice-President has to communicate the President's resignation to the Speaker of the Lok Sabha [Art. 56(2)].

(h) IMPEACHMENT OF THE PRESIDENT

The President may be removed from his office, before the expiry of his term, for "violation of the Constitution" by the process of impeachment [Art. 56(1)(*b*); Art. 61(1)]. The procedure for impeachment is as follows.

For impeachment, the charge against him may be preferred by either House of Parliament [Art. 61(1)].

The proposal to prefer the charge is to be put in the form of a resolution of the House. Such a resolution can be moved only after giving at least fourteen days' written notice signed by not less than one-fourth of the total number of members of the House [Art. 61(2)(*a*)]. The resolution must be passed by a majority of not less than two-thirds of the total membership of the House [Art. 61(2)(*b*)].

When one House thus prefers a charge, it becomes incumbent on the other House to investigate the same. Investigation may be made either by the House

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19. Until so prescribed, he will get the emoluments etc. as laid down in the Second Schedule to the Constitution. Parliament has enacted the President's Emoluments and Pension Act, 1951.

itself or by some other agency as the House may direct. The President has the right to appear and be represented at such investigation [Art. 61(3)].

If after investigation, the House passes a resolution by a majority of not less than 2/3 of its total membership declaring that the charge preferred against the President has been sustained, it would have the effect of removing the President from his office from the date on which the resolution is so passed [Art. 61(4)].

There is however only a remote possibility of this provision being invoked because the President acts on the advice of his Ministers who are responsible to Parliament.[20] So long as he acts in this manner, the majority in Parliament need not invoke the provision regarding impeachment as it can easily remove the Council of Ministers. Nevertheless, the provision is salutary. Being otherwise immune from parliamentary and judicial control—he has a fixed term of office; his emoluments cannot be curtailed or diminished by Parliament during his term; he has immunity from judicial process[21] and the courts are barred from probing into the relationship between the President and the Council of Ministers [Art. 74(2)],[22] the fear that he may be impeached will keep the President within the framework of the Constitution and he will not dare to violate it.

The power to impeach might possibly be invoked in the event of the President acting independently of, or contrary to, ministerial advice, or for "treason, bribery or other high crimes or misdemeanours."[23] Impeachment is a political instrument; what constitutes 'violation of the Constitution' is a matter to be decided by the House which tries the charge and the House is essentially a political organ. There is no difficulty in the House interpreting the phrase 'violation of the Constitution' in a wider sense and regard a violation of the conventions, usages and spirit of the Constitution as violation of the Constitution. When forms are maintained and the spirit is sapped away the Constitution is violated.[24]

The idea of impeachment seems to have been borrowed from the U.S. Constitution.[25] According to Art. II, section 4 of the U.S. Constitution, the President can be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanours. According to Art. I, section 3, all impeachments are tried solely by the Senate and when the President is being impeached, the Chief Justice of the Supreme Court is to preside. To convict the President, concurrence of two-thirds of the members present is needed.[26]

Though the idea of impeachment has been borrowed from the U.S.A., it has been given an entirely new orientation in India, as will be clear from the following features:

(1) The President in India can be impeached only for violation of the Constitution and not for any criminal offence.

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20. See, *infra*, Sec. B(a), on this point.
21. *See below under Presidential Privileges :* Art. 361.
22. See, *infra*, Sec. B(a).
23. See, *infra*, under "*President—A Titular Head*", Sec. B(a).
24. Also see *infra*, Ch. XIII; B.C. DAS, *Impeachment of India's President: A Study of the Procedure*, V *JCPS* 245 (1971).
25. See, *infra*, Sec. F.
26. In the U.S.A., the process of impeachment of the President (Andrew Johnson) was invoked in 1868 but it failed by one vote in the Senate. The procedure has been put into motion again recently to impeach President Clinton, but, ultimately, it failed because of lack of 2/3 votes in the Senate to convict the President.

(2) In India, impeachment can be tried by either of the two Houses of Parliament, and not necessarily by the Upper House [Rajya Sabha].

(3) There is no provision for the Chief Justice of India to preside at such sittings of the House when the charge against the President is being investigated.

(4) For conviction, in the U.S.A., votes of 2/3 of the members of the Senate present are needed, whereas, in India, votes of at least 2/3 of the total membership of the House is required. Therefore, in India, conviction on impeachment is more difficult.

(i) PRESIDENTIAL PRIVILEGES

The office of the President is very august and the Constitution attaches to it many privileges and immunities. He is not answerable to any court for the exercise and performance of the powers and duties of his office, or for "any act done or purporting to be done by him" in the exercise and performance of those powers and duties [Art. 361(1)].

The ambit of this immunity is very extensive. No court can compel the President to exercise or not to exercise any power, or to perform or not to perform any duty, nor can a court issue any writ in respect of the President's official acts or omissions. He is not amenable to any mandate, writ or direction from any court. No court can compel him to show cause or defend his action. In the case of official acts, an absolute immunity from the process of the court is given to the President.

The immunity extends to acts or omissions which may be incidental to, as well as to any act 'purporting to be done' by the President in, the exercise and performance of the powers and duties of his office. The words "purporting to be done" are of very wide scope. Even though the act is outside, or in contravention of, the Constitution, the President is protected so long as the act is professed to be done in pursuance of the Constitution.[27]

The immunity is, however, personal to the President. It does not place the action as such beyond court scrutiny in suitable actions or proceedings. Appropriate proceedings can be brought against Government of India [Proviso to Art. 361(1)]; only the President personally is not amenable to a court-process with reference to the act in question. It is axiomatic that lack of *bona fides* unravels every transaction yet when a question arises whether in a given situation the President has acted rightly or wrongly it may be decided only against the Government of India without questioning the President's conduct.[28]

When any official act of the President is challenged on the ground of *mala fides*, the immunity under Art. 361 extends to him and he cannot be called upon personally to defend himself against such an allegation. Nevertheless, the validity of the act can be questioned and the Government has to defend it.

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27. *Biman C. Bose v. H.C. Mookerjee,* 56 CWN 651.
Also see, *Satwant v. State of Punjab,* AIR 1960 SC 266; *Dhananjoy v. Mohan,* AIR 1960 SC 745; *Prabhakar v. Shankar,* AIR 1969 SC 686 (688) : (1969) 2 SCR 1013.

28. *Rao Birinder Singh v. Union of India,* AIR 1968 Punj, 441; *Madhav Rao Scindia v. Union of India,* AIR 1971 SC 530 : (1971) 1 SCC 530: *Bijayanand v. President of Union of India,* AIR 1974 Ori. 52; *K.A. Mathialagam v. The Governor,* AIR 1973 Mad. 198.
Also see *infra,* Ch. XIII.

Government orders are issued in the name of the President as Art. 77(1) requires[29] all executive actions of the Central Government to be expressed in the name of the President. But such an order does not become an order passed by the President *personally*. It remains basically and essentially an order of the Minister on whose advice the "President" acted and passed the order. That being so, the order carries with it no immunity granted to the President under Art. 361. The Supreme Court has observed on this point.[30]

> "Being essentially an order of the Government of India, passed in exercise of its executive functions, it would be amenable to judicial scrutiny and, therefore, can constitute a valid basis for exercise of power of judicial review by this court. The authenticity, validity and correctness of such an order can be examined by this court in spite of the order having been expressed in the name of the President. The immunity available to the President under Art. 361 of the Constitution cannot be extended to the orders passed in the name of the President under Art. 77(1) or 77(2) of the Constitution."

Further, it is now a very well settled proposition that if the President appoints a disqualified person to a constitutional office, the discretion of the President to do so cannot be questioned because of Art. 361. But that would confer *no* immunity on the appointee himself. His qualification to hold the office can be challenged in *quo warranto* proceedings.[31] If the appointment is contrary to constitutional provisions, it can be quashed.[32]

A House of Parliament is not debarred from calling into question any act of the President in impeachment proceedings and for this purpose the House may appoint any court, tribunal or other body to investigate into a charge against the President [Proviso to Art. 361(1)].

No criminal proceeding whatsoever can be instituted against the President in [Art. 361(2)], and no process for the arrest or imprisonment of the President can issue from, any court during his term of office [Art. 361(3)]. Thus, no criminal proceedings can be taken against the President even for acts done in his personal capacity.

No civil proceedings claiming relief against the President in respect of any act done or purporting to be done by him in his personal capacity can be instituted during his term of office until a two months' notice in writing has been served on him stating the nature of the proceedings, the cause of action, the name, description and residence of the party taking legal proceedings and the relief claimed [Art. 361(4)].

In civil cases, a distinction is drawn between the President's official or personal acts. In respect of his official acts, an absolute bar has been created against a court action; in respect of his personal acts, there is only a partial bar in so far as a two months' notice needs to be given to him prior to the institution of civil proceedings.

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29. See, *infra*, Sec. B(a), for this Article.

30. *Common Cause, A Registered Society v. Union of India*, AIR 1999 SC 2979 at 2991 : (1999) 6 SCC 667.

31. For a writ of *quo warranto*, see, Ch. VIII, *infra*.

32. See, *Kumar Padma Prasad v. Union of India*, *infra*, Chs. IV and VIII, under "Appointment of Judges".

Also, *B.R. Kapur v. State of Tamil Nadu*, JT 2001 (8) SC 40 : (2001) 7 SCC 231 : AIR 2001 SC 3435; *infra*, Ch. VII.

(ii) VICE-PRESIDENT

There is a Vice-President of India [Art. 63]. He is the *ex-officio* chairman of the *Rajya Sabha* [Art. 64]. In case the office of the President falls vacant due to death, resignation, removal or otherwise, the Vice-President acts as the President till the new President-elect enters upon his office [Art. 65(1)]. The Vice-President also discharges the functions of the President when he is unable to act owing to illness, absence or any other cause until the President is able to resume his duties [Art. 65(2)].

When the Vice-President acts as, or discharges the functions of, the President, he enjoys all powers and immunities enjoyed by the President. He is entitled to such emoluments, allowances and privileges as may be determined by Parliament by law. Until such a law is made, he receives such emoluments, allowances and privileges as are specified in the Second Schedule to the Constitution. [Art. 65(3)].

While acting as the President, the Vie-President ceases to act as the Chairman of the *Rajya Sabha* and he is not entitled to any salary or allowance payable to him in that capacity [Proviso to Art. 64].

Parliament is empowered to make such provisions as it thinks fit for the discharge of the President's functions in any other contingency not mentioned above [Art. 70]. In pursuance of this provision, Parliament has enacted the President (Discharge of Functions) Act, 1969. It provides that when vacancies occur in the offices of both the President and the Vice-President, the Chief Justice of India or, in his absence, the senior-most Judge of the Supreme Court available, is to discharge the President's functions until a new President or Vice-President enters upon his office.

(a) HOW ELECTED?

The Vice-President of India is elected by the members of an electoral college consisting of the members of both Houses of Parliament assembled in a joint meeting in accordance with the system of proportional representation by means of single transferable vote by secret ballot [Art. 66(1)].

The functions of the President extend both to the Central and the State spheres and, therefore, State representatives participate in his election along with the members of Parliament. The normal function of the Vice-President, on the other hand, is to preside over the Rajya Sabha. Only rarely, and that, too, only temporarily he may officiate as the President. That being so, it was not thought necessary by the framers of the Constitution to invite members of the State Legislative Assemblies to participate in the Vice-Presidential election.[33]

Subject to the provisions of the Constitution, Parliament is empowered to enact legislation to regulate any matter relating to the election of the Vice-President [Art. 71(3)].

All doubts and disputes arising out of, or in connection with, the election of the Vice-President are to be decided by the Supreme Court whose decision is fi-

33. VII *Constitutional Assembly Debates*, 1001.

nal [Art. 71(1)]. The position in this connection is the same as discussed earlier in relation to the election of the President [Art. 71(1)].[34]

The election of the Vice-President also cannot be called in question on the ground that any vacancy exists in the electoral college electing him [Art. 71(4)]. If the Court declares the election of a person as Vice-President void, the acts done by him while in office before the Court's declaration are not invalidated [Art. 71(2)].

A candidate for the Vice-President's office should be a citizen of India, of at least thirty-five years of age, and qualified to be elected as a member of the Rajya Sabha [Art. 66(3)]. He should not be holding any office of profit under the Central or State Government or under any local or other authority subject to the control of any such government [Art. 66(4)]. However, the President or the Vice-President or a State Governor, or a Minister in the Central or a State Government, is not disqualified to contest election to this office [Expl. to Art. 66(4)].

Election to fill the Vice-President's office is to be completed before it falls vacant by efflux of the incumbent's term [Art. 68(1)]. In case vacancy arises for any other reason, election to fill the same is to be held as soon as possible after the vacancy occurs [Art. 68(2)]. The person thus elected is entitled to serve as Vice-President for the full term of five years from the date on which he enters upon his office [Art. 68(2)].

(b) OTHER CONDITIONS OF THE VICE-PRESIDENT'S OFFICE

Before entering upon his office, the Vice-President has to subscribe to, before the President or someone appointed by him for this purpose, an oath or affirmation in the prescribed form [Art. 69]. He cannot hold any other office of profit [Art. 64]. He cannot be a member of any House of Parliament or of a State Legislature and, if a member at the time of election, he automatically vacates his seat on the date he enters upon his office [Art. 66(2)].

As Chairman of the Rajya Sabha, the Vice-President is entitled to get such salary and allowances as may be fixed by Parliament by law, and until so fixed, as specified in the Second Schedule to the Constitution. [Art. 97]. He does not get any salary as Vice-President.

(c) TENURE

The normal tenure of the Vice-President's office is five years from the date on which he enters upon his office [Art. 67]. He would however continue to hold office even thereafter until his successor enters upon his office [Proviso (*c*) to Art. 67].

He may resign his office by writing to the President [Proviso (*a*) to Art. 67]. He may also be removed from office by a resolution passed by a majority of all the then members of the Rajya Sabha, and agreed to by the Lok Sabha. Such a resolution can be moved only when at least fourteen days' notice has been given of the intention to move it [Proviso (*b*) to Art. 67].

The above provision means that while in the Rajya Sabha there should be an absolute majority of the total membership (excluding those whose seats are va-

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34. *Supra*, Sec. A(i)(b).

cant) of the House supporting the resolution to remove the Vice-President, a simple majority is sufficient in the Lok Sabha. Also, the resolution to remove the Vice-President is to be passed in the Rajya Sabha first, and then it is to be agreed to by the Lok Sabha. The preponderant voice in this matter has thus been given to the Rajya Sabha, the reason obviously being that he is its Chairman and is thus one of its officers.[35]

The procedure for removing the Vice-President is much simpler than that prescribed for removing the President. The President is removable by impeachment, but no such formal procedure is necessary to remove the Vice-President and only a resolution of both Houses is sufficient. The President can be removed only for violation for the Constitution, by a 2/3 vote in both Houses and after an enquiry into the charges against him. The Vice-President, on the other hand, can be removed on any ground, without a 2/3 vote in the two Houses, and without enquiry into the charges against him.

(iii) COUNCIL OF MINISTERS

Articles 74 and 75 which deal with the composition and status of the Council of Ministers are sketchy and very generally worded. The framers of the Indian Constitution left these matters undefined so that these may be regulated by practices and conventions.

The conventions operating in Britain, where a similar pattern of government prevails, are very relevant to India and can be adapted suitably to meet the conditions prevailing here. The Supreme Court has emphasized upon the importance of conventions to interpret these constitutional provisions in the following words:[36]

> "It was said that we must interpret Article 75(3) according to its own terms regardless of conventions that prevail in the United Kingdom. If the words of an article are clear, notwithstanding any relevant convention, effect will no doubt be given to the words. But it must be remembered that we are interpreting a Constitution and not an Act of Parliament, a constitution which establishes a Parliamentary system of Government with a cabinet. In trying to understand one may well keep in mind the conventions prevalent at the time the constitution was framed."

According to Art. 74(1), there shall be a Council of Ministers with the Prime Minister at its head to aid and advise the President who shall, in the exercise of his functions, *act in accordance with such advice*.

The provision that "there shall be a Council of Ministers" is mandatory and at no point of time can the President dispense with this body. The Council of Ministers remains in office even when the Lok Sabha is dissolved.[37] The Supreme Court has refused to accept the contention in *U.N.R. Rao* that during the dissolution of the Lok Sabha, there need be no Council of Ministers and that the President can rule with the help of advisers.

This argument was based on the hypothesis that when there is no *Lok Sabha*, the responsibility of the Council of Ministers to this House cannot be enforced

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35. *Supra*, (ii).
36. *U.N.R. Rao v. Indira Gandhi*, AIR 1971 SC 1002, 1005 : (1971) 2 SCC 63.
On conventions, see, Ch. I, and also, *supra*, Ch. XL, *infra.*
37. *Ibid.*

and so there need be no Council of Ministers when there is no House[38]. The Supreme Court rejected the argument that, in the context, the word "shall' in Art. 74(1) should be read as "may". Just as Art. 52 ("there shall be a President of India") is mandatory so is Art. 74(1).

The Constitutent Assembly did not choose the Presidential System of Government.[39] Accepting the argument that Art. 74(1) is not mandatory would change the whole concept of the Executive. It would mean that the President need not have a Prime Minister and Ministers to aid and advise him in the exercise of his functions. In the absence of the Council of Ministers, nobody would be responsible to the *Lok Sabha*. The President would be able to rule with the aid of advisors till he is impeached. Therefore, the Court ruled that the word "shall" in Art. 74(1) sought to be read as meaning "shall" and not "may". Accordingly, "the President cannot exercise the executive power without the aid and advice of the Council of Ministers." It is thus clear that the President cannot function without a Council of Ministers at any time.

It may be noted that the Supreme Court has emphasized upon the theme of responsible government in India in a number of cases.[40] Thus, the Supreme Court has made a sterling contribution towards the promotion and strengthening of parliamentary system of government in the country.

Functions are conferred on the President by constitutional and statutory provisions. According to Art. 74(1) all these functions are to be discharged by the President on the advice of the Council of Ministers.

Under Art. 53(1), executive powers vested in the President are to be exercised by him either directly or through officers subordinate to him.[41] When the President acts directly, he acts on the advice of the Council of Ministers. Instead of the whole Council of Ministers, advice may be tendered to the President by one Minister. Advice tendered by one Minister is regarded as advice tendered by the Council of Ministers in view of the principle of collective responsibility[42] of the Council of Ministers. When a decision is taken by an official himself, he acts under the Rules of Business framed by the President under Art. 77(3).

What is the legal sanction behind the provision making ministerial advice binding on the President? *Prima facie*, the provision is cast in mandatory terms as the use of the word "shall" act in accordance with the advice of Council of Ministers would seem to indicate. But, legalistically speaking, the provision is at best merely of a directory nature because it *is* not legally enforceable through a court action.

No action can be brought against the President personally because of the ban placed on such legal actions by Art. 361.[43] Further, according to Art. 74(2), the

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38. On dissolution of Lok Sabha see, *supra*, Ch. II, Sec. I(c).
On the question of accountability of the Council of Ministers to the Lok Sabha, see, *infra*, under "Collective Responsibility," Sec. B(d).

39. For discussion on the Presidential System, see, *infra*, Sec. F.

40. Reference may be made to the following cases in this connection : *Ram Jawaya v. State of Punjab*, AIR 1955 SC 549 : (1955) 2 SCR 225; *A. Sanjeevi Naidu v. State of Madras*, AIR 1970 SC 1102 : (1970) 1 SCC 443; *Samsher v. State of Punjab*, AIR 1974 SC 2192 : (1974) 2 SCC 831; *S.R. Bommai v. Union of India*, (1994) 3 SCC 1 : AIR 1994 SC 1918.

41. *Infra*, Sec. B.

42. The principle of collective responsibility is discussed later in this book. See, *infra*, Sec. B.

43. *Supra*, under "Presidential Privileges," Sec. A(i)(*i*)

courts are barred from enquiring into what advice, if any, has been given by the Ministers to the President.[44] Whatever advice the Cabinet or a Minister has given to the President is confidential, and the courts can neither take any cognisance thereof nor enquire as to what advice has been given by the Ministers to the President. The courts are, therefore, helpless in the matter in view of this constitutional provision. Thus, the matter lies outside the purview of the courts and any relief through the courts in such a situation does not seem to be possible.

The only sanction behind the provision would thus seem to be political, and, ultimately, there is the fear of impeachment of the President if he violates Art. 74(1) on a crucial matter by not acting on ministerial advice.[45] This may be regarded as "violation of the Constitution" in terms of Art. 56(b). But, as has already been discussed above, impeachment is a very complicated and cumbersome procedure, and it can be resorted to only by a very strong government having majority in one House and *support* of 2/3rd of *total* membership in another House. The Constitution stipulates that to remove the President from office it is necessary to pass the motion by not less than 2/3rd of the total membership of the House.

For all these reasons, the only conclusion is that that part of Art. 74(1) which makes the ministerial advice binding on the President is merely directory in nature. In Britain, it is a convention that the monarch acts on the advice of the Ministers. In India, an attempt has been made to codify this convention, but, in effect, it still remains a convention, and does not become a legally enforceable injunction.

(a) NON-JUSTICIBAILITY OF CABINET ADVICE

The next question is : what is the scope of the provision in Art. 74(2) which bars the courts from embarking upon an inquiry as to whether any, and if so what, advice was tendered by the Council of Ministers to the President.

The reasons which may have weighed with the Council of Ministers in giving the advice also form part of the advice and so are protected from judicial scrutiny. The notings of the officials which lead to the cabinet note leading to the cabinet decision also form part of the advice tendered to the President.[46] All this material is protected from disclosure under Art. 74(2).[47] Thus, the courts would be barred, because of Art. 74(2), from inquiring, for example, into the grounds which might have weighed with the Council of Ministers in advising the President to issue a proclamation under Art. 356.[48] However this rule has been whittled away in subsequent decisions.[49]

But the courts can compel production of the materials on which the decision of the Council of Ministers is based as such material does not form part of the ad-

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44. See, below.
45. On Impeachment of the President, see, *supra.*
46. *Harsharan Verma v. Union of India,* AIR 1987 SC 1969 : 1987 Supp SCC 310.
47. *Rao Birinder Singh v. Union of India,* AIR 1968 P.H. 441, 450; *State of Punjab v. Sodhi,* AIR 1961 SC 493 : (1961) 2 SCR 371.
48. See, *State of Rajasthan v. Union of India,* AIR 1977 SC 1361 : 1977 (2) SCC 592, per BEG, C.J., at 1392; CHANDRACHUD, J., at 1420, and FAZL ALI, J., at 1440-41.
For discussion on Art. 356, see, *infra,* Ch. XIII.
49. See *infra* and *Rameshwar Prasad (VI) v. Union of India,* (2006) 2 SCC 1 : AIR 2006 SC 980.

vice.[50] Therefore, the correspondence between the Chief Justice of India, the Chief Justice of the concerned High Court and the Central Government—which constitutes the material forming the basis of the Central Government's decision to continue or discontinue a High Court Judge—falls outside the exclusionary rule contained in Art. 74(2).[51]

The Supreme Court has clarified the implications of Art. 74 (2) in *S.R. Bommai v. Union of India*[52]. No court is concerned with what advice was tendered by the Minister to the President. The court is only concerned with the validity of the order and not with what happened in the inner councils of the President and the Minister. An order cannot be challenged on the ground that it is not in accordance with the advice tendered by the Minister or that it is based on no advice. If, in a given case, the President acts without, or contrary to, the advice tendered to him, it may be a case warranting his impeachment, but so far as the court is concerned, it is the act of the President.

Article 74(2) protects and preserves the secrecy of the deliberations between the President and his Council of Ministers. Its scope is limited. It does not immunize orders and acts done by the President in exercise of his functions. Art. 74(2) cannot override the basic provisions of the Constitution relating to judicial review. When any action taken by the President in exercise of his functions is challenged, it is for the Council of Ministers to justify the same, since the President acts under Art. 74(1).

Article 74(2) does not mean that the Government need not justify the act of the President taken in exercise of his functions. When act or order of the President is questioned in a court, it is for the Council of Ministers to justify the same by disclosing the material which formed the basis of the act/order.

The Court will not inquire whether such material formed part of the advice tendered to the President, or whether the material was placed before him, or what advice was tendered to the President, what discussions took place between the President and the Ministers and how was the ultimate decision arrived at. "The court will only see what was the material on the basis of which the requisite satisfaction is formed and whether it is relevant to the action taken".

The Court will not go into the correctness or adequacy of the material. The material placed before the President by a Minister does not become part of the advice. Advice is what is based upon the said material. Material is not advice. The material only because it was placed before the President in support of the advice does not become advice itself. It is difficult to appreciate how does the supporting material become part of the advice.[53] The Court disagreed in this respect with the reasoning of its own earlier decision in *State of Rajasthan v. Union*

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50. *Kartar Singh v. State of Punjab,* JT (1994) 2 SC 423 : (1994) 3 SCC 569; *R.K. Jain v. Union of India,* (1993) 4 SCC 119 : AIR 1993 SC 1769.

51. *S.P. Gupta v. Union of India,* AIR 1982 SC 149 : 1981 Supp SCC 87, per BHAGWATI, J., at 230. This view overrules the view of GAJENDRAGADKAR, C.J., in *State of Punjab v. Sodhi Sukhdev Singh,* AIR 1961 SC 493, giving a broad meaning to the parallel provision in Art. 163(3), *infra,* Ch. VII.
Also see, *R.K. Jain v. Union of India,* (1993) 4 SCC 119 : AIR 1993 SC 1769.
For discussion on *S.P. Gupta,* see, *infra,* Ch. VIII.

52. AIR 1994 SC 1918 : (1994) 3 SCC 1. For further discussion on this case, see, Ch. XIII, *infra.*

53. *Ibid.,* at 2073. All other Judges participating in this decision substantially agreed with this view.

of India.[54] The view expressed in *Bommai's* case was affirmed and extended in *Rameshwar Prasad(VI) v. Union of India*[55] and the views to the contrary in *State of Rajasthan v. Union of India,*[54] were held to be no longer the law. The majority held that Article 74(2) does not bar scrutiny by courts of the factual existence and relevance of the material on the basis of which advice is given by the Ministers to the President. The onus of proving the preconditions for the exercise of the President's power was on the Union of India. The mere ipse dixit of the Governor's report would not do. The courts can also scrutinise the reasons for such advice.[56]

The Court, in *Bommai's case*, also mentioned that while privilege in respect of presenting documents in the court may not be claimed under the constitutional provision in Art. 74(2), it may, nevertheless, be possible to claim privilege under S. 123, Evidence Act.[57] The field and purpose of S. 123 is entirely different and distinct from Art. 74(2). Art. 74(2) and S. 123 cover different and distinct areas. While justifying the government action in court, the Minister or the concerned official may claim a privilege under S. 123 and the court will decide the claim on its merits.[58]

This clause is designed to safeguard the confidentiality and secrecy of cabinet deliberations as well as of the advice tendered to the President by the Cabinet. The Supreme Court has ruled in *Doypack*[59] that "it is duty of this court to prevent disclosure where Art. 74(2) is involved." The Court has also ruled that "the notings of the officials which lead to the Cabinet note leading to the Cabinet decision formed part of the advice tendered to the President." Cabinet papers also include papers brought into existence for the purpose of preparing submission to the Cabinet.

This clause excluding the courts from the area of the President-Cabinet relationship also means that if the President refuses to act on the advice of the Cabinet in any particular instance, the courts are barred from compelling the President to act according to the cabinet advice, because the courts are barred from compelling production of the advice tendered by the Council of Ministers.

(b) APPOINTMENT OF PRIME MINISTER

The Prime Minister is appointed by the President [Art. 75(1)]. This is one act which the President performs in his discretion without the advice of the Council of Ministers or the Prime Minister. The question of appointment of a new Prime Minister usually arises either after holding a fresh election to Lok Sabha, or when the incumbent Prime Minister dies or resigns. In such a contingency, the President cannot act on the advice of any Prime Minister in the matter of selection and appointment of the Prime Minister.

While the Constitution *prima facie* appears to confer an unfettered discretion on the President to appoint whomsoever he likes as the Prime Minister, in practice, it is not so. A few conventions, and a few constitutional provisions indirectly, restrict his choice of a Prime Minister.

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54. AIR 1977 SC 1361 : 1977 (2) SCC 592.
55. (2006) 2 SCC 1 : AIR 2006 SC 980.
56. *Ibid* at pp. 119 and 124.
57. For discussion on S. 123, Evidence Act, see Jain & Jain, *Principles of Adm. Law*, Ch. XIX. Also see, *R.K. Jain v. Union of India,* AIR 1993 SC 1769 : (1993) 4 SCC 119.
58. Also see, *A.K. Kaul v. Union of India,* AIR 1995 SC 1403, 1414-1415 : (1995) 4 SCC 73.
59. *Doypack Systems v. Union of India,* AIR 1988 SC 782 : (1988) 2 SCC 299.

To keep the fabric of parliamentary government in proper working order, it is necessary that the Council of Ministers, of which the Prime Minister is the head, enjoys the confidence of the Lok Sabha. It is thus laid down that the Council of Ministers shall be collectively responsible to the Lok Sabha [Art. 75(3)].[60]

It is, therefore, essential that the President appoints a person as the Prime Minister who has the support and confidence of a majority of the members of the Lok Sabha, otherwise he will not be in a position to form a stable Ministry and carry the House with him in his policies and programmes and the government cannot function. This means that the leader of the majority party in the Lok Sabha should invariably be invited to become the Prime Minister. This is the principal limitation in practice on the President's choice. As IVOR JENNINGS has asserted in the context of Britain: "If a party secures a majority and that party has a leader, that leader must become Prime Minister".

A well established convention in Britain has been that the Prime Minister should belong to the House of Commons.[61] The justification for the convention is not far to seek. The House of Commons is elected on the popular basis, reflects the public opinion more truly and faithfully than does the House of Lords, and plays a decisive role in the governmental process. The Cabinet is responsible to it; it controls the strings of the purse and thus it is here that the maintenance of party organization matters vitally. To carry on the government effectively, the Prime Minister cannot afford to be out of touch with the House of Commons. In the very nature of things, therefore, it is necessary that the Prime Minister should belong to the House of Commons so that he may carry the House along with him.

There is neither any specific provision in the Indian Constitution nor a mandatory convention debarring a member of the Rajya Sabha from becoming the Prime Minister. For example, Mrs. Indira Gandhi, a member of the Rajya Sabha, became the Prime Minister in 1966. But the fact that she was elected to the Lok Sabha soon thereafter also shows that it is considered desirable that the Prime Minister should belong to the Lok Sabha. Rajya Sabha is not a hereditary chamber like the House of Lords, and has contact with the contemporary public opinion as one-third of its members are indirectly elected every two years.

Also, a Minister who is a member of the Rajya Sabha has a right to participate in the proceedings of the Lok Sabha and *vice versa* [Art. 88].[62] Such is not the case in Britain where a Lord, even though a Minister, cannot participate in the proceedings of the House of Commons. In view of these circumstances, there may not be as much objection to a member of the Rajya Sabha becoming the Prime Minister as there is in the case of a peer becoming the Prime Minister in Britain. In fact, the present Prime Minister, Dr. Manmohan Singh, was appointed as such in 2004 when he was a member of the Rajya Sabha and in a departure with earlier convention he did not seek re-election to the Lok Sabha after resigning from the Rajya Sabha. But, keeping the best democratic traditions in view, and also to ensure smooth working of the governmental machinery, it is preferable that a member of the Lok Sabha rather than that of the Rajya Sabha should

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60. *See, infra,* Sec. B(d).

61. WADE AND PHILLIPS, *op. cit,* 244 (IX Ed.).
LORD HOME renounced his peerage in Oct., 63, to become the Prime Minister.

62. *Supra,* Ch. II, Sec. G(h).

be the Prime Minister. In any case, a member of the Rajya Sabha on becoming the Prime Minister should seek election to the Lok Sabha at the earliest opportunity.

In the matter of appointment of the Prime Minister, the President thus enjoys some marginal discretion his discretion being limited to choosing a person who is qualified to be a member of Parliament under Article 84 and not disqualified under Article 102, who is either a member of Parliament or has the potentiality to be so elected within six months of his appointment and who can command the support of the majority of the members of the Lok Sabha.[63] In a recent decision, the Supreme Court held that there was no requirement under the Constitution which required a person elected to the Rajya Sabha to either be a voter or a resident in the State which the person is chosen to represent.[64] At critical moments, the choice of the Prime Minister by the President may prove to be extremely crucial. When a party has a clear majority in the Lok Sabha, the President has to induct the acknowledged leader of the party into the Prime Minister's office, and the President's power in such a case is merely formal. If, however, the political situation is not clear and no party has a clear majority, then the President will have some scope to exercise his own judgment as to who amongst the several aspirants to the office has the best chance of forming a stable Ministry and secure confidence of the Lok Sabha.

But even here it may be desirable to have some agreed conventions for the guidance of the President, *e.g*., that he may invite the leader of the largest party in the Lok Sabha to form the government. In the ultimate analysis, however, the President's choice of a Prime Minister is controlled, in practice, by the will of the majority in the Lok Sabha.

Even a minority government may remain in office for sometime with the parliamentary support of some other parties for its policies. For example, towards the end of 1969, Indira Gandhi's Government, though numerically in a minority in the Lok Sabha remained in power for quite some time. There were several occasions when the Gandhi Government was challenged on the floor of the House, but the opposition motions were defeated with wide margins.

If two or more parties enter into a coalition and thus secure a majority in the Lok Sabha, then again the President would have no option but to induct the acknowledged leader of the coalition into the Prime Minister's office. In 1977, the Janata Party, a combination of several parties, secured a majority. The leader of the Janata Party was appointed as the Prime Minister. After the break of this party, in 1979, Chaudhury Charan Singh, leader of a faction of the Janata Party, was appointed as the Prime Minister as he was being supported by the Congress Party from outside, i.e. without participating in the Council of Ministers.

Although he did not command an absolute majority in the Lok Sabha, he, nevertheless, enjoyed support of more members than Morarji Desai who had just resigned as the Prime Minister.[65] The President at the time expressed the wish that "in accordance with the highest democratic traditions and in the interest of establishing healthy conventions", the Prime Minister should seek a vote of con-

63. *Ashoke Sen Gupta v. Union of India*, 1996 (II) CHN 292, 297.
64. *Kuldip Nayar v. Union of India*, (2006) 7 SCC 1 : AIR 2006 SC 3127.
65. To assess the support enjoyed by each leader in the House, the President asked them both to submit lists of their supporters.

fidence in the Lok Sabha at the earliest. Within a few days, the Congress Party withdrew its support and Charan Singh was reduced to a minority in the Lok Sabha. The House was then prorogued by the President on the advice of the new Prime Minister. Charan Singh could not seek a vote of confidence from the House. Incidentally, he was the only Prime Minister who remained in office for a while without obtaining a vote of confidence from, and without ever facing, the Lok Sabha.

A petition was moved in the Delhi High Court for the issuance of a writ of *quo warranto* challenging the appointment of Charan Singh as the Prime Minister. The Court however rejected the petition.[66] The Court rejected the argument that it is only after a member of the Lok Sabha secures the vote of confidence of the Lok Sabha that he should be appointed as the Prime Minister. The Court argued that to accept this contention would virtually amount to saying that it is not the President but the Lok Sabha who should select the Prime Minister. Under the Constitution, such a function is to be performed by the President.[67] He has, of course, to respect the constitutional conventions in choosing the Prime Minister.

The Court argued further that the existence of the Council of Ministers precedes, in order of time, the vote of confidence or no confidence in the Council of Ministers by the Lok Sahba. It is not possible to expect the Council of Ministers to seek the approval of the House immediately on appointment.[68] The Court also held it proper and constitutional in the circumstances to prorogue the House.[69] The President exercised his discretion after considering the advice of the Council of Ministers and in a difficult and extraordinary situation. The legal status of the new government under Charan Singh as the Prime Minister being according to the conventions and the Constitution, the President could accept its advice to prorogue the House.

After some time, Charan Singh Ministry resigned and advised the President to dissolve the House and hold fresh election to the Lok Sabha.[70] The President, accordingly, dissolved the House and asked the Ministry to remain in office till other arrangements could be made. At this stage, another petition for *quo warranto*[71] was moved in the Calcutta High Court to show cause under what authority the Prime Minister and his colleagues resolved to advise the President to dissolve the Lok Sabha and also to show cause as to why Charan Singh should not be removed from the office of the Prime Minister.

After a review of the relevant cases[72] and the conventions prevailing in Britain,[73] the Court in *Madan Murari v. Chaudhury Charan Singh*,[74] rejected the petition. The Court observed that despite the 42nd Amendment,[75] the President acts in his own discretion in choosing the Prime Minister. In making his assessment

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66. *Dinesh Chandra v. Chaudhuri Charan Singh*, AIR 1980 Del. 114.
67. *Supra*, under "Council of Ministers", Sec. A(iii).
68. *Infra.*
69. *Supra*, Ch. II, Sec. I(a).
70. *Supra*, Ch. II, Sec. I(c).
71. *Infra*, Ch. VIII, Sec. E.
72. *Samsher Singh v. State of Punjab*, AIR 1974 SC 2192 : (1974) 2 SCC 831; *infra*, Sec. B; *U.N.R. Rao v. Indira Gandhi*, AIR 1971 SC 1002 : (1971) 2 SCC 63; *supra*.
73. *Supra*, under "Council of Ministers"; *infra*, under "Collective Responsibility."
74. AIR 1980 Cal 95.
75. *Infra*, Ch. XLII.

as to who as the Prime Minister will enjoy the confidence of the Lok Sabha he is not fettered in his choice except by his own assessment, and the court could not sit in judgment on the political assessment of the President. Whether he was politically justified or not in appointing the Prime Minister is not a matter for the court to determine.

Thus, in the facts and circumstances of the case, the President was legally and constitutionally justified in calling upon Charan Singh to form the Ministry. Once the Ministry was formed it was competent constitutionally and legally to function and aid and advise the President in terms of Art. 74(1) until the Cabinet resigned on the 20th August, 1979.

It was constitutionally within the discretion of the President to accept the Cabinet's advice to dissolve the Lok Sabha. The President was not bound to accept that advice; he was free to accept or not to accept that advice. The President did not act unconstitutionally in accepting that advice. After the Prime Minister and the Council of Ministers tendered their resignation, their continuance in office until alternative arrangements could be made as directed by the President was mandatory and an imperative obligation for them as they held their office during President's pleasure.

The Court however expressed the view that the government should now function only as a caretaker government and carry out only day to day administration and defer all policy questions which could await disposal by a Council of Ministers responsible to the Lok Sabha. This was so because the government had never proved its responsibility to Parliament; it resigned before facing a vote of confidence and it was an unprecedented situation that such a government should give advice to the President which would be binding on him.

Accordingly, the President could refuse to accept any advice which went beyond the day to day administration. This no doubt would give powers to the President not expressly conferred on him by the Constitution, but having regard to the basic principle behind the Constitution, in the peculiar facts and circumstances of the case, that "is the only legitimate, legal and workable conclusion that can be made."

Needless to say, Chaudhury Charan Singh episode constituted an unprecedented situation. Here was a Council of Ministers which never faced the *Lok Sabha* for a single day, never proved its responsibility to the House, which resigned before facing a vote of confidence, and which was aiding and advising the President in the discharge of his functions. The whole episode cannot be regarded as being in the best traditions of constitutionalism and the Parliamentary system.

In 1985, when Prime Minister Indira Gandhi was assassinated, the Congress Party, which had a majority in the Lok Sabha, had no acknowledged leader. The calling of a meeting of the Congress Legislature Party would have taken a few days, but it was necessary to appoint the Prime Minister immediately. At this critical moment, President Zail Singh immediately appointed her son Rajiv Gandhi as the Prime Minister without waiting for his being formally elected as the leader of the Congress Party. It was only after his appointment as the Prime Minister that he was elected as the leader of the majority party.

In 1989, V.P. Singh was appointed as the Prime Minister even though his party had no clear majority as the party had only 176 members in a House of 520.

The BJP promised to support V.P. Singh from outside without itself participating in the government. V.P. Singh succeeded in getting a vote of confidence from the House.[76] After some time, BJP withdrew support. Though V.P. Singh was reduced to minority in the House, yet the President did not ask him to vacate his office immediately but gave him time to prove his majority in the House. V.P. Singh resigned when he failed to secure the vote of confidence from the House.

In November, 1990, Chandra Sekhar was appointed as the Prime Minister. Though he led a minority group, he was promised support from outside by the Congress Party and was thus able to muster a majority support in the Lok Sabha.[77] After some time, the Congress Party withdrew support, and, consequently, Chandra Sekhar resigned and recommended dissolution of the House and holding of fresh elections.

In 1991, fresh elections were held for the House. Again, no party emerged with a clear-cut majority in Lok Sabha. Narasimha Rao, leader of the Congress Party, was appointed as the Prime Minister. Though he had no majority support, he was the leader of the largest party. The party position in Lok Sabha at the time was that the Congress Party had 251 members in a House of 528 members and, thus, it was short by 14 members for a simple majority. No other party at the time staked its claim to form the government. The President asked Rao to establish his majority in the Lok Sabha in four weeks.[78] Not only was Rao able to do so but, in course of time, he succeeded in mustering a majority in the House and was thus able to stay as the Prime Minister for a full five year term.

In 1996, Lok Sabha was dissolved at the end of its term of five years and general elections held which resulted in a Parliament with no party having a majority in the Lok Sabha. The Congress Party which was the ruling party before the elections (1991-1996) could secure only 135 seats in a House having 520 members. The Bhartya Janata Party (BJP) secured 162 seats. The United Front (Leftist Parties along with Janta Dal and a few other regional parties) secured 178 seats and the rest of the seats went to Independents and small groups. The President invited the leader of the BJP which was the single largest party to form the government with the stipulation that it should secure a vote of confidence in the Lok Sabha within 15 days. Prime Minister Atal Beharee Vajpayee having failed to secure such a vote resigned just after 13 days.

The President then invited the leader of the United Front which had been promised support from outside (without participation in the government) by the Congress Party. The President appointed Deve Gowda, who was not a member of either the Rajya or the Lok Sabha and did not belong to any political party but had the support of the majority of the members. This Government lasted for nearly two years (with a change of leadership in between). It resigned in December, 1997 when the Congress Party withdrew support.

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76. The President had imposed a condition on him to get a vote of confidence from the Lok Sabha. See, R. VENKATARAMAN, *MY PRESIDENTIAL YEARS*, 324 (1994).

77. When Chandra Shekhar was appointed as the Prime Minister, the President was satisfied *prima facie* that he had the strength to form a viable government. Nevertheless, the President stipulated that the Prime Minister should prove his majority in the Lok Sabha. See, VENKATARAMAN, *op. cit.* 443.

78. Venkataraman, *op. cit.*, 553.

The House was dissolved and fresh elections were held in March, 1998. Again, no majority party emerged in the Lok Sabha. Atal Behari Vajpayee, the leader of the BJP (being the largest single party having 162 members as against 141 members belonging to the Congress Party), was able to form a coalition with several small regional parties and having thus got a majority was invited to form the government. Atal Behari Vajpayee became the Prime Minister again and was able to win a vote of confidence in the Lok Sabha. In the general elections held in 2004 and 2009, the government in the centre was formed by the Congress, which emerged as the largest single party, with the support of other political parties.

It is clear from the above events that the President seeks to put in office a Prime Minister who is able to muster majority support in the House. This accords with the view expressed by S.A. de Smith as regards Britain that when "no party has an overall majority in the House", the Queen will have to decide who has "a reasonable prospect" of maintaining himself in office. "That person will normally, *but not invariably*, be the leader of the largest party in the House of Commons".

At times, a Deputy Prime Minister is appointed though no such office is created by the Constitution. A question has been raised whether the taking of oaths as the DPM is constitutionally valid as there is no separate oath prescribed for the DPM. The Supreme Court has ruled that the DPM is just a Minister and he takes the same oath as a Minister does. Though described as the DPM, such description does not confer on him any of the powers of the Prime Minister.[79]

(c) APPOINTMENT OF MINISTERS

A Minister should, normally speaking, be a member of a House of Parliament. It is a well established convention in all countries having the Parliamentary system[80] but not, an absolute rule; even a non-member may be appointed as a Minister, but he must sooner than later become a member of a House.

In India, the same practice prevails. If, however, a non-member is appointed as a Minister, he cannot hold the office for longer than six months without becoming a member of a House of Parliament in the meantime. A Minister who for a period of six consecutive months is not a member of a House of Parliament ceases to be a Minister at the expiry of that period [Art. 75(5)].

This provision ought to be read along with Art. 88[81] which permits a Minister to participate in the proceedings of a House of which he is not a member. This means that a Minister who is not a member of any House can speak in, and participate in the proceedings of, any House, but he does not have a right to vote in any House. Thus, the Minister can function effectively even though not a member of any House.

The rule that Ministers should be members of Parliament is, indeed, essential to the smooth and proper working of parliamentary form of government. Their presence in Parliament makes a reality of their responsibility and accountability

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79. *K.M. Sharma v. Devi Lal*, AIR 1990 SC 528 : (1990) 1 SCC 438.

80. SIR IVOR JENNINGS, *CABINET GOVERNMENT*, 60 (IIIrd ed.); WADE & BRADLEY, *CONSTITUTIONAL AND ADMINISTRATIVE LAW*, 268; PETER W. HOGG, *CONSTITUTIONAL LAW OF CANADA*, 243 (4th ed.); *State of South Wales v. Commonwealth of Australia*, 108 ALR 577.

81. *Supra*, Ch. II, Sec. G(h).

to Parliament, and facilitates co-operation and interaction between them and Parliament, both these features being vital to parliamentary government.

To appoint a non-member of the Parliament as a Minister does not militate against the constitutional mechanism or democratic principles embodied in the constitution. A non-member can remain a Minister only for a short period of six months and as a minister he is collectively responsible to Lok Sabha. There are several reasons for permitting a non-member to be appointed as a Minister for a short duration. A person who may be competent to hold the post of a Minister may be defeated in the election. There is no reason why he cannot be appointed as a Minister pending his election to the House.

There is no condition that only a member of a House of Parliament can be appointed as the Prime Minister. A non-member, even a member of a State Legislative Assembly, may be appointed as the Prime Minister. However, his appointment as the P.M. would remain valid if within six months, he becomes a member of a House of Parliament and resigns his seat in the Legislative Assembly.

Under Art. 75(5)[82], a person who is not a member of any House of Parliament can be appointed as a Minister. He has to become a member of either House within six months otherwise he ceases to be the Minister. The term 'Minister' in Art. 75(5) includes the Prime Minister. The Supreme Court has repudiated the suggestion that appointment of a non-member as the Prime Minister is anti-democratic. Only a person who, the President thinks, commands the confidence of the Lok Sabha is appointed as the Prime Minister. The Council of Ministers of which he is the head is collectively responsible to the *Lok Sabha*. Therefore, even though the Prime Minister is not a member of Parliament, he is the one who commands the support of a majority of members of the *Lok Sabha* and he becomes answerable and accountable to the House and this ensures the smooth functioning of the democratic process.

Shri Sitaram Kesari was appointed as a Minister of State in the Central Cabinet. His appointment was challenged in a writ petition on the ground that he was not a member of either House of Parliament at the time of his appointment and so he could not be appointed as a Minister. The writ petition was dismissed as under Art. 75(5), a person not being a member of a House could be appointed as a Minister upto a period of six months.

Reading Arts. 75(5) and 88 together,[83] the Supreme Court has reiterated in *Harsharan Verma v. Union of India*:[84]

> "The combined effect of these two Articles is that a person not being a member of either House of Parliament can be a Minister up to a period of six months. Though he would not have any right to vote, he woud be entitled to participate in the proceedings thereof."

Shri H.D. Deve Gowda, who was not a member of either House of Parliament was appointed as the Prime Minister of India. His appointment was put in issue.[85]

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82. *Supra.*

83. For Art. 88; see, *supra*, Ch. II, Sec. G(h). According to Art. 88, a Minister, even though a non-member, can participate in the proceedings of a House without vote.

84. AIR 1987 SC 1969 : 1987 Supp SCC 310.

85. *S.P. Anand v. H.D. Deve Gowda*, AIR 1997 SC 272 : (1996) 6 SCC 734.
Also see, *Janak Raj Jai (Dr.) v. H.D. Deve Gowda*, (1997) 10 SCC 462.

The Supreme Court upheld the appointment. The Court also repelled the argument that if a non-member is appointed as the Prime Minister, it would be against national interest. Once appointed as the Prime Minister, he becomes responsible and answerable to the House. The Court observed:

> "Even if a person is not a member of the House, if he has support and confidence of the House, he can be chosen to head the Council of Ministers *without violating the norms of democracy and the requirement of being accountable to the House* would ensure the smooth functioning of the democratic process."

The Supreme Court has made a pronouncement of great constitutional significance in *S.R. Chaudhuri v. State of Punjab.*[86] The question which arose in the instant case was as follows : a person who is not a member of a House of Parliament is appointed as a minister. He resigns after six months, as required by Art. 75(5), as he fails to become a member of a House of Parliament in the meantime. Can he be re-appointed as a minister for another term of six months? Can a person be appointed repeatedly as a minister for a period of six months at a time even though he is not a member of a House of Parliament?

Although Art. 75(5) does not specifically bar such a practice, if a literal view is adopted thereof, the Supreme Court has banned it in *Chaudhuri* characterising it as "undemocratic"; it would be "subverting the Constitution" to allow such a practice. The Court has observed further : "The practice would be clearly derogatory to the constitutional scheme, improper, undemocratic and invalid." Art. 75(5) is in the nature of an exception to the normal rule that only members of Parliament can be appointed as ministers. "This exception is essentially required to be used to meet very extraordinary situation and must be strictly construed and sparingly used."[87] This means that within the life time of Parliament for five years, a person who is not a member of a House of Parliament, can be appointed as a minister only once and that too for a short period of six months.

The *Chaudhuri* case arose the State of Punjab under Art. 164(4) which applies to the appointment of ministers in a State and is in *pari materia* with Art. 75(5). Therefore, whatever is said in relation to Art. 164(4) applies to Art. 75(5) as well and *vice versa.*[88]

In a very significant pronouncement, viz. *B.R. Kapur v. State of Tamil Nadu,*[89] the Supreme Court has read a significant restriction in Art. 75(5). The Supreme Court has ruled that under Art. 75(5), a person who is not a member of a House of Parliament can be appointed as the Prime Minister or a Minister only if he has the qualifications for membership of Parliament as prescribed by Art. 84[90] and is not disqualified from the membership thereof by reason of the disqualifications set out in Art. 102.[91]

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86. AIR 2001 SC 2707 : (2001) 7 SCC 126.
87. *Ibid,* at 2720.
88. For Art. 164(4) and a detailed discussion on the *Chaudhuri* case, see, Ch. VII, *infra.*
89. JT 2001 (8) SC 40 : (2001) 7 SCC 231 : AIR 2001 SC 3527. The case arose under Art. 164(4) but the principle is equally applicable to Art. 75(5) as both the provision are similar in phraseology.
For further discussion of this issue, see, *infra,* Ch. VII.
90. *Supra,* Ch. II, Sec. A(iii)(c).
91. *Ibid.*

The Ministers are appointed by the President on the advice of the Prime Minister [Art. 75(1)]. In effect, therefore, Ministers are the nominees of the Prime Minister. The President depends entirely on the Prime Minister's advice in this matter; he does not have much of a choice in the matter and his function in this respect is purely formal.

The Constitution does not contain any restriction on the Prime Minister's choice of his colleagues. In practice, his choice is governed by many considerations, such as party standing, capacity, educational skill, willingness to carry out a common policy, regional representation and representation of backward or scheduled classes and minorities. However, since 2004, the total number of Ministers including the Prime Minister cannot exceed 15% of the total number of members in the Lok Sabha [Article 75(1B)][1]

The President administers to a Minister, before he enters upon his office, the prescribed oaths of secrecy and office [Art 75(4)].

It is for Parliament to prescribe salaries and allowances of Ministers from time to time by law [Art. 75(6)]. The Salaries and Allowances of Ministers Act, 1952, has been passed for this purpose.

(d) MINISTERIAL TENURE

On this question, two constitutional provisions, *viz.*, Art. 75(2) and 75(3) come into play. *Ex facie* these provisions seem to be inconsistent with each other but, in practice, it is not so and these provisions can be reconciled.

The Council of Ministers remains in office so long as it enjoys the confidence of the Lok Sabha and a majority of members in that House back and support it. It should resign when it is unable to command this confidence. This is the inevitable result of Art. 75(3) which requires the Council of Ministers to be collectively responsible to the Lok Sabha. The provision brings into existence responsible government. It means that the tenure of the Ministry is determined by the House. However, Art. 75(3) operates only when the Lok Sabha is not dissolved. When the Lok Sabha is dissolved, the Council of Ministers naturally cannot enjoy the confidence of the House.[2]

Another constitutional provision having a bearing on the question of ministerial tenure is Art. 75(2), according to which, Ministers hold office during the pleasure of the President. *Prima facie* it would mean that the ministerial tenure is within the President's discretion and that a Minister may legally be dismissed by him as and when he likes. *Ex facie*, there appears to be an inconsistency between Arts. 75(2) and 75(3), but, in practice, this is not so. Reading Arts. 75(2) and 75(3) together, the position seems to be that the President's power to dismiss the Ministry is subject to democratic controls.

The President's power of dismissal is conditioned by the need to keep in office a Ministry able to command the confidence of the Lok Sabha and, therefore, he is not expected to dismiss a Ministry so long as it enjoys this confidence.[3] The reasons for the proposition are not difficult to discern. It is mandatory for the Presi-

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1. Inserted by the Constitution (Ninety-first Amendment) Act, 2003 with effect from 2-1-2004.
2. *U.N.R. Rao v. Indira Gandhi, supra*, under "Council of Ministers".
3. M. RAMASWAMY, "The Constitutional Position of the President of the Indian Republic," 28 *Can. B.R.* 648 (1950); *infra*, Sec. B(d).

dent to have a Council of Ministers. If, therefore, the President acts in a high handed manner and dismisses from office a ministry enjoying the confidence of the House, the alternative Ministry which he installs will be a minority Ministry. Such a Ministry will find it practically impossible to carry on government because the majority in the House will not support it. The Ministry cannot carry out its policy; legislation desired by it will not be passed and the House may even refuse funds to it. The President's position itself becomes vulnerable as the majority party whose Ministry has been dismissed by the President may even move for his impeachment.[4]

In view of these dangers, it may be safely assumed that the power of the President to dismiss a Ministry is more formal than substantial. It is to be used by him to throw a Ministry out of office, not when it enjoys, but when it forfeits, the confidence of the Lok Sabha. Ordinarily, a Ministry losing the confidence of the House will itself resign, or seek a dissolution of the House[5]. But in case it sits tight and takes no action one way or the other, the President will use his power, dismiss the Ministry and install into office another Ministry able to command the confidence of the House.

The President's power, therefore, is a reserve power to be used by him in case of a clear manifestation of lack of Parliament's confidence in the Ministry. This power is to be used to support, and not to thwart, the Constitution and the institution of representative government in the country. 'During pleasure' does not mean that the 'pleasure' shall continue notwithstanding the fact that the Ministry has lost the confidence of the majority.

A President who dismisses Ministers would be regarded as the ally of the opposition, and as such be made the subject of attack. His function is to see that the Constitution functions in the normal democratic manner. It is for the electors and not the President to decide between competing parties. The power of dismissal of the Ministry is the ultimate weapon, a recourse of last resort "which is liable to destroy its user."[6]

This position is in accord with the conventions prevailing in Britain. A similar power vested in the Crown in Britain has become practically obsolete. Since 1783, no Ministry enjoying the confidence of the Commons has been dismissed in Britain.[7] The scholarly opinion however is that the Monarch can dismiss the Ministers if they are purporting to subvert the democratic basis of the Constitution, such as, prolonging the life of Parliament in order to avoid defeat at a General Election; obtaining majority by duress, or fraudulent manipulation of the poll etc.

It may be worthwhile to take note of the dismissal of the Labour Government in Australia in 1975 by the Governor-General. The Government had a majority in the Lower House but not in the Senate. The Lower House passed the annual appropriation bill but the Senate refused to approve the same making the running of government difficult. In Australia, assent of the Senate to financial legislation is required. There was a danger that the whole governmental machinery may come

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4. *Supra*.
5. For discussion on Lok Sabha, see, *supra*, Ch. II.
6. DE SMITH, *CONSTITUTIONAL & ADM. LAW*, 102 (1977).
7. KEITH, *BRITISH CABINET SYSTEM*, 8 (1952); JENNINGS, *THE CABINET GOVT*., 403-412 (1969).

to a halt if the appropriation bill was not passed, because no money could then be withdrawn from the government treasury.

To resolve the crisis, the Governor-General dismissed the Government and invited the leader of the opposition to form the new government. The new Prime Minister who formed a minority government got the appropriation bill passed by the Senate and then recommended to the Governor-General to dissolve the Parliament and hold fresh elections. This recommendation was accepted by the Governor-General and both the Houses were dissolved and fresh elections to the Houses were held. In the subsequent elections, this Government won a majority in the Lower House. However, the action of the Governor-General gave rise to a bitter public controversy in the country.

The President's power of dismissal under Art. 75(2) may however be invoked by the Prime Minister to get rid of a Minister who has lost his confidence. Since a Minister is appointed on the advice of the Prime Minister, so he can get rid of any Minister. Although, technically, the ministers hold office during the "pleasure" of the President, the acknowledged democratic convention is that on the advice of the Prime Minister, the President has to dismiss the Ministers. If the Prime Minister has the power to make his Ministers, it is also his constitutional right to unmake them. The identity of the Ministers is not known without the Prime Minister.

Ordinarily, a Minister whom the Prime Minister no longer wants in the Council of Ministers will himself resign when asked by the Prime Minister to do so. But in an extreme situation, when such a Minister ignores the wishes of the Prime Minister, the latter may request the President to dismiss the undesirable Minister from office. The President thus acts on the advice of the Prime Minister and uses his power to maintain the integrity and solidarity of the government without which the Council of Ministers cannot function effectively.[8]

Accordingly, President's power to dismiss a Minister is only meant to be used to keep the parliamentary form of government functioning smoothly, to promote collective responsibility among Ministers,[9] and to protect the Ministry from disruption. In a healthy democratic polity, where democratic traditions have taken roots, the President's power may never be called into action. It is only the ultimate resort, to be invoked in an exceptional situation, and that, too, to uphold, support and maintain democratic and parliamentary traditions.

B. WORKING OF THE EXECUTIVE

(a) PRESIDENT—A TITULAR HEAD

The supreme command of the defence forces of the Union is vested in the President but the exercise of the supreme command is to be regulated by law [Art. 53(2)]. This provision seeks to bring the defence forces subject to the civilian authority.

The executive power of the Union is vested in the President [Art. 53(1)]. This power is to be exercised in accordance with the Constitution [Art. 53(1)]. Though formally vested in the President, the idea could never be that he should person-

8. *Infra*, Sec. B(d), under "Collective Responsibility."
9. *Ibid.*

ally exercise this power, or take every decision himself. That would be a task physically impossible for him to discharge. It will also be constitutionally undesirable for in a parliamentary system effective powers vest in the Ministers. The Constitution therefore seeks to create a mechanism by which the responsibility for decision making may be passed from the President to others.

First, the Constitution provides that the President can exercise his functions either directly or through officers subordinate to him [Art. 53(1)]. This provision permits exercise of executive power vested in the President by the Ministers and other officials. For this purpose, a Minister is regarded as an officer subordinate to the President and, therefore, the President can exercise his executive authority through the Ministers.[10]

Secondly, the President is to make Rules for the more convenient transaction of the business of the Government of India and for the allocation of work among the various Ministers [Art. 77(3)]. The Rules of Business confer power on the Ministers to carry on the administration and take decisions in their departments. When an order is made in accordance with the Rules of Business made under Art. 77(3), it cannot be challenged on the ground that the President had not personally applied his mind to the matter.[11]

The idea underlying Art. 77(3) is that while the actual administration is run by the Ministers, and not by the President who is a constitutional head, a Minister cannot, in the very nature of things, take every decision by himself. A Minister is not expected to burden himself with the day to day administration in his department. Minister's primary function is to lay down policies and programmes of his Ministry. Therefore, under the Rules of Business, officials in the department can take decisions and when a civil servant takes a decision, he does so on behalf of the government. The officers designated by the Rules of Business or the standing Orders[12] can take decisions on behalf of the Government[13].

Thirdly, Parliament may by law confer any function on authorities other than the President [Art. 53(3)(*b*)]. When Parliament does so, the officer concerned can act in his own name.

Fourthly, although, executive power of the Union is vested in the President, actually, in practice, it is carried on by the Ministers and other officials and the President's personal satisfaction is not necessary in every case.[14]

There is however the over-all condition, *viz.*, the executive power is to be exercised "in accordance with this Constitution". This clause opens the way to judi-

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10. *King-Emperor v. Sibnath Banerji*, AIR 1945 PC 163; *S.N. Ghosh v. B.L. Cotton Mills*, AIR 1959 Cal. 552.
For further discussion, see, *infra*, under "State Executive,", Ch. VII.

11. For a detailed discussion on the scope and effect of the Rules of Business, see, M.P. JAIN, *A Treatise on Administrative Law*, Vol. II, Ch. XXI.
For further discussion on Rules of Business, see, *infra*, Sec. E.

12. Standing Orders are made by the Minister for his department.

13. See, *A. Sanjeevi Naidu v. State of Madras*, AIR 1970 SC 1102 : (1970) 1 SCC 443; *Laxim Udyog Rock Cement Pvt. Ltd. v. State of Orissa*, AIR 2001 Ori. 51.
Also see, Ch. VII, *infra*.

14. *Bijoya Cotton Mills v. State of West Bengal*, AIR 1967 SC 1145 : (1967) 2 SCR 406; *A. Sanjeevi v. State of Madras*, AIR 1970 SC 1102 : (1970) 1 SCC 443; *Samsher Singh v. State of Punjab*, *infra*, note 20.
For further discussion on this point, see, *infra*.

cial review of executive action *vis-à-vis* the Constitution. The court can strike down an unconstitutional act, *i.e.*, an act infringing a constitutional provision. "Any exercise of the executive power not in accordance with the Constitution will be liable to be set aside"[15]

The formal vesting of executive power in the President does not also envisage that he should personally sign all the executive and administrative orders passed by the Central Government. The wheels of government would stop if it were to be mandatory for the President to sign all such orders. In actual practice, the President signs only a few crucial orders, and all other orders are promulgated by subordinate officers without reference to him. This result is achieved by Article 77.

According to Art. 77(1), all executive action of the Central Government is to be expressed to be taken in the name of the President.

Article 77(1) prescribes the mode in which executive action of the Central Government is to be expressed. This provision is however merely directory and not mandatory and its non-compliance does not render the order a nullity as it does not preclude proof by other means that the order or instrument in question was made by the President. This provision does not lay down how an executive action of the Government of India is to be performed; it only prescribes the mode in which such act is to be expressed.[16] However, even if an executive action of the Central Government is not formally expressed to have been taken in the name of the President, it would not render the action invalid under Article 77. [17]

Further, Art. 77(2) lays down the manner in which the order of the Central Government is authenticated. Art. 77(2) says that orders and other instruments executed in the President's name are to be authenticated in such manner as may be specified in the rules made by the President,[18] and the validity of any document so authenticated cannot be called into question on the ground that it is not an order or instrument made or executed by the President.

This provision immunizes an order from being challenged on one ground only, *viz.*, that it has not been made by the President. It does not oust the jurisdiction of the courts to examine the validity of the order on any other ground. Thus, the correctness of the recitals in the order as to the facts which are essential for its validity can be questioned.[19] Nor can any policy decision be taken under Articles 77 or 162 which would contravene constitutional or statutory provisions. [20]

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15. *U.N.R. Rao v. Indira Gandhi,* AIR 1971 SC 1002, 1004 : (1971) 2 SCC 63; *supra,* Sec. A(iii).
Also, *Maneka Gandhi v. Union of India,* AIR 1978 SC 597 : (1978) 1 SCC 248.

16. The terms of Art. 77(1) are equivalent to Art. 166(1) which operates in the State sphere.
For a detailed discussion on Art. 77(1), see, *infra,* Chapter VII.

17. *Air India Cabin Crew Assn. v. Yeshaswinee Merchant,* (2003) 6 SCC 277/ 312: AIR 2004 SC 187. The observation in *Draupadi Devi v. Union of India,* (2004) 11 SCC 425, 451: AIR 2004 SC 4684, to the effect that a decision not taken in the manner contemplated by Article 77,"would only mean that there was no decision" was made without reference to the decision in Air India Cabin Crew Assn.

18. The President has promulgated the Authentication (Order and Other Instruments) Rules, 1958. Rule 2 thereof provides that orders and other instruments made and executed in the name of the President shall be authenticated by the signatures of the Secretary, Joint Secretary, Deputy Secretary, Under Secretary or Assistant Secretary to the Government of India.
For a detailed discussion on Art. 77, see, *supra,* JAIN, footnote 11.

19. *Supra,* footnote 10.

20. *Post Master General v. Tutu Das* , (2007) 5 SCC 317, 322 : 2007 (6) JT 340.

Article 77 gives effect to the provisions of Article 53 which permit the President to exercise his authority through others. When an order issued in the President's name is duly authenticated by the authorised officer, it cannot be impeached on the ground that the matter has not been personally considered by the President or that he has not applied his mind to it.

The implications of Arts. 77(1) and (2) are as follows : Arts. 77(1) and 77(2) are only directory.[21] If an order is issued in the name of the President, and is duly authenticated in the manner prescribed by Art. 77(2), there is an irrebuttable presumption that the order is made or executed by the President. Even if an order is not issued in strict compliance with the provisions of Art. 77(1), it can be established by evidence aliunde that the order has been made by the appropriate authority.

An order not in strict compliance with the provisions of Arts. 77(1) and (2), is not invalid *per se*, but the irrebuttable presumption in its favour cannot be drawn. The party concerned can prove by other evidence that, as a matter of fact, the order has been made by the appropriate authority. For example, in *Barsay*,[22] an order issued by the Deputy Secretary to the Government on behalf of the Central Government was held valid. Under the Prevention of corruption Act, a public servant can be prosecuted for certain criminal offences only after the Central Government gives its sanction for the purpose. In the instant case, the sanction was given in the name of the Central Government by its Deputy Secretary. It was not an authenticated order but one issued by the Deputy Secretary in his own right. Although the order did not comply with Arts. 77(1) and 77(2), nevertheless, it was held valid because the Deputy Secretary was competent to accord sanction in his own right. The order was made by the Deputy Secretary on behalf of the Central Government in exercise of the power conferred on him under the Rules of Business.[23]

The expressions "executive power" and "executive action" in the context mean the power and action of the executive. Therefore, all orders made by the executive, whether administrative or legislative in nature, can be authenticated under Art. 77(2).[24] It is not true to say that under Art. 77(2) only executive orders, and not legislative orders, can be authenticated.

Before 1976, Art. 74(1) merely said that the Council of Ministers is to 'aid and advise' the President in the exercise of his functions. Art. 74(2) declares that no court can inquire into the question whether any, and if so what, advice was tendered by the Ministers to the President.[25] Art. 74(2) thus expressly makes advice tendered by the Ministers to the President non-justiciable. Originally there was no provision in the Constitution to make ministerial advice binding on the President, but , for all practical purposes, this was so. The position by and large had crystallised before 1976 that the President was more or less a titular head of the executive and was bound by the advice of the Ministers. The real head of the ex-

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21. See, *Dattatraya Moreshwar v. State of Bombay*, AIR 1952 SC 181 : 1952 SCR 612. For a further discussion on the point, see, Ch. VII, *infra.*
22. *Major E.G. Barsay v. State of Bombay*, AIR 1961 SC 1762 : (1962) 2 SCR 195.
23. See, *infra*, Sec. E.
24. *D.S. Sharma v. Union of India*, AIR 1970 Del. 250.
25. *Supra*, Sec. A(iii).

ecutive was the Prime Minister. This author had summed up the position as follows:[26]

> "Whatever the formal constitutional provisions may be, in effect, however, the totality of the executive power at the Centre vests not in the President alone, but in the President and the Council of Ministers. The President is the head of the State and only a formal executive. In all functions vested in him, he acts on the advice of the Ministers. The President is more of a symbol used to formalize the decisions arrived at by the Ministers and the Cabinet. The effective executive power lies with the Prime Minister and the Ministers who constitute the real executive carrying on the entire burden of conducting the administration of the Union."

The Supreme Court had, in a number of decisions, expressly accepted this constitutional position of the President. In *Ram Jawaya v. State of Punjab*,[27] MUKHERJEA, C.J., speaking on behalf of the Supreme Court stated that our Constitution has adopted the British system of a parliamentary executive, that the President is only "a formal or constitutional head of the executive" and that "the real executive power are vested in the Ministers or the Cabinet." MUKHERJEA, C.J., further observed:

> "Our Constitution…. is modelled on the British Parliamentary system where the executive is deemed to have the primary responsibility for the formulation of governmental policy and its transmission into law though the condition precedent to the exercise of this responsibility is its retaining the confidence of the legislative Branch of the State... In the Indian Constitution, therefore, we have the same system of Parliamentary executive as in England and the Council of Ministers consisting, as it does, of the members of the legislature is like the British Cabinet, 'a hyphen which joins, a buckle which fastens', the legislative part of the State to the executive part. The cabinet enjoying, as it does, a majority in the legislature concentrates in itself the virtual control of both legislative and executive functions…."

In *U.N.R. Rao v. Indira Gandhi*,[28] the Supreme Court emphasized that the conventions operating in Britain governing the relationship between the Crown and the Ministers are very pertinent to the Indian Constitution as well, and the formal provisions of the Indian Constitution should be read in the light of those conventions. The Court observed:

> "The Constituent Assembly did not choose the Presidential system of Government."[29]

In *R.C. Cooper v. Union of India*,[30] the Supreme Court said: "Under the Constitution, the President being the constitutional head, normally acts in all matters including the promulgation of an ordinance on the advice of his Council of Ministers."[31]

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26. See the last edition of this book at 94.
27. AIR 1955 SC 549 : (1955) 2 SCR 225.
28. AIR 1971 SC 1002 : (1971) 2 SCC 63.
29. *Ibid*, at 1005.
For discussion on the Presidential System, see, *infra*, Sec. F.
30. AIR 1970 SC 564 : (1970) 1 SCC 248.
31. On the power to issue ordinances, see, *infra*, Sec. D(ii)(d).
Also see, Ch. VII, *infra*.

In *Samsher Singh v. State of Punjab*,[32] the Supreme Court stated that it was not correct to say that the President is to be satisfied personally in exercising the executive power. The President is only a formal or constitutional head who exercises the power and functions conferred on him by or under the Constitution on the aid and advice of his Council of Ministers. Whenever the Constitution requires the 'satisfaction' of the President for the exercise by him of any power or function, it is not his 'personal satisfaction', but, in the constitutional sense, the 'satisfaction of the Council of Ministers'.

The President's "opinion, satisfaction or decision is constitutionally secured when his Ministers arrive at such opinion, satisfaction or decision." "The decision of any Minister or officer under the Rules of Business [made under Art. 77(3)][33] is the decision of the President".[34] Any argument that an order could not be made by a Minister without reference to the President is thus untenable. Describing the nature of the government, the Court observed:[35]

> "It is a fundamental principle of English constitutional law that Ministers must accept responsibility for every executive act. In England, the sovereign never acts on his own responsibility. The power of the sovereign is conditioned by the practical rule that the Crown must find advisers to bear responsibility for his action. Those advisers must have the confidence of the House of Commons. This rule of English constitutional law is incorporated in our Constitution. The Indian Constitution envisages a parliamentary and responsible form of Government at the Centre and in the States and not a Presidential form of Government."

The Court then said that whatever the function vested in the President/Governor, whether executive, legislative or quasi judicial in nature and whether vested by the Constitution, or by a statute, may be discharged according to the Rules of Business, unless the contrary is clearly provided for by such constitutional or statutory provisions. The Court stated in this regard as follows:

> "The President as well as the Governor is the Constitutional or formal head. The President as well as the Governor exercises his powers and functions conferred on him by or under the Constitution on the aid and advice of his Council of Ministers, save in spheres where the Governor is required by or under the Constitution to exercise his functions in his discretion. Whenever the Constitution requires the satisfaction of the President or the Governor for any exercise by the President or the Governor of any power or function, the satisfaction required by the Constitution is not the personal satisfaction of the President or Governor but the satisfaction of the President or the Governor in the constitutional sense in the cabinet system of government, that is, satisfaction of his Council of Ministers on whose aid and advice the President or the Governor generally exercises all his powers and functions. The decision of any Minister or Officer under rules of business made under any of these two Articles 77(3) and 166(3) is the decision of the President or the Governor respectively. These Articles did not provide for any delegation. Therefore, the decision of Minister

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32. AIR 1974 SC 2192 : (1974) 2 SCC 831. *Pu Myllai Hlychhlo v. State of Mizoram* , (2005) 2 SCC 92 : AIR 2005 SC 1537. Also see, *infra*, under State Executive, Ch. VII.
33. See, *supra*; *infra*, Sec. D(iii).
34. See, *G.D. Zalani v. Union of India*, AIR 1995 SC 1178 : (1995) Supp (2) SCC 512; *B.L. Wadehra v. Union of India*, AIR 1998 Del. 436.
35. AIR 1974 SC at 2199 : (1974) 2 SCC 831.

or officer under the rules of business is the decision of the President or the Governor."

Under Art. 352, the President of India can proclaim an emergency in the country in certain situations.[36] Thereafter, under Art. 359 (1), the President may by order suspend the operation of any Fundamental Right.[37] The proclamation of emergency is issued in the name of the President under his own signature.[38]

In the instant case, orders suspending Arts. 14, 21 and 22[39] were issued under Art. 359(1) in the name of the President but were signed by an Additional Secretary to the Government of India. Rejecting the argument that it could not be said whether the President was personally satisfied about the orders or not, the Supreme Court ruled in *Nambiar*[40] that in view of Art. 77, President's personal satisfaction is not essential for issuing such an order. A properly authenticated order signed by the Additional Secretary to the Government of India issued under Art. 359(1) could not be questioned on the ground that it was not an order made and executed by the President.

The National Mineral Development Corporation (NMDC) an autonomous public sector undertaking transferred the mining lease of an iron mine to a joint venture company. The transfer was approved by the Ministry of Steel. Under the Memorandum and Articles of Association, the Corporation could transfer property only with the sanction of the President.

The Delhi High Court ruled that the sanction given to the transfer by the Minister was valid. It was not necessary for the President to personally give the sanction. In the cabinet system, the 'satisfaction' of the President does not mean his 'personal satisfaction' but the satisfaction of the President in the constitutional sense, i.e. the satisfaction of the Council of Ministers on whose aid and advice the President exercises all his powers and functions. The decision of a Minister or an officer under the Transaction of Business Rules is regarded as the decision of the President.[41]

Thus, the President/Governor does not exercise the executive functions personally. He acts on the aid and advice of the Council of Ministers in all matters which vest in the executive whether those functions are executive or legislative in character.

In *Union of India v. Sripati Ranjan*,[42] the respondent was dismissed from service by the Collector of Customs. He preferred an appeal to the President as was provided for in the Service Rules. The Minister of Finance rejected the appeal without any reference to the President. The question was whether the Minister could have himself decided the appeal or should the President have decided the matter personally because the rule in question said that the appeal lay to the President.

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36. *Infra*, Ch. XIII, Sec. A.
37. *Ibid.*
38. *Ibid.*
39. See, *infra*, Chs. XXI, XXVI and XXVII.
40. *K. Anada Nambiar v. Government of Madras*, AIR 1966 SC 657 : (1966) 2 SCR 406.
41. *B.L. Wadehra v. Union of India*, AIR 1998 Del 436.
42. AIR 1975 SC 1755 : (1975) 4 SCC 699.
Also see, *A. Sanjeevi v. State of Madras*, AIR 1970 SC 1102 : (1970) 1 SCC 443; *supra*, footnote 12.

The Supreme Court ruled that the appeal had been validly disposed of by the Minister. The Court asserted that the Constitution 'conclusively contemplates' a constitutional President and any reference to the President under any rule made under the Constitution must need be to the President as the constitutional head acting with the aid and advice of the Council of Ministers. Thus, in the instant case, the principle laid down in *Samsher Singh* has been extended to a *quasi-judicial* function as well vested in the President by a statutory provision.

It may be pointed out that Arts. 74[43] and 77[44] are in a way complimentary to each other, though they may operate in different fields. Art. 74(1) deals with the acts of the President done "in exercise of his functions". Art. 77 speaks of the executive action of the Government of India which is taken in the name of the President of India. As regards the executive action of the Government of India, it has to be taken by the Minister/Officer to whom the said business is allocated by the Rules of Business under Art. 77(3). The allocation of business has been construed as merely directory by the Bombay High Court.[45] However, recently the Supreme Court has taken a contrary view in *NDMC v. Tanvi Trading and Credit (P) Ltd.*,[46] Guidelines relating to the Lutyens' Bungalow Zone in Delhi had been issued by the Ministry of Urban Development at the instance and initiative of the Prime Minister's Office. The Court held that these guidelines cannot be ignored by the Court and any relaxation in the guidelines under the Government of India (Transaction of Business) Rules, 1961 would require the approval of the Prime Minister's Office. Therefore, although the subject-matter of the guidelines fell within the scope of the Minister of Urban Development, a relaxation, without the approval of the Prime Minister could not be granted by any other authority, other than the Prime Minister's Office.

An order issued in relation to the executive action of the government has to be authenticated by the officer empowered under the Rules of Authentication under Art. 77(2). Many such orders do not reach the President and so there is no occasion in such cases for any aid and advice being tendered to the President by the Council of Ministers. These acts though executed in the name of the President are really the acts of the government. They are distinct from the acts of the President "in the exercise of his functions" which he discharges on the aid and advice of his Ministers.

The Constituent Assembly had consciously adopted the British pattern of government.[47] Therefore, the relevant conventions operating in Britain governing the relationship between the Crown and the Ministers are very pertinent to the Indian Constitution as well. In Britain, following a centuries-old tradition, the formal position is that the King, who had gradually lost legislative, judicial, and finally executive powers, is still the supreme formal agency in whose name action is taken. According to the British convention, the Sovereign has "the right to be consulted, the right to encourage, the right to warn" the Ministers.[48] The term

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43. *Supra*, Sec. B.
44. *Supra*, Sec. B.
45. *Crawford Bayley & Co v. Union of India*, 2003 AIHC 3372 (Bom). The view was affirmed by the Supreme Court in (2006) 6 SCC 25, 34 : AIR 2006 SC 2544.
46. (2008) 8 SCC 765 : (2008) 10 JT 109.
47. AUSTIN, *THE INDIAN CONSTITUTION : CORNERSTONE OF A NATION*, 116-143 (1966).
48. BAGHEOT, *THE ENGLISH CONSTITUTION*, 111 (Fontana Ed.)

'Crown' represents the sum-total of governmental powers and is synonymous with the executive.[49]

Accordingly, the term 'President' has been used in most of the constitutional provisions in India as denoting the Central Executive, *i.e.*, the President acting on the advice of the Ministers, and not the President acting personally. The Constitution-framers never envisaged that the powers and functions vested in the President should be exercised by him on his own responsibility without the consent of the Ministers. The framers of the Indian Constitution had no doubt in their minds that what they were seeking to create was a President to act merely as a constitutional head without having any discretionary or prerogative powers. Pandit Nehru while moving the report of the Committee on Principles of the Union Constitution stated:[50]

> "Power really resided in the Ministry and in the Legislature and not in the President as such. At the same time, we did not want to make the President just a mere figure-head like the French President. We did not give him any real power, but we have made his position one of authority and dignity."

The point was very clearly elucidated by several stalwarts in the Constituent Assembly that what was being introduced in India was the British model of the parliamentary government, and that the President, like the British Crown, would be a mere constitutional head. Thus, ALLADI K. AYYAR observed that "the word 'President' used in the Constitution merely stands for the fabric responsible to the Legislature."[51] AMBEDKAR said in the same vein that "the President is merely a nominal figure-head", that he "represents the nation but does not rule the nation. He is the symbol of the Nation" and that "he has no discretion and no powers of administration at all," and that he "occupies the same position as the King under the English Constitution."[52] "His place in the administration is that of a ceremonial device on a seal by which the nation's decisions are made known" and "the President of the Indian Union will be generally bound by the advice of his Ministers. He can do nothing contrary to their advice nor can he do anything without their advice."[53]

The President's role as a constitutional-head is reflected in his indirect election. If he were to be elected directly by adult franchise, then it might have been anomalous not to give him any real powers and it was feared that he might emerge as a centre of power in his own right. Since the power was really to reside in the Ministry and in the Legislature, and not in the President, it was thought adequate to have him elected indirectly.[54] It is also pertinent to note that in the Government of India Act, 1935, phrases like 'discretion' and 'individual judgment' were used to denote the areas where the Governor-General could act without, or independent of, the advice of the Ministers. No such phrases were adopted in the Constitution in relation to the President.

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49. WADE & PHILLIPS, *op. cit.*, 216.
Also, *Town Investment Ltd. v. Dept. of Environment*, (1978) A.C. 359.
50. IV *CAD*, 734.
51. VII *CAD*, 337; IV *CAD*, 12, 909.
52. IV *CAD*, 1036; VIII *CAD*, 724.
53. VII *CAD*, 32.
54. NEHRU, IV *CAD*, 6, 713, 734; AUSTIN, *op. cit.*, 121; GHOSH, *THE CONSTITUTION OF INDIA: HOW WAS IT FRAMED*. 140 (1966). Also see, *supra*, 133.

A question may be asked that if the framers of the Constitution were so definite in their minds regarding the constitutional status of the President, then why did they not categorically incorporate any provision in the Constitution that the President would be bound by ministerial advice? The Drafting Committee did examine this question but dropped the idea of putting any such provision as it thought it better to leave the matter to conventions. Such a provision could not have been enforced legally and the remedy could only have been political and that remedy exists even now. The relationship of the President with the Cabinet is based on the system of responsible government functioning in Britain. There the system of parliamentary government based on conventions has been working for long and it could be expected that a similar system would also work reasonably well in India.

Further, President's part in assent of Bills has already been defined in the Constitution.[55] In matters of dissolution of the Lok Sabha,[56] appointment of the Prime Minister[57] and dismissal of the Ministry,[58] there may be a marginal use of discretion by the President in certain grave and exceptional situations, and so in such matters some flexibility appeared to be necessary to meet any unforeseen contingencies. As conventions in Britain around the powers of the King in his relationship with the Cabinet 'are sufficiently strong', there could be no danger of misuse of these powers by the President.

No exact rules could be laid down for the exercise of these reserve powers as threats to the Constitution may be infinite in variety and, therefore, it was not possible to put in the Constitution precisely what the President must do in these extremely exceptional situations or what the Prime Minister can ask him to do and where the President can use his judgment.[59]

The power of the Prime Minister in Britain has been progressively increasing and his advice is now regarded as paramount.[60]

Nor does the matter rest entirely on conventions. There are a few safeguards woven into the fabric of the Constitution itself because of which critical situations may arise if the President ever ignores ministerial advice. The Council of Ministers is responsible to the Lok Sabha and this principle necessarily leads to the gravitation of effective power into the hands of the Prime Minister and the Ministers.[61]

If the President ever takes it into his head to override the Ministry on any matter, it may resign *en bloc* and thus create a constitutional crisis. It is obligatory on the President to always have a Council of Ministers[62] and so it follows that when a Ministry resigns, the President must at once seek to have an alternative Ministry which may be capable of commanding the confidence of the House and justifying to Parliament, and securing its approval of, the presidential action in refusing the advice of the previous Ministry. The President may find this very

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55. *Supra*, Ch. II, Sec. J(i)(c).
56. *Supra*, Ch. II, Sec. (I)(c).
57. *Supra*, Sec. A(iii).
58. *Ibid.*
59. XI *CAD*, 956. See, AUSTIN, *op. cit*, 132-6.
60. See, *infra*, under "Prime Minister".
61. *Infra*, see under "Collective Responsibility".
62. *Supra*, Sec. A(iii).

difficult in a situation where the previous Ministry enjoying the confidence of the House had to resign due to his own conduct, as the majority of members, who supported the previous Ministry, would refuse to support any other Ministry.

Parliament has supreme power of legislation, taxation and appropriation of funds. No appropriations from the Consolidated Fund can be made, and no tax can be levied by the Executive, without parliamentary sanction.[63] President's ordinance-making power is meant for use only for a short duration and is ultimately subject to parliamentary control.[64] The President cannot carry on the administration of the country without the co-operation of Parliament as no more than six months could elapse between two parliamentary sessions.[65] The President's power to declare an emergency is also subject to the approval of the two Houses of Parliament.[66]

All the above-mentioned constitutional provisions lead inevitably to one result : that there should be in office a Ministry which is in a position to secure parliamentary approval, sanction and finance for its policies and programme. A Ministry lacking the confidence of the Lok Sabha will find it impossible to carry on the administration with a non co-operative, or even hostile, House facing it. It is therefore absolutely essential for the President to maintain in office a Council of Ministers enjoying the confidence of the Lok Sabha and to act on its advice.

Further, if a Ministry having the solid support of the Lok Sabha is dislodged by the President, the majority party may even move for his impeachment for violation of the Constitution.[67] The President may be impeached if he seeks to disregard the rule of parliamentary government by ignoring the underlying basic conventions, as the phrase 'violation of Constitution' in the constitutional provision relating to Presidential impeachment is flexible enough to include not only the formal provisions of the Constitution but also the conventions operating thereunder.[68] This, therefore, should serve as a sanction to make the President observe the convention of acting on the advice of the Council of Ministers.

On the other hand, the 'activist' theory of the President has many snags for the President himself as well as for the Constitution. The President is not elected for his political views or programme. It is the programme of the political party, emerging as the majority party at the polls, which may be regarded as having been endorsed by the electorate and the Council of Ministers is there to implement the same.

The 'activist' theory will result in the negation of the parliamentary system. If the President vetoes a Bill passed by the two Houses, he will be setting himself against the majority in Parliament. He will thus become controversial and partisan and be drawn into the vortex of political controversy and public criticism which will do irreparable damage to the dignity, prestige and neutrality of the President's office.

An activist President is going to face sooner or later a confrontation with the Cabinet. There is no way to hold the President responsible except the extreme

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63. *Supra*, Ch. II.
64. *Infra*, Sec. D(ii)(d).
65. *Supra*, Ch. II, Sec. G.
66. *Infra*, Ch. XIII.
67. *Supra*, Sec. A(i)(h).
68. X *CAD*, 7, 269, 270; AUSTIN, *op cit.*, 138 .

step of impeachment. Two co-ordinate decision-making authorities acting independently of each other would be the negation of good government as well as that of responsible and parliamentary form of government. What would happen to the theory of collective responsibility of the Ministers, specifically stated in the Constitution, with an activist President? Will the Ministers defend the actions of the President in Parliament or criticise the same as having been taken against their advice? Such a situtation is bound to injure the parliamentary system irreparably.

The working of the Constitution since 1950 has conclusively established that the President is a figure head while the Council of Ministers wields the real executive power. There has not been a single case when the President might have vetoed a Bill passed by the two Houses or refused to accept ministerial advice on any point. Nehru, the First Prime Minister of India, made the position clear repeatedly by asserting that the responsibility for any policy was entirely that of the government which was responsible to Parliament, which in turn was responsible to the people and that the President was a constitutional head who did not oppose or come in the way of anything.[69]

It is however true that controversies regarding the President's constitutional position did arise from time to time in the past but each time it ended in confirming the position that the President was a constitutional, and not an effective, head of the State.

Within a few months of the Constitution coming into operation, President Rajendra Prasad, in a note to Prime Minister Nehru, expressed the desire to act solely on his own judgment, independently of the Council of Ministers, in the matter of giving assent to the Bills and sending messages to Parliament. This view was based on a literal reading of Articles 111 and 86 ignoring the underlying conventions.[70] Nehru consulted Attorney-General Setalvad and Ayyar, a member of the Drafting Committee of the Constituent Assembly, and they both expressed the view that the President had no discretion in this matter and that it would be constitutionally improper for him not to seek, or not to be guided, by the advice of his Ministers as Art. 74 was all pervasive in character and the Council of Ministers was to aid and advise the President in all his functions. The matter was not however precipitated as President Prasad relented and did not force his views.[71]

The controversy erupted again in 1960. On November 28, 1960, while laying the foundation-stone of the Indian Law Institute building, President Prasad said that it was generally believed that like the Sovereign of Great Britain, the President of India was also a constitutional head and had to act according to the advice of his Council of Ministers. But there were in the Constitution many provisions which laid down specific duties and functions of the President and, therefore, the question which needed to be studied and investigated was the extent to which, and the matters in respect of which, the powers and functions of the President differed from those of the British Sovereign. Further, it might also be considered

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69. Press Conf., July 7, 1959; *The Hindustan Times*, July 8, 59, p.1.

70. Art. 86 enables the President to send messages to the Houses of Parliament. Art. 111 refers to Presidential assent to Bills. See, *supra*, Ch. II.

71. AUSTIN, *op. cit.*, 140-143. Also SETALVAD, *My Life, Law and Other Things*, 170-2 (1970). See, MUNSHI, *PILGRIMAGE TO FREEDOM*, I, 568-75, (1967), for President's note and Setalvad's opinion.

if the procedure by which the President was elected and was liable to be removed or impeached introduced any difference, constitutionally speaking, between the President and the British Monarch. The President also posed the wider question as to how far the conventions of the unwritten British Constitution could be invoked and incorporated into the written Indian Constitution by interpretation.[72]

This speech naturally brought into forefront the question of President's relationship with his Council of Ministers, but the matter was set at rest by Nehru declaring at the Press Conference on December 15, 1960, that the President's remarks were only "casual," and that politically and constitutionally, the President's position conformed to that of the British Crown and that the President was a constitutional head and had always acted as such.[73]

For the third time, a similar controversy was raised in 1967. As a result of the Fourth General Elections held in March, 1967, the Congress monopoly of power in the States was broken as in some States non-Congress governments took office. When the question of electing a new President arose in May, 1967, the parties opposed to the Congress set up their candidate as against the Congress candidate, and one of the arguments that was put forth by these parties in soliciting support for their candidate was that the President was not a figure-head and that he had a constructive and meaningful role to play in the affairs of the country, especially, that he should act as a sort of mediator between the Centre and the States.

This last idea became rather important in the newly emerging political pattern of some States being under non-Congress governments while the Centre was under the Congress control, and, thus, seeds of Centre-State conflict, tensions and stresses were inherent in this situation. But the controversy was laid at rest with the election of the Congress candidate as the President, for the Congress Party had fought the election specifically on the basis that the President was merely a constitutional head and this was vindicated by the election of its candidate.[74]

Again, in 1969, the presidential election brought forth the same issue, but again the issue was settled in favour of the view that the President is a constitutional head and performs no activist role.

Thus, in 1976 the position was quite clear. Even without any words in the Constitution making ministerial advice binding on the President, the President, in effect, acted only as the titular head of the executive while the Prime Minister was the real head. The phrase 'aid and advice' used in Art. 74(1) was a masterly understatement of the real position enjoyed by the Council of Ministers for, in

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72. *THE HINDUSTAN TIMES*, November 29, 1960, p. 1.

73. *Ibid.*, Dec. 16, 1960, p. 6.

74. MUNSHI in *THE PRESIDENT UNDER THE INDIAN CONSTITUTION* (1963), argued that the Indian President's position was not the same as that of the British Crown. He based himself partly on a literalistic reading of the Constitution and argued that conventions could not override written constitutional provisions—obviously, an untenable argument, see, *infra*, Ch. XL, under "Constitutional Interpretation". Partly, his argument was political, as what he would like the position to be.

It is, however, interesting to note that in the Constituent Assembly, as a member of the Drafting Committee, he had assured the members that the President would be a constitutional head.

VII *CAD*. 984. Also, MUNSHI, *PILGRIMAGE*, *op. cit.*, 276-290.

practice, most of the decisions were made and implemented by the Ministers themselves without reference to the President.

It was recognised that the Ministers and not the President bore the responsibility of the governmental action and in whatever matter the President acted, he invariably did so on ministerial advice. There was no aspect of his functioning which was free of ministerial advice, and that the President exercised no discretion himself except the marginal discretion in such matters as appointing the Prime Minister *etc*. It was widely recognised that the Constitution embodied generally the parliamentary or the cabinet system on the British model where the monarch never acts on his own responsibility; he has ministers to bear the responsibility for his actions and that the constitutional relationship existing between the President and the Council of Ministers was substantially analogous to that subsisting between the British Crown and the Cabinet.

In spite of this, in 1976, by the Constitution (Forty-second Amendment) Act, 1978,[75] Art. 74(1) was amended so as to state explicitly that the President shall act in accordance with the advice of the Ministers in the exercise of his functions.

This amendment did not effect any real or significant change in the pre-existing position of the President *vis-a-vis* the Council of Ministers but it did make explicit what had been implicit at that time. The constitutional amendment only reiterates the position as it had come to be by then. The purpose of the amendment however was to remove any doubt on this point and clarify the position once and for all.

The Forty-Fourth Constitution Amendment[76] introduced a new proviso to Art. 74(1) authorising the President to require the Council of Ministers to reconsider the advice given by it, and the President shall act in accordance with the advice tendered after such reconsideration. And, further, that "the question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any Court" [Art. 74(2)].[77]

The present position therefore is that the President has to act on ministerial advice. The only right the President has is to ask the Council of Ministers to reconsider the matter. But the President is bound by the advice given thereafter [Proviso to Art. 74(2)]; He must act in accordance with this advice. In 2006 a potential confrontation was avoided in connection with the "office of profit" amendment.[78]

At times, the "reconsideration clause" may prove to be of crucial significance and may result in avoidance of hasty action on the part of the Council of Ministers. In October, 1997, the Gujral Government recommended imposition of the President rule in Uttar Pradesh under Art. 356 of the Constitution,[79] but the President sent it back to the Cabinet for reconsideration. The reason was that the U.P. Government had just won a vote of confidence in the Assembly. The Cabinet then relented and decided not to pursue the matter further.[80]

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75. For the Amendment, see, *infra*, Ch. XLII.
76. *Ibid.*
77. *Ibid.*
78. See *supra* p.76
79. For discussion on Art. 356, see, *infra*, Ch. XIII.
80. *THE TIMES OF INDIA*, dated 23/10/1997, p. 1.

History repeated itself in 1998 when the B.J.P. Government recommended imposition of the President's rule in Bihar under Art. 356, but the President again sent back the recommendation to the Cabinet for reconsideration, but the Cabinet decided to keep the matter pending and not pursue it. This happended on September 25, 1998. But, on February 12, 1999, the Cabinet reconsidered the matter and reiterated its earlier recommendation to impose President's rule in Bihar and this time the President accepted the Cabinet recommendation according to the proviso to Art. 74(2).

More recently, while affirming that the satisfaction of the President under Article 356 to direct dissolution of the Legislative Assembly is the satisfaction of the Council of Ministers, the Supreme Court set aside the order dissolving the Assembly because the Council of Ministers had wrongly advised the President.[81]

In this connection, reference may also be made to Art. 78 which empowers the President to be informed about the country's affairs. Thus, the Prime Minister is obligated to communicate to the President all decisions of the Council of Ministers relating to the administration of the affairs of the Union and the proposals for legislation [Art. 78(*a*)]. The Prime Minister is also under a duty to furnish such information relating to the administration of the affairs of the Union and proposals for legislation as the President may call for [Art. 78(*b*)].

As the constitutional head of the Union Executive, he has at least the right to be informed and to call for any information that he may desire. Further, the President may require the Prime Minister to submit for the consideration of the Council of Ministers any matter on which a decision has been taken by a Minister alone without consulting the Council of Ministers [Art. 78(c)]. This provision is designed in effect to enforce the principle of collective responsibility among the Ministers.[82] In all these matters, obviously, the President acts on his own responsibility without any ministerial advice because no Ministry is going to advise the President to seek information from it or ask it to reconsider its earlier decision.

From the phraseology of Art. 78(b), it becomes obvious that the right of the President to seek information is not governed by Art. 74. Arts. 74 and 78 are not mutually restrictive or contradictory. To call for information, the President does not have to act on the advice of the Council of Ministers. Denial of information to the President will amount to violation of the Constitution.

It is the duty of the Prime Minister to communicate the decision of the government to the President to enable him to know and to bring his influence to bear on the working of the government. It is also the duty of the Prime Minister to furnish such information relating to the administration of the affairs of the Union as the President calls for. If the President feels that a decision taken by a Minister requires reconsideration by the Council of Ministers, he can require the Prime Minister to place it before the Council of Ministers. It will therefore be wrong to assume that the President is merely a non-effective symbol.

In addition to what has been said above, the President can exercise a persuasive influence on the Ministers and help them with his advice and experience.

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81. *Rameshwar Prasad v. Union of India (UOI)*, (2006) 2 SCC 1 : AIR 2006 SC 980. For further discussion see *infra*, Chapter VII.

82. On "Collective Responsibility", see, *infra*.

Like the British Sovereign, the role of the President is "to advise, encourage and warn Ministers in respect of the recommendations which they make."[83]

The influence of the President, however, depends on his personality. A man of character and ability can really exert a potent influence on the affairs of the government with his advice, help and persuasion, by using his knowledge, experience and disinterestedness to arrive at sound decisions on matters affecting the well-being of the people and not by his dictating any particular course of action to his Ministers.

In the ultimate analysis, it is the Council of Ministers which will prevail and not the President. His role is at best advisory; he may act as the guide, philosopher and friend to the Ministers, but cannot assume to himself the role of their master—a role which is assigned to the Prime Minister. The Constitution intends that the President should be a centre from which a beneficent influence should radiate over the whole administration, and not that he should be the focus or centre of any power.

While the new provision makes explicit what had generally been regarded as already being the position, there may possibly arise some difficulties in practice in some situations as a result of this explicit statement. Before 1976, in exceptional and abnormal situations, the President enjoyed some marginal discretion in certain matters, as for example, appointment of the Prime Minister (when the Lok Sabha is split with no majority party), or dissolution of the Lok Sabha, or the removal of the Council of Ministers from office. What is the position in these matters now after 1976? What is the impact of the new constitutional provision on these matters? What happens when the Prime Minister's party loses the election and a new Prime Minister is to be appointed? Is the President to seek, and is he bound by, the advice of the defeated Prime Minister regarding whom to appoint as the new Prime Minister or can he take his own decision in the matter?

Suppose the Council of Ministers is defeated on the floor of the House and the Prime Minister seeks dissolution of the House even though it may be possible to install an alternative ministry in office. Should the President automatically follow the Cabinet advice and dissolve the House, or should he seek to find a new Prime Minister and avoid fresh election? Or, again, the Prime Minister loses the confidence of the Lok Sabha and the Prime Minister neither resigns nor seeks dissolution of the House to hold fresh elections? Is the President to watch the situation helplessly because he cannot act without Prime Minister's advice, or can he act on his own and take suitable action? The crucial question is whether in such crucial questions the President is left with any discretion?

The true position seems to be that in the crucial areas mentioned here, the President has to depend on his own judgment. In the matter of appointment of the Prime Minister, as the court cases concerning appointment of Chaudhary Charan Singh as the Prime Minister clarify,[84] the President is to depend on his own assessment. He is not required to seek the advice of anyone in this matter.

Similarly, in matters of taking action when the Council of Ministers is defeated in the House, the President cannot be immobilisd merely because the Prime Minister does not advise him to take any action. Perhaps the constitutional

83. WADE AND PHILLIPS, *op, cit*., 222.
84. *Supra.*

provision binding the President to ministerial advice may be read as meaning that the advice of the Ministers is binding on the President only so long as the Council of Ministers enjoy the confidence of the House.[85]

It may be argued that Arts. 74(1) and 75(3) ought to be read together. Art. 74(1) comes into play so long as Art. 75(1) is being fulfilled, *i.e.*, the Council of Ministers retains the confidence of the *Lok Sabha.* Similarly, in the matter of dissolving the Lok Sabha, he may have to exercise his own judgment in some situations.[86] In critical constitutional situations, any one of these matters may assume great importance and the President's decision may have a profound impact on the country's destiny and in spite of the amended Art. 74(1), it cannot be interpreted so as to take away all discretion from the President to act suitably in difficult situations. The President continues to have marginal discretion in these matters although, in normal times, he acts on the advice of the Prime Minister even in some of these matters.

In *Rameshwar Prasad (VI) v. Union of India*,[87] the Supreme Court relied on the recommendations of the Sarkaria Commission relating to the discretionary powers of the Governor when faced with a fractured electoral mandate. Given the element of subjectivity involved in the Governor's taking decisions in controversial circumstances, including the appointment of the Chief Minister, or in ascertaining the majority, or in dismissal of the Chief Minister or in dissolving the legislative assembly, the Supreme Court emphasised that it was necessary to ensure that the decisions were objective and politically unbiased.

A question has been raised about the relation between the President and the Council of Ministers which has resigned on losing majority support in the Lok Sabha, but which remains in office pending alternative arrangements being made. If the House is dissolved, then such a Ministry may remain in office for a few months pending fresh elections to the Lok Sabha.[88] This happened when Charan Singh resigned in 1979, or when Chandra Sekhar resigned in 1991, or Gujral resigned in 1997. In each of these cases, the Ministry lost majority support in the Lok Sabha, so it resigned. As no alternative Ministry could be formed, the Lok Sabha was dissolved[89] and fresh elections held. The question is: Is the President bound to act on the advice of such a Ministry?

Article 74(1) draws no distinction between a Ministry enjoying confidence of the House and the one which remains in office after losing confidence of the Lok Sabha. Theoretically, therefore, it can be argued that the President remains bound by the advice of such a Ministry. But, on the other hand, it may also be argued that Art. 74(1) is pre-conditioned by Art. 75(2). However, a view has been expressed that such a Ministry should only act as a care-taker government and take routine decisions and not policy decisions or make heavy financial commitments binding the future government.[90] This means that the President has to monitor Cabinet decisions and refuse to accept any policy decision by a care-taker gov-

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85. Reference may be made to what happended in Australia in 1975 : see, *supra*.
86. On dissolution of Lok Sabha, see, Ch. II, *supra.*
87. (2006) 2 SCC 1 : AIR 2006 SC 980.
88. This arrangement has been validated by the Supreme Court in *U.N.R. Rao v. Indira Gandhi*, *supra*, Sec. A(iii).
89. On dissolution of Lok Sabha, see, *supra*, Ch. II, Sec. I(c)(d).
90. R. VENKATARAMAN (former President), Relations with the Cabinet, *The Hindustan Times*, dated Feb. 24, 98, p. 13; VENKATARAMAN, *MY PRESIDENTIAL YEARS*, 504.

ernment. To do so would amount to an exception to the rule contained in Art. 74(1) that the President acts in accordance with the aid and advice of the Council of Ministers.

It can also be argued that so far as the Constitution is concerned, it draws no distinction between a care-taker and a normal government. The term care-taker government has not been used anywhere in the Constitution. The term came in vogue to denote a government in office after dissolution of the Lok Sabha pending fresh elections and installation of a new government. The question lies basically in the realm of practices and conventions. Perhaps, in course of time, some conventions will emerge to regulate the relationship between the President and the Ministry holding office while the *Lok Sabha* is dissolved.

This question came to the forefront rather acutely during the period April to October, 1999. The Vajpayee Government, a coalition of several parties headed by the BJP was in office at the time. A constituent party (AIADMK) withdrew support and doubt arose whether the Government enjoyed a majority support in the Lok Sabha. The President advised the Government to seek a vote of confidence. On April 17, 1999, the Government lost by one vote (in favour, 269; against, 270). As the opposition failed to come together to form an alternative government, the President dissolved the Lok Sabha on April 26, '99, on the advice of the Cabinet, and asked the Vajpayee Government to remain in office till a new government assumed office after fresh elections which were scheduled to be held in September, 99. Thus, the new government could assume office only in October.[91]

The question arose how should the Vajpayee Government behave during the period from April to October, a period of about 6 months. The opposition parties insisted that the Government should act as a care-taker government and take only routine administrative decisions and no policy decision. On the other hand, the Government's view was that it was not a care-taker, but a full-fledged, government. In practice, the Government did take several policy decisions. The most important task performed by the Government was to throw out Pakistani intruders from Kargil, and this involved taking a number of policy decisions. The Government could not have taken the stand that being a caretaker government, it would not take such decisions. Such a stand would have been against national interest.

In such a situation, therefore, a relevant question does arise : can a government remain in limbo for six months? At the end of the day, the question seems to be one of propriety rather than of legality. Perhaps, in normal circumstances, it may be proper to avoid taking policy decisions, and bind the discretion of the future

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91. This episode raises some serious questions having a bearing on the working of parliamentary form of government in India. One, should a government in office be required to seek a vote of confidence whenever a doubt arises about its majority support in Lok Sabha? The opposition parties always have at their disposal the technique of bringing a vote of no-confidence against the government, especially when the Parliament is in session. Besides, many occasions arise when the government majority can be tested on the floor of the House. Two, should the opposition parties vote out a government in office when they themselves are not in a position to form an alternative government? In the view of the author, the opposition parties owe to the people that they should behave with a sense of responsibility.

In Britain, a minority government has remained in office when the opposition parties, though in majority, are not in a position to form government. Why cannot this happen in India as well?

government, except when it becomes absolutely necessary to take such a decision. The matter falls more in the domain of conventions rather than of law.

The fact, however, remains that the working and viability of the parliamentary system depends upon a disciplined party system. If there are multiple loosely knit parties then the marginal discretion of the President in matters of appointing the Prime Minister and dissolution of Lok Sabha may be of crucial and decisive significance.[1] But the President may not have much scope to exercise his judgment if there is a strong and cohesive party system.

In normal times, the Prime Minister and his colleagues hold their offices not as a gift from, or as a matter of grace of the President, but because they have a majority support behind them. So long as this position holds, the President has no activist role to play. There can be no conflict between his will and that of Parliament. But when fissures appear in the party system, and it becomes fluid, then the President will have opportunity to exercise his marginal discretion. In any case, the Constitution envisages not a dictatorial but a democratic President who uses his judgment to keep the democratic and representative government functioning and not to thwart or to subvert the same.

The relationship between the President and the Council of Ministers is based on political sanctions and any error of judgment on the part of the President may well prove to be his graveyard.[2] Nevertheless, the President can exert a lot of constructive and beneficial influence on the functioning and processes of the government of the day through his sagacious, objective, non-partisan and non-political advice. He may not rule but he certainly may reign and seek to keep parliamentary system on an even keel.[3] This is in line with the tradition in Britain where the Queen "has the right to offer, on her own initiative, suggestions and advice to her Ministers even where she is obliged in the last resort to accept the formal advice tendered to her".[4]

(b) PRIME MINISTER

In the mechanism of the parliamentary form of government, the Prime Minister occupies a crucial position.[5] JENNINGS describes him as the 'keystone of the

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1. See, *Dinesh Chandra v. Chaudhuri Charan Singh*, AIR 1980 Del. 114, *supra*, Sec. A(iii), where the court has said that the President enjoys discretion in the matter of appointment of the Prime Minister.
2. The question of the constitutional position of the President has been discussed too often in India. See, for example, HENRY W. HOLMES JR., Powers of President : Myth or Reality, 12 *J.I.L.I.* 367 (1970); V.S. DESHPANDE, The President, His Powers and their Exercise, 13 *J.I.L.I* 326 (1971); HARISH KHARE, The Indian Prime Minister—A Plea for Institutionalization of Powers, V *JCPS* 22 (1971).
3. Some time back, some letters exchanged between President Sanjeeva Reddy and Prime Minister Indira Gandhi (period 1981) were released. It seems from these letters that the President did communicate his views on urgent public matters to the Prime Minister and urged her to take remedial action. Other Presidents have also adopted a similar course. Apart from personal discussion, Presidents do use the vehicle of letters to communicate their views to the Prime Ministers. See, CHALAPATI RAO & AUDINARAYANAN REDDY, *FROM FARM HOUSE TO RASHTRAPATI BHAWAN*: *BIOGRAPHY OF PRESIDENT SANJEEVA REDDY*, (1989).
   One will gather the same impression after reading the memories of the former President of India, (1987-1992), R. VENKATARAMAN under the title *MY PRESIDENTIAL YEARS*, (1994).
4. S.A. DE SMITH, *CONSTITUTIONAL AND ADMINISTRATIVE LAW*, 99 (III Ed. 1977).
5. On the question of appointment of the Prime Minister, see, *supra*, Sec. A(iii).

Constitution'.[6] He further observes : "All roads in the Constitution lead to the Prime Minister". Earlier, Joh Morley had described him as the "keystone of the cabinet arch".

The Prime Minister is the leader of the majority party in the Lok Sabha. He is the head of the Council of Ministers. He co-ordinates government policy. He is the channel of communication, the only link, between the President and the Council of Ministers. In this connection, reference may be made to the provisions of Art. 78.[7]

He is responsible for the appointment of the Ministers and allocation of work among them.[8] He can compel the resignation of a Minister and invoke the presidential power to dismiss an unwanted Minister, and, therefore, all Ministers hold office at his discretion.[9] A Minister who is not prepared to accept his leadership must tender his resignation.

The Prime Minister is the principal spokesman of the Cabinet and its defender in Parliament. He can obtain dissolution of the Lok Sabha.[10] He is the Chairman of the Cabinet, summons its meetings and presides over them. His resignation would automatically amount to a resignation of all Ministers who compose the government.

Therefore, the Prime Minister's position is one of great power, influence and prestige. He keeps the fabric of the parliamentary form of government in working order. The entire constitutional machinery would appear to revolve around his personality. He has therefore, been described as 'the keystone of the Cabinet arch,' who is 'central to its formation, central to its life, and central to its death.'[11]

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6. JENNINGS, *CABINET GOVT*., 173 (1969). Also see, BYRAM CARTER, *THE OFFICE OF PRIME MINISTER*; JENNINGS, *PARLIAMENT*, 73-79 (1970); MACKINOSH, *THE BRITISH CABINET*, 428-58 (1977).

7. *Supra*, p. 209.

8. *Supra*, Sec. A(iii).

9. *Ibid.*

10. *Supra*, Ch. II, Sec. (I)(c).

11. S.A. DE SMITH, *CONSTITUTIONAL AND ADMINISTRATIVE LAW*, 146 *et seq;* LASKI, *PARLIAMENTARY GOVERNMENT IN ENGLAND*, 228; A.H. BROWN, Prime Ministerial Power, 1968 *Public Law*, 228; O. HOOD PHILLIPS, *CONSTITUTIONAL & ADM. LAW*, 3-325 (1993).

In Britain, the position of the Prime Minister has been described in various ways. "The Prime Minister", said JOHN MORLEY, "is the keystone of the cabinet arch". JENNINGS describes him as "the keystone of the Constitution". IVOR JENNINGS in the *CABINET GOVERNMENT* states that the Prime Minister is not merely the first among equals, he is not merely a moon among lesser stars, he is rather "a sun around which planets revolve".

NEHRU also underlined the primacy of the Prime Minister's office: *THE HINDUSTAN TIMES*, June 17, 1954, p. 5. Again, in a Press Conference on Nov. 7, 1958, he emphasized that the whole basis of parliamentary system of government is based on a homogeneous Cabinet of which the keystone is the Prime Minister and that if a Minister could not co-operate with him, it was difficult for him to carry on—either the Prime Minister goes or he goes,' and that it would be rather absurd if Ministers functioned in a way opposed to the Prime Minister; *The Hindustan Times*, Nov. 8, 1958, p. 1.

Similarly, the President of the ruling party, the Congress, stated that if after discussions and consultation, the Ministers do not agree with the Prime Minister, he after assessing the situation in the light of discussions may finally make it clear to his Ministers, his own view and those who do not agree with him will have to decide whether they will vote with him or against him. If they vote against him, then the Prime Minister would be justified in calling for their resignations; *THE HINDUSTAN TIMES*, Jan. 19, 1959. p. 12.

However, no Prime Minister can govern without the aid of colleagues. He thus functions under one important limitation—that of keeping a government in office which constantly enjoys the confidence of the majority in the Lok Sabha. The selection of the Prime Minister is itself the result of compromises of various forces within the political party concerned and, therefore, the Prime Minister has also to seek constantly the support of the political party to which he belongs. If the Prime Minister is heading a coalition government, his freedom of action becomes much more limited because he has to carry with him not only his own party but also the several parties in the coalition.

The Prime Minister cannot, therefore, act as an autocrat or despot; he cannot afford to disregard the views of his colleagues and party organs always. He depends on his colleagues for support and too many resignations from the Cabinet may ultimately lead to his downfall.

Due to this reason, it has sometimes been suggested that the Prime Minister is *primus inter pares* among his colleagues.[12] But this does not depict the position of the Prime Minister aptly. Subject to the limitation of his commanding the confidence of the Lok Sabha, and the support of the political party, the Prime Minister's position is very much superior to that of other Ministers. Much, however, depends on the individual personality of the Prime Minister and a person like Nehru or Indira Gandhi could completely overshadow the whole Cabinet, and even the party machinery. In the words of KEITH, "the polite description of the Prime Minister as *primus inter pares*" is "inadequate to describe the real position of the Prime Minister if by temperament he is willing to assert to the full position which he can assert if he so desires."[13]

In this connection, DE SMITH observes:[14]

> "But the most significant fact is that nearly all commentators regard the cabinet as being in some degree subordinate to the Prime Minister. Hardly any one today will make out a case for the proposition that the Prime Minister is merely *primus inter pares*, the first among the equals.."

The Constitution makes no mention of the office of the Deputy Prime Minister, but, on occasions such appointments have been made. In 1990, when V.P. Singh was appointed as the Prime Minister, Devi Lal took oath mentioning himself as the Deputy Prime Minister. A question was raised through a writ petition before the Supreme Court whether the oath taken by Devi Lal was valid.

In *K.M. Sharma v. Devi Lal*,[15] the Court rejected the writ petition saying that an oath has two parts—(i) descriptive; (ii) substantial. So long as the substantial part of the oath is properly followed, a mere mistake or error in the descriptive part would not vitiate the oath.[16] On this basis, the Court ruled that though Devi Lal described himself as the Deputy Prime Minister, he was "just a Minister like other members of the Council of Ministers" and though he described himself as the Deputy Prime Minister, such description of him "does not confer on him any powers of the Prime Minister."

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12. WADE AND PHILLIPS *op. cit*., 244.
13. *THE BRITISH CABINET SYSTEM*, 61 (1952); also, JENNINGS, *CABINET GOVT*., 227.
14. S.A. DE SMITH, *CONST. AND ADMN. LAW*, 147.
15. AIR 1990 SC 528 : (1990) 1 SCC 438.
16. *Virjiram Sutaria v. Nathalal Premji Bhavadia*, AIR 1970 SC 657 : (1969) 1 SCC 77.

(c) CABINET

Cabinet is the nucleus of the Council of Ministers. The Council of Ministers is usually a large body consisting of a number of Ministers of various ranks, *e.g.*, Cabinet Minister, Ministers of State and Deputy Ministers. Within this large body, there exists a smaller inner body known as the Cabinet which is really the effective policy-making organ within the Council of Ministers.

Cabinet really is the driving and steering body responsible for the governance of the country.[17] It consists of the principal Ministers with whom rests the real direction of policy. The Council of Ministers as a whole never meets formally.

In Britain, Cabinet is based on no legal sanction and has no legal status; it is an organ of government which rests on understandings and conventions. Similar is the case in India. The Constitution makes reference to the Council of Ministers but makes no reference to the Cabinet. Cabinet is a conventional, an extra-constitutional, body but it is the ultimate policy-making and decision-making organ within the executive.

All members of the Council of Ministers are not members of the Cabinet. Its composition is flexible. It is for the Prime Minister to determine from time to time the composition of the Cabinet, though due to the relative importance of certain departments, their Ministers are invariably its members. The Cabinet Ministers are members of the Cabinet, while a Minister of State may attend a Cabinet meeting when matters pertaining to his department are to be discussed.

Cabinet decides major questions of policy. Its decisions are binding on all Ministers. The various government departments carry out the Cabinet's policy decisions by administering the law and devising measures for enactment as law by Parliament. A Minister may himself dispose of routine matters without reference to the Cabinet, but in all matters of major policy or of real political importance, a Minister seeks guidance from the Cabinet.

Cabinet is the central directing instrument of government in legislation as well as in administration. It coordinates administrative action and sanctions legislative proposals. It is the Cabinet which controls Parliament and governs the country. The primary function of the Cabinet is to formulate the policies of the government for the governance of the country, have it accepted by the Legislature and carry on the executive function of the state as per the Constitution and the laws.

In no other authority there is such a concentration of power and such a capacity for decisive action as that possessed by the Cabinet, provided always that it enjoys the support of majority in the House.[18] The Cabinet can be said to be the centre of gravity of the parliamentary system for the whole weight of government is, in a very real sense, concentrated at that point. However, views have been expressed recently that the Cabinet government has become transformed into Prime Ministerial government. This indicates the ascendancy of the Prime Minister at the expense of the Cabinet.[19]

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17. *R.K. Jain v. Union of India*, (1993) 4 SCC 119, 147 : AIR 1993 SC 1769; *S.R. Bommai v. Union of India*, (1994) 3 SCC 1 : AIR 1994 SC 1918.

18. L.S. AMERY, The Nature of British Parliamentary Government, in *PARLIAMENT—A SURVEY*, (ed. Lord CAMPION), 59; DAWSON, *op, cit.*, 167-192.

19. WADE AND PHILLIPS, *Op. Cit.*, 242, 246

(d) COLLECTIVE RESPONSIBILITY

A notable principle underlying the working of parliamentary government is the principle of collective responsibility which represents ministerial accountability to the legislature. It means that the Government must maintain a majority in the *Lok Sabha* as a condition of its survival.

In Britain, the principle is not legal but conventional; in India, on the other hand, there is a specific provision in the Constitution to ensure the same. Art. 75(3) lays down that the Council of Ministers shall be collectively responsible to the Lok Sabha.

Reference may also be made in this connection to Art. 78(*c*) which says that the President may submit a decision taken by a Minister for consideration by the Council of Ministers which really means the Cabinet. This provision further strengthens the principle of collective responsibility. When a Minister tenders any advice to the President, the matter not having been considered by the Cabinet, the President may submit it for consideration by the Cabinet.[20]

The principle of collective responsibility may be regarded as fundamental to the working of the parliamentary government, as it is in the solidarity of the Cabinet that its main strength lies. The principle of collective responsibility means that the Council of Ministers is responsible as a body for the general conduct of the affairs of the government. All Ministers stand or fall together in Parliament, and the government is carried on as a unity. The rule ensures that the Council of Ministers works as a team, as a unit, and as a body commands the confidence of the House, and that Cabinet's decisions are the joint decisions of all Ministers.[21] There has been for sometime and is at present a multitude of political parties in India. At present, 57 political parties are represented in Parliament and in the States. Without any particular party capable of forming a government on its own, there have been coalition governments at the Centre and in many States for about the last 30 years. The country has and is being run by a number of parties which not only do not represent the majority in the country but may not even represent the majority in their own state. With different political agendas there is often no consensus on major issues of policy. Threats of withdrawal of support unless a coalition partner's particular political agenda is met, has resulted either in a stalemate or in an individual minister in charge of the ministry taking decisions without consulting the Council or the Cabinet.[22]

The principle of collective responsibility secures the unity of the Cabinet and the Council of Ministers. Prime Minister Nehru took occasion to expound the principle as follows in the context of the State Governments. "A government af-

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20. *Supra* (a).

21. *State of Jammu & Kashmir v. Bakshi Gulam Mohd*., AIR 1967 SC 122 : 1966 Supp SCR 401.

See, KEETON, *THE BRITISH COMMONWEALTH*, I, 55.

For a discussion on the Indian Cabinet at work, see, MICHAEL BRECHER, *INDIA AND WORLD POLITICS*, 234-253 (1968).

On collective responsibility, also see, Beg, C. J., in *State of Karnataka v. Union of India*, AIR 1978 SC 68 at 96-7 : (1977) 4 SCC 608; Common Cause, *A Registered Society v. Union of India*, AIR 1999 SC 2979, 2992 : (1999) 6 SCC 667; *PU Myllai Hlychho v. State of Mizoram*, (2005) 2 SCC 92 : AIR 2005 SC 1537.

22. See for exhaustive discussion : Bimal Jalan: India's Politics: A view from the Backbench (2007).

ter the parliamentary model, is one united whole. It has joint responsibility. Each member of the government has to support the others so long as he remains in the government. The Minister has to support his other Ministers and the other Ministers have to support each other and the Chief Minister. It is quite absurd for any Minister to oppose or give even the impression of opposing a colleague of his. Opinions may be freely expressed within the Cabinet. Outside, the government should have only one opinion. There is no question of a member of government being neutral in a controversial issue in which the government is concerned, except in the rare cases which we may consider as matters of conscience, where freedom is given."[23]

Collective responsibility envisages that each Minister assumes responsibility for cabinet decisions and action taken to implement the same. The policies and programmes of the Cabinet have to be supported by each Minister. Even if there may be differences of opinion within the Cabinet, once a decision has been taken by it, it is the duty of every Minister to stand by it and support it both within and outside the Legislature.

The decisions of the Cabinet are regarded as the decisions of the whole Council of Ministers and binding on all Ministers. A Minister cannot disown responsibility for any Cabinet decision so long as he remains a Minister. He cannot both remain a Minister and criticise or oppose a Cabinet decision or even adopt an attitude of neutrality, or oppose a colleague in public. A Minister who disagrees with a Cabinet decision on a policy matter, and is not prepared to support and defend it, should no longer remain in the Council of Ministers and should better resign.

There have been a number of resignations in the past because of differences with the Cabinet. Dr. Mathai resigned as a Finance Minister because he disagreed with the Cabinet on the question of scope and powers of the Planning Commission which was proposed to be set up then. C.D. Deshmukh resigned because he differed from the Cabinet on the issue of re-organisation of States, especially on the question of Bombay. On September 5, 1967, Foreign Minister Chagla resigned because of his differences with the Government's language policy, especially the place of English. Several other Ministers have resigned from the Central Council of Ministers owing to their differences with the Cabinet.[24] There is, however, a convention that a resigning Minister may, if he so wishes, may state the nature of his disagreement with the Cabinet in his letter of resignation and make a resignation speech in Parliament.

The principle of collective responsibility does not mean that every Minister must take an active part in the formulation of policy, or that he should be present in the committee room whenever a policy decision is taken. This is not possible because of the large size of the present-day Council of Ministers. The effective decision-making body is the Cabinet and not the entire Council of Ministers and, therefore, the obligations of a Minister may be passive rather than active when the decision does not relate to matters falling within his own sphere of responsibility.

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23. NEHRU'S Letter, *THE HINDUSTAN TIMES*, June 17, 1954.
24. For details, see, VENKATESWARAN, *CABINET GOVERNMENT IN INDIA*, 73-93 (1967).

Collective responsibility ensures that the Council of Ministers presents a united front to Parliament. In the words of LASKI, "Cabinet is by nature a unity : and collective responsibility is the method by which this unity is secured." In the words of the Supreme Court of India, the principle of collective responsibility is that "for every decision taken by the Cabinet, each one of the ministers is responsible to the Legislature concerned."[25]

The principle of collective responsibility is both salutary and necessary. In *S.P. Anand, Indore v. H.D. Deve Gowda*,[26] it was held that even though a Prime Minister is not a member of either House of Parliament, once he is appointed he as also his Ministers become answerable to the House and the principle of collective responsibility governs the democratic process. On no other condition can a Council of Ministers work as a team and carry on the government of the country. It is the Prime Minister who enforces collective responsibility amongst the Ministers through his ultimate power to dismiss a Minister. The Supreme Court has ruled that the principle of collective responsibility is in full operation so long as the *Lok Sabha* is not dissolved. "But when it is dissolved the Council of Ministers cannot naturally enjoy the confidence of the House of People."[27]

The Gujarat High Court has described the principle of collective responsibility as follows:[28]

> "Collective responsibility means all Ministers share collective responsibility even for decisions in which they have taken no part whatsoever or in which they might have dissented at the meeting of the Council of Ministers. Collective responsibility means the members of Council of Ministers express a common opinion. It means unanimity and confidentiality."

According to the Supreme Court, collective responsibility means that "all members of a government are unanimous in support of its policies and would exhibit that unanimity on public occasions although while formulating the policies, they might have expressed a different view in the meeting of the Cabinet."[29]

It is to give effect to the principle of collective responsibility that the deliberations of the Cabinet are kept secret and confidential because preservation of a united front will become impossible if disclosures are permitted of the differences of opinion which emerged at a Cabinet meeting amongst its members.[30]

The consequences of this secrecy are far reaching. "Relying on this protection, Cabinet members are free to voice their opinions without reserve on all subjects which come up for discussion; the motives which have influenced the Cabinet in coming to its decision will not be disclosed: the dissentients can support the corporate policy without being themselves singled out for special attack or having the motives impugned."[31]

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25. *Karnataka v. Union of India,* AIR 1978 SC 131. For further discussion on this case, see, *infra,* Ch. XIII, Sec. B.
26. 1996 (6) SCC 734 : AIR 1997 SC 272.
27. *U.N.R. Rao v. Indira Gandhi,* AIR 1971 SC 1002 : (1971) 2 SCC 63; *supra,* Sec. A(iii).
28. *Dattaji Chirandas v. State of Gujarat,* AIR 1999 Guj. 48, 59.
29. *Common Cause—A Regd. Society v. Union of India,* AIR 1999 SC 2979 at 2992 : (1999) 6 SCC 667.
30. WADE AND PHILLIPS, *op. cit*., 100.
31. DAWSON, *op. cit*., 185.

A Cabinet Minister may lose his office if he reveals the details of a Cabinet discussion to the press. The secrecy may at times be released partially when a Minister resigns his office. He is entitled to make a statement in Parliament so that he may reveal the reasons for his resignation.

How far can an ex-Cabinet Minister be legally obligated not to reveal Cabinet discussion? This question has been answered in Britain in *Attorney-General v. Jonathan Cape Ltd*.[32] Crossman was a Cabinet Minister for nearly six years (1964-1970). He maintained a detailed diary about the Cabinet proceedings. After he ceased to be a Minister, he began to collate his diaries with a view to their eventual publication. Crossman died in 1974. After his death, his diaries were due for publication. The Attorney General brought an action for injunction against Crossman's executors for restraining them to publish the diaries. His contention was that the Cabinet proceedings and Cabinet papers being secret, these could not be publicly disclosed. The confidentiality of Cabinet papers and proceedings emanate from "the convention of joint Cabinet responsibility" "whereby any policy decision reached by the Cabinet has to be supported thereafter by all members of the Cabinet whether they approve of it or not, unless they feel obliged to resign".

The Court laid down the proposition that "when a Cabinet Minister receives information in confidence the improper publication of such information can be restrained by the Court". The Court pointed out that the "Cabinet is at the very centre of national affairs and must be in possession at all times of information which is secret or confidential". To identify the Ministers who voted one way or another in a Cabinet meeting would undermine the doctrine of joint responsibility".

The Court, therefore, ruled that "the expression of individual opinions by Cabinet Ministers in the course of Cabinet discussion are matters of confidence, the publication of which can be restrained by the court when this is clearly necessary in the public interest". The Court also agreed that "the maintenance of the doctrine of joint responsibility within the Cabinet is in the public interest, and the application of that doctrine might be prejudiced by premature disclosure of the views of individual Ministers". But in the instant case, the Court refused to grant injunction because what was sought to be revealed was ten years old, as the Cabinet discussions held during the period 1964-1966 were sought to be published in 1975, and there would be no damage to public interest by the said publication.

As earlier noted, coalition governments have now become the order of the day in India, especially at the Centre. A number of disparate political parties come together to form the government as no single party has majority in the House. Experience has shown that inherently such governments are unstable as any constitutional party forming such a coalition government can withdraw its support anytime, thus, reducing the government to a minority. Another casualty of such an arrangement is the principle of collective responsibility, the reason being that the various parties lack a common programme and a common approach to national issues and so they speak in different voices. Further, the various parties constituting the government are more interested in pursuing their own party programme rather than a common national agenda. The coalition governments adversely affect the homogeneity and solidarity of the Cabinet.

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32. [1976] QB 752.

To begin with, in Britain, the concept of collective responsibility was based on conventions. But, now, after *Jonathan Cape*, it cannot be regarded as a purely conventional concept because the court of Appeal has specifically recognised it. In India, the concept of collective responsibility has been specifically incorporated in a constitutional provision [Art. 75(3)], and it has been judicially recognised in several cases mentioned above.

(e) MINISTER'S INDIVIDUAL RESPONSIBILITY

All decisions are not taken by the Cabinet; many decisions are taken by the Ministers themselves without reference to the Cabinet, or by officials in the department without reference to the Minister.

Article 77(3), noted above, [33] envisages distribution of business among several Ministers. Even a Minister does not take all decisions himself, most of the decisions are taken by officials in the department under the Minister according to the Rules of Business. This is the effect of Art. 77(3). Therefore, along with the principle of collective responsibility, there also works the principle of the individual responsibility of each Minister to Parliament, which is more positive in character. Each Minister is personally accountable for his actions.

The Supreme Court has explained this principle in the following words: [34]

> "The Cabinet is responsible to the legislature for every action in any of the ministeries. That is the essence of joint responsibility. That does not mean that each and every decision must be taken by the Cabinet. The political responsibility of the Council of Ministers does not and cannot predicate the personal responsibility of the Ministers to discharge all or any of the governmental functions. Similarly, an individual Minister is responsible to the legislature for every action taken or omitted to be taken in his Ministry. This again is a political responsibility and not personal responsibility."

No Minister can retain office against the will of Parliament. Each Minister in his own sphere of responsibility bears the burden of speaking and acting for the government. He has to answer questions relating to the activities of his department and defend his policies and administration when the House discusses the same. He must answer for every act or neglect of his department, and he cannot throw this responsibility on any one else whether an official in his department or another Minister. Each Minister is personally liable and collectively responsible for his actions, acts and policies.

This positive liability of each Minister is essential if the Parliament is to effectively perform its role of criticising the Executive. But when a particular Minister is under fire in Parliament, the principle of collective responsibility ensures that other Ministers should come to his rescue and defend his actions.[35]

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33. See, *supra*, Sec. B(a).
For a detailed discussion on this point, see, M.P. JAIN, *A TREATISE ON ADMINISTRATIVE LAW*, II, Ch. XX.

34. *A. Sanjeevi v. State of Madras*, AIR 1970 SC 1102 : (1970) 1 SCC 443.

35. The best example of this is provided by the discussion in Parliament on Kuo Oil Deal. When the then Petroleum Minister P.C. Sethi was being criticised for his error of judgment, his action was defended by the Shiv Shankar who was the Petroleum Minister at the time of the discussion. Sethi said nothing in his defence: See, *THE HINDUSTAN TIMES* (Int'l, ed.), Aug, 12, 82, p. 4.

By and large, a vote of no-confidence against one Minister may be treated as a vote of no-confidence against the entire Council of Ministers. This principle of responsibility of the entire Council of Ministers for the actions of one Minister is not, however, an absolute rule. Many a time, a Minister acts without reference to the Cabinet though on important issues of policy he would ordinarily seek the Cabinet's decision. If the Minister has taken the policy-decision in question with the Cabinet's approval, then, naturally, the principle of collective responsibility applies and each Minister is liable for it. But, some flexibility is noticeable in case a Minister takes an action without the Cabinet's approval.

Ordinarily, the Council as a whole would support him, but there have been instances when the erring Minister has been asked or allowed to go instead of the whole Council. The truth probably is that constitutional practice in this respect is not rigidly settled, but depends on the exigencies of the situation. On occasions, Cabinet may feel bound to back a Minister, but there are instances, when the Cabinet has decided to throw the offending Minister off. "Faced with the problem of what to do when an individual Minister's actions are likely to be criticised in Parliament, the Cabinet must decide which course will do the greater damage to the Government—to accept full responsibility and let the odium fall on the Government as a whole or suffer the shock of the amputation of the offending member. What the Cabinet cannot, however, do is to retain the Minister but contend that the responsibility is all his."[36]

The most outstanding example of a Minister going out instead of the whole Council of Ministers is that of Krishna Menon who resigned as the Defence Minister because of the debacle of the Indian arms in the face of the Chinese aggression in 1962. Many policies of the Cabinet going way back were responsible for India's unpreparedness, and not only what one Minister alone did or did not do, but still the brunt of public hue and cry fell on Menon. The truth appears to be that it is ultimately for the Prime Minister to decide whether he will drop a particular Minister or not because of criticism against him in Parliament. It appears to be most unlikely today that the House could force a Prime Minister to remove an individual Minister from his office.

When a Minister is guilty of some indiscretion, corruption, *mala fides* or a mistake of a personal nature, invariably he alone would go out instead of the whole Council of Ministers. For example, in 1963, K.D. Malaviya resigned after an inquiry by a Supreme Court Judge into some allegations against him, although the Judge's findings were kept confidential. In 1965, T.T. Krishnamachari, the Finance Minister, resigned because certain allegations were made against him which the Prime Minister wanted to be enquired into by a Supreme Court Judge. Krishnamachari, insisted that the Prime Minister should himself hold the inquiry and since the Prime Minister did not agree to this, he resigned as he felt that the Prime Minister had ceased to have confidence in him.[37]

When a commission of inquiry is appointed to probe into charges of corruption or misuse of power against an individual minister, there is no violation of the principle of collective responsibility discussed above. As the Supreme Court has

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36. KEETON, *op.cit.*, 56.

37. VENKATESWARAN, *op. cit.*, 160.

Also see, WADE AND PHILLIPS, *op. cit.*, 106-8; KEETON, *op. cit.*, 56; S.A. DE SMITH, *CONSTITUTIONAL & ADMINISTRATIVE LAW*, 161-167**.** Also see, *infra*, Ch VII.

observed in this connection in *State of Karnataka v. Union of India,*[38] it is difficult to accept that for "acts of corruption, nepotism or favouritism which are alleged or proved against an individual Minister, the entire Council of Ministers can be held collectively responsible to the legislature. If an individual Minister uses his office as an occasion or pretence for committing acts of corruption, he would be personally answerable for his unlawful acts and no question of collective responsibility of the Council of Ministers can arise in such a case." The principle of collective responsibility of the Cabinet does not exclude the individual responsibility of a Minister for his actions or decisions.

The Supreme Court has very explicitly spelt out the concept of the individual responsibility of a Minister in *Secretary, Jaipur Development Authority v. Daulat Mal Jain.*[39] The holder of a public office is empowered by virtue of his appointment to the office. The holder of the office, therefore, gets opportunity to abuse or misuse the office. Each Minister is personally and collectively responsible for the actions, acts and policies. He is accountable and answerable to the people. The legal and moral responsibility or liability for the acts done or omissions, duties performed and policy laid down rest solely on the Minister of the Department. Accordingly, he is indictable for his conduct or omission, or misconduct or misappropriation. The Council of Ministers is jointly and severally responsible to the legislature. The Minister/Council of Ministers is/are also publicly accountable for the acts or conducts in the performance of duties.

The Court has further asserted that the most elementary qualification which a Minister ought to possess is honesty and incorruptibility.[40]

The principle of individual responsibility is underlined by Art. 75(2) according to which "The Ministers shall hold office during the pleasure of the President". As stated above, the power to dismiss a Minister is to be exercised on the advice of the Prime Minister on whose recommendation a Minister is appointed. The Prime Minister can get rid of an undesirable minister by invoking the President's power under Art. 75(2). But, in practice, this power is invoked rarely for a Minister would ordinarily resign when asked to do so by the Prime Minister.[41]

Ministers or government employees also remain accountable to the courts for the legality of their actions. They may be held civilly or criminally liable, in their individual capacities, for tortious or criminal acts.[42] An unlawful order passed by a Minister or a civil servant can be quashed or declared unlawful on judicial review. In the case noted below,[43] the Supreme Court quashed the allotment of petrol pumps by the Central Minister for Petroleum in his discretion describing it as illegal, arbitrary and "atrocious". In another case,[44] allotment of shops/stalls by the Minister of Housing and Urban Development to her own relatives/employees/

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38. AIR 1978 SC 131.
Also, *Bakshi Ghulam Mohd. v. State of Jammu & Kashmir,* AIR 1967 SC 122 : 1966 Supp SCR 401.

39. (1997) 1 SCC 35.

40. Also see, *Common Cause, A Registered Society v. Union of India,* AIR 1999 SC 2979 : (1999) 6 SCC 667.

41. *Supra,* Sec. A(iii)(d).

42. See, *State of Jammu & Kashmir v. Bakshi Gulam Mohd.,* AIR 1967 SC 122 : 1966 Supp SCR 401.

43. *Common Cause A Registered Society v. Union of India,* (I), AIR 1996 SC 3538 : (1996) 6 SCC 520; *Common Cause v. Union of India,* (II), AIR 1999 SC 2979 : (1999) 6 SCC 667.

44. *Shiv Sagar Tiwari v. Union of India,* (1996) 6 SCC 599; (1996) 6 SCC 558.

domestic servants out of the discretionary quote without following any policy or criteria was held by the Supreme Court to be "wholly arbitrary, *mala fide* and unconstitutional."

MISFEASANCE IN OFFICE

In course of time, a tort of misfeasance in public office has also come into existence.

The tort has been defined as "malicious abuse of power, deliberate maladministration and unlawful acts causing injury" to a person. The tort arises when there is deliberate abuse of power. The tort imposes, liability on a public officer who does an act which to his knowledge amounts to an abuse of his office and which causes damages. The element of "bad faith or malice" is the decisive factor in such a tort.[45] In *Common Cause* I (1996), the Supreme Court held that the Minister for Petroleum had committed the tort of "malfesance in public office" and imposed on him exemplary damages of Rs. 50 lacs payable to the Central Exchange. But, then, in *Common Cause* II (1999), the Court revised its earlier judgment and held that the Minister had not committed any such tort. The Minister's order was held to be simply "unlawful" and so it was quashed.[46]

(f) MINISTER'S RESPONSIBILITY FOR HIS SUBORDINATES

A Minister's responsibility extends not only to his own actions but also covers the actions of his subordinates who work under him.

A Minister cannot attend to every business in his department. Most of the decisions in the department are taken by civil servants at various levels. The function of the Minister is to lay down broad policies and programmes of his Ministry while the Council of Ministers settle the major policies and programmes of the government. A Minister is not expected to burden himself with day to day administration.[47]

An important convention followed in Britain is that a Minister is responsible for the acts of his subordinate civil servants in his Ministry. By tradition, individual civil servants are not the target for parliamentary criticism: for their shortcomings and mistakes the Minister must accept responsibility. For what an unnamed official does, or does not do, his Minister alone must answer in Parliament. A Minister is responsible for his department and is accountable for departmental errors even though the individual fault is to be found in his subordinates.

Again, the Supreme Court has pointed out that the functions of the government are carried out in the name of the President by the Prime Minister, Ministers and Civil Service. "Since the functions of the government are carried on by the Executive in the name of the President on the advice of the Ministers, they alone are answerable to the Parliament. The Civil Service as such has no constitutional personality or responsibility separate from the duly constituted government."[48]

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45. *Dunlop v. Woolahara Municipal Council*, [1981] 2 WLR 693; *Northern Territory v. Mengel*, (1995) 69 *Aus LJ* 527; *Lucknow Development Authority v. M.K. Gupta,* AIR 1994 SC 787 : (1994) 1 SCC 243.

46. For further discussion on this tort, see, JAIN, *A TREATISE ON ADM. LAW*, II.

47. *A. Sanjeevi v. State of Madras*, AIR 1970 SC 1102 : (1970) 1 SCC 443.

48. *Common Cause, A Regd. Society v. Union of India,* AIR 1999 SC 2979 at 2989 : (1999) 6 SCC 667.

This principle has two advantages. First, the official who cannot defend himself publicly, is thus protected from attack. Secondly, it prevents the Minister from trying to evade criticism of his own actions by shifting the responsibility on to the subordinates. It would be a dangerous constitutional doctrine if a Minister were to shield himself by blaming the officials for the failure of his policies. No Minister can absolve himself by passing on the blame to someone else or saying that what was done had not been authorised by him. This positive liability of a Minister is essential if Parliament is to perform effectively its role of critic of the executive. In Britain, the classic case defining ministerial responsibility is the *Crichel Down* case in which the Minister of Agriculture resigned because of certain controversial transactions by his department without his personal knowledge.[49]

The principle of Minister's individual responsibility for the acts of his subordinate was reiterated in India rather dramatically in what is known as the *Mundhra* affair. The principal Finance Secretary in the Ministry of Finance negotiated the purchase of a large number of shares from an individual industrialist for the Life Insurance Corporation. This transaction was later found to be improper and against business principles. Dealing with the question whether the Finance Minister was in any way responsible for the acts of his Secretary, Justice Chagla enquiring into the transaction observed: "In any case, it is clear that constitutionally the Minister is responsible for the action taken by his Secretary with regard to this transaction. It is clear that a Minister must take the responsibility for actions done by his subordinates. He cannot take shelter behind them, nor can he disown their actions."

Further, Justice Chagla observed: "The doctrine of ministerial responsibility has two facets. The Minister has complete autonomy within his own sphere of authority. As a necessary corollary, he must take full responsibility for the actions of his servants. It is true that this may throw a very great burden on the Minister because it is impossible to expect that in a highly complicated system of administration which we have evolved the Minister could possibly know, leave alone give his consent to, every action taken by his subordinates. But it is assumed that once the policy is laid down by the Minister, his subordinates must reflect that policy and must loyally carry out that policy. If any subordinate fails to do so, he may be punished or dismissed, but, however vicariously, the responsibility of his action must be assumed by the Minister".

In conclusion, Justice Chagla held that in the instant case the Minister must fully and squarely accept the responsibility for what the Secretary did and "if the transaction is improper although the Secretary be actually responsible for the transaction, constitutionally the responsibility is that of the Minister."[50]

The convention of a Minister's responsibility for the acts of his subordinates was thus established in India. Writing to the Finance Minister, while accepting his resignation as a sequel, Prime Minister Nehru observed, "Whoever might be responsible for this ..... according to our conventions, the Minister has to assume responsibility, even though he might have had little knowledge of what others did and was not directly responsible for any of these steps."

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49. *Crichel Down Enquiry*, Cmd. 9176 (1954).
50. *The* HINDUSTAN TIMES, Feb. 14, 1958, p. 13. *P. M's letter, Ibid*, at p. 7.

Later, the Prime Minister observed, in the course of a debate in Parliament on the Chagla Report, "The Government accepted the broad principles of ministerial responsibility in this matter but to say that the Minister was always responsible for all the actions of the officers working under him would be taking this much too far."

In the State sphere, where practically the same principles of ministerial responsibility apply as at the Centre, the Agriculture Minister of Madhya Pradesh resigned because information pertaining to his Ministry's budget demands in the Legislature leaked from his department. The Minister's responsibility in the matter of leakage could at best be regarded as vicarious.[51]

The principle of responsibility of a Minister for the acts of his subordinates has been specifically reiterated by the Supreme Court in the under mentioned case.[52] The Court has pointed out that the government functions through bureaucrats, who shape its social, economic and administrative policies to further the social stability and progress socially, economically and politically. Therefore, the actions of the individuals do reflect upon the actions of the government.

The Court has stated that a Minister is responsible not only for his own actions but also for the job of the bureaucrats who work under him. The government acts through its bureaucrats. The Minister owes the responsibility to the electors for all his actions taken in the name of the Governor in relation to the department of which he is the head.

No Minister can possibly get acquainted with all the detailed decisions involved in the working of his department. The ministerial responsibility, therefore, would be that the Minister must be prepared to answer questions in the House about the actions of his department and the resultant enforcement of the policies. Even for actions performed without his concurrence, he will be required to provide explanations and also bear responsibility for the actions of the bureaucrats who work under him. "Therefore, he bears not only moral responsibility but also in relation to all the actions of the bureaucrats who work under him bearing actual responsibility in the working of the department under his ministerial responsibility." Despite the de facto control that may be exercised by the Government either directly or through its appointees, ministers are, as yet, not responsible for the actions of autonomous statutory corporations. The laws setting up the Corporations do not expressly so provide and the issue is yet to be agitated before the Courts.

The principle of vicarious liability is in the highest traditions of parliamentary government, but in modern administration it is becoming more and more difficult to observe it in practice. Because of the vast expansion of administrative responsibilities of a Minister, chances of errors by his subordinates have very much increased and it cannot, therefore, be asserted that the Minister must resign for every lapse of his subordinates. The limits of this responsibility are hard to define. For example, Lal Bahadur Shastri resigned as the Railway Minister because of a railway accident caused by the negligence of some railway servants. In 1999, Nitish Kumar resigned as Railway Minister owning moral responsibility for the August 2 Gaisal rail disaster that claimed over 280 lives. These resignations are

51. See, *infra*, Ch. VII.
52. *Secretary, Jaipur Development Authority, Jaipur v. Daulat Mal Jain*, (1997) 1 SCC 35, 45 : (1996) 8 JT 387.

exceptional and have not served as precedents in other departments of government.

C. INTERACTION BETWEEN THE EXECUTIVE AND PARLIAMENT

India has parliamentary form of government at the Centre which implies a government not by Parliament itself but by Ministers responsible to Parliament. As ILBERT has stated: "Parliament does not govern, and is not intended to govern. A strong executive government, tempered and controlled by constant, vigilant and a representative criticism is the ideal at which Parliamentary institution aim."[53] The Constitution amply fulfils this ideal by fully underlining the responsibility of the Ministers to the Lok Sabha.

In the first place, a Minister must be a member of a House of Parliament.[54] Such membership ensures contact between the Executive and the Legislative wings, facilitates co-operation and interaction between them and makes parliamentary control over the Executive somewhat real.

In the second place, Ministers stay in office so long as they enjoy the support of a majority in the Lok Sabha.[55] This helps Parliament in calling the Ministers to account, keeping a watch on them, eliciting information from them on matters of public importance and influencing the policy-making process. Defeat of the Ministry in the Lok Sabha on a major question of policy is counted as an expression of want of confidence leading to the resignation of the Ministry. A motion of want of confidence in the Council of Ministers may be moved in the Lok Sabha though not in the Rajya Sabha as the Council of Ministers is not responsible to it.

Thirdly, both Houses of Parliament take a number of opportunities to discuss, question, criticise and debate government policy and conduct of administration. Legislation provides an opportunity for Parliament discussing the executive's programme as many policies of the executive need laws for effective implementation. Taxation and appropriations are not authorised without parliamentary law. Discussions on the annual budget, demands for grants, *etc*. provide a useful opportunity to the members of Parliament to review and criticise the policies and working of each department. Each House has a number of committees which constantly scrutinise several aspects of the working of the Executive.[56]

Fourthly, the Executive cannot ignore and by-pass Parliament because the Constitution enjoins that not more than six months should pass between the end of one session and the beginning of another. Therefore, sooner or later the Executive must face Parliament.

Lastly, a number of constitutional provisions assign to Parliament a role in certain matters pertaining to the Executive, *e.g*., Parliament is empowered to fix the emoluments, allowances and privileges of the President, Vice-President and the Ministers. Houses of Parliament may impeach the President for violation of the Constitution; the elected members of Parliament constitute an important seg-

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53. ILBERT, *PARLIAMENT*, 103.
54. Sec. A(iii), (c), *supra.*
But for six months, a non-member can remain a Minister, *supra.*
55. *Supra*, Sec. B(d).
56. *Supra*, Ch. II, Sec. J(iv).

ment of the electoral college for electing the President; the Vice-President may be removed from his office by a resolution of the Rajya Sabha agreed to by the Lok Sabha; the Vice-President is elected by the members of both Houses of Parliament. Powers of the Executive to issue ordinances and declare an emergency are subject to parliamentary control.[57]

In the modern set up, however, in effect, more than Parliament controlling the Executive, it is the other way round, *viz*. the Executive controlling the Parliament.[58] Summoning, prorogation and dissolution of Houses lie in the hands of the Executive. The Executive also has a veto on legislation enacted by the Houses and, in financial matters, the executive plays a very important role. Practically, all legislation is sponsored by the Ministers. The Cabinet is in complete control of the Houses and virtually monopolises business therein.

The dominant role now played by the Cabinet in parliamentary affairs is the result of the emergence of party governments. There are well organised and disciplined political parties which solicit votes. The party securing majority in the lower House forms the Council of Ministers which consists of practically all the leading members of the party. The party members follow the lead given by the party leaders. The party members do not vote against the party Ministry.

Further, defeat of a Ministry in the House often leads to the dissolution of the Lower House resulting in a general election.[59] The power to dissolve the House is a potent weapon in the hands of the Prime Minister which he wields to control the House, for the M.Ps. do not want to undergo the ordeal of a general election until it is absolutely essential. For one thing, it is a very costly proposition to contest an election; for another, no one can be sure of the result of an election and it is possible that political power may pass to the opposing political party which no one likes. A modern election cannot possibly be contested without the support of a party. Therefore, a member of the majority party supports the government while in Parliament lest he should offend the party leaders and make it difficult for him to get the party nomination at the time of the next election.

The threat to dissolve results in promoting cohesion and discipline within the party. Not only this, the Cabinet's power of dissolution instils responsibility even in its political opponents who cannot create a crisis on every issue by defeating the Ministry, for they know that in that case the Ministry may appeal to the electorate and seek its verdict. The opposition has thus to select the issue very carefully to defeat the Ministry, for it should be such on which the risks and hazards of a general election are well worth taking.[60]

All these circumstances place an enormous amount of power in the hands of the Cabinet and the Prime Minister. Rarely will a Ministry lose office by an adverse vote so long as it holds its majority in Lok Sabha. The result is that while in

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57. For discussion on the power to issue ordinances, see, *infra*, Sec. D(ii)(d); for emergency provisions, see, Ch. XIII, *infra*.

58. LORD HAILSHAM describes the British system as follows: "To a great and greater degree Parliament is becoming the House of Commons, the House of Commons is becoming the government majority and the government majority is a rubberstamp for government".
The Dilemma of Democracy, 107 (1978).
This is also true of India.

59. On dissolution of Lok Sabha, see, *supra*, Ch. II, Sec. I(c).

60. JENNINGS, *PARLIAMENT*, 7, 135, 136; KEETON, *THE PASSING OF PARLIAMENT*, 56-63 (1954); *PARLIAMENT—A SURVEY*, 89-120; BOWIE AND FRIEDRICH, *STUDIES IN FEDERALISM*, 15, 16.

theory Parliament is supreme in that it can make or unmake a Ministry, in practice, a Ministry once in power controls and leads the Parliament. This however is subject to this rider that as the Cabinet is dependent on the continuous support of a majority, it has to take into account the opinions of its supporters. "Just as Parliament must accept direction from the Government, so the Government must remember that Parliament represents the electorate. A Government which does not take care that its general policy retains the confidence of the public risks defeat either in Parliament or when it faces the electorate, which it must do at least every five years."

Behind the parliamentary scene, Ministers often meet their supporters and exchange views with them: party meetings are held to discuss matters of current importance and all these processes have an impact on the executive policy and decision-making. The truth, therefore, is that mutual controls and checks between the executive and the legislative organs generate mutual interdependence and co-operation, which is essential for the smooth operation of the parliamentary system.

D. FUNCTIONS AND POWERS OF EXECUTIVE

The Central Executive exercises very broad and varied functions. It exercises not only 'executive' functions but also, in a limited way, judicial and legislative functions as well.

(i) JUDICIAL FUNCTIONS

The Central Executive appoints the Judges of the Supreme Court[61] and the High Courts.[62] Whether a member of a House of Parliament has become subject to a disqualification or not is decided formally by the President, though, in effect, by the Election Commission.[63]

POWER OF PARDON

Article 72 empowers the President to grant pardon, reprieve, respite or remission of punishment, or to suspend, remit or commute the sentence of any person convicted of any offence in all cases—

(*a*) where the punishment or sentence is by a court martial;

(*b*) where the punishment or sentence is for an offence against a law relating to a matter to which the Union's executive power extends; and

(*c*) of a death sentence.[64]

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61. Art. 124(2); *infra*, Ch. IV.
62. Art. 217(1); *infra*, Ch. VIII.
63. *Supra*, Ch. II, Sec. D(b).
64. Reprieve means stay of the execution of sentence; respite denotes postponement of execution of a sentence; pardon means to forgive, to excuse; remission reduces the amount of a sentence without changing its character and commutation is changing the sentence to a higher penalty of a different form.

A pardon is an act of grace which releases a person from punishment for some offence. A pardon may be either full, limited or conditional. A full pardon wipes out the offence in the eyes of law; a limited pardon relieves the offender from some but not all the consequences of the guilt and a conditional pardon imposes some condition for the pardon to be effective.

This, however, does not affect the power conferred by law on any officer of the Union armed forces to suspend, remit or commute a sentence passed by a court martial, as well as the power exercisable by the State Executive to suspend, remit or commute a death sentence.[65]

The President acts in this matter on the advice of the Home Minister.

The offences relating to currency and coinage included in Ss. 489-A to 489-D of the Indian Penal Code are matters exclusively within the legislative competence of Parliament and the executive power of the Central Executive extends to these matters.[66] Accordingly, the Central, and not the State, Government is the appropriate Government competent to remit the sentence passed in relation to such offences.[67]

The question whether the power of pardon can be exercised when the Court has sentenced the contemnors to imprisonment or imposed any other penalty has not yet been decided. It is arguable that since the power of the Courts to punish for contempt is derived from the Constitution,[68] the phrase "offence against any law relating to a matter to which the Executive power of the Union extends" in Article 72 (1), would not cover such punishments.[69]

The scope of the power conferred on the President by Art. 72 is very extensive. It extends to the whole of India. The power to grant pardon may be exercised either before conviction by amnesty to the accused or under-trial prisoner or after conviction.[70]

This power is practically similar to that in America or Britain. The American President has power to grant reprieves and pardons for offences committed against the United States except in cases of impeachment. In Britain, the Crown enjoys a prerogative to grant a pardon to any criminal; but the prerogative is exercised on ministerial advice.

As regards the nature of the power of pardon vested in the President by Article 72, the Supreme Court has propounded the American, rather than the British, view. In Britain, the power is regarded as the royal prerogative of pardon exercised by the Sovereign. It is regarded as an act of grace issuing from the Sovereign. On the other hand, in the U.S.A., a pardon by the President is regarded not as a private act of grace but as a part of the constitutional scheme.[71] The Supreme Court of India, in *Kehar Singh v. Union of India*,[72] has preferred to adopt the view propounded by HOLMES, J., in the context of India. PATHAK, CJ, has observed on behalf of a unanimous Court:

> "The power to pardon is a part of the constitutional scheme, and we have no doubt, in our mind, that it should be so treated also in the Indian Republic. It has

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65. *Infra*, Ch. VII, Sec. C.
66. *Infra*, Chs. X and XII.
67. *G.V. Ramaniah v. Supdt., Central Jail*, AIR 1974 SC 31 : (1974) 3 SCC 531.
68. Articles 129 and 215.
69. The power of the Union and the States to legislate is concurrent (Entry 14; List III; Seventh Schedule) and expressly excludes contempt of the Supreme Court.
70. *In re Channugadu*, AIR 1954 Mad 511, See, BALKRISHNA, Presidential Power of Pardon, 13 *J.I.L.I*, 103.
71. MR. JUSTICE HOLMES, in *WI Biddle v. Vuco Perovich*, 71 L Ed 1161.
72. AIR 1989 SC 653 : (1989) 1 SCC 204. See also *Epuru Sudhakar v. Govt. of A.P.* (2006) 8 SCC 161, 172, 190 : AIR 2006 SC 3385.

> been reposed by the people through the Constitution in the Head of the State, and enjoys high status. It is a constitutional responsibility of great significance, to be exercised when occasion arises in accordance with the discretion contemplated by the context."

The reason for taking this view is, as explained by PATHAK, CJ., earlier in the judgment that 'to any civilized society, there can be no attributes more important than the life and personal liberty of its members'. In most civilised societies, 'the deprivation of personal liberty and the threat of the deprivation of life by the action of the State' is regarded seriously, and, therefore, recourse is provided to the judicial organ for its protection. But there is always remaining the possibility of 'fallibility of human judgment' even in 'the most trained mind', and it has been considered appropriate that in the matter of life and personal liberty, 'the protection should be extended by entrusting power further to some high authority to scrutinise the validity of the threatened denial of life or the threatened or continued denial of personal liberty. The power so entrusted is a power belonging to the people and reposed in the highest dignitary of the State'.

In *Kehar Singh*, the fact situation was as follows: Kehar Singh was convicted under S. 120B read with S. 302, IPC, for the assassination of Indira Gandhi, the then Prime Minister of India, and was sentenced to death. His appeal to the Supreme Court was dismissed. His son then presented a petition before the President of India for grant of pardon to his father under Art. 72. The President rejected the petition. Kehar Singh's request for a personal hearing was rejected by the President on the ground of not being in conformity with the "well established practice in respect of consideration of mercy petitions". In response to a communication by the counsel on behalf of Kehar Singh, the President stated that "he cannot go into the merits of a case finally decided by the highest court of the land".

Thereafter, Kehar Singh's son filed a writ petition in the Delhi High Court seeking an order restraining the Central Government from executing the death sentence on Kehar Singh. On this petition being dismissed by the High Court, a special leave appeal under Art. 136 was filed in the Supreme Court. A Bench of five Judges considered the matter and the judgment of the Court was delivered by PATHAK, C.J.

The most significant question considered by the Court was : To what areas does the President's power to scrutinise evidence extend in exercising his power to pardon? On this question, again, the Court exhibited the most liberal view. The Court expressed the view that it is open to the President in the exercise of the pardon power vested in him by Article 72 'to scrutinise the evidence on the record of the criminal case and come to a different conclusion from that recorded by the Court in regard to the guilt of, and sentence imposed on, the accused'. Explaining the matter, the Court observed:[73]

> "In doing so, the President does not amend or modify or supersede the judicial record. The judicial record remains intact, and undisturbed. The President acts in a wholly different plane from that in which the Court acted. He acts under a constitutional power, the nature of which is entirely different from the judicial power and cannot be regarded as an extension of it. And this is so, not-

73. (1989) 1 SCC at 213 : AIR 1989 SC 653.

> withstanding that the practical effect of the Presidential act is to remove the stigma of guilt from the accused or to remit the sentence imposed on him."

Thus, the Court took the view that in exercising his power of pardon, the President can go into the merits of the case notwithstanding the fact that it has been judicially concluded by the court. The President can examine the record of evidence of the criminal case and determine for himself whether the case is one deserving the grant of the relief falling within that power. As regards the plenitude of power conferred by Article 72 on the President, the Court observed:[74]

> "... The power under Article 72 is of the widest amplitude, can contemplate a myriad kinds and categories of cases with facts and situations varying from case to case, in which the merits and reasons of state may be profoundly assisted by prevailing occasion and passing time. And it is of great significance that the function itself enjoys high status in the constitutional scheme."

The Court asserted that 'the question as to the area of the President's power under Article 72 falls squarely within the judicial domain and can be examined by the court by way of judicial review'. The Court asserted that the function of determining whether the act of a constitutional or statutory functionary falls within the constitutional or legislative conferment of power, or is vitiated by self denial on an erroneous appreciation of the full amplitude of the power, is a matter for the court. In view of this clarification, the Court ruled in *Kehar Singh* that the petition of the petitioner invoking power under Art. 72 "shall be deemed to be pending before the President to be dealt with and disposed of afresh." After reconsideration of the matter in the light of Supreme Court's observations, Kehar Singh's mercy petition was again rejected by the President.

The exercise of this power over time has not been free from controversy. A number of questions have cropped up before the courts as regards the exercise of the power of pardon, as for example—

(*i*) Does the President exercise any personal discretion in the matter or does he act merely as a constitutional head?

(*ii*) Should he give a personal hearing to the convicted or his lawyer before disposing of the matter?

(*iii*) Is the power to pardon subject to any norms, *e.g.*, Art. 14?[75]

(*iv*) Is the exercise of this power subject to any judicial review?

It has now been judicially clarified that though the power to pardon is formally vested in the President, he exercises this power, as he exercises any other power, as per Art. 74(1)[76], on the advice of the concerned Minister, *i.e.*, the Home Minister. The Supreme Court clarified in *Maru Ram v. Union of India*[77] that it is not open to the President to take an independent decision or to direct release or refuse release of any one of his own choice. "It is fundamental to the Westminister system that the Cabinet rules and the Queen reigns being too deeply rooted as foundational to our system….." "The President is an abbreviation for the Central Government."

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74. *Ibid*, 218.
75. For a full discussion on Art. 14, see, Ch. XXI, *infra.*
76. *Supra*, Sec. B(a).
77. AIR 1980 SC 2147 : (1981) 1 SCC 107.

In *Kehar Singh*, the Supreme Court has denied that there is any right in the condemned person to insist on an oral hearing before the President on his petition invoking his powers under Art. 72. The matter lies within the discretion of the President and it is for him to decide how he will deal with the case. The proceeding before the President is of an executive character[78] and when the petitioner files his petition it is for him to submit with it all the requisite information necessary for the disposal of the petition.

From time to time, the Supreme Court has considered the question whether there should be some guidelines for the exercise of power to pardon by the President. In *Maru Ram*, the Court expressed a view in favour of laying down some guidelines for the purpose of exercising power under Art. 72 in order to avoid any allegation of arbitrary exercise of power. The Court observed:

> "The proper thing to do, if the Government is to keep faith with the founding fathers, is to make rules for its own guidance in the exercise of the pardon power keeping, of course, a large residuary power to meet special situations or sudden developments. This will exclude the vice of discrimination such as may arise where two persons have been convicted and sentenced in the same case for the same degree of guilt but one is released and the other refused, for such irrelevant reasons as religion, caste, colour or political loyalty."

The matter again cropped up before the Court in *Kuljeet Singh v. Lt. Governor*,[79] In a writ petition, it was argued before the Supreme Court that under Art. 72, President's power is coupled with a duty and that it must be exercised fairly and reasonably. Has the Government formulated any uniform standard or guidelines by which the exercise of the constitutional power under Art. 72 is intended to be or is in fact governed? The Court said that the question was of far-reaching importance and that it was necessary that it be examined with care.

But, then, later the Court did not really examine this question and left it open and dismissed the writ petition on the ground that, in view of the circumstances in which murder was committed by the accused in the instant case, the only sentence which could possibly be imposed on him was death and there was no reason to interfere with that sentence. In the instant case, the Court opined that in refusing to commute the death sentence to a lesser sentence, the President did not in any manner transgress his discretionary power under Art. 72.[80] The question, therefore, of standards and guidelines for the exercise of the power under Art. 72 (as well as Art. 161)[81] remained an open one.

But in *Kehar Singh*, the Court has given a very broad ambit to this power and has also changed its stance on the question of laying down any guidelines. The Court has said that "there is sufficient indication in the terms of Art. 72 and in the history of the power enshrined in that provision as well as existing case-law, and specific guidelines need not be spelled out." In fact, the Court has now realised that it may not be possible to lay down any "precise, clearly defined and sufficiently channelised guidelines" as Art. 72 has very wide amplitude and contemplates "a myriad kinds and categories of cases with facts and situations varying

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78. The Court has characterized the power to pardon as "executive" for two reasons : (i) There is no inherent right in the petitioner to claim an oral hearing; (2) the President acts in this matter on the advice of the concerned Minister. The author has however characterised the power as 'Judicial' because the power does involve interference with the Judicial process.

79. AIR 1981 SC 2239.

80. *Kuljeet Singh v. Lt. Governor*, AIR 1982 SC 774 : (1982) 1 SCC 417.

81. See, *infra*, Ch. VII, Sec. C.

from case to case, in which the merits and reasons of state may be profoundly assisted by prevailing occasion and passing time."[82]

A significant question which has cropped up before the Supreme Court several times has been whether there can be any judicial review of the exercise of the power of pardon by the President. The Court considered this question as early as 1976 in *G. Krishna Goud v. State of Andhra Pradesh*.[83] Two persons were sentenced to death for committing murder in implementing their ideology of social justice through terrorist technology. The President refused to commute the death sentence. Before the Supreme Court, it was argued on their behalf that their crime was of a political nature which merited different considerations. Rejecting the petition, the Supreme Court described the nature of the power as follows:

> "Article 72 designedly and benignantly vest in the highest executive the humane and vast jurisdiction to remit, reprieve, respite, commute and pardon criminals—on whom judicial sentences may have been imposed. Historically, it is a sovereign power; politically, it is a residuary power; humanistically, it is in aid of intangible justice where imponderable factors operate for the well-being of the community, beyond the blinkered court process."

But the Court pointed out that all public power—'all power, however, majestic the dignitary weilding it, shall be exercised in good faith, with intelligent and informed care and honestly for the public weal'. In the instant case, the Court had not been shown any demonstrable reason or glaring ground to consider the refusal of commutation' as 'motivated by malignity or degraded by abuse of power'.

In *Maru Ram*,[84] the Supreme Court insisted that although the power of pardon is very wide, 'it cannot run riot'. The Court emphasized that no constitutional power is to be exercised arbitrarily. Public power vested on a high pedestal has to be exercised justly. 'All *public power*, including constitutional power, shall never be exercisable arbitrarily or *mala fide* and, ordinarily, guidelines for fair and equal execution are guarantors of the valid play of power'. On this aspect, the Court stated further:

> "Article 14 is an expression of the egalitarian spirit of the Constitution and is a clear pointer that arbitrariness is anathema under our system. It necessarily follows that the power to pardon, grant remission and commutation, being of the greatest moment for the liberty of the citizen, cannot be a law unto itself but must be informed by the finer canons of constitutionalism."[85]

Although considerations for the exercise of power under Art. 72 (and the same goes for Art. 161)[86], may be "myriad and their occasion protean", and best be left to the government, yet, if in any case, the power to pardon, commute or remit is exercised on irrational, irrelevant, discriminatory or *mala fide* considerations, the courts could examine the case and intervene if necessary. There may be grounds, such as, political vendetta or party favouritism which may make the actual exer-

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82. Also see, *Ashok Kumar v. Union of India*, AIR 1991 SC 1792 : (1991) 3 SCC 498. In this case, the Court has reiterated the *Kehar Singh* ruling on the question of laying down guidelines for exercising power under Art. 72.

83. (1976) 2 SCR 73 : (1976) 1 SCC 157. Also see, *Kuljeet Singh v. Lt. Governor*, AIR 1982 SC 774 : (1982) 1 SCC 417.

84. AIR 1980 SC 2147 : (1981) 1 SCC 107.

85. For discussion on Art. 14, see, *infra*, Ch. XXI, Sec. B.

86. *Infra*, Ch. VII, Sec. C.

cise of the constitutional power vulnerable. 'The order which is the product of extraneous or *mala fide* factors will vitiate the exercise' and likewise 'capricious criteria will avoid the exercise'. Thus, the power under Article 72 is not to be exercised on 'wholly irrelevant, irrational, discriminatory or *mala fide*' considerations. 'Only in these rare cases will the Court examine the exercise.' The Court then went on to suggest:

> "The proper thing to do, if the Government is to keep faith with the founding fathers, is to make rules for its own guidance in the exercise of the pardon power keeping, of course, a large residuary power to meet special situations or sudden developments. This will exclude the vice of discrimination such as may arise where two persons have been convicted and sentenced in the same case for the same degree of guilt but one is released and the other refused, for such irrelevant reasons as religion, caste, colour or political loyalty."

But the Court resiled from the above approach in *Kehar Singh*[87] with the following observation :

> "It seems to us that there is sufficient indication in the terms of Art. 72 and in the history of the power enshrined in that provision as well as existing case law, and specific guidelines need not be spelled out."

The Court went on to say that it may indeed not be possible to lay down any "precise, clearly defined and sufficiently channelised guidelines", for the power under Art. 72 "is of the widest amplitude", and it can contemplate "a myriad kinds of and categories of cases with facts and situations varying from case to case, in which the merits and reasons of state may be profoundly assisted by prevailing occasion and passing time. And it is of great significance that the function itself enjoys high status in the constitutional status."

The Court later explained away the apparent contradiction between *Maru Ram* and *Kehar Singh* in a later case[88] by saying that what was said in *Maru Ram* was "a mere recommendation and not a *ratio decidendi* having a binding effect." In *Satpal v. State of Haryana*,[89] the Governor's order granting pardon was set aside on the ground that the Governor had not been advised properly with all the relevant materials.

In *Kehar Singh*, the Supreme Court has accepted the proposition laid down in *Maru Ram* as regards the exercise of pardon power by the President. The Court has expressed the view that the order of the President cannot be subjected to judicial review on its merits except within the strict limitations defined by the Court in *Maru Ram*. The Court has observed:

> "The function of determining whether the act of a constitutional or statutory functionary falls within the constitutional or legislative conferment of power, or is vitiated by self-denial on an erroneous appreciation of the full amplitude of the power is a matter for the court."

It will thus be noted from *Kehar Singh* and *Maru Ram* that while the Supreme Court has conceded to the President a wide plenitude scope to consider all facets of the matter to exercise his power, the President's power is not absolute and

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87. AIR 1989 SC 653 : (1989) 1 SCC 204.
88. *Ashok Kumar v. Union of India*, AIR 1991 SC 1792, 1803-1804 : (1991) 3 SCC 498.
89. (2000) 5 SCC 170 : AIR 2000 SC 1702; See also *Dhananjoy Chatterjee @ Dhana v. State of West Bengal*, (2004) 9 SCC 751 : AIR 2004 SC 3454.

completely beyond judicial purview. Of course, the courts will interfere only if the power is exercised *mala fide* or in an arbitrary or discriminatory manner.[90]

In *Epuru Sudhakar v. Govt. of A.P.*,[91] KAPADIA J.in a concurring judgment, held that considerations of religion, caste or political loyalty are irrelevant and prohibited. It was also held that the power of executive clemency is not only for the benefit of the convict, but while exercising such a power the President or the Governor, as the case may be, has to keep in mind the effect of the decision on the family of the victim and society and the precedent it sets for the future.[92]

The U.S. Supreme Court has justified the existence of the power of clemency in the executive in *Grossman*[93] in the following words:

> "Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law. The administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt. To afford a remedy, it has always been thought essential in popular Governments, as well as in monarchies, to vest in some authority other than the court, power to ameliorate or avoid particular judgments…Our Constitution confers this discretion on the highest office in the nation in confidence that he will not abuse it."

The Law Commission of India has also justified the existence of the prerogative of mercy in the executive.[94] The Commission has observed in this connection:

> "There are many matters which may not have been considered by the courts. The hands of the court are tied down by the evidence placed before it. A sentence of death passed by a court after consideration of all the materials placed before it may yet require reconsideration because of: (*i*) facts not placed before the court; (*ii*) facts placed before the court but not in the proper manner; (*iii*) facts discovered after the passing of the sentence; (*iv*) events which have developed after the passing of the sentence, and (*v*) other special features. Nor can one codify and select these special features which would be too numerous to lend themselves to codification. For these reasons, we do not recommend any change in the scope of these powers".

The Supreme Court has ruled in *State of Punjab v. Joginder Singh*[95] that the power under Art. 72 "is absolute and cannot be fettered by any statutory provision such as Ss. 432, 433 and 433A of the Criminal Procedure Code. This power cannot be altered, modified or interfered with in any manner whatsoever by any statutory provisions or Prison Rules.". A decision of the President of India on a petition under Art. 72 is subject to judicial review but on very limited grounds.[96]

Under Art. 161, a parallel power to grant pardon vests in the State Governors. There have been cases where the exercise of the power by the Governors has

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90. See *Bikas Chatterjee v. Union of India*, (2004) 7 SCC 634 : (2004) 10 Scale 190.
91. (2006) 8 SCC 161 at 163 : AIR 2006 SC 3385.
92. *Ibid* at pp. 190-191. *For further discussion see under Note Chapter VII (infra).*
93. *Ex parte, Grossman*, 267 US 87 (1925).
94. *Report on Capital Punishment*, 317-18 (1967).
95. AIR 1990 SC 1396, 1400 : (1990) 2 SCC 661. Also, *Ashok Kumar v. Union of India*, AIR 1991 SC 1792 : (1991) 3 SCC 498; *State Government of NCT of Delhi v. Premraj*, (2003) 7 SCC 121: (2003) 8 JT 17.
96. *Bikas Chatterjee v. Union of India*, (2004) 7 SCC 634 : (2004) 10 Scale 109.

been quashed by the Supreme Court on the ground of misuse of power by the concerned Governor.[1]

(ii) LEGISLATIVE FUNCTIONS

Legislative power of the Central Executive can be discussed under the following heads:

(1) participation of the Executive in the legislative process;

(2) power of rule-making under the Constitution;

(3) power to proclaim an emergency; and (4) power to make ordinances.

(a) PARTICIPATION

The Council of Ministers being an integral part of Parliament participates intimately in the legislative process, and discharges several important functions in relation to Parliament. This concept is underlined by making President a component part of Parliament.[2]

The Executive's power to convene and prorogue Parliament, to dissolve Lok Sabha,[3] presentation of Bills to Parliament and the requirement of Presidential assent for transforming a Bill passed by the two Houses into an Act,[4] are some of the indicia which denote the intimate role played by the Executive in relation to the legislative process.

Because the government enjoys majority support in Lok Sabha, no bill is passed by the House unless the government supports it. Therefore, a private members's bill has no chance of getting through the House without government support. In practice, government monopolises legislative process in Parliament. Practically, all bills passed by the House of Parliament are those presented by the government.

Then, the Central Executive also participates, to some extent, in the legislative process in the States. Its consent is needed for certain types of State legislation: in some cases, *before* a Bill is introduced in the State Legislature, like a Bill imposing restrictions on freedom of trade, commerce and intercourse within the State,[5] and in some cases, *after* a Bill is passed by a State Legislature.[6] Thus, State Bills falling under Art. 288(2) do not become law unless approved by the Central Executive.[7]

Besides, as already stated, the President may address any or both Houses of Parliament,[8] and send messages to either House with respect to a Bill pending in Parliament or otherwise.[9]

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1. For these cases, see, Ch. VII, *infra.*
2. *Supra*, Ch. II, Sec. A.
3. *Supra*, Ch. II, Secs. G and I.
4. *Supra*, Ch. II, Sec. J(i)(c).
5. Art. 304(*b*)*; infra*, Ch. XV.
6. See, Art. 31A Proviso; *infra*, Ch. XXXII, Sec. A*;* Art. 200, *infra*, Ch. VI, Sec. D.
7. *Infra*, Ch. X, Sec. F.
8. Art. 86(1)*; Supra*, Ch. II, Sec. G(b).
9. Art. 86(2); *Supra*, Ch. II, Sec. G(c).

Further, several provisions in the Constitution require prior recommendation of the President for introducing legislation on some matters in a House of Parliament. As for example—

(*i*) President's recommendation is required to introduce in either House a Bill for the formation of new States or alteration of areas boundaries or names of existing States [Art. 3].[10]

(*ii*) A Money Bill cannot be introduced without the recommendation of the President [Art. 117(1)].[11]

(*iii*) President's recommendation is required for consideration by a House of a bill involving expenditure from the Consolidated Fund of India [Art. 117(3)].[12]

(*iv*) Prior recommendation of the President is required for introducing in either House of Parliament any bill affecting any tax in which States are interested [Art. 274].[13]

It may however be noted that because of Art. 255(*c*), an Act of Parliament, or any provision is not to be regarded invalid on the ground that previous sanction was not obtained, if assent to that Bill is eventually given by the President.

(b) RULE MAKING

Several constitutional provisions confer rule-making powers on the Central Executive enabling it to prescribe detailed provisions for several matters, as for example:

(*a*) authentication of orders and instruments made and executed in the name of the President [Art. 77(2)];[14]

(*b*) the more convenient transaction of the government's business [Art. 77(3)];[15]

(*c*) conditions of services *etc*. of Audit and Accounts Department [Art. 148(5)],[16] Chairman and Members of the Union and Joint Public Service Commissions [Art. 318],[17] Secretariat and staff of Houses of Parliament [Art. 98(3)];[18]

(*d*) consultation with the U.P.S.C. regarding appointment of officials of the Supreme Court [Art. 146(1)];[19]

(*e*) dual membership of Parliament and State Legislatures [Art. 101(2)];[20]

(*f*) procedure to be followed at the joint sittings of the two Houses of Parliament [Art. 118(3)];[21]

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10. See, *infra*, Ch. V.
11. See, *supra*, Ch. II, Sec. J(ii)(c).
12. See, *supra*, Ch. II, Sec. J(ii)(a).
13. See, *infra*, Ch. XI, Sec. D.
14. *Supra*, Ch. III, Sec. B(a),
15. *Supra*, Ch. III, Sec. B(a),
16. *Supra*, Ch. II, Sec. J(ii)(s).
17. *Infra*, Part V, Ch. XXXVI.
18. *Supra*, Ch. II, Sec. H(c).
19. *Infra*, Ch. XXXVI.
20. *Supra*, Ch. II, Sec. E(a).
21. *Supra*, Ch. II, Sec. J(i)(b).

(*g*) regulating the requirements and conditions of service of persons appointed to services and posts in connection with the affairs of the Union [Proviso to Art. 309].[22]

(c) DECLARATION OF EMERGENCY

In certain contingencies, the Central Executive has power to proclaim emergency. The declaration of an emergency effects several important changes in the normal working of the Constitution. This matter has been discussed in detail later in this book.[23]

(d) ORDINANCE-MAKING POWER

The Central Executive has power to issue ordinances and thus promulgate laws for a short duration. The technique of issuing an ordinance has been devised with a view to enabling the Executive to meet any unforeseen or urgent situation arising in the country when Parliament is not in session, and which it cannot deal with under the ordinary law.[24]

Ordinarily, under the Constitution, the President is not the repositary of the legislative power of the Union. This power belongs to Parliament. But, with a view to meet extraordinary situations demanding immediate enactment of laws, the Constitution makes provision to invest the President with legislative power to promulgate ordinances. An ordinance is only a temporary law. The executive in Britain or the U.S.A. enjoys no such power.

Article 123 empowers the President to promulgate such ordinances as the circumstances appear to him to require when—

(1) both Houses of Parliament are not in session; and

(2) he is satisfied that circumstances exist which render it necessary for him to take immediate action.

The provision confers the power formally on the President; but, as already stated, he acts in this matter, as he does in other matters, on the advice of the Council of Ministers and, therefore, the ordinance-making power is vested effectively in the Central Executive. As the Supreme Court has stated: "The Ordinance is promulgated in the name of the President and in a constitutional sense on his satisfaction: it is in truth promulgated on the advice of his Council of Ministers and on their satisfaction."[25]

The power to issue an ordinance is legislative power. An ordinance issued by the President partakes fully of the legislative character and is made in the exercise of legislative power.[26]

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22. *Infra*, Ch. XXXVI.

23. Ch. XIII, *infra*.

24. AMBEDKAR, VIII *CAD*, 213. See also, PANDEY, Hundred Years of Ordinance in India, 10 *JILI* 259 (1968).

Reference may also be made to the discussion on Ordinance-making power of the State Governors, see, *infra*, Ch. VII, Sec. D(ii)(c).

25. *R.C. Cooper v. Union of India*, AIR 1970 SC 564, 587 : (1970) 1 SCC 248. Also see, *R.K. Garg v. Union of India*, AIR 1981 SC 2138, 2144 : (1981) 4 SCC 675; *A.K. Roy v. Union of India*, AIR 1982 SC 710 : (1982) 1 SCC 271; *Venkata v. State of Andhra Pradesh*, AIR 1985 SC 724; *Nagaraj v. State of Andhra Pradesh*, AIR 1985 SC 551.

26. *A.K. Roy v. Union of India*, *op. cit.*

An ordinance is to be promulgated when the 'President', or rather the Central Executive, is satisfied that circumstances exist which render it necessary to take immediate action. Whether or not circumstances exist which make the promulgation of an ordinance necessary is a matter to be decided by the Executive in its subjective satisfaction. Whether this satisfaction is non-justiciable or subject to judicial review on any ground still remains an open question.

Section 72 of the Government of India Act, 1935, authorised the Governor-General to make and promulgate ordinances for the peace and good government of British India 'in cases of emergency'. Discussing this provision in *Bhagat Singh v. King-Emperor*,[27] LORD DUNEDIN observed: "Who is to be judge of whether a state of emergency exists? A state of emergency is something that does not permit of any exact definition. It connotes a state of matters calling for drastic action which is to be judged as such by someone. It is more than obvious that someone must be the Governor-General and he alone. Any other view would render utterly inept the whole provision. Emergency demands immediate action, and that action is prescribed to be taken by the Governor-General. It is he alone who can promulgate the ordinance." In *Lakhi Narayan v. State of Bihar*,[28] the Federal Court had observed that whether the requisite circumstances existed for promulgating the ordinance was a 'matter which is notwithin the competence of courts to investigate. The language of the provision shows clearly that it is the Governor and Governor alone who has got to satisfy himself as to the existance of circumstances necessitating the promulgation of an ordinance. The existence of such necessity is not a justiciable matter which the courts could be called upon to determine by applying an objective test..." In *King-Emperor v. Benoari Lal*,[29] the Privy Council emphasized that the Governor-General was not required by the constitutional provision to state that there was an emergency, or what the emergency was, either in the text of the ordinance or at all, and assuming that "he acts *bona fide* and in accordance with his statutory powers it cannot rest with the courts to challenge his view that the emergency exists".

The above cases arose under the Government of India Act, 1935. A few cases have arisen under the Constitution as well.

In *S.K.G. Sugar Ltd. v. State of Bihar*[30] the Supreme Court stated as regards Governor's satisfaction to make an ordinance under Art. 213 (which is similar to Art. 123) that "the necessity of immediate action and of promulgating an ordinance is a matter purely for the subjective satisfaction of the Governor. He is the sole judge as to the existence of the circumstances necessitating the making of an ordinance. His satisfaction is not a justiciable matter. It cannot be questioned on the ground of error of judgment or otherwise in a court." Thus, on the basis of these cases,[31] it could be asserted that an enquiry into the question of satisfaction of the President as to the need for promulgating an ordinance is not a justiciable matter.

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27. 58 I.A. 169, 172.
28. AIR 1950 FC 59. The case referred to the State (at that time, a Province), see, *infra*, Ch. IX.
29. 72 I.A. 57. Also, *Lakhi Narayan v. State of Bihar*, AIR 1950 FC 59.
30. AIR 1974 SC 1533 : (1974) 4 SCC 827.
31. Also see, *Prem Narain v. State of Uttar Pradesh*, AIR 1960 All. 205; *Sarju Prasad v. State of U.P.*, AIR 1970 All. 571; *Kalyan Bhadra v. Union of India*, AIR 1975 Cal. 72; *Fathima v. Ravindranathan*, AIR 1975 Ker. 202.

But in the *Bank Nationalisation* case,[32] the constitutional validity of the Banking Companies (Acquisition and Transfer of Undertakings) Ordinance, 1969, was challenged. By this ordinance, the Central Government nationalised a number of private banks. It was argued that the Ordinance was invalid because the condition precedent to the exercise of the power under Art. 123 did not exist. It was argued that Art. 123 does not make the President as the final arbiter of the exercise of the conditions on which the power to promulgate an ordinance may be exercised. On the other hand, the Government's argument was that "the condition of satisfaction of the President" "is purely subjective" and the Government was "under no obligation to disclose the existence of, or to justify the circumstances of the necessity to take immediate action". But as the Ordinance had been replaced by an Act of Parliament, the Supreme Court left the question open saying that the question had become 'academic'.[33]

The Court expressed no opinion on the extent of the Court's jurisdiction to examine, whether the condition relating to satisfaction of the President was fulfilled in the instant case. RAY, J., (minority opinion) however ruled that "the satisfaction of the President is subjective" and the only way in which the exercise of power by the President can be challenged in by establishing "bad faith or *mala fide* and corrupt motive".[34]

To remove any doubt on this point, in 1975, the 38th Amendment of the Constitution had added Art. 123(4) making satisfaction of the President to issue an ordinance non-justiciable.[35] In spite of Art. 123(4), the Supreme Court suggested that presidential satisfaction under Art. 123(1) could still be questioned on the ground of mala fides.[36]

However, in 1978, the 44th Amendment deleted this provision, and restored the *status quo ante*.[37] Again, in *A.K. Roy v. Union of India*,[38] the question of judicial review of the President's satisfaction to promulgate the National Security Ordinance, 1980, providing for preventive detention was raised. The Supreme Court left the question open whether the satisfaction of the President under Art. 123(1) is justiciable or not. The Court did say however that it was arguable that "judicial review is not totally excluded in regard to the question relating to the President's satisfaction." As to whether the preconditions to the exercise of power under Art. 123 have been satisfied or not cannot be regarded as a purely political question and kept beyond judicial review. In the instant case, since the Ordinance in question had been replaced by an Act of Parliament, the Court felt no need to go into the question of the President's satisfaction to issue the Ordinance in question. Further, the Court felt that the material placed before it was not sufficient to enable it to reach any conclusion one way or another on this question. The Court also pointed out that a *prima facie* case must be established by the petitioners as regards the non-existence of the circumstances necessary for the promulgation of the Ordinance before the burden can be cast on the President

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32. *Cooper v. Union of India*, AIR 1970 SC 564 : (1970) 1 SCC 248.
33. *Ibid*, at 588.
34. *Ibid*, at 644.
35. See, *infra*, Ch. XLII.
36. *State of Rajasthan v. Union of India*, AIR 1977 SC 1361 : 1977 (2) SCC 592 : 1978 (1) SCR 1; see, *infra*, Ch. XIII.
37. See, *infra*, Ch. XLII.
38. AIR 1982 SC 710 : (1982) 1 SCC 271.

to establish those circumstances. A passing and a casual challenge to the existence of the circumstances leading to the President's satisfaction to issue the ordinance in question cannot be entertained by the Court. The Court did however observe that the power to issue ordinances is not meant to be used recklessly or under imaginary state of affairs or *mala fide* against the normal legislative process.

This argument is further strengthened after the Supreme Court has ruled in *Bommai*,[39] that a proclamation by the President under Art. 356 can be challenged on the ground of *mala fides*, or that it is based on wholly extraneous and irrelevant grounds. Repeal of the 38th Amendment by the 44th Amendment of the Constitution also indicates that the argument of *mala fides* is not foreclosed to challenge an ordinance.

In *T. Venkata Reddy v. State of Andhra Pradesh*,[40] the Supreme Court has ruled that since the power to make an ordinance is legislative and not executive power, its exercise cannot be questioned on such grounds as improper motives, or non-application of mind[41], or on grounds of its propriety, expediency and necessity. An ordinance stands on the same footing as an Act. Therefore, "an ordinance should be clothed with all the attributes of an Act of legislature carrying with it its incidents, immunities and limitations under the Constitution. It cannot be treated as an executive action or an administrative decision". The courts can declare a statute unconstitutional when it transgresses constitutional limits, but they cannot inquire into the propriety of the exercise of legislative power. It has to be assumed that the legislative discretion is properly exercised. The Court has observed:[42]

> "The motives of the legislature in passing a statute is beyond the scrutiny of the courts. Nor can the courts examine whether the legislature had applied its mind to the provisions of a statute before passing it. The propriety, expediency and necessity of a legislative act are for the determination of the legislative authority and are not for the determination of the courts."

Similarly, the Supreme Court has observed in *Nagaraj*: [43]

> "It is impossible to accept the submission that the ordinance can be invalidated on the ground of non-application of mind. The power to issue an ordinance is not an executive power but is the power of the executive to legislate... This power is plenary within its field like the power of the State Legislature to pass laws and there are no limitations upon that power except those to which the legislative power of the State Legislature is subject. Therefore, though an ordinance can be invalidated for contravention of the constitutional limitations which exist upon the power of the State Legislature to pass laws it cannot be declared invalid for the reason of non-application of mind, any more than any other law can be. An executive act is liable to be struck down on the ground of non-application of mind. Not the act of a Legislature".

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39. See, *infra*, Ch. XIII.
40. AIR 1985 SC 724 : (1985) 3 SCC 198.
41. For explanation of these grounds, see, M.P. JAIN, *A TREATISE OF ADMINISTRATIVE LAW*, I. Ch. XIX.
42. AIR 1985 SC at 731 : (1985) 3 SCC 198.
For further discussion on this topic, see, *infra*, Ch. VII, Sec. D(ii)(c).
Also see, Ch. II, Sec. M.
43. *K. Nagaraj v. State of Andhra Pradesh*, AIR 1985 SC 551, 565 : (1985) 1 SCC 523.

In these cases, the Supreme Court seems to have gone too far in immunizing an ordinance from judicial review. In the view of the author, it does not seem to be correct to treat an ordinance on all fours with an Act passed by Parliament. While it is one thing to say that a validly made ordinance has the same effect as an Act of Parliament, the two—an ordinance and an Act—are not the same in all respects. The essential difference between the two is that while legislation through Parliament, an elected body, is open and transparent and is subjected to criticism on the floor of the House and even outside the House, making and promulgating an ordinance is purely an executive decision, neither transparent nor open nor subject to any open discussion in any forum.

It is the legislative act of the executive but not the act of the legislature. Therefore, challenging the executive decision on the ground of *mala fides* should always remain a possibility so that the executive is deterred from using its power to issue an ordinance in an improper manner.

Recently the Constitutional Bench of the Supreme Court[44] has disapproved the view expressed in *State of Rajasthan v. Union of India (supra)* and reaffirmed the ratio in *Bommai's* case that the subjective satisfaction of a Constitutional authority including the Governor, is not exempt from judicial review. It was said that " it is open to the Court, in exercise of judicial review, to examine the question whether the Governor's report (recording his satisfaction) is based upon relevant material or not; whether it is made bona fide or not; and whether the facts have been duly verified or not". No doubt the opinion was expressed in connection with executive action under Article 356 which was not legislative in character, nevertheless it indicates an assertion that unless specifically barred every executive action is subject to judicial review.

The Delhi High Court has observed on this point :[45]

> "It is settled law that it is for the petitioner to make out a *prima facie* case that there could not have existed any circumstances whatsoever necessitating the issuance of ordinances before the Government could be called upon to disclose the facts which are within its knowledge. Every casual challenge to the existence of such circumstances would not be enough to shift the burden of proof to the Executive to establish those circumstances."

A single Judge of the Karnataka High Court in *Hasanahba*[46] declared an ordinance promulgated by the State Governor as being *mala fide.* The learned Judge maintained that "an ordinance is an emergency or a stop gap measure and the power is required to be used for purposes of sub-serving conserving and enhancing the constitutional process and should not be and cannot be used for purposes of bypassing it." He also referred to the *Bommai* case in support of his approach. But, on appeal, a bench of two judges reversed the single judge's judgment and ruled that the power to make an ordinance being legislative in nature, the concept of *mala fides* cannot apply thereto.[47] The court said that *mala fides* cannot be attributed to the legislature as a body and the governor acts as the substitute of the Legislature while making the ordinance. The court said :

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44. *Rameshwar Prasad v. Union of India,* (2006) 2 SCC 1 : AIR 2006 SC 980.
45. *Gyanendra Kumar v. Union of India,* AIR 1997 Del 58, 61.
46. *B.A. Hasanahba v. State of Karnataka,* AIR 1998 Kant. 91.
47. *State of Karnataka v. B.A. Hasanahba,* AIR 1998 Kant 210.

> "The *mala fides* in making the law or passing the ordinance could not make such law unconstitutional".

The Court depended on *Nagaraj* for support and did not at all refer to *Bommai.* This author commends the approach of the single judge mentioned above rather than the division bench approach which has taken recourse to a mythical argument in preference to a realistic argument. It is beyond comprehension as to how can an executive body be treated as a "substitute" for the legislature. This amounts to taking recourse to a fiction in preference to reality.

An ordinance cannot be promulgated when both Houses of Parliament are in session. [Art. 123(1)]. Accordingly, an ordinance made when the two Houses are in session is void. It may, however, be made when only one House is in session, the reason being that a law can be passed by both Houses and not by one House alone, and, thus, it cannot meet a situation calling for immediate legislation and recourse to the ordinance-making power becomes necessary.

The House in session may, however, regard it as a discourteous act on the part of the government if it promulgates an ordinance without consulting it. What, therefore, may be done in such a situation is that a Bill embodying the necessary provisions may be got passed by the House in session and the same may then be promulgated as an ordinance. The Bill as passed by one House may later be passed by the other House and the ordinance revoked. This was done in 1957 when the Central Government servants threatened to go on strike. The Lok Sabha but not the Rajya Sabha was in session. A Bill was passed by the Lok Sabha to provide for maintaining essential services and the Essential Services Maintenance Ordinance was then issued embodying the provisions thereof.

The executive's ordinance-making power is not unrestrained. An ordinance can remain in force only for a short duration and is brought under the parliamentary scrutiny at the earliest possible opportunity. The scheme of Art. 123 is to place the ordinance-making power subject to the control of Parliament rather than that of the courts.

The ordinance is to be laid before each House of Parliament when it reconvenes after the making of the ordinance [Art. 123(2)(a)]. The ordinance shall cease to operate at the expiry of six weeks from the assembly of Parliament [Art. 123(2)(a)]. When the two Houses of Parliament assemble on different dates, the period of six weeks is to be reckoned from the later of the two dates.[48] It means that Parliament must pass a law to replace the ordinance within six weeks of its assembling. Thus, the maximum duration for which an ordinance may last is 7½ months as under Art. 85, six months cannot intervene between two sessions of Parliament, and the ordinance would cease to operate six weeks after the Parliament meets.

An ordinance may cease to have effect even earlier than the prescribed six weeks, if both Houses of Parliament pass resolution disapproving it [Art. 123(2)(*a*)]. It may be withdrawn by the Executive at any time [Art. 123(2)(*b*)]. Parliament's control over the Central Executive's ordinance-making power is thus *ex post facto, i.e.* it is exercised after the ordinance has been promulgated and not before.

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48. Explanation to Art. 123(2)(a).

To ensure that the Executive uses the ordinance-making power only when circumstances are such as admit of no delay, rules of both Houses provide that a Bill seeking to replace an ordinance should be introduced in the House along with a statement explaining the circumstances which made immediate legislation by an ordinance necessary.

If the provisions made through the ordinance are to continue even after the ordinance comes to an end, Parliament has to enact a law incorporating the provisions made through the ordinance. Since the government enjoys majority in the Lok Sabha, there is no difficulty in the House passing the Act. But situation in Rajya Sabha may be different. If the government does not have majority in that House, passage of the Act by that House may become a problem.

The normal democratic legislative process involves the people's representatives in the two Houses openly enacting a law after a full consideration and discussion. An ordinance seeks to circumvent this process for it is drafted secretly in government chambers and is promulgated without an open discussion. The ordinance-making power should therefore be invoked not lightly but only when it is absolutely necessary to do so, and the situation cannot otherwise be met effectively. However, an ordinance partakes of legislative character; it is made in exercise of legislative power and is subject to the same limitations as an Act passed by Parliament.[49]

The Supreme Court has held that the power to make ordinance is not antidemocratic even though the power is vested in the Executive and not the legislature. An ordinance is promulgated on the advice of the Council of Ministers which remains answerable to the Parliament. If the executive misuses or abuses its power, the House of Parliament may not only disapprove the ordinance but may also pass a vote of no confidence against the Council of Ministers.[50]

An ordinance has the same force and effect as an Act of Parliament [Art. 123(2)]. An ordinance comes to an end in the following situations—

(a) Resolutions disapproving the ordinance are passed by both Houses of Parliament;

(b) if the ordinance is not replaced by an Act within the stipulated period;

(iii) the executive lets it lapse without bringing it before the Houses of Parliament;

(iv) if it is withdrawn by the Government at any time.

The power of the President to issue ordinances is co-extensive with the legislative power of Parliament.[51] The President's power to promulgate ordinances is no higher and no lower than the power of Parliament to make laws.[52] An ordinance cannot make a provision which Parliament is not competent to enact [Art. 123(3)]. Conversely, an ordinance can make any provision which Parliament can enact, except that an appropriation from out of the Consolidated Fund cannot be made by an ordinance [Art. 114(3)].[53] Thus, an ordinance may make provision with respect to a matter in Lists I and III, but not in List II, except when procla-

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49. *A.K. Roy*, *infra*, footnote 59.
50. *R.K. Garg v. Union of India*, AIR 1981 SC 2138 : (1981) 4 SCC 675.
51. *Satpal & Co. v. Lt. Governor of Delhi*, AIR 1979 SC 1550.
52. See, *infra*, Ch. X.
53. *Supra*, Ch. II, Sec. J(ii)(j).

mation of emergency is in operation.[54] Further, like a law made by Parliament, an ordinance is also subject to Fundamental Rights.[55]

Again, in *A.K. Roy v. Union of India*, the Supreme Court has emphasized that an ordinance is law and is a product of exercise of legislative power. It is 'law' for the purposes of Art. 21. The Court has rejected the contention in *R.K. Garg v. Union of India*[56] that under Art. 123, the President has no power to issue an ordinance amending or altering the tax laws. An ordinance has the same force and effect as an Act of Parliament. There is no qualitative difference between an ordinance and an Act passed by Parliament. President's legislative power under Art. 123 is co-extensive with Parliament's power to make laws and, therefore, no limitation can be read into the legislative power of the President so as to make it ineffective to alter or amend tax laws. Conversely, it would also mean that an ordinance cannot do what Parliament could not do by enacting an Act.[57]

Prima facie it can be said that an ordinance which signifies law-making by the executive is an undemocratic instrument. But an analysis of Art. 123 would show that the power to make ordinances has been given only to deal with unforeseen or urgent matters, and it is subject to proper parliamentary controls. In the first place, the power is exercised by a government accountable to Parliament. In the second place, it is to be exercised when Parliament is not in session. In the third place, the ordinance has to be placed before both Houses which can disapprove the ordinance if they so like. If the executive misuses its power, the *Lok Sabha* can pass a vote of no confidence to remove the government from office. However, all said and done, it cannot be denied that a government enjoying majority support in the House can misuse or abuse this power. It can use this power to bypass Parliament and enact a law through an ordinance which it feels would raise controversies on the floor of the House.[58]

Under Art. 123, an ordinance can be issued to deal with the emergent situation which might arise as a result of a law being declared unconstitutional by a court. There is no inhibition on the ordinance-making power that it shall not deal with a matter already covered by a law made by Parliament.[59]

In *Union of India (UOI) v. C. Dinakar, I.P.S.*[60] the C.B.I. (Senior Police Posts) Recruitment Rules, 1996 framed under Proviso to Article 309 of the Constitution of India specifically provided for the grade from which promotion to the post of Director, CBI was to be made. In *Vineet Narain v. Union of India*,[61] directions were issued by the Supreme Court regarding the procedure for appointment of the Director, CBI. An Ordinance was subsequently promulgated by the President of India known as the Central Vigilance Commission Ordinance, 1998 which came into force on or about 25.8.1998 and which provided for the process of selection to the post of Director CBI. Parliament then incorporated the provisions

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54. Chs. X, XI and XIII, *infra.*
55. For discussion on Fundamental Rights, see *infra*, Chs. XX-XXXIII.
56. AIR 1981 SC 2138 : (1981) 4 SCC 675.
57. *Garg v. Union of India, supra.*
58. On this aspect also see the discussion under Governor's power to make ordinance, *infra*, Ch. VII.
59. *A.K. Roy v. Union of India*, AIR 1982 SC 710 at 725 : (1982) 1 SCC 271.
Also see, *infra*, Ch. VII, Sec. D(ii)(c) for discussion on Misuse of Power to Promulgate Ordinances.
60. (2004) 6 SCC 118 : AIR 2004 SC 2498.
61. (1998) 1 SCC 226 : AIR 1998 SC 889.

of the said Ordinance by enacting the Central Vigilance Commission Act, 2003. The selection process adopted by the Central Government in appointing the Director was challenged on the ground that the same was contrary to and inconsistent with the directions of the Court in *Vineet Narain's* case (supra). The court negatived the submission holding that the 1996 Rules being subordinate legislation ceased to exist as soon as the Ordinance came into force and that the directions issued by the Court were to operate only till legislation was passed in that regard.

At times, the government may misuse its ordinance-making power by repeatedly reissuing an ordinance over and over again without placing it before the legislature. This aspect of the ordinance-making power was brought to the notice of the Supreme Court in *Wadhwa,* as regards the State of Bihar.[62] The Court trenchantly criticised this practice characterising it as anti-democratic. The Court insisted that the government cannot by-pass the legsilature and keep ordinances alive indefinitely without enacting their provisions into Acts of legislature. *Wadhwa's* case has been taken note of in the discussion on the ordinance-making power of the State Governments [Art. 213] which is on all fours with the ordinance-making power of the Centre.

In *Gyanendra,*[63] a similar situation was presented to the Delhi High Court concerning the Central Government. Several ordinances had been reissued over and over again during the period Oct. 95 to March, 96 without being brought before Parliament. For example, the Industrial Disputes (Amendment) Ordinance, was issued on 11/10/95; it was re-issued on 5/1/96 and again on 27/3/96. Ordinarily, such a practice would be characterised as unconstitutional within the *Wadhwa* ruling, but in the instant case the court desisted from declaring the ordinances invalid accepting the government plea that Parliament had been very busy with urgent and emergent public business and so it could not find sufficient time to enact the laws to replace the ordinances. In such a situation, repromulgation of the ordinance could not be regarded as unconstitutional or illegal. In fact, in *Wadhwa,* the Supreme Court has itself recognised such a contingency.[64]

The ordinance comes into effect as soon as it is promulgated. If later the ordinance comes to an end for any reason, the ordinance does not become void *ab initio.* It was valid when promulgated and whatever transactions have been completed under the ordinance cannot be reopened when the ordinance comes to an end.

In *Venkata Reddy,*[65] in 1984, the State Government promulgated an ordinance abolishing posts of part-time village officers in the State. The ordinance was not replaced by an Act of the Legislature though it was succeeded by 4 ordinances. It was argued that the ordinance having lapsed as the Legislature did not pass an Act in its place, the posts which had been abolished should be deemed to have been revived and the issue of successive ordinances, the subsequent one replacing the earlier one did not serve any purpose. The Supreme Court rejected the argument. The Court argued that an ordinance comes into effect as soon as it is promulgated. If later the ordinance comes to an end for any reason, the ordinance

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62. See, *infra,* Ch. VII, Sec. D(ii)(c).
63. *Gyanendra Kumar v. Union of India,* AIR 1997 Del. 58.
64. See, *infra,* Ch. VII, Sec. D(ii)(c).
65. *T. Venkata Reddy v. State of Andhra Pradesh,* AIR 1985 SC 724 : (1985) 3 SCC 198.

does not become void *ab initio*. It is valid when promulgated and whatever transaction has been completed under the ordinance cannot be reopened when the ordinance comes to an end. Art. 123 or 213 does not say that the ordinance shall be void from the commencement on the Parliament/State Legislature disapproving it. It says that it shall cease to operate. It only means that the ordinance should be treated as being effective till it ceases to operate.

The ordinance in question in the instant case abolished the posts of part-time village officers. Therefore, because of the ordinance, all posts of part-time village officers stood abolished and these officers ceased to be employees of the State Government. This was an accomplished matter. Therefore, even if the ordinance ceased to operate later, what had been accomplished became irreversible. The abolition of the posts having become completed events, "these is no questions of their revival."

Elections were held for the Cuttack Municipality and 27 councillors were declared elected. A defeated candidate challenged these elections and the High Court voided them on the ground that the electoral roll had not been prepared according to law. Apprehending that on this ground, elections to municipalities other than those of the Cuttack Municipality, might also be declared void, the State Government promulgated an ordinance validating the electoral rolls, and all elections held on the basis of these rolls were declared to be valid "notwithstanding any judgment to the contrary." Later, the ordinance lapsed and no Act was enacted to replace it.

Thereafter, a writ petition was filed questioning the elections. It was argued that the ordinance being temporary in nature, the invalidity in the elections stood revived as soon as the ordinance lapsed. But the Supreme Court rejected the argument in *Orissa v. Bhupendra Kumar Bose*.[66] The Court ruled that the validation of the elections was not intended to be temporary in nature and the same did not come to an end as soon as the ordinance expired. Having regard to the object of the ordinance, and to the rights created by its provisions, "it would be difficult to accept the contention that as soon as the ordinance expired, the validity of the elections came to an end and their invalidity was revived."

An ordinance was promulgated by the President in 1996 declaring a section of the population of Assam as Scheduled Tribes. The same ordinance was repeated several times and ultimately it lapsed without Parliament passing an analogous Act. The High Court of Gauhati ruled in *Maitreyee Mahanta v. State of Assam*[67] that as Parliament did not pass the necessary law, the ordinance would lapse and, accordingly, the rights vested in the communities by the ordinance would also lapse.

(iii) EXECUTIVE FUNCTIONS

The Central Executive is entitled to exercise executive functions with respect to all those subjects which fall within the legislative sphere of Parliament [Art. 73].[68] It can also exercise such executive functions as are exercisable by the Government of India under any treaty or agreement.

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66. AIR 1962 SC 945 : 1962 Supp (2) SCR 380.
67. AIR 1999 Gau. 32.
68. See, Chs. X and XI, *infra*.

A few provisions in the Constitution confer on the President, *i.e*., the Central Executive, some specific executive powers, such as *inter alia*:

(i) the power to appoint various high officials like the Attorney-General [Art. 76(1)][69], Comptroller and Auditor-General [Art. 148(1)],[70] a State Governor [Art. 155],[71] Members of the Union Public Service Commission [Arts. 315-323],[72] Election Commissioners [Art. 324(2)],[73] *etc*.; The Constitutional scheme, is that when a Constitutional post is required to be filled up by a person having the qualification specified therefor, he alone would perform the duties and functions, be it Constitutional or statutory, attached to the said office. The Constitution does not envisage that such functions be performed by more than one person. The office of the Advocate General is a public office. He not only has a right to address the Houses of Legislature under Art. 177 but also is required to perform other statutory functions in terms of Section 302 of Cr. P.C.

The question of interpretation of a Constitution would arise only in the event the expressions contained therein are vague, indefinite and ambiguous as well as capable of being given more than one meaning. If by applying the golden rule of literal interpretation, no difficulty arises in giving effect to the constitutional scheme, the question of application of the principles of interpretation of a statute would not arise. Thus the state in exercise of its jurisdiction under Article 162 is competent to appoint a lawyer of its choice and designate him in such manner as it may deem fit and proper. Once it is held that such persons who are although designated as Additional Advocates General are not authorised to perform any constitutional or statutory functions, indisputably, such appointments must be held to have been made by the State in exercise of its executive power and not in exercise of its constitutional power.[74]

(ii) the power to appoint Commissions, like Inter-State Council [Art. 263],[75] Finance Commission [Art. 280],[76] Commission for Scheduled Tribes [Art. 339(1)];[77], and Backward Classes [Art. 340(1)];[78] Official Language Commission [Art. 344(1)];[79]

(iii) power to enter into contracts on behalf of the Indian Union [Art. 299];[80]

(iv) power to issue directions to the States in certain circumstances.[81]

Besides the above, Art. 53 confers executive power on the President in a general way. Thus, under Art. 53, the Central Executive has a large unspecified reservoir of powers and functions to discharge. The Constitution makes no attempt to define 'executive power', or to enumerate exhaustively the functions to be exercised by the Executive, or to lay down any test to suggest as to which activity

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69. *Infra*, Sec. G.
70. *Supra*, Ch. II, Sec. J(ii).
71. *Infra*, Ch. VII, Sec. A.
72. *Infra*, Ch. XXXVI.
73. *Infra*, Ch XIX.
74. *M. T. Khan v. Govt. of A.P.*, (2004) 2 SCC 267 : AIR 2004 SC 2934.
75. *Infra*, Ch. XIV, Sec. C.
76. *Infra*, Ch. XI, Sec. L.
77. *Infra*, Ch. XXXV, Sec. G.
78. *Infra*, Ch. XXXV, Sec. G.
79. *Infra*, Ch. XVI, Sec. B.
80. *Infra*, Ch. XXXIX, Sec. C.
81. Arts. 256, 257, 339(2); See **further** on this point, Chs. XII, XIII.

or function would legitimately fall within the scope of the executive power. The truth is that the executive power of a modern state is not capable of any precise or exhaustive definition.

The government in exercise of its executive power is charged with the duty and the responsibility of carrying on the general administration of the state. The scope of the executive power may be said to be residual, that is to say, any function not assigned to Parliament or the Judiciary may be performed by the Executive[82], or governmental functions that remain after the legislative and judicial functions are taken away.[83]

The Supreme Court has observed in *Madhav Rao* : "The functions of the state are classified as legislative, judicial and executive; the executive function is the residue which does not fall within the other two functions."[84] To the same effect is the following observation of MUKHERJEA, C.J., in *Ram Jawaya:*[85]

> "It may not be possible to frame an exhaustive definition of what executive function means and implies. Ordinarily the executive power connotes the residue of governmental functions that remain after legislature and judicial functions are taken away."

A primary function of the Executive is to administer and execute the laws enacted by Parliament and maintain law and order. But executive function is not limited only to this. A modern state does not confine itself to a mere collection of taxes, maintaining law and order and defending the country from external aggression. It engages in multifarious activities. The Executive operates over a very large area and discharges varied and complex functions.

In a parliamentary type government, the Council of Ministers enjoys a majority support in the Legislature, and even controls the same to a large extent. It directs foreign policy; it enters into treaties with foreign countries;[86] it carries on and supervises general administration; promotes socio-economic welfare of the people. It formulates and executes policies, and changes policies from time to time to suit changing circumstances;[87] it initiates legislation. In such a context, the Executive is not confined to discharging only those functions which have been specifically conferred on it by the Legislature or the Constitution.

Nor can it be said that before the Executive can act there ought to be a law to back it and that it cannot do anything except administering the law. So long as the Executive enjoys the majority support in the Legislature, it can go on discharging its policies and no objection can be taken on the ground that a particular policy has not been sanctioned by legislation. This, however, is subject to some limitations, *e.g.*, the Executive cannot ignore a constitutional prohibition or provision.[88] Executive power must be exercised in accordance with the Constitution.[89] Thus, it cannot spend money from the Consolidated Fund without an Ap-

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82. *Jayantilal Amarathlal v. F.N. Rana,* AIR 1964 SC 648 : (1964) 5 SCR 294.
83. *Chandrika Jha v. State of Bihar,* AIR 1984 SC 322 : (1984) 2 SCC 41.
84. *Madhav Rao Scindia v. Union of India,* AIR 1971 SC 530, 565 : (1971) 1 SCC 85.
85. *Rai Sahib Ram Jawaya Kapur v. State of Punjab,* AIR 1955 SC 549 : (1955) 2 SCR 225.
86. *Maganbhai v. Union of India,* AIR 1969 SC 783 : (1970) 3 SCC 400; *Satwant Singh v. Asstt. Passport Officer,* AIR 1967 SC 1836 : (1967) 3 SCR 525.
87. *A.S. Sangwan v. Union of India,* AIR 1981 SC 1545 : 1980 Supp SCC 559.
88. *Wazir Chand v. State of Himachal Pradesh,* AIR 1954 SC 415 : (1955) 1 SCR 408.
89. *U.N.R. Rao v. Indira Gandhi,* AIR 1971 SC 1002 : (1971) 2 SCC 63.

propriation Act,[90] or impose a tax without law: it cannot encroach upon the sphere assigned to any other instrumentality like Parliament or the Judiciary.[91]

The Executive cannot act against a statute or exceed its statutory powers;[92] if there exists a law on a particular matter, the Executive must act in accordance with it.[93] Also, the Executive cannot infringe the rights of private individuals without legal sanction. Where rights of a private person are affected prejudicially, executive action could be taken only if supported by law. Thus, a restriction requiring a person to reside in a specified place cannot be imposed merely by an executive order without the backing of the law.[94]

The State of Uttar Pradesh amended Section 24 of the Code of Criminal Procedure so that the State was not required to consult the High Court before appointing a Public Prosecutor for the High Court. The amendment was made on the ground that similar provisions exist in the Legal Remembrancer Manual. The Supreme Court held that the Legal Remembrancer Manual is merely a compilation of executive orders and is not a 'law' within the meaning of Article 13 of the Constitution of India and that *"a law cannot be substituted by executive instructions which may be subjected to administrative vagaries"*.[95]

If to pursue a policy, the Executive needs some additional powers over what it already possesses generally under the prevailing law or the Constitution, then a specific law will be needed for the purpose. But, apart from such matters, it cannot be said that in order to undertake any function, such as, entering into any trade or business, the Executive must obtain prior legislative sanction.

This question regarding the scope of the executive power has been elaborately discussed by the Supreme Court in *Ram Jawaya v. State of Punjab*.[96] The recognised schools in Punjab used only such text books as were prescribed by the Education Department. In 1950, the Government embarked on the policy of nationalising text books and, thus, took over the work of printing and publishing them. The author of the book selected by the Government for the purpose by contract vested the copyright of the book in the Government in lieu of royalty. The scheme was challenged on the ground, *inter alia*, that the Executive could not engage in any trade or business activity without any law being passed for the purpose.

The Supreme Court negatived the contention saying that the expenses necessary to carry on the business of publishing text books had been approved by the Legislature in the Appropriation Act. The Government required no additional power to carry on the business as whatever was necessary for that purpose, it could secure by entering into contracts with authors and other people. No private right was being infringed as the publishers were not being debarred from publishing books. In the circumstances, the carrying on of the business of publishing

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90. *Supra*, Ch. II, Sec. J(ii)(g).
91. *Pratap Singh v. State of Jharkhand*, (2005) 3 SCC 551 : AIR 2005 SC 2731.
92. *Madhav Rao v. Union of India*, AIR 1971 SC 530 : (1971) 1 SCC 85; *A Sanjeevi Naidu v. State of Madras*, AIR 1970 SC 1102 : (1970) 1 SCC 443.
93. *Guruswamy v. State of Mysore*, AIR 1954 SC 592 : (1955) 1 SCR 305.
94. *State of Madhya Pradesh v. Bharat Singh*, AIR 1967 SC 1170; *Kharak Singh v. State of Uttar Pradesh*, AIR 1963 SC 1295 : (1964) 1 SCR 332; *Hindustan Times v. State of UP*, 2003 (1) SCC 591 : AIR 2004 SC 3800.
95. *State of U.P. v. Johri Mal*, (2004) 4 SCC 714 : AIR 2005 SC 2731,
96. AIR 1955 SC 549 : (1955) 2 SCR 225. See, *supra*.

text books without a specific law sanctioning the same was not beyond the competence of the Executive.[1]

Following *Ram Jawaya*, the Supreme Court has held that the government can prescribe text books for schools in the exercise of its executive power so long as it does not infringe the rights of any one.[2]

In a number of cases, courts have reiterated the principle that the Executive can engage in several activities in exercise of its executive powers without any prior legislation. In fact, the Executive is competent to represent the State in all matters international and may by agreement, convention or treaties incur obligations which in international law are binding on the State. But the obligations are not by their own force binding upon Indian nationals. In 1969, the Supreme Court, in keeping with the classical dualist view, said "[I]n India the making of a law by Parliament is necessary when the treaty or agreement operates to restrict the rights of citizens or modifies the laws of the State."[3]

That the Government can engage in trading activities, is made clear by Article 298.[4] By virtue of Art. 298, the executive power also includes—(a) the carrying on of trading opera-tions; (b) the acquisition, holding and disposing of property; and (c) the making of contracts for any purpose.[5]

The Government can make appointments under its executive power without there being a law or rule for that purpose.[6] However, if rules have been made under Art. 309, then the government can make appointments only in accordance with the rules. Having made the rules, the executive cannot then fall back upon its general executive power under Art. 73.[7]

The Government can also issue administrative directions to regulate promotions to selection grades.[8] The Government cannot amend or supersede statutory rules, if any, by administrative instructions, but if the rules are silent on any particular point, the Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed.[9] "The executive power could be exercised only to fill in the gaps but the instructions cannot and should not supplant the law but would only supplement the law."

In *Union of India v. Naveen Jindal*[10] the prohibition to fly the National flag under the Flag Code was held to be unconstitutional on two grounds. First, the field was already occupied by The Emblems and Names (Prevention of Improper

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1. Also see, *Sarkari Sasta Anaj Vikreta Sangh v. State of Madhya Pradesh*, AIR 1981 SC 2030 : (1981) 4 SCC 471; *Bishambar v. State of Uttar Pradesh*, AIR 1982 SC 33 : (1982) 1 SCC 39.

2. *Naraindas Indurkhya v. State of Madhya Pradesh*, AIR 1974 SC 1232 : (1974) 2 SCC 788.

3. *Maganbhai v. Union of India*, (1970) 3 SCC 400 : AIR 1969 SC 783. See also *Union of India v. Azadi Bachao Andolan*, (2004) 10 SCC 1, 23 : AIR 2004 SC 1107.

4. *Infra*, Ch. XII, Sec. C. Also see, *Jayantilal v. Rana*, AIR 1964 SC 648 : (1964) 5 SCR 294.

5. See, *infra*, Ch. XXXIX, Sec. C.

6. *B.N. Nagarajan v. State of Mysore*, AIR 1966 SC 1942 : (1966) 3 SCR 682. Also see, *infra*, Ch. XXXIV.

7. *J.K. Public Service Commission v. Narinder Mohan*, AIR 1994 SC 1808 : (1994) 2 SCC 630.

8. *Sant Ram v. State of Rajasthan*, AIR 1967 SC 1910 : (1968) 1 SCR 111.

9. *Fernandez, G.J. v. State of Mysore*, AIR 1967 SC 1753 : (1967) 3 SCR 636.
Also see, *infra*, under *Mandamus*, Ch. VIII, Sec. E and Ch. XXXVI, Sec. B.
For a detailed discussion on directions, see, JAIN & JAIN, *Principles of Administrative Law*, Ch. III.

10. (2004) 2 SCC 510 : AIR 2004 SC 1559.

Use) Act, 1950 and the Prevention of Insults to National Honour Act, 1971and could not be supplanted by the Flag Code which only contains the executive instructions of the Central Government and second, the right to fly the National flag was a fundamental right under Article 19(1)(a); the Flag Code is not a law within the meaning of Article 13(3)(a) of the Constitution of India for the purpose of Clause (2) of Article 19 and as such could not restrictively regulate the free exercise of the right of flying the National Flag.

Thus, it is not always necessary to have a law before the Executive can function nor are its powers limited merely to the carrying out of the laws. However, once a law is passed to cover any area of the activities of the Executive, the executive power can then be exercised only in accordance with such a law insofar as it goes.

Article 73 defines the extent of the executive power of the Centre. "Subject to the provisions of the constitution", the executive power of the Centre extends to—

(i) the matters with respect to which Parliament has power to make laws;

(ii) the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement.

The principle underlying (i) above is that executive power is co-extensive with legislative power. So, the extent of the executive power of the Centre is co-extensive with Parliament's legislative power. But in the concurrent area, where both Parliament as well as the State Legislatures can make laws, Centre's executive power extends to this area only when either the Constitution or a law made by Parliament expressly provides for.[11] The expression "agreement' in the second clause of Article 73 has been held as referable to Article 299.[12]

It may not be out of place to mention here that to-day, by law, multifarious functions of all types—administrative, *quasi*-judicial, legislative—are being conferred on the executive-administrative organs, and such is the plethora of functions exercised by these organs that a whole branch of law, known as the Administrative Law, has now come into existence. The primary purpose of this newly developing jurisprudence is to study the functions of the Executive, the manner in which, and subject to what controls, are these exercised, and what safeguards are available to those whose rights may be infringed by administrative action.[13]

E. RULES OF BUSINESS

The essence of collective responsibility is that the Cabinet is responsible to the Parliament for all acts of the Ministers. But that does not mean that the Cabinet itself can attend to numerous matters that come up before the government or that the Cabinet itself ought to take each and every decision. As the Supreme Court has observed : "The political responsibility of the Council of Ministers does not and cannot predicate the personal responsibility of the Ministers to discharge all

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11. The matter has been discussed further in Ch. XII, *infra*.

12. *Sharma Transport v. Govt. of A.P.*, (2002) 2 SCC 188 : AIR 2002 SC 322.

13. M.P. JAIN, *A TREATISE ON ADMINISTRATIVE LAW;* M.P. JAIN, *CASES AND MATERIALS ON INDIAN ADMINISTRATIVE LAW.*

or any of the governmental functions."[14] The main function of the Council of Ministers is to settle the major policies and programmes of the government.

Similarly, an individual Minister is responsible to the Parliament for every action taken or omitted to be taken in his Ministry. This again is a political responsibility. The Minister is not expected to burden himself with day to day routine administration; he does not have to take each and every decision himself. His main function is to lay down policies and programmes of his ministry subject to which decisions in individual cases are taken by the officials in the Ministry.

Although under Art. 77(1), an order is issued in the name of the President, it does not mean that every order is passed by him personally. Even when a constutitonal or statutory provision specifically vests power in the President, the power is not to be exercised by the President himself.

Article 77(3) says *inter alia :* "The President shall make rules for the more convenient transaction of the business of the Government of India". This means that the decisions of the Government of India are not always taken personally by the President. The decision may be taken by the Minister concerned or even by the official authorised to take the decision under the Rules of Business made by the President under Art. 77(3). The decision taken by the officer authorised under the Rules of Business is regarded as the decision of the Government of India. The wheels of the government will stop grinding if all decision were required to be taken by the President or even by the Ministers.[15]

This also means that an order issued in the name of the President, not being his personal order, cannot claim immunity under Art. 361 from judicial review. As the Supreme Court has observed in *Common Cause*.[16]

> "The authenticity, validity and correctness of such an order can be examined by this Court in spite of the order having been expressed in the name of the President. The immunity available to the President under Art. 361 of the Constitution cannot be extended to the orders passed in the name of the President under Art. 77(1) or Art. 77(2) of the Constitution".

To smoothen the running of the administration, Art. 77(3) makes two crucial provisions :

(i) to authorise the President to make Rules for the more convenient transaction of the government business;

(ii) to allocate the said business among the Ministers.

The Rules made under (i) are known as the Rules of Business. These Rules are made by the Executive in the name of the President. These rules authorise officials in the department to take various decisions. Thus, most of the decisions within a Ministry are taken by the officials authorised by the Rules of Business. The Minister exercises over-all control over the working of his department; he can call for any file, pass an order or issue directions, but actual decisions in a large number of cases are taken by officials authorised by the Rules of Business on behalf of the government.

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14. *Sanjeevi v. State of Madras,* AIR 1970 SC 1102, 1106 : (1970) 1 SCC 443.

15. *Ram Jawaya Kapur v. State of Punjab,* AIR 1955 SC 549 : (1955) 2 SCR 225; *Samsher Singh v. State of Punjab,* AIR 1974 SC 2192 : (1974) 2 SCC 831; *G.D. Zalani v. Union of India,* AIR 1995 SC 1178, 1189 : 1995 Supp (2) SCC 512; *Common Cause, A Regd. Society v. Union of India,* AIR 1999 SC 2979, 2990 : (1999) 6 SCC 667.

16. *Common Cause, ibid.,* at 2991.

When a minister puts his signature with the endorsement file returned, such signature meant his approval.[17]

When a decision is taken by such an authorised officer, it becomes the decision of the government. The validity of any such decision taken cannot be challenged on the ground that it is not the decision of the Minister. As the Supreme Court has emphasized in *Sanjeevi:*[18] "When those officials discharge the functions allotted to them, they are doing so as limbs of the Government and not as persons to whom the power of the Government had been delegated". Similarly, in *Samsher*,[19] the Court has stated that the decision of any Minister or officer under the rules of business made under Art. 77(3) is the decision of the President for these rules do not provide for any delegation.

These rules have statutory force and are binding. Therefore, sanction for prosecution of an employee of the Central Government under the Prevention of Corruption Act was held not valid when it was granted by a Ministry other then the one authorised to do so under the Rules of Business.[20]

Under the Rules of Business of the Maharashtra Government, both the Home Secretary and the Home Minister can deal with a matter of preventive detention. The order of detention was made by the Secretary, but the representation of the detenu was considered and rejected by the Home Minister. There was nothing wrong in this as both the Secretary and the Minister could act on behalf of the State Government.[21]

The Supreme Court has ruled in *State of Haryana v. P.C. Wadhwa*[22] that the Business Rules cannot override a provision made by an Act or by any statutory rule.[23]

F. INDIAN V. U.S. FORMS OF GOVERNMENT

The functionary at the head of the Indian Union, like that of the U.S.A., is called the President, but India's form of government is very different from that of the U.S.A. India has parliamentary, and not presidential, form of government. India's form of government differs substantially from that of America. Beyond the identity of names between the Indian and the American Presidents, there is not much in common between them.

The position of the President of India is more akin to the British monarch rather than the American President. He is the head of the state and only a formal, not an effective, head of the Executive. The effective repository of the executive power is the Council of Ministers. On the other hand, the U.S. President is both

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17. *Tafcon Projects (I) (P) Ltd. v. Union of India*, (2004) 13 SCC 788 : AIR 2004 SC 949.
18. *Sanjeevi*, *supra*, footnote 14, at 1107.
19. *Samsher v. State of Punjab*, AIR 1974 SC 2194, 2198, 2202 : (1974) 2 SCC 831.
20. *State of Rajasthan v. A.K. Datta*, AIR 1981 SC 20.
21. *Raverdy Marc Germain Jules v. State of Maharashtra*, AIR 1982 SC 311 : (1982) 3 SCC 135. Also, *Smt. Masuma v. State of Maharashtra*, AIR 1981 SC 1753 : (1981) 3 SCC 566; *Kavita v. State of Maharashtra*, AIR 1981 SC 1641 : (1981) 3 SCC 558; *Sanwal Ram v. Addl. District Magistrate*; AIR 1982 Raj 139 : (1987) 2 SCC 602; *R.J. Singh v. Delhi*, AIR 1971 SC 1552 : (1970) 3 SCC 451; *infra*, Chs. VII and XXVII.
22. AIR 1987 SC 1201 : (1987) 2 SCC 602. See also *Union of India v. Naveen Jindal*, 2004 (2) SCC 510 : AIR 2004 SC 1559.
23. For further discussion on the Rules of Business, see, *infra*, Ch. VII, Sec. B.

the head of the state as well as the effective head of the Executive. The system is known as the presidential form of government because the President is the chief executive. The administration of the country is vested in him.

The U.S. Constitution makes the President responsible for ensuring that the laws of the country are faithfully executed. He alone is vested with the power to appoint and remove executive officers and, thus, can effectively control the government departments.

The President has under him Secretaries of State in charge of different executive departments who are appointed by him and who are his personal advisers. He is not bound to accept the advice tendered by them; he enjoys ultimate power of decision and therefore, has complete political responsibility for all executive action. The President dominates the Cabinet completely as the Secretaries of State hold their offices entirely at his pleasure and are accountable to him. They are merely the instruments through whom the President's policy is carried out. As has been aptly said, "The cabinet is not a device for sharing responsibility among a group; it is a necessary result of the President's inability to supervise all affairs directly."[24]

The Indian President, on the other hand, acts generally on the advice of the Ministers. The U.S. President is free to dismiss any of his Secretaries as and when he likes. The President of India has a formal power to that effect but exercises it on the advice of the Prime Minister, or when the Cabinet has forfeited the confidence of the Lok Sabha. The Secretaries of State in the U.S.A., on the other hand, are neither responsible to Congress, nor are its members, nor do they function on the basis of collective responsibility. This is very different from the underlying principles on which the Executive functions in India.

The truth of the matter is that America hardly has a Cabinet corresponding to the classic idea of a Cabinet in the parliamentary form of government. "Because of his unfettered power of removal over them and the fact that his tenure of office is not in any way dependent upon the effect which his dismissal of the Cabinet members may have upon the Congress, the President is able to dominate his Cabinet to an extent which would be almost impossible in the case of a Prime Minister."[25]

The presidential form of government is based on the principle of Separation of Powers between the executive and the legislative organs. The doctrine of Separation of Powers, ascribed to Montesquieu, a Frenchman, exercised a potent influence on the public mind in the 18th century when the American Constitution was drafted. It envisaged that the legislative, executive and judicial functions in a state ought to be kept separate and distinct from each other. There ought to be separate organs for each, working together, but none of them should be dependent on, and discharge the function belonging to, the other, as for example, the Executive should have no legislative or judicial power.[26]

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24. BOWIE AND FRIEDRICH, *STUDIES IN FEDERALISM*, 65.

25. SCHWARTZ, *AMERICAN CONST. LAW*, 111. Also see, Corwin, *THE CONSTITUTIION & WHAT IT MEANS TO-DAY*, 111-60 (1973); CORWIN, *THE PRESIDENT, OFFICE AND POWERS.*

26. JENNINGS, *LAW AND THE CONST.*, App. 1., 280-304 (1959); FINKELMAN, SEPARATION OF POWERS, 2 *Toranto* L.J., 313; VANDERBITT, *THE DOCTRINE OF SEPARATION OF POWERS*; ILBERT, *PARLIAMENT*, 193; ROSSITER, *AMERICAN PRESIDENCY.*

Till recently, developments in the area of Administrative Law were progressively eroding the efficacy of the doctrine of Separation of Powers in the U.S.A. See Laurence Tribe : American Constitutional Law (2nd ed.) 18 (1988).

The thesis underlying the doctrine is that the merger of all powers in one body will lead to autocracy and negation of individual liberty. Basing itself on this doctrine, the American Constitution vests the executive power in the President who is elected for a fixed term of four years; legislative power is vested in the Congress, and the judicial power is vested in a system of courts with the Supreme Court at the apex.

An implication of the doctrine of Separation is that each of the three branches of government ought to be composed of different persons. Neither the President nor any of his Secretaries of State can be a member of the Congress. A member of the Congress can join the government only after resigning his membership therein.

While basically the U.S. Constitution is designed on the basis of the principle of Separation of Powers, the framers of the U.S. Constitution also introduced, to some extent, the principle of checks and balances. The framers adopted both these strategies with a view to ensure a weak government so that the government may not act in an arbitrary manner. The doctrine of Separation weakens the government by dividing its powers, for a divided government is intrinsically weaker than a government having all powers concentrated therein.

The principle of checks and balances further limits government power. The underlying idea is that if one organ of government is left free to exercise the power assigned to it without any control, it may run amok with its power and act arbitrarily in exercising its assigned power. For example, if the Congress is left free to make any law it likes, it may make harsh or unjust laws. Therefore, the doctrine of checks and balances envisages that one organ of government be controlled, to some extent, by the other two organs. For example, the President may veto a bill passed by the two Houses of Congress and, thus, the President controls the Congress so that it may not pass arbitrary or discriminatory legislation. But President's veto may be overridden by the two Houses passing the bill in question again by a 2/3 vote in each House. Also, the Supreme Court has power to declare an Act *passed* by the Congress as unconstitutional, but the Judges of the Supreme Court are appointed by the President with the consent of the Senate.

The Congress through its committees continuously probes into the functioning of the government departments. Similarly, the Secretaries of State are appointed by the President with the consent of the Senate. In the U.S.A., the Executive and Legislative organs are kept separate from each other.[27]

The parliamentary system, on the other hand, is based on an intimate contact, a close liaison, or co-ordination, between the Executive and the Legislative wings. India recognises no doctrine of Separation between them. As the Supreme Court has stated, there may be in India a differentiation and demarcation of functions between the Legislature and the Executive, and, generally speaking, the Constitution does not contemplate that one organ should assume the functions belonging essentially to the other organ, yet, nevertheless, there is no separation between them in its absolute rigidity.[28]

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27. Also see, Delegation of Legislative Powers, *supra*, Ch. II, Sec. N.

28. *Ram Jawaya v. State of Punjab, supra*, footnote 15. Also see, *In re, Delhi Laws Act, 1912*, AIR 1951 SC 332 : 1951 SCR 747; *supra*, Ch. II, Sec. N.

The Indian Constitution itself does not indicate a separation of powers as is commonly understood. There is, to a large extent, a parallelism of power, with hierarchies between the three organs in particular fields. It is this balance of hierarchies which must be maintained by each organ subject to checks by the other two. To illustrate this is the requirement for the executive to fill the legislative vacuum by executive orders[29]. Where there is inaction even by the executive for whatever reason, the judiciary can step in and in exercise of its obligations to implement the Constitution provide a solution till such time as the legislature or the executive act to perform their roles either by enacting appropriate legislation or issuing executive orders to cover the field[30]. Similarly while the legislature and executive may reject a judicial decision by amending the law, the judiciary may in turn test that law against the touchstone of the Constitution.

The U.S. Executive does not depend for its survival on a majority in the Congress as the President has a fixed tenure of four years. He cannot be dismissed before the expiry of his term by an adverse vote in the Congress. He can be removed only by the rare process of impeachment. Correspondingly, the President has no power to dissolve the Congress. The House of Representatives has a fixed term of two years. The American system produces a stable government having a fixed tenure because it is independent of the legislative whim. It has happened often that the President may belong to one political party, but the majority in either House or both Houses, may belong to another political party.

Members of Congress enjoy a good deal of freedom to oppose or support the programme and policies proposed by the President even when the majority in the Houses of Congress may belong to the same party as the President. On the other hand, the distinctive feature of the parliamentary system is that the Cabinet depends on the majority in the Lok Sabha, and holds office so long as it enjoys the confidence of the majority in the House which can depose the Cabinet at its pleasure, but the Cabinet has the corresponding right to dissolve the House. In a parliamentary system, the government has no fixed tenure as it may have to go out any moment the majority in Parliament withdraws its support.

The parliamentary system works best with two strong and disciplined political parties with one party having a clear majority. If the Legislature is fragmented into many small groups, the Cabinet has to be based on a coalition of parties and the Cabinet becomes unstable as it is constantly exposed to the danger of disintegration due to disagreements amongst the members of the coalition, or the constantly changing alignments of various parties in the Legislature, or because of the danger of defection of members from one party to another, and even the Executive's power to dissolve the House may not be effective to create the necessary discipline for a stable government in such a situation.

The American Executive not being directly accountable to the Legislature, tends to become less responsible to it than the parliamentary government which has constantly to seek the majority support. In America, the responsibility of the

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29. Articles 73 and 162.

30. Articles 32 and 226: *Vineet Narain v. Union of India*, (1998) 1 SCC 226 : AIR 1998 SC 889, "to fill the void in the absence of suitable legislation to cover the field..[i]t is the duty of the executive to fill the vacuum by executive orders…and where there is inaction even by the executive, for whatever reason, the judiciary must step in, in exercise of its constitutional obligations…to provide a solution till such time as the legislature acts to perform its role by enacting proper legislation to cover the field".

Executive is assessed by the electorate once in four years when election is held for the Presidential office. In India, on the other hand, the responsibility of the Executive is assessed daily by the Legislature through resolutions, questions, debates, *etc.*, and periodically by the electorate through general elections.

Though the Executive in the U.S.A. is constitutionally not directly accountable to the Legislature, yet it will be wrong to suppose that the Legislature has absolutely no control over the Executive. The Congress can bring indirect pressure over the Executive through its powers to levy taxes, make appropriations for government expenses, enact legislation, investigate executive work and policies through its committees and the Senate's power to confirm treaties and appointments. On the other hand, the President also is not completely powerless in relation to Congress. Though he cannot dissolve the Congress yet he does exercise some influence over it through his power to send messages and veto legislation; the efficacy of his veto, however, is limited as it can be overridden by the vote of 2/3rd members in each House of Congress. On the whole, therefore, legislative control over the Executive and *vice versa* is much weaker in the U.S.A. than it is in India where the Legislature and the Executive can dissolve each other.

The executive-legislative relation is one of co-ordination in a parliamentary government.[31] All Ministers are members of Parliament and this creates an intimate relationship between the two organs. The Executive is in a strong position to carry the Legislature along with it in its programmes and policies. The executive-legislative conflict or deadlock is resolved soon, for in that case either the Cabinet must resign, or, the House be dissolved and fresh elections held. By its power to dissolve the lower House and submit the issue to the electorate, the Executive exercises a substantial check on frivolous disagreements amongst its own party members as well as those in the opposition. This power is an essential counter-weight to the power of the Legislature to force the resignation of the Cabinet. The Ministers effectively influence the deliberations of the Legislature; in fact, the Cabinet acts as an effective leader of the Legislature.

The position in the U.S.A. is entirely different where due to the doctrine of Separation of Powers,[32] formal means of co-ordination between the Executive and the Legislature are lacking. No member of the Executive participates immediately in the legislative process in the Congress. Party discipline in Congress is loose and members enjoy considerable freedom to oppose or support any proposal even though it may be a part of the President's programme. President's leadership of the Congress is much looser than that of the Prime Minister in a parliamentary system mainly because the President has no power to dissolve the Congress or to participate in legislative deliberations. He rarely has at his disposal the almost automatic legislative majority which is available to the government in a parliamentary system. He does not have the means available to the Prime Minister to enforce disciplined voting along party lines.

The President, unlike the Prime Minister, cannot directly ensure that the measures which he desires will be enacted by the Congress. This may happen even when the President and the majority in the Congress belong to the same political party. But lack of co-ordination between the Executive and the Legislature in the U.S.A. may be heightened if the President and the majority in the Houses

31. BROGAN in *PARLIAMENT—A SURVEY*, (ed. Campion) 74-75; SCHWARTZ, *op. cit.*, 98.
32. See, *supra*, pp. 256-257 for discussion on this doctrine.

belong to different political parties as happens quite often. Sometimes the impasse between the President and the Congress can be resolved only when fresh elections are held in due course of time.[33]

In the Constituent Assembly some members advocated presidential form of government for India. Their hypothesis was that the presidential form of government leads to a strong and stable government while a parliamentary government constitutes a weak, unstable and vaccilating government, the reason being that the Ministers depend on their party members for support. Ultimately, however, the choice was made in favour of the parliamentary form, mainly because Indians were somewhat familiar with the system as in some form or other, such a system had been in operation in the country during the pre-Constitution era.

Further, as Ambedkar emphasized, in combining stability with responsibility, the Constitution-makers preferred the system of daily assessment of responsibility to the other system of periodic assessment. They also wanted to avoid the Legislative-Executive conflicts and friction such as arise in the presidential system. The framers of the Constitution thought that an infant democracy could not afford to take the "risk of a perpetual cleavage, feud or conflict or threatened conflict" between the Executive or Legislative organs. They preferred a system where the Executive being a part of the Legislature is in a position to give guidance to it and where both co-operate with each other. There is 'confusion of responsibility' and 'not necessarily a clear direction of policy'[34] in the U.S.A., but this is not so in a parliamentary system.[35]

Should India adopt the Presidential system instead of the present-day Parliamentary system? This question has been debated from time to time. India is presently undergoing a phase of coalition governments at the Centre because no single party has a majority in the Lok Sabha, and a number of disparate parties have to come together to form a coalition to form the Cabinet.

With the advent of the phase of coalition governments, the trend of governmental instability has set in. A coalition government is intrinisically unstable because of contradictory policies of the parties coming together to form the coalition. During 1995-1998, three governments fell at the Centre. The parties do not have a common outlook and it becomes a herculean task for the Prime Minister to arrive at a consensus on any point. Frequent elections to Lok Sabha are also not possible in the context of India with its huge population. In this context, it has been suggested that India should opt for the presidential system.

It is indeed a very difficult choice as both systems have their advantages and disadvantages. A liberal and democratic presidential system (such as prevails in the U.S.A.) has the advantage of enabling the President to appoint experts as his Ministers; he can select persons of competence and integrity as his Ministers without political considerations for he will not be bound to appoint only members of Parliament as Ministers as happens in the parliamentary system. The Prime Minister has an extremely limited choice in the matter of appointing Ministers as

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33. ALLEN, *LAW AND ORDERS*, 19; BERMAN, The Legislative Process in the U.S. Congress, II(2). *JI of Constitution & Parl. Studies*, 34 (1968).

34. GHOSH, *supra*; IV *CAD*, 544, 573, 580, 635, 968, 984 and 985; VII *CAD*, 32, 33, 243, 263, 266, 295; MORRIS-JONES, *op. cit*., 117; AUSTIN, *THE INDIAN CONSTITUTION*, 116.

35. LASKI, *PARL. GOVT. IN ENG*., 224 (1959).

he can only appoint members of Parliament as Ministers and there may not be many experienced and expert members in Parliament.

The presidential system may also be an answer to the present-day constitutionally and politically immoral system of defections to serve personal interests,[36] since in a presidential system the life of the Cabinet no longer depends on parliamentary majority. The President is elected directly by the people and holds office for a fixed tenure. This results in stability of the government.

In the presidential system, the President enjoys a fixed tenure and he does not depend on majority support in the Legislature, and this results in government stability. The President may be freer to adopt policies on their merits rather than adopt populist measures. The Legislature also has more say in the governance of the country and may have more control over the administration.

However the presidential system as it prevails in the U.S.A. has its own problems, the major problem being lack of co-ordination between the Executive and the Legislature resulting in fragmented policies. Also, in a Parliamentary system, different interests may have an opportunity to participate in the government.

The general public opinion (and even of political parties) by and large does not favour a change from parliamentary to the presidential system. If India seeks to adopt the presidential system, the system will have to be so devised as to promote better co-ordination between the Executive and the Legislature than what exists in the U.S.A. This means that the system has to incorporate some features of both the presidential and parliamentary systems. Then, there is another big problem to consider : should the presidential system be adopted at the Centre only or in the States as well?

Thus, before a change can be thought of, there are many delicate issues to be considered. A thorough study needs to be made of the various models of the presidential system functioning in the U.S.A., France, Switzerland and Sri Lanka. The touchstone should be to promote better, more effective and moral government, but less afflicted by narrow and parochial vested interests.

G. ATTORNEY-GENERAL FOR INDIA

The President is to appoint a person who is qualified to be appointed a Supreme Court Judge to be the Attorney-General for India [Art. 76(1)]. He holds office during the President's pleasure, and receives such remuneration as may be determined by him [Art. 76(4)].

The Attorney-General gives advice to the Government of India upon such legal matters as may be referred, and performs such other duties of a legal character as may be assigned, to him by the President from time to time [Art. 76(3)]. He also discharges the functions conferred on him by or under the Constitution or any other law [Art. 76(3)].

According to the rules made by the President,[37] the Attorney-General, in addition, is required to appear on behalf of the Government of India in all cases in the Supreme Court in which the Government of India is concerned; also, he represents the Government of India in any reference made by the President to the Su-

36. On Defections, see, *supra*, Ch. II, Sec. F.
37. See Notification, 1950, S.C. J.JI. Sec.

preme Court under Art. 143.[38] The Government of India may also require him to appear in any High Court in any case in which the Government of India is concerned.

In the performance of his duties, the Attorney-General has the right of audience in all courts in India [Art. 76(3)]. He has the right to take part in proceedings of either House of Parliament, or their joint sitting, and any parliamentary committee of which he may be named as a member, but he does not have a right to vote under this provision [Art. 88].[39] He enjoys all the privileges which are available to a member of Parliament.[40]

In Britain, the appointment of the Attorney-General is 'political' in nature in the sense that it is conferred on a successful barrister who is a supporter of the party in power. He has sometimes been a member of the Cabinet though "it is generally regarded as preferable that he should remain outside the Cabinet as the Government's chief legal adviser."[41] O. Hood Phillips observes :[42]

> "The better opinion is that the Attorney-General should not be in the Cabinet because of his *quasi*-judicial functions with regard to prosecutions, and also because it is desirable to separate the giving of advice from those who decide whether to act on the advice. Indeed it must be open to question in view of his unfettered discretion to refuse to initiate proceedings and his power to terminate criminal proceedings whether the appointment should be non-political".

According to the practice followed in India so far, the Attorney-General is appointed on the basis of professional competence and not on political considerations. He is a non-party man, is appointed because of his competence as a lawyer and he is not a member of the Cabinet.

38. *Infra*, Ch. IV, Sec. F.
39. *Supra*, Ch. II, Sec. G(h).
40. Art. 105(3); *supra*, Ch. II, Sec. L.
41. WADE & PHILLIPS, *op. cit.*, 333.
42. *CONSTITUTIONAL & ADM. LAW*, 332.

CHAPTER IV

SUPREME COURT

SYNOPSIS

A. INTRODUCTORY

In any country, the Judiciary plays the important role of interpreting and applying the law and adjudicating upon controversies between one citizen and another and between a citizen and the state. It is the function of the courts to maintain rule of law in the country and to assure that the government runs according

to law. In a country with a written constitution, courts have the additional function of safeguarding the supremacy of the Constitution by interpreting and applying its provisions and keeping all authorities within the constitutional framework.

In a federation, the Judiciary has another meaningful assignment, namely, to decide controversies between the constituent States *inter se*, as well as between the Centre and the States. A Federal Government is a legalistic government,[1] a characteristic feature of which is the allocation of powers between the Centre and the States. Disputes usually arise between the Centre and the constituent units relating to distribution of powers and functions between them. An arbiter is, therefore, required to scrutinize laws to see whether they fall within the allotted legislative domain of the enacting legislature and this function is usually left to the Judiciary.

In India, in addition to the above, the judiciary also has the significant function of protecting and enforcing the Fundamental Rights of the people guaranteed to them by the Constitution. JUSTICE UNTWALIA has compared the Judiciary to "a watching tower above all the big structures of the other limbs of the state" from which it keeps a watch like a sentinel on the functions of the other limbs of the state as to whether they are working in accordance with the law and the Constitution, the Constitution being supreme".[2]

India has a unified Judicial system with the Supreme Court standing at the apex.[3] There are High Courts[4] below the Supreme Court, under each High Court there exists a system of subordinate courts.[5] The Supreme Court thus enjoys the topmost position in the judicial hierarchy of the country. It is the supreme interpreter of the Constitution[6] and the guardian of the people's Fundamental Rights.[7] It is the ultimate court of appeal in all civil and criminal matters and the final interpreter of the law of the land, and thus helps in maintaining a uniformity of law throughout the country.

Article 124(1) establishes the Supreme Court of India. The Chief Justice of the Court is designated as the Chief Justice of India. The Supreme Court sits at Delhi, or at such other place, as the Chief Justice of India may, with the approval of the President, appoint from time to time [Art. 130].

Explaining the purport of Art. 130, the Supreme Court has stated in *Union of India v. S.P. Anand*[8] that it is an enabling provision and does not cast a mandatory obligation on the Chief Justice of India to appoint any place other than Delhi as the seat of the Supreme Court. Whether the Supreme Court should sit at a place other than Delhi involves taking a policy decision by the Chief Justice of India which must receive the approval of the President of India.

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1. DICEY *Law of the Constitution*, Ch. III, 175 (1956). Also, M.P. JAIN, *Role of Judiciary in a Democracy*, 6 J.M.C.L. 239 (1979).
2. *Union of India v. Sankalchand Himatlal Sheth*, AIR 1977 SC 2328 : (1977) 4 SCC 193; see, *infra*, Ch. VIII.
3. However the Supreme Court does not exercise administrative control over the High Courts.
4. For a discussion on the High Courts, see, *infra*, Ch. VIII.
5. *Infra*, Ch. VIII
6. *Infra*, Ch. XL, for discussion on 'Constitutional Interpretation'.
7. *Infra*, Ch. XX.
8. AIR 1998 SC 2615 : (1998) 6 SCC 466.

Thus, making of an order under Art. 130 of the Constitution providing for sitting of the Supreme court at a place other than Delhi requires, in the first place, a decision by the Chief Justice of India in that regard and, thereafter, the approval of the proposal of the Chief Justice of India by the President on the advice of the Council of Ministers.

To enable the courts to discharge their multi-faceted functions effectively, it is extremely important that the courts enjoy independence.[9] Therefore, independence of the judiciary becomes a basic creed in a democratic society. The need for judicial independence becomes all the more necessary in India as judicial review is regarded as the 'fundamental feature' of the Indian Constitution.[10]

B. COMPOSITION OF THE COURT

(a) STRENGTH OF THE COURT

Originally, under Art. 124(1), the strength of the Court was fixed at one Chief Justice and seven other Judges. But Parliament has been given power to increase the number of other Judges beyond seven [Art. 124(1)]. This number has been increased progressively to 25 by the enactment of the Supreme Court (Number of Judges) Act, 1956, amended in 1977 and again in 1986 and lastly in 2009.

(b) APPOINTMENT OF JUDGES

According to Art. 124(2), the Judges of the Supreme Court are appointed by the President. While appointing the Chief Justice, the President has consultation with such of the Judges of the Supreme Court and the High Courts as he may deem necessary. In case of appointment of other Judges, the President is required to consult the Chief Justice of India though he may also consult such other Judges of the Supreme Court and the High Courts as he may deem necessary. [Proviso to Art. 124(2)].

(c) PROCEDURE TO APPOINT JUDGES IN THE UK AND USA

In Great Britain, the Judges are appointed by the Crown, which prior to 2005 meant the Executive of the day, without any restriction. The power of the Executive was curtailed in March 2005, by the Constitutional Reform Act, 2005 which established a Judicial Appointments Commission for England and Wales and a Judicial Appointments and Conduct Ombudsman. In the U.S.A., on the other hand, the President appoints the Supreme Court Judges with the consent of the Senate.

The framers of the Indian Constitution saw difficulties in both the methods prevailing at that time and so they adopted a middle course. The earlier English method appeared to give a blank cheque to the Executive while the American system is cumbersome and involves the possibility of subjecting judicial appointments to political influence and pressures. The Indian method, as laid down in Art. 124(2), as mentioned above, neither gives an absolute authority to the Executive nor does it permit Parliament to influence appointment of Judges. The Executive is required to consult persons who are *ex hypothesi* well-qualified to give proper advice in this matter.

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9. For discussion on the concept of "Independence of the Supreme Court:, see, *infra,* Sec. K.

10. For discussion on the concept of "Fundamental Features of the Constitution, see, *infra,* Ch. XLI.

(d) APPOINTMENT OF SUPREME COURT JUDGES

POSITION before 1993

Before the year 1993, the President's power to appoint the Supreme Court Judges was purely of a formal nature, for, he would act in this matter, as in other matters, on the advice of the concerned Minister, *viz.*, the Law Minister. The final power to appoint Supreme Court Judges rested with the Executive and the views expressed by the Chief Justice were not regarded as binding on the Executive.

For long, the practice in India had been to appoint the senior-most Judge of the Supreme Court as the Chief Justice whenever a vacancy occurred in that office. In 1958, the Law Commission criticised this practice on the ground that a Chief Justice should not only be an able and experienced Judge but also a competent administrator and, therefore, succession to the office should not be regulated by mere seniority.[11] The Government did not act upon this recommendation for long. It continued to appoint the senior-most Judge as the Chief Justice as it was afraid that it might be accused of tampering with judicial independence. A mechanical adherence to the rule at times resulted in the Chief Justice holding office only for a few months before he retired from the Court.

In 1973, the Government suddenly departed from this practice and appointed as Chief Justice a Judge [Justice A.N. RAY] who was fourth in the order of seniority. Thus, three senior Judges were by-passed, who then resigned from the Court in protest. This raised a hue and cry in the country and the Government was accused of tampering with the independence of the Judiciary.[12] Although the Government invoked the Law Commission's recommendation to support the step taken by it, no one believed that the seniority rule had been jettisoned only because of what the Law Commission had said a few years back.

The appointment of the new Chief Justice was even challenged in the Delhi High Court through a petition for *quo warranto* under Art. 226 on the ground that—(*i*) it was *mala fide*, (*ii*) it was against the rule of seniority inherent in Art. 124(2), and (*iii*) the mandatory consultative process envisaged in Art. 124(2) had not been resorted to.

The High Court dismissed the petition holding that the motives of the appointing authority are irrelevant in *quo warranto* proceedings. Without expressing any definitive opinion on points (*ii*) and (*iii*), the court ruled that even if these contentions were correct, any writ issued by the court would be futile as Justice RAY could immediately be reappointed, by following the requisite consultative procedure as he was now the senior-most Judge on the Bench.[13]

Again in 1976, the Government appointed Justice BEG as the Chief Justice bypassing Justice KHANNA who was senior to him at the time. Consequently, Justice KHANNA resigned in protest. However, after the retirement of Chief Justice BEG, the senior-most Judge, Justice CHANDRACHUD was appointed as the Chief

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11. Law Comm., *XIV Rep*., I, 39-40 (1958).

12. For details of the controversy see, KULDIP NAYAR, *SUPERSESSION OF JUDGES* (1973); KUMARAMANGLAM, *JUDICIAL APPOINTMENTS* (1973); PALKHIVALA, *OUR CONSTITUTION DEFACED & DEFILED*, 93-105 (1974), and *A JUDICIARY MADE TO MEASURE*.

13. *P.L. Lakhanpal v. A.N. Ray*, AIR 1975 Del. 66.
For Art. 226 and writ of *quo warrants*, see Ch. VIII, Secs. D and E, *infra*.

Justice. Since then again the rule of seniority has been followed in the matter of appointment of the Chief Justice of India.

In the context of India, it appears to be best to adhere to the convention of appointing the senior-most Judge as the Chief Justice. This will avoid any suspicion that the Government seeks to tamper with the judiciary. Also, when the Government has discretion to appoint the Chief Justice, there is no guarantee that the best man for the post will always be appointed and that considerations other than merit will not come into play. Appointment of a junior Judge invariably results in the resignation of Judges senior to him and thus the country loses the services of able and experienced Judges who could make significant contribution to the cause of law and justice. In India, the tradition so far has been to have a non-political Judiciary and it appears to be best to maintain that tradition. Since 1978, again, the practice has developed of appointing the senior-most judge as the Chief Justice.

POSITION AFTER 1993

The question of selection and appointment of the Judges is crucial to the maintenance of independence of the judiciary. If the final power in this respect is left with the executive, then it is possible for the executive to subvert the independence of the judiciary by appointing pliable judges.

The Constitution does not lay down a very definitive procedure for the purpose as it merely says that the President is to appoint Supreme Court Judges in consultation with the Chief Justice and "such" other Judges of the Supreme Court and of the High Courts as "the President may deem necessary". [Art. 124(2)]. It was not clear from this provision as to whose opinion was finally to prevail in case of difference of opinion among the concerned persons. This important question has been considered by the Supreme Court in several cases.

In 1991, in *Subhash Sharma v. Union of India*,[14] a three Judge Bench of the Supreme Court expressed the view that consistent with the constitutional purpose and process, as expressed in the Preamble to the Constitution, "it becomes imperative that the role of the institution of the Chief Justice of India be recognised as of crucial importance in the matter of appointments to the Supreme Court...."

As regards the word "consultation" in Art. 124(2), the Court said: "The constitutional phraseology would require to be read and expounded in the context of the constitutional philosophy of separation of powers to the extent recognised and adumbrated and the cherished values of judicial independence". The Bench suggested that this question be considered by a larger Bench. The Bench emphasized:[15]

> "An independent non-political judiciary is crucial to the sustenance of our chosen political system. The vitality of the democratic process, the ideals of social and economic *egalitarianism*, the imperatives of a socio-economic transformation envisioned by the Constitution as well as the Rule of law and great values of liberty and equality are all dependent on the tone of the judiciary. The quality of the judiciary cannot remain unaffected, in turn, by the process of selection of judges".

14. AIR 1991 SC 631, 641 : 1991 Supp (1) SCC 574.
15. *Ibid*. at 640.

Subsequent to *Subhash Sharma*, the question of the process of appointing the Supreme Court Judges came to be considered by the Supreme Court in *S.C. Advocates on Record Association v. Union of India*.[16] A public interest writ petition was filed in the Supreme Court by the Lawyers' Association raising several crucial issues concerning the Judges of the Supreme Court and the High Courts. The petition was considered by a bench of nine Judges.[17] The majority judgment was delivered by J.S. VERMA, J., on behalf of himself and YOGESHWAR DAYAL, G.N. RAY, A.S. ANAND and BHARUCHA, JJ.

The Court considered the question of the primacy of the opinion of the Chief Justice of India in regard to the appointment of the Supreme Court Judges. The Court emphasized that the question has to be considered in the context of achieving "the constitutional purpose of selecting the best" suitable for composition of the Supreme Court "so essential to ensure the independence of the judiciary, and, thereby, to preserve democracy."[18]

Referring to the 'consultative' process envisaged in Art. 124(2) for appointment of the Supreme Court Judges, the Court emphasized that this procedure indicates that the Government does not enjoy 'primacy' or "absolute discretion" in the matter of appointment of the Supreme Court Judges.[19]

The Court has pointed out that the provision for consultation with the Chief Justice was introduced because of the realisation that the Chief Justice is best equipped to know and assess the worth of the candidate and his suitability for appointment as a Supreme Court Judge, and it was also necessary to eliminate political influence.

The Court has also emphasized that the phraseology used in Art. 124(2) indicates that it was not considered desirable to vest absolute discretion or power of veto in the Chief Justice as an individual in the matter of appointments so that there should remain some power with the Executive to be exercised as a check, whenever necessary. Accordingly, the Court has observed:[20]

> "The indication is that in the choice of a candidate suitable for appointment, the opinion of the Chief Justice of India should have the greatest weight, the selection should be made as a result of a participatory consultative process in which the executive should have power to act as a mere check on the exercise of power by the Chief Justice of India, to achieve the constitutional purpose. Thus, the executive element in the appointment process is reduced to the minimum and any political influence is eliminated. It was for this reason that the word 'consultation' instead of 'concurrence' was used, but that was done merely to indicate that absolute discretion was not given to any one, not even to the Chief Justice of India as an individual."

Thus, in the matter of appointment of a Supreme Court Judge, the primary aim ought to be to reach an agreed decision taking into account the views of all the consultees giving the greatest weight to the opinion of the Chief Justice. When decision is reached by consensus, no question of primacy arises. Only when conflicting opinions emerge at the end of the process, the question of giving primacy

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16. AIR 1994 SC 268 : (1993) 4 SCC 441.
17. For discussion on the concept of 'Public Interest Litigation', see, *infra*, Chs. VIII, Sec. D and XXXIII, Sec. B.
18. AIR 1994 SC at 425 : (1993) 4 SCC 441.
19. *Ibid*, at 429.
20. *Ibid*, at 430.

to the opinion of the Chief Justice arises, "unless for very good reasons known to the executive and disclosed to the Chief Justice of India, that appointment is not considered to be suitable."[21]

The Court has further clarified that "the primacy of the opinion of the Chief Justice of India" is, in effect, "primacy of the opinion of the Chief Justice of India formed collectively, that is to say, after taking into account the views of his senior colleagues who are required to be consulted by him for the formation of his opinion".

Emphasizing upon this aspect further, the Court has said that the principle of non-arbitrariness is an essential attribute of the Rule of Law and is all pervasive throughout the Constitution. An adjunct of this principle is "the absence of absolute power in one individual in any sphere of constitutional activity. Therefore, the meaning of the "opinion of the Chief Justice" is "reflective of the opinion of the judiciary" which means that "it must necessarily have the element of plurality in its formation". The final opinion expressed by the Chief Justice is not merely his individual opinion but "the collective opinion formed after taking into account the views of some other Judges who are traditionally associated with this function".[22] The Court has observed in this connection:[23]

> "Entrustment of the task of appointment of superior Judges to high constitutional functionaries; the greatest significance attached to the view of the Chief Justice of India, who is best equipped to assess the true worth of the candidates for adjudging their suitability; the opinion of the Chief Justice of India being the collective opinion formed after taking into account the views of some of his colleagues; and the executive being permitted to prevent an appointment considered to be unsuitable for strong reasons disclosed to the Chief Justice of India, provide the best method, in the constitutional scheme, to achieve the constitutional purpose without conferring absolute discretion or veto upon either the judiciary or the executive much less in any individual, be the Chief Justice of India or the Prime Minister."[24]

The Court also laid down the following propositions in relation to the appointment of the Supreme Court Judges:

(1) Initiation of the proposal for appointment of a Supreme Court Judge must be by the Chief Justice.

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

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21. *Ibid,* at 430.
22. *Ibid,* 434.
23. *Ibid,* at 434-435.
24. KULDIP SINGH and PANDIAN, JJ., in separate opinions mainly concurred with the majority opinion.

(3) No appointment of any Judge to the Supreme Court can be made by the President unless it is in conformity with the final opinion of the Chief Justice formed in the manner indicated above.

(4) As the President acts on the advice of the Council of Ministers in the matter of appointment of a Supreme Court Judge, the advice of the Council of Ministers is to be given in accordance with Art. 124(2) as interpreted by the Supreme Court.

(5) All consultation with every one involved, including all the Judges consulted, must be in writing. Expression of opinion in writing is an inbuilt check on exercise of the power, and ensures due circumspection.

(6) Appointment to the office of Chief Justice of India ought to be of the senior-most Judge of the Supreme Court considered fit to hold the office. "The provision in Art. 124(2) enabling consultation with any other Judge is to provide for such consultation, if there be any doubt about the fitness of the senior-most Judge to hold the office, which alone may permit and justify a departure from the long standing convention", *i.e.,* to appoint the senior-most Supreme Court Judge to the office of the Chief Justice of India.

(7) "*Inter se* seniority among Judges in their High Court and their combined seniority on all India basis" should be "kept in view and given due weight while making appointments from amongst High Court Judges to the Supreme Court. Unless there be any strong cogent reason to justify departure, that order of seniority must be maintained between them while making their appointment to the Supreme Court."

The main purpose underlying the law laid down by the Supreme Court in the matter of appointing Supreme Court Judges was to minimise political influence in judicial appointments as well as to minimise individual discretion of the Constitutional functionaries involved in the process of appointment of the Supreme Court Judges. The entire process of making appointments to high judicial offices is sought to be made more transparent so as to ensure that neither political bias, nor personal favouritism nor animosity play any part in the appointment of Judges.

Clarifying certain points arising out of the above judgment, the Supreme Court has now delivered an advisory opinion on a reference made by the President[25] under Art. 143[26]. In this opinion, the Court has laid down the following propositions in regard to the appointment of the Supreme Court Judges:

(1) In making his recommendation for appointment to the Supreme Court, the Chief Justice of India ought to consult four senior-most puisne Judges of the Supreme Court. Thus, the collegium to make recommendation for appointment should consist of the Chief Justice and four senior-most puisne Judges.

(2) The opinion of all members of the collegium in respect of each recommendation should be in writing.

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25. *In re: Special Reference,* AIR 1999 SC 1 : (1998) 7 SCC 739.
26. For discussion on Art. 143, see, *infra*, section F.

(3) The views of the senior-most Supreme Court Judge who hails from the High Court from where the person recommended comes must be obtained in writing for the consideration of the collegium.

(4) If the majority of the collegium is against the appointment of a particular person, that person shall not be appointed. The Court has gone on to say that " if even two of the Judges forming the collegium express strong views, for good reasons, that are adverse to the appointment of a particular person, the Chief Justice of India would not press for such appointment."

(5) The following exceptions have now been engrafted on the rule of seniority among the High Court Judges for appointment to the Supreme Court:

(a) A High Court Judge of outstanding merit can be appointed as a Supreme Court Judge regardless of his standing in the seniority list. "All that needs to be recorded when recommending him for appointment is that he has outstanding merit".

(b) A High Court Judge may be appointed as a Supreme Court Judge for "good reasons" from amongst several Judges of equal merit, as for example, the particular region of the country in which his parent High Court is situated is not represented on the Supreme Court Bench.

Thus, the responsibility to make recommendations for appointment as Supreme Court Judges has been taken away from the Central Executive and has now been placed on a collegium consisting of the Chief Justice of India and four senior-most puisne Judges. The sphere of consultation has thus been broadened. Before this opinion was delivered, this collegium consisted of the Chief Justice and two senior-most Judges. The Court has now specifically stated that an opinion formed by the Chief Justice of India in any manner other than that indicated has no primacy in matter of appointments to the Supreme Court and the Government is not obliged to act thereon.[27] The process of consultation among the members of the collegium has now been formalized as every member Judge has to give his opinion in writing.

(e) PROPOSAL FOR SETTING UP A JUDICIAL COMMISSION

In its 121st report issued in 1987, the Law Commission has advocated the setting up of a Judicial Commission. In 1987, after the case of *S.P. Gupta,*[28] the executive came to wield overriding powers in the matter of selection and appointment of Judges. The Commission was unhappy with the situation prevailing at the time. Criticising the system prevailing in 1987, the Law Commission observes:

> "The present model… confers overriding powers on the executive in the matter of selection and appointment of judges and in dealing with the judiciary. The constitutional mandate all was to separate executive and judiciary in all its ramifications. The Constitution aims at ensuring independence of Judiciary, when translated in action, independence from executive."

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27. *Ibid,* at 16.

28. *S.P. Gupta v. Union of India,* AIR 1982 SC 149 : 1981 Supp SCC 87. For discussion on this case, see, Ch. VIII, Sec. B(c), *infra.*

Accordingly, the Law Commission suggested that a National Judicial Commission be set up. But the Law Commission did not work out its composition and function. In this regard, the Law Commission said : "Composition and functions of such a National Judicial Service Commission will have to be worked out in meticulous detail." Tentatively, however, the Law Commission suggested the following composition: Chief Justice of India (Chairman); three seniormost judges of the Supreme Court; retiring Chief Justice of India; Three Chief Justices of the High Courts according to their seniority; Minister of Law and Justice, Government of India; Attorney-General of India, and an outstanding law academic.

The Law Commission issued its report in 1987. It is clear that it was primarily to dilute the executive power, and as a hedge against executive interference with the judiciary, that the Law Commission mooted the idea of a Judicial Commission. Since then things have changed drastically as a result of the two Supreme Court cases mentioned above. In fact, the 121st report of the Law Commission played a significant role in the Supreme Court decision in *Advocates-on-Record* case in 1994.

The rationale underlying the Report has now been overtaken by the two Supreme Court decisions *viz*., *Supreme Court Advocates-on-Record Association v. Union of India* and *In re* : *Presidential Reference*, as discussed above. As a result of these judicial pronouncements, the effective power to appoint Supreme Court and High Court Judges has come to vest in a collegium of Judges as mentioned above. Theoretically at least, this '*de facto*' Judicial Commission ensured a freedom from executive interference and consequently guaranteed judicial independence. But actual freedom from political considerations and other pressures, turning as they do on the personal characteristics of selectors coupled with the absence of public scrutiny, has led to a recent rethinking on the issue. The National Commission to Review the Working of the Constitution in its report submitted in 2002 has opined that a National Judicial Commission should be constituted for making recommendations as to the appointments of judges of all superior courts other than the Chief Justice of India. It has expressed the view that the Vice President of India, the Chief Justice of India, the two senior most puisne judges of the Supreme Court and the Union Minister for Law and Justice should constitute the Judicial Commission. The Chief Justice of a High Court would also be associated as a Member of the Commission when considering the appointment of a judge of that High Court.

(f) ACTING CHIEF JUSTICE

The President can appoint a Supreme Court Judge as the acting Chief Justice in case the office falls vacant, or the Chief Justice is unable to perform his duties due to absence or otherwise [Art. 126].

(g) OATH

A person appointed as a Supreme Court Judge, before entering upon his office, has to make and subscribe before the President, or some person appointed by him for the purpose, an oath or affirmation in the form prescribed [Art. 124(6)].

(h) QUALIFICATIONS

A person to be appointed a Supreme Court Judge should be a citizen of India. In addition, he may have been—

(i) either a Judge of a High Court (or High Courts) for five years, or

(ii) an advocate of a High Court (or High Courts) for ten years, or,

(iii) may be, in the opinion of the President, a distinguished jurist [Art. 124(3)].

It is thus possible to appoint an eminent non-practising, academic lawyer to the Supreme Court. This provision has been inspired by the American example where distinguished law teachers have often been appointed to the Supreme Court and they have proved to be successful Judges.[29] At times, a non-practising laywer-judge might be in a better position, because of his breadth of outlook and freedom from a narrow and technical approach to law, to deal with problems of public law.[30] While there have been two appointments to the Supreme Court directly from the Bar till now, however, no jurist, as such, has been appointed as a Supreme Court Judge in India.

(i) SALARY

To begin with, the salary payable to a Supreme Court Judge was specified in the Constitution [Art. 125(1) and the Second Schedule].[31] But then by the Fifty-fourth Constitutional Amendment, Parliament has been given power to determine the salary payable to a Supreme Court Judge by law.

Parliament is also authorised to determine, from time to time, by law such questions as the privileges, allowances, rights in respect of leave of absence and pension for these Judges. None of these can, however, be varied by Parliament to the disadvantage of a Judge after his appointment to the Court [Art. 125(2) and the proviso]. All these matters are now regulated by the Supreme Court Judges (Salaries and Conditions of Service) Act, 1958.[32]

(j) AD HOC JUDGE

The Chief Justice may call a Judge of a High Court to act as an ad hoc Judge of the Supreme Court, for such period as may be necessary, if the quorum of the Supreme Court Judges is insufficient to hold or continue a session of the Court. The Judge so appointed should be qualified to act as a Supreme Court Judge.

Before making such an appointment, the Chief Justice of India has to consult the Chief Justice of the High Court concerned and also obtain the prior consent of the President [Art. 127(1)]. It is the duty of the High Court Judge so appointed, in priority to other duties of his office, to attend the sittings of the Supreme Court at such time and for such period for which his attendance is required there. While so attending the Supreme Court, an *ad hoc* Judge enjoys all the jurisdiction, powers and privileges of, and discharges all such duties like, any other Supreme Court Judges [Art. 127(2)].

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29. VIII *CAD* 254; Law Commission of India, *ibid.*, 36.

30. MC WHINNEY, *JUDICIAL REVIEW, Passim* (1969); FREUND, *UMPIRING THE FEDERAL SYSTEM*, 54 *Col. L.R.* 574.

31. The Schedule has been amended by the Fifty-Fourth Amendment of the Constitution enacted in 1986; see, *infra*, Ch. XLII.

32. This Act has been recently amended by the High Court and Supreme Court Judges (Salaries and Conditions of Services) Amendment Act, 2002.

(k) RETIRED SUPREME COURT JUDGE

A person who has held office as a Supreme Court Judge cannot plead or act in any court or before any authority in India [Art. 124(7)]. This disqualification has been placed on the ex-Judge with a view to preserving the dignity of the Supreme Court and also to avoid embarrassment to the tribunal or the court before whom he may appear.

However, the Chief Justice of India, with the previous consent of the President, may request any retired Supreme Court Judge to sit and act as a Judge of the Court. If he agrees to do so, then while so sitting and acting, he is entitled to such allowances as may be determined by an order of the President. He will also enjoy all the jurisdiction, powers and privileges of a Supreme Court Judge, but shall not otherwise be deemed to be a Judge of the Court.

The Chief Justice may similarly request a retired High Court Judge, who is duly qualified to be appointed as a Supreme Court Judge, to sit and act as a Judge of the Supreme Court [Art. 128].

(l) TENURE

A Judge of the Supreme Court may resign his office by writing to the President.[33] He holds office until he attains the age of 65 years.[34] If a question arises regarding his age, it is to be determined by such authority and in such manner as Parliament may by law provide.[35] Parliament has now laid down the procedure for the purpose.[36]

The Indian provision fixing a retiring age has this virtue that it ensures infusion of new talent from time to time and thus protects the Court from falling into a groove or getting out of tune with the contemporary social and economic philosophy and this aspect is important because of the Court's significant function of interpretation of the Constitution. On the other hand, an unfortunate result of the provision at times may be to remove some Judges untimely from the bench just when they may be beginning to find their feet as constitutional judges and approaching the period of their greater intellectual usefulness. It may therefore be advisable to extend the age of retirement of a Supreme Court Judge to 70 years.

(m) REMOVAL OF A JUDGE

The question of removal of a Judge before the age of retirement is an important one as it has a significant bearing on the independence of the judiciary. If a Judge of the Supreme Court could be removed by the Executive without much formality, then it can be imagined that the Court would lose its independence and become subject to the control of the Executive.

In every democratic country swearing by the Rule of Law, therefore, special provisions are made making removal of judges an extremely difficult exercise. In Britain, for example, Judges hold office during good behaviour and can be removed only on an address from both Houses of Parliament.[37] In the U.S.A., a Supreme Court Judge holds office for life and is removable only by the process

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33. Art. 124(2), proviso (a).
34. Art. 124(2).
35. Art. 124(2A).
36. See, *infra*, Ch. VIII, Sec. B(g), for details of the procedure.
37. S.A. de Smith, *CONSTITUTIONAL AND ADMINISTRATIVE LAW*, 353, 362 (1977).

of impeachment in case of treason, bribery or other high crimes and misdemeanours.[38] Provision has however been made by law for voluntary retirement on full salary after ten years of service and attainment of the age of seventy.

The Constitution of India also makes a provision for the removal of a Supreme Court Judge.[39] He may be removed from office by the President on an address by both Houses of Parliament presented in the same session for proved misbehaviour[40] or incapacity. The address must be supported by a majority of the total membership in each House, and also by a majority of not less than two thirds of the members of each House present and voting.[41]

The word 'proved' in this provision indicates that the address can be presented by Parliament only after the alleged charge of misbehaviour or incapacity against the Judge has been investigated, substantiated and established by an impartial tribunal. The constitutional provision does not prescribe how this investigation is to be carried on. It leaves it to Parliament to settle and lay down by law the detailed procedure according to which the address may be presented and the charge of misconduct or incapacity against the Judge investigated and proved.[42]

In accordance with the above provision, Parliament has enacted the necessary law for the purpose. The Judges (Inquiry) Act, 1968, now regulates the procedure for investigation and proof of misbehaviour or incapacity of a Supreme Court Judge for presenting an address by the Houses of Parliament to the President for his removal.

The procedure for the purpose is as follows: A notice of a motion for presenting such an address may be given by 100 members of the Lok Sabha, or 50 members of the Rajya Sabha. The Speaker or the Chairman may either admit or refuse to admit the motion. If it is admitted, then the Speaker/Chairman is to constitute a committee consisting of a Supreme Court Judge, a Chief Justice of a High Court and a distinguished jurist. If notices for the motion are given on the same day in both the Houses, the Committee of Inquiry is to be constituted jointly by the Speaker and the Chairman.

The Committee of inquiry is to frame definite charges against the Judge on the basis of which the investigation is proposed to be held and give him a reasonable opportunity of being heard including cross-examination of witnesses. If the charge is that of physical or mental incapacity, the Committee may arrange for the medical examination of the Judge by a medical board appointed by the Speaker/Chairman or both as the case may be.

The report of the Committee is to be laid before the concerned House or Houses. If the Committee exonerates the Judge of the charges laid against him, then no further action is to be taken on the motion for his removal. If, however, the Committee finds the Judge to be guilty of misbehaviour, or suffering from an incapacity, the House can take up consideration of the motion. On the motion being adopted by both Houses according to Art. 124(4), noted above, an address

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38. SCHWARTZ, *AMERICAN CONSTITUTIONAL LAW*, 135; Art. II(4) of the U.S. Constitution.
39. Art. 124(2), proviso (*b*); Art. 124(4) and Art. 124(5).
40. Even if a Judge commits errors, even gross errors, it does not amount to misbehaviour on his part: *C.K. Daphtary v. O.P. Gupta*, AIR 1971 SC 1132. See further under 'Power to Review'.
41. Art. 124(2), proviso (*b*) and Art. 124(4).
42. Art. 124(5).

may be presented to the President for removal of the Judge. Rules under the Act are to be made by a committee consisting of 10 members from the Lok Sabha and 5 members from the Rajya Sabha.

It can be seen that the constitutional provision in India for the removal of a Supreme Court Judge is modelled on the English provision, though the former is somewhat more rigid than the latter insofar as—(i) it requires a special majority in both Houses whereas in England no special majority is prescribed; (ii) while in India the grounds have been specified on which an address for the removal of a Judge can be presented, there is no such provision in England; (iii) in India, there is provision for investigation and proof of the grounds before presenting an address, no such provision exists in England. Therefore, it appears that the provision in England for the removal of Judges is more flexible than that in India.

The procedure outlined above for the removal of a Supreme Court Judge was activated in 1991. For the first time since the Constitution came into force, the above-mentioned procedure to remove a Supreme Court Judge was put in motion in 1991. Steps were initiated to remove a Supreme Court Judge on charges of misconduct prior to his appointment when he was the Chief Justice of a High Court. 108 members of the Ninth Lok Sabha gave notice to the Speaker of a motion for presenting an address to the President for removal of Justice V. Ramaswami of the Supreme Court.

The charge against him was that he committed financial irregularities while he was the Chief Justice of Punjab and Haryana High Court. The Speaker of the Lok Sabha admitted the motion on 12th March, 1991, and proceeded to constitute an Enquiry Committee consisting of Justice P.B. SAWANT, a sitting Judge of the Supreme Court, Chief Justice DESAI of the Bombay High Court and Mr. CHINNAPPA REDDY, a retired Supreme Court Judge as a distinguished jurist. This was done by the Speaker in terms of S. 3(2) of the Judges (Inquiry) Act, 1968. Before the Committee could present its report, Lok Sabha was dissolved.[43]

In *Sub-Committee of Judicial Accountability v. Union of India*,[44] the Supreme Court was called upon to consider the question whether dissolution of the Lok Sabha put an end to the motion for removal of the concerned Supreme Court Judge. The Court's response to this question was that the motion for removal of a Judge under Art. 124 of the Constitution does not lapse with the dissolution of the House. The motion having been submitted to the Speaker, its validity would in no way be impaired by the dissolution of the House. The Court reached this conclusion as a result of interpretation of Ss. 3(1) and 6 of the Judges (Inquiry) Act. Referring to these statutory provisions, the Court observed:[45]

> "The effect of these provisions is that the motion shall be kept pending till the Committee submits its report and if the Committee finds the Judge guilty, the motion shall be taken up for consideration".

The Court ruled that the Committee of Inquiry appointed by the Speaker was a body outside Parliament and a statutory body under the Judges (Inquiry) Act, and till it furnishes its findings to the House, the Committee maintains its own separate identity.

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43. On dissolution of Lok Sabha, see, *supra*, Ch. II, Sec. I(c).
44. AIR 1992 SC 320 : (1981) 4 SCC 399.
45. AIR 1992 SC at 344 : (1981) 4 SCC 399.

The Court ruled further that whether a motion has lapsed or not because of the dissolution of the House is not solely for the House to decide. In the Court's opinion, because of the written Constitution, "the usual incidents of parliamentary sovereignty do not obtain and the concept is one of 'limited Government'".[46] Judicial review is an inevitable part of a written Constitution which is the fundamental law of the land. The Court ruled accordingly:[47]

> "The interpretation of the laws is the domain of the courts and on such interpretation of the constitutional provisions as well as the Judges (Inquiry) Act, 1968, it requires to be held that under the law such a motion does not lapse and the courts retain jurisdiction to so declare."

Interpreting Arts. 121 and 124, the Supreme Court ruled that the constitutional process for the removal of a Judge up to the point of admission of the motion, constitution of the Committee and the recording of findings by the Committee are not, strictly speaking, proceedings of the House of Parliament. This part is covered by the enacted law. The Speaker is a statutory authority under the Judges (Inquiry) Act up to that point and the matter cannot be said to remain outside the Court's jurisdiction. Till this stage, the matter cannot be discussed on the floor of the House because of the bar placed by Art. 121.[48]

The Speaker while admitting a motion and constituting a committee to investigate the alleged grounds of misbehaviour or incapacity does not act as part of the House. The House does not come into the picture at this stage. The Parliament comes in the picture only when a finding is reached by that machinery that the alleged misbehaviour or incapacity has been proved.

Prior proof of misconduct in accordance with the law made under Art. 124(5) is a condition precedent for the lifting of the bar under Art. 121 against discussing the conduct of a Judge in Parliament. Art. 124(4) really becomes meaningful only with a law made under Art. 124(5). Without such a law having been made, the constitutional scheme and process for removal of a Judge remain inchoate. The Judges (Inquiry) Act, 1968 is, therefore, constitutional and *intra vires* Parliament.

When the Speaker admits the motion under S. 3 of the Judges (Inquiry) Act, the Judge concerned is not, as a matter of right, entitled to any notice or hearing. Also, there is no legal provision under which the Court has power to interdict the Judge from attending to judicial work in the Court pending enquiry against him. It may, however, be advisable to do so if so advised by the Chief Justice.

The Chief Justice is expected to find a desirable solution in such a situation to avoid embarrassment to the Judge and to the institution in a manner which is conducive to the independence of the judiciary. Should the Chief Justice be of the view that in the interests of the institution of judiciary it is desirable for the Judge to abstain from judicial work till the final outcome under Art. 124(4), he would advise the Judge accordingly. The Judge would ordinarily abide by the advice of the Chief Justice.

The Court also ruled that the petitioner, being a Committee of the Bar, has *locus standi* to move a writ petition in the Court to raise these matters concerning the removal of a Supreme Court Judge.

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46. *Ibid.*, at 345.
47. *Ibid.*, at 346
48. *Supra*, Ch. II; Sec. L(i)(a) *infra.*

Soon after the Inquiry Committee started proceedings, a Congress M.P., Shri M. Krishnaswami, filed a petition in the Supreme Court challenging the Committee's functioning. His complaint was that Justice Ramaswami had not been given a fair hearing and also that the Judge was entitled to a copy of the report. The Supreme Court dismissed the petition on the ground that the petitioner had no *locus standi*. If Justice Ramaswami wanted a copy of the report, he would have to appeal to the Court himself.[49]

Next, a writ petition was filed in the Supreme Court on behalf of Justice Ramaswami by his wife claiming a copy of the report of the Inquiry Committee before its being submitted to the Speaker so that the Judge may take recourse to judicial review in case he was found guilty by the Committee. In *Sarojini Ramaswami v. Union of India*,[50] the Supreme Court considered several important questions arising out of the writ petition, *viz.*:

(1) Whether the concerned Judge has a right of judicial review of the order of removal made by the President under Art. 124(4)?

(2) Is the Inquiry Committee a tribunal and thus subject to the Supreme Court's appellate jurisdiction under Art. 136?

(3) Does the concerned Judge have a right to get a copy of the report before its submission to the Speaker?

A five-Judge Bench considered the issues involved; three opinions were filed. The majority opinion (3 Judges) was written by VERMA, J.; a separate but concurring opinion was filed by KASLIWAL, J., and K. RAMASWAMY, J., filed a dissenting opinion. The following summary is based on the three Judge-opinion given by VERMA, J.

After reading the constitutional provisions and the provisions of the Judges (Inquiry) Act and the rules made thereunder, the Court pointed out that if the Inquiry Committee reaches the verdict of 'not guilty', either unanimously or by majority, the matter ends there and Parliament is not required to take up the motion of removal for consideration.

This means that the Inquiry Committee is "the sole and final arbiter on the question of removal of the Judge where the findings reached by the Committee, whether unanimously or by majority, is that the Judge is 'not guilty'[51]. This indicates that there can be no judicial review where the Inquiry Committee makes a finding that the Judge is 'not guilty' of any misbehaviour. In such a situation, no question arises of furnishing a copy of the report of the Committee to the concerned Judge.

In case, the Inquiry Committee finds the Judge guilty, then the matter goes to Parliament. The Supreme Court has come to the conclusion that under Art. 124(4), "a full consideration on merits, including correctness of the finding of 'guilty' made by the Inquiry Committee on the basis of the materials before the Parliament is contemplated during the Parliamentary part of the process of removal of a Judge."

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49. *Krishnaswami v. Union of India*, (1992) 4 SCC 605.
50. AIR 1992 SC 2219 : (1992) 4 SCC 506.
51. *Ibid.*, 2235.

This means that despite the finding of 'guilty' by the Committee, the Parliament may decide, after considering the matter, not to adopt the motion for removing the Judge. This leads to the conclusion that the concerned Judge should also have an opportunity to comment on the finding by the Inquiry Committee. For this purpose, therefore, the Speaker/Chairman of the House has to supply a copy of the Inquiry Committee's report to the concerned Judge while causing it to be laid before the Parliament under S. 4(3) of the Act.[52]

As regards judicial review, the Court has ruled that if Parliament does not adopt the motion for removal of the Judge, the process ends there with no challenge available to anyone. The judicial review of the finding of 'guilty' made by the Inquiry Committee may be permissible on limited grounds "pertaining only to the legality" but only after "the making of the order of removal by the President in case the Parliament adopts the motion by the requisite majority". "Resort to judicial review by the concerned Judge between the time of conclusion of the inquiry by the Committee and making of the order of removal by the President would be premature and is unwarranted in the constitutional scheme."[53]

The Supreme Court has ruled that the Inquiry Committee appointed under the Judges (Inquiry) Act cannot be treated as a 'tribunal' for the purposes of Art. 136 because the report finding the Judge guilty of misbehavour is "in the nature of recommendation for his removal which may or may not be acted upon by the Parliament". Since the Committee holding that the Judge is guilty of any misbehaviour is not "final and conclusive", "it is legally not permissible to hold that the Committee is a tribunal under Art. 136 of the Constitution."[54] This means that an appeal cannot be filed in the Supreme Court from the Inquiry Committee under Art. 136.[55]

This judgment has seeds of confrontation between the Supreme Court and Parliament. Ordinarily, after Parliament has taken a decision to remove the Judge, on the basis of the report of the Committee of Inquiry, the matter should come to an end. As the Court has said itself, if the Inquiry Committee report is favourable to the concerned Judge, the matter ends there and Parliament cannot take any further action in the matter. If, however, the report of the Inquiry Committee goes against the Judge, then, only Parliament can take action to remove him after giving him a hearing on the inquiry report.

Once Parliament has passed the resolution removing the Judge after following the due procedure and the President assents to the motion, the Judge stands removed and there appears to be no need for any judicial review thereafter. Otherwise, there is a chance of controversy arising between the Judiciary and Parliament. In any case, judicial review can only be on procedural grounds and not on the merits of the grounds of removal.

In the long and arduous process of removal of the Supreme Court Judge, the third stage was reached when the Inquiry Committee held the Judge guilty of wilful and gross misuse of office and moral turpitude by using public funds for private ends in several ways while he was the Chief Justice of the Punjab and Haryana High Court during Nov. 11, 1987 to Oct. 6, 1989. The Committee reported

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52. *Ibid.*, 2241–42.
53. *Ibid.*, 2244.
54. *Ibid.*, 2248.
55. For discussion on Art. 136, see, *infra*, Sec. D.

that acts committed by the Judge were of such a nature that his "continuance in office will be prejudicial to the administration of justice and public interest". The Committee said: "The acts constitute 'misbehaviour' within the meaning of Art. 124(4) of the Constitution."

The report of the Committee was tabled in Parliament on December 17, 1992.[56] Thereafter, the motion was debated in the Lok Sabha. A lawyer was allowed to appear before the House to defend Justice RAMASWAMI. Ultimately, the motion was put to vote in the House but was lost as it could not receive the requisite votes in the House because of the absence of the Congress Party members from the House.

As a sequel to the above episode, a writ petition was moved in the Supreme Court seeking a declaration that the motion of impeachment moved in the Lok Sabha for the removal of the Supreme Court Judge ought to be regarded to have been carried by construing the expression "supported by a majority" in Art. 124(4) as meaning that a member abstaining from voting should be deemed to have supported the motion. The Supreme Court rejected the contention. The Court argued that the expression "not less than two-thirds of the members present and voting" in Art. 124(4) implies that motion is to be deemed carried only when the requisite number of members express their support for the motion by casting votes in its favour. Abstention from casting vote cannot be construed as deemed support for the motion.[57]

The President cannot remove a Supreme Court Judge except in accordance with the procedure laid down in Art. 124(4). Thus, the President cannot remove a Judge unless each House of Parliament passes an address for the removal of the Judge supported by a majority of the total membership of the House and by a majority of not less than two-thirds of the members present and voting on the ground of proved misbehaviour and incapacity. Unless such an address is presented to the President in the same session by the two Houses, the President is not empowered to remove a Judge.[58]

The second time in the history of Indian Judiciary, the CJI recommended the impeachment of Justice, SOUMITRA SEN of the Calcutta High Court. Justice Sen allegedly misappropriated funds while acting as a Receiver prior to his appointment as a Judge. The further allegation was that the funds were not returned or accounted for till several years after his elevation and only pursuant to a judicial order of the Court. The Chief Justice of the High Court's request that he should resign or retire prematurely was refused. The three-judge committee set up by the Chief Justice of India to enquire into the matter reported that Justice Sen was guilty of misconduct. On August 4, 2008, the Chief Justice of India wrote a letter to the Prime Minister recommending impeachment proceedings against Justice Sen under Article 217(1) read with Article 124(4) of the Constitution. About 60 Rajya Sabha MPs have filed a petition before the Chairman of the Upper House demanding the impeachment of Justice Sen. The debate in Parliament is pending.

The word 'misbehaviour' used in Art. 124(4), "is a vague and elastic word and embraces within its sweep different facets of conduct as opposed to good conduct". Literally 'misconduct' means wrong conduct or improper conduct. Guarantee

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56. *THE HINDU*, dated December 26, 1992, p. 12.
57. *Lily Thomas v. Speaker, Lok Sabha*, (1993) 4 SCC 234.
58. *K. Veeraswami v. Union of India*, (1991) 3 SCC 655 : (1991) SCC (Cri) 734.

of tenure to a Judge, and its protection by the Constitution does not mean giving sanctuary for corruption or grave misbehaviour. But, at the same time, every action or omission by a Judge in the performance of his duties which may not be a good conduct necessarily, may not be regarded 'misbehaviour' for purposes of Art. 124(4) indictable by impeachment.[59] Error in judgment, however gross, cannot amount to 'misbehaviour'.[60]

In December 2006, a Bill to amend the 1968 Act was introduced in the Lok Sabha. It seeks to effect far reaching reforms in the action permissible against a judge for "misbehaviour" or "incapacity". Both words are defined. Provisions are also sought to be introduced for the setting up of a National Judicial Council to enquire into allegations of misbehaviour or incapacity of a judge. The proposed Council is to consist of the Chief Justice of India as the Chairperson, the two senior most judges of the Supreme Court and two Chief Justices of High Courts. If the Chief Justice of India is the object of the inquiry, the President may appoint the senior most judge of the Supreme Court to discharge the functions of the Chairperson. In a sharp departure from the provisions of the 1968 Act, the Bill seeks to allow complaints to be filed by any person to the Council apart from the procedure earlier followed, namely by way of a reference by the Speaker of the Lok Sabha or the Chairman of the Rajya Sabha. If after inquiry, the complaint is found established by the Council, it may, if the charge is serious, advise the President accordingly, who is required to place the advice before both Houses of Parliament so that the Constitutional process for removal of the judge can commence. If the charges established are not serious and do not warrant the removal of the judge, the Council may issue advisories or warnings to the judge concerned or withdraw judicial work or censure or admonish the judge privately or publicly or request the judge to voluntarily retire. The Bill, if enacted, would meet the need for accountability in judges, transparency in the system and allow for some punitive action against a judge found guilty of misbehaviour or incapacity without resorting to the long drawn and uncertain political outcome of impeachment.

C. JURISDICTION AND POWERS

The Supreme Court is a multi-jurisdictional Court and may be regarded as the most powerful Apex Court in the World.

The Constitution confers very broad jurisdiction on the Court. The jurisdiction of the Court may be put under the following heads:

(i) The Court has power to commit a person for its contempt [Art. 129].

(ii) The Court has original jurisdiction to decide inter-governmental disputes [Art. 131].

(iii) The Court has appellate jurisdiction. It is the highest court of appeal in the country in all matters, civil or criminal [Arts. 132 to 134].

(iv) The Court has a very extensive appellate jurisdiction under Art. 136 from any court or tribunal in the country in matters not falling under heading (iii).

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59. *C. Ravichandran Iyer v. Justice A.M. Bhattacharjee*, (1995) 5 SCC 457 : 1995 SCC (Cri) 953.

60. *Daphtary v. Gupta*, AIR 1971 SC 1132 : (1971) 1 SCC 626.

(v) The Apex Court has power under Art. 32 to enforce Fundamental Rights. [Art. 32][61]

(vi) The Court has advisory jurisdiction. [Art. 143]

(vii) The Court has power to review its own decisions. [Art. 137]

(viii) The Court has power to make any order necessary for doing complete justice in any case. [Art. 142]

All the above provisions are discussed below except Art. 32 which is discussed later in the book.[62]

(i) COURT OF RECORD

(a) CONTEMPT OF SUPREME COURT

The Supreme Court is a 'court of record'[63] and has all the powers of such a court including the power to punish for its contempt. A court of record has—

(1) power to determine its own jurisdiction, and

(2) it has power to punish for its contempt.

On the first question, the Supreme Court has asserted:[64]

> "In the absence of any express provision in the Constitution the Apex Court being a court of record has jurisdiction in every matter and if there be any doubt, the court has power to determine its jurisdiction."

On the question of contempt of court, the Supreme Court has a summary jurisdiction to punish contempt of its authority. This is an extraordinary power and is exercised only when the public interest so demands. Such a power is very necessary to prevent interference with the course of justice, to maintain the authority of law as administered in the court, and thus to protect public interest in the purity of the administration of justice.

The Supreme Court has emphasized upon the need for the concept of contempt of court in the following words.[65]

> "Availability of an independent judiciary and an atmosphere wherein judges may act independently and fearlessly is the source of existence of civilisation in society. The writ issued by the court must be obeyed. It is the binding efficacy attaching with the commands of the court and the respect for the orders of the court which deter the aggrieved persons from taking the law in their own hands because they are assured of an efficacious civilised method of settlement of disputes being available to them wherein they shall be heard and their legitimate grievances redeemed. Any act or omission which undermines the dignity of the court is therefore viewed with concern

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61. For discussion on Fundamental Rights, see, Chs. XX-XXXIII, *infra*.

62. See, Ch. XXXIII, *infra.*

63. A court of record is a court whereof the acts and judicial proceedings are enrolled for a perpetual memory and testimony, the records of which are admitted to be of evidentiary value and are not to be questioned when produced before any court. A court of record as such has power to punish for its contempt.

64. *Naresh Shridhar Mirajkar v. State of Maharashtra*, AIR 1967 SC 1 : (1966) 3 SCR 744; *Ganga Bishan v. Jai Narain*, AIR 1986 SC 441 : (1986) 1 SCC 75; *Delhi Judicial Service Association v. State of Gujarat*, AIR 1991 SC at 2005.

65. *Om Prakash Jaiswal v. D.K. Mittal*, AIR 2000 SC 1136 : (2000) 3 SCC 171.

> by the society and the court treats it as an obligation to zealously guard against any onslaught on its dignity."

The Supreme Court exercises this power to punish an act which tends to interfere with the course of administration of justice. The following *inter alia* have been held to constitute contempt of court:[66]

(a) insinuations derogatory to the dignity of the Court which are calculated to undermine the confidence of the people in the integrity of the Judges;

(b) an attempt by one party to prejudice the Court against the other party to the action;

(c) to stir up public feelings on the question pending for decision before the Court and to try to influence the Judge in favour of himself;

(d) an attempt to affect the minds of the Judges and to deflect them from performing their duty by flattery or veiled threat;

(e) an act or publication which scandalises the Court attributing dishonesty to a Judge in the discharge of his functions;

(f) wilful disobedience or non-compliance of the Court' order.[67]

The Supreme Court directed the Delhi Development Authority to constitute a committee of inquiry to look into several allegations of irregularities committed in the allotment of plots in the Naraina Warehousing Scheme. The DDA took no action in the matter. Holding DDA guilty of committing contempt of court, the Court observed:[68]

> "Public bodies like, DDA, which are trustees of public properties, and are to carry out public functions, in our view, cannot escape their accountability for their failure to carry out the orders of this court made in public interest. The officers of the DDA who are guilty of inaction, in our view, should be proceeded against in contempt action."

However, in the instant case, instead of imposing any punishment, the Court gave to the DDA one more chance to comply with the Court order.

The Supreme Court has emphasized that in a government of laws and not of men, such as exists in India, the Executive branch of government bears a grave responsibility for upholding and obeying judicial orders.[69] Cases usually arise where government officials are found guilty by the Supreme Court of contempt of court for disregarding, not obeying, deliberately disobeying or not imple-

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66. *Hira Lal Dixit v. State of Uttar Pradesh*, AIR 1954 SC 743 : (1955) 1 SCR 677; *Brahma Prakash v. State of Uttar Pradesh*, AIR 1954 SC 10 : 1953 SCR 1169; *C.K. Daphtary v. O.P. Gupta*, AIR 1971 SC 1132 : (1971) 1 SCC 626; *Pritam Pal v. High Court of M.P.*, AIR 1992 SC 904 : 1993 Supp (1) SCC 529.

67. *Rajiv Choudhary v. Jagdish Narain Khanna*, (1996) 1 SCC 508; *Vineet Kumar Mathur v. Union of India*, (1996) 7 SCC 714; *Indian Airports Employees Union v. Ranjan Chattergee*, AIR 1999 SC 880 : (1999) 2 SCC 537. See also *Sunkara Lakshminarasamma v. Sagi Subba Raju*, (2009) 7 SCC 460 : (2009) 11 JT 264; swearing of false affidavit, punishment by ordering exemplary costs. Also see, *infra*, under Art. 144, Sec. I(e).

68. *M/s. Shorilal & Sons v. Delhi Development Authority*, AIR 1995 SC 1084, 1088 : (1995) 3 SCC 320.

69. *Mohd. Aslam v. Union of India, (*1994) 6 SCC 442 : AIR 1995 SC 548*; Bihar Finance Service House Construction Coop. Society Ltd. v. Gautam Goswami, (*2008) 5 SCC 339, at page 348 : AIR 2008 SC 1975.

menting court orders.[70] Punishment by way of imprisonment for a month has been imposed on a Minister in charge of a department as well as the Principal Secretary of the department, who were found guilty of a wilful violation of an order of the Supreme Court.[71]

In several cases, private parties violating or flouting Supreme Court orders have been held guilty of contempt of court.[72] Gomti River water was being polluted due to discharge of effluents from the distillery of a company. The Supreme Court ordered the company to remove deficiencies in the effluent treatment plant by a certain date. The company failed to do so and yet kept on running its plant. The Court ruled that violation of the Court order by the company was deliberate and pre-planned indicating a defiant attitude on its part. The Court imposed a fine of Rs. 5 lacs on the company which amount was to be utilised for cleaning of the Gomti River.[73]

The Managing Director and Director of a Company held liable for contempt, were sentenced to undergo six months' and three months' imprisonment respectively in *Maruti Udyog Ltd. v. Mahinder C. Mehta*[74] .

As the Court has observed in *Duda*:[75] "Any publication which was calculated to interfere with the due course of justice or proper administration of law would amount to contempt of court. A scurrilous attack on a judge, in respect of a judgment or past conduct has in our country the inevitable effect of undermining the confidence of the public in the judiciary; and if confidence in judiciary goes administration of justice definitely suffers."

In *Hiralal Dixit*,[76] the Supreme Court has observed that it is not necessary that there should be an actual interference with the course of administration of justice. It is enough if the offending act or publication tends in any way to so interfere. If there are insinuations made which are derogatory to the dignity of the court and are calculated to undermine the confidence of the people in the integrity of the judges, the conduct would amount to contempt.

In *Daphtary*, the Court refused to accept the contention that after the case is decided, even if it is criticised severely and unfairly, it should not be treated as contempt of court. The Court observed:

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70. See, for example, *Mohd. Aslam v. Union of India*, (1994) 6 SCC 442 : AIR 1995 SC 548; *Manilal Singh v. H. Borobabu Singh*, AIR 1994 SC 505 : 1994 Supp (1) SCC 718; *J. Vasudevan v. T.R. Dhananjaya*, (1995) 6 SCC 249 : AIR 1996 SC 137; *Mohd. Quiser v. L.K. Sinha*, 1995 Supp (4) SCC 283 : (1995) 9 JT 133; *T.R. Dhananjaya v. J. Vasudevan*, (1995) 5 SCC 619 : AIR 1996 SC 302; *T.M.A. Pai Foundation v. State of Karnataka*, AIR 1995 SC 1938 : (1995) 4 SCC 1; *Vineet Kumar Mathur v. Union of India*, (1996) 1 SCC 119, *In re, M.P. Dwivedi*, AIR 1996 SC 2299 : (1996) 4 SCC 152.

71. *T.N.Godavarman Thirumalpad v. Ashok Khot*, (2006) 5 SCC 1 : AIR 2006 SC 2007; See also *Anil Ratan Sarkar v. Hirak hosh*, JT 2002(2) SC 602 : (2002) 4 SCC 21; *Indra Sawhney v. Union of India*, AIR 2000 SC 498 : (2001) 1 SCC 168; *Abhijit Tea Co. (P.) Ltd. v. Terai Tea Co. (P.) Ltd.*, (1996) 1 SCC 589.

72. *Rajiv Choudhary v. Jagdish Narian Khanna*, (1996) 1 SCC 508; *Delhi Development Authority v. Skipper Consruction Co. (P.) Ltd.*, AIR 1996 SC 2005 : (1996) 4 SCC 622.

73. *Vineet Kumar Mathur v. Union of India*, (1996) 7 SCC 714 : 1996 (1) JT 454.

74. (2007) 13 SCC 220, at page 230.

75. *P.N. Duda v. P. Shiv Shankar*, AIR 1988 SC 1208, 1226 : (1988) 3 SCC 167 . See also *C. Elumalai v. A.G.L. Irudayaraj*, (2009) 4 SCC 213.

76. *Hira Lal Dixit v. State of Uttar Pradesh*, AIR 1954 56 743 : (1955) 1 SCR 677; see, *supra*, footnote 66.

> "We are unable to agree.... that a scurrilous attack on a Judge in respect of a judgment or past conduct has no adverse effect on the due administration of justice. This sort of attack in a country like ours has the inevitable effect of undermining the confidence of the public in the judiciary. If confidence in the judiciary goes, the due administration of justice definitely suffers."[77]

An article in a daily, criticising a Supreme Court decision, atrributing improper motives to the Judges and seeking to create an impression in the public mind that the Supreme Court Judges act on extraneous considerations in deciding cases has been held to constitute Court's contempt. The Court has stated that if an impression were created in the public mind that the Judges in the highest court act on extraneous considerations in deciding cases, public confidence in the administration of justice would be undermined and no greater mischief than that could possibly be imagined.[78]

Contempt of court is committed when a court is scandalised by casting "unwarranted, uncalled for and unjustified aspersions on the integrity, ability, impartiality or fairness of a judge in the discharge of his judicial functions as it amounts to an interference with the due course of administration of justice".[79] Charging the judiciary as "an instrument of oppression", and the judges as "guided and dominated by class hatred" "instinctively favouring the rich against the poor" has been held to constitute contempt of court as these words weaken the authority of law and law courts, and have the effect of lowering the prestige of judges and courts in the eyes of the people.[80]

A fair, reasonable, temperate and legitimate criticism of the Judiciary, or of the conduct of a Judge in his judicial capacity is permissible.

A distinction is drawn between a mere libel or defamation of a Judge personally and what amounts to a contempt of the court. A mere defamatory attack on a Judge is not actionable but it becomes punishable when it is calculated to interfere with the due course of justice, or the proper administration of law by the court. Alternatively the test is whether the wrong is done to the Judge personally, or it is done to the public.[81]

The power to punish for contempt, large as it is, is not invoked very frequently, and as the Court has itself observed, it should be exercised "cautiously, wisely and with circumspection."[82] On occasion, factors which have been considered sufficient to warrant a lesser punishment, in one case have not drawn a similar response in another. Thus, even when criminal contempt was found established and the contemnor had "not shown any repentance or regret or remorse", a "symbolic" punishment of imprisonment for one day and a fine of Rs. 2000/- was imposed "keeping in mind that the respondent was a woman"[83]. In a later case however, a woman who was found guilty of contempt was sentenced to

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77. *C.K. Daphtary v. O.P. Gupta*, AIR 1971 SC 1132, 1144 : (1971) 1 SCC 626.
78. *In the matter of the Editor, Printer and Publisher, Times of India (Daily) Bombay, Delhi*, AIR 1953 SC 75.
79. *Jaswant Singh v. Virender Singh*, (1995) Supp (1) SCC 384 : AIR 1995 SC 520; *Chetak Construction Ltd. v. Om Prakash*, AIR 1998 SC 1855 : (1998) 4 SCC 577.
80. *E.M.S. Namboodiripad v. T.N. Nambiar*, AIR 1970 SC 2015 : (1970) 2 SCC 325.
81. *Rustom Cawasjee Cooper v. Union of India*, AIR 1970 SC 1318 : (1970) 2 SCC 298; *Perspective Publications v. Maharashtra*, AIR 1971 SC 221; *C.K. Daphtary v. O.P. Gupta*, *supra*, note 77.
82. *In re* under Art. 143 (*Keshav Singh's* case), AIR 1965 SC 745; *infra*, Sec. F.
83. *Arundhati Roy, In re*, (2002) 3 SCC 343 : AIR 2002 SC 1375.

undergo imprisonment for 1 year and to pay costs of Rs. 50,000/- for having conducted herself in a manner "which illegitimately affect(ed) the presentation of evidence in…courts"[84]. The Court can punish its contempt by fine or imprisonment.[85] The Court does not use its power to punish for contempt unless there is real prejudice which can be regarded as 'substantial interference' with the due course of justice.[86]

A news item was published in *The Times of India* regarding a document containing a "vituperous attack" upon the Supreme Court's decision during the emergency in the *Skukla* case.[87] Contempt proceedings were initiated against the editor of the paper but these were dropped later by the majority decision. The minority view (BEG C.J.) was that the attack on the decision was "primarily irrational and abusive".[88]

Contempt of court is characterised either as civil or criminal. Any wilful disobedience of a court order to do or abstain from doing any act is a civil contempt. Civil contempt arises when the power of the court is invoked or exercised to enforce obedience to court orders.[89] On the other hand, criminal contempt is criminal in nature. It includes outrages on judges in open court, defiant disobedience to the judges in the court, libels on judges or courts or interfering with the course of justice or any act which tends to prejudice the course of justice.

A person is guilty of criminal contempt when his conduct tends to bring the authority and administration of law into disrespect or tends to interfere with or prejudice litigants during the litigation.[90] A government official while filing an affidavit on behalf of his department cast aspersions on, and attributed motives to, the Court. The Supreme Court came to the conclusion that the accusations, attributions and aspersions made in the affidavit were not only deliberately calculated to malign the Court but also to undermine its authority and to deter it from performing its duty. It was an intentional attempt to obstruct the course of justice and, thus, amounted to criminal contempt of the Court.[91] Threat by a lawyer representing a litigant to file prosecution against the Judge in respect of the judicial proceedings conducted by him in his own court amounts to a positive attempt to interfere with the due course of administration of justice.[92] A witness who takes inconsistent stands before courts in the course of a trial has also been held guilty of contempt.[93]

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84. *Zahira Habibullah Sheikh v. State of Gujarat:* (2006) 3 SCC 374 : AIR 2006 SC 1367.
85. On contempt of court also see, *In re S. Mulgaokar*, AIR 1978 SC 727.
86. *Rizwan-ul-Hasan v. State of Uttar Pradesh*, (1953) SCR 581 : AIR 1953 SC 185; *Shareef v. Judges*, (1955) 1 S.C.R. 767 : AIR 1955 SC 19.
87. *Additional District Magistrate, Jabalpore v. S. Shukla*, AIR 1976 SC 1207. See, *infra*, Ch. XXXIII, Sec. F.
For Emergency Provisions in the *Constitution*, see, Ch. XIII, *infra.*
88. *In re, Sham Lal*, AIR 1978 SC 489 : (1978) 2 SCC 479.
89. *Delhi Development Authority v. Skipper Construction*, (1995) 3 SCC 507.
90. *DDA v. Skipper Construction, ibid.; Ram Avtar Sharma v. Arvind Sharma*, (1995) Supp 2 SCC 130; *Dhananjay Sharma v. State of Haryana*, AIR 1995 SC 1795 : (1995) 3 SCC 757; *D.C. Saxena v. Chief Justic of India*, AIR 1996 SC 2481 : (1996) 5 SCC 216. *In Re* : *Bineet Kumar Singh*, AIR 2001 SC 2018 : (2001) 5 SCC 501; *In Re Arundhati Roy*, (2002) 3 SCC 343 : AIR 2002 SC 1375.
91. *In re Sanjiv Datta, Dy. Secy., Ministry of Information & Broadcasting*, (1995) 3 SCC 619.
92. *Re Ajit Kumar Pandey*, (1996) 6 SCC 510. Also see, *D.C. Saxena v. Chief Justice of India*, AIR 1996 SC 2481.
93. *Zahira Habibullah Sheikh (5) v. State of Gujarat*, (2006) 3 SCC 374 : AIR 2006 SC 1367.

A newspaper published a news item that two sons of a Supreme Court Judge had been allotted petrol pumps by the Minister out of his discretionary quota. However, on verification the news was found to be incorrect. The Court held the printer, publisher, editor and the reporter guilty of the contempt of the court. None of them took the necessary care in evaluating the correctness and credibility of the information published by them as a news, item in the newspaper in respect of the allegation of a very serious nature causing an embarrassment to the Court.[1]

The Court can take cognisance of its contempt *suo motu.*[2] An advocate of the Court can also bring to the notice of the Court any contempt of the court. In *Daphtary*,[3] a pamphlet published and circulated by the respondent was alleged to contain statements amounting to contempt of the Court. The President of the Supreme Court Bar chose to bring the matter to the Court's notice. The Court ruled that it could issue a notice *suo motu* and the President of the Supreme Court Bar was perfectly entitled to bring to the notice of the Court any contempt of the Court.

Under section 14 of the Contempt of Courts Act, in case of a criminal contempt of the Supreme Court, the Court may take action in either of the three ways: (1) on its own motion; (2) on the motion of the Attorney-General or the Solicitor-General; or (3) any other person with the consent of the Attorney-General/Solicitor-General. If, therefore, a citizen wants to initiate proceedings for contempt of court, he must first seek the consent in writing either of the Attorney-General or the Solicitor-General. If any of these refuses to give consent, the matter can be brought before the Court for judicial review of the refusal. The Court has ruled in *Duda*[4] that if the Attorney-General or Solicitor-General refuses to give permission to a person to move the Court for its contempt, the non-granting of the consent is a justiciable matter. The Court has observed in this connection:[5]

> "Discretion vested in law officers of this Court to be used for a public purpose in a society governed by rule of law is justiciable."

Another option may be that when a person draws the Court's attention to commission of contempt by some one, and he has not been given permission either by the AG or the SG, the Court may take cognisance of the complaint *suo motu*. The party which brings the contumacious conduct of the contemnor to the notice of the court, whether a private person or the subordinate court, is only an informant and does not have the status of a litigant in the contempt of court case. The case of contempt is not *stricto-sensu* a cause or a matter between the parties *inter se.* It is a matter between the Court and the contemner.[6] It is not tried as an adversarial litigation. However, in *Bal Thackeray v. Harish Pimpalkhute,*[7] the Court dismissed an application alleging criminal contempt on the ground that it did not comply with section 15 of the Contempt of Courts Act, 1971. The decision, which appears to be contrary to earlier decisions on the subject, can be justi-

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1. *Re Harijai Singh,* (1996) 6 SCC 466.
2. *Delhi Development Authority v. Skipper Construction,* (1995) 3 SCC 507.
3. *C.K. Daphtary v. O.P. Gupta,* AIR 1971 SC 1132 : (1971) 1 SCC 626; *supra,* note 77.
4. *P.N. Duda v. P.N. Shivshankar,* AIR 1988 SC 1211 : (1988) 3 SCC 167; *supra,* note 75.
5. *Ibid.,* 1225.
6. *Supreme Court Bar Association v. Union of India,* (1998) 4 SCC 409 : AIR 1998 SC 1895.
7. **(**2005) 1 SCC 254 : AIR 2005 SC 396.

fied, if at all, on the narrow ground that there was no prayer in the petition for taking *suo motu* action against the alleged contemnor.[8]

The decision illustrates the reluctance of Courts to exercise the power to act *suo motu* in matters which otherwise require the Attorney-General to initiate proceedings or at least give his consent to such initiation.

In *Daphtary*, the pamphlet in question ascribed bias and dishonesty to a Judge of the Supreme Court while acting in judicial capacity. This was made the basis of contempt proceedings against the respondent. Examining the scope of the concept of contempt of court, the Supreme Court stated that the test was whether the impugned publication was a mere defamatory attack on the Judge or whether it would interfere with the due course of justice or proper administration of law by the Court. On this test, the Court found that the pamphlet contained scurrilous remarks about a Supreme Court Judge which amounted to gross contempt of the Judge and of the Court itself. The Court laid down the following general propositions regarding the scope of the concept of contempt of court.

(1) There is no excuse whatsoever for imputing dishonesty to a Judge even if it were to be assumed that the judgment contained numerous errors.

(2) No evidence other than affidavits is allowed to justify allegation amounting to contempt of court.

(3) In trying contempt of court, the Court can deal with the matter summarily and adopt its own procedure. However the procedure must be fair. The Code of Criminal Procedure does not apply in matters of contempt.

(4) When the charge against the contemner is simple and clear, there is no need to draw up a formal charge by the Court.

(5) The President of the Supreme Court Bar Association can bring to the notice of the Court any contempt of court as the Bar is vitally concerned in the maintenance of the dignity of the courts and the proper administration of justice.

The Court has also ruled in *Nahata*[9] that a contempt petition cannot be withdrawn by the petitioner as a matter of right. The matter is primarily between the Court and the contemner. It is, therefore, for the Court to allow or refuse withdrawal in the light of the broad facts of the case and more particularly whether respect for judicial process would be enhanced or reduced by the grant or refusal of withdrawal. It is for the Court to determine whether the act complained of tending to scandalize the Court if viewed with certain severity with a view to punishing the person would in the larger interest of the society enhance respect for the judicial process, or too sensitive attitude in such matter may even become counter-productive. The power to commit for contempt of court has to be exercised with the greatest caution.

Shri Shiv Shankar, Minister for Law, Justice and Company Affairs, in a speech delivered before the Bar Council of Hyderabad made certain statements

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8. SAMARADITYA PAL: THE LAW OF CONTEMPT (4th edn. 2006 pp. 438-439).
9. *Amrit Nahata v. Union of India*, (1985) 3 SCC 382, 385-87 : AIR 1986 SC 791.

which were derogatory to the dignity of the Supreme Court. He attributed to the Court partiality towards economically affluent sections of the people.

A practising lawyer brought the speech to the notice of the Supreme Court and thus contempt proceedings were initiated against the Minister. Dismissing the action in *P.N. Duda v. P. Shiv Shankar*,[10] the Court adopted the following words spoken by LORD ATKIN in *Ambard v. A. G. for Trinidad and Tobago*:[11] "Justice is not a cloistered virtue; she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men." The Court went on to observe (as per SABYASACHI MUKHARJI, J.):

> "Administration of justice and judges are open to public criticism and public scrutiny. Judges have their accountability to the society and their accountability must be judged by their conscience and oath of their office, that is, to defend and uphold the Constitution and the laws without fear and favour. This the judges must do in the light given to them to determine what is right."

And also:

> "In the free market place of ideas criticisms about the judicial system or the Judges should be welcomed, so long as criticisms do not impair or hamper the administration of justice."[12]

Contempt of court arises when criticism about the judicial system or the Judges hampers the administration of justice or which erodes the faith in the objective approach of Judges and brings administration of justice into ridicule. Judgments can be criticised but motives should not be attributed to the Judges as "it brings the administration of justice into deep disrepect". Applying this test to the Minister's speech, the Court ruled that there was no imminent danger of interference with the administration of justice, or of bringing administration of justice into disrepute. In that view of the matter, the Court held the Minister not guilty of its contempt.

Again, the Supreme Court has emphasized that contempt of court is not committed if a person publishes any fair comment on the merits of any case which the Court has heard and decided finally. But, in the guise of criticising a judgment, personal criticism of the Judge is not permissible. "Courts like any other institution do not enjoy immunity from criticism as long as the criticism is fair, reasonable and temperate and does not accuse Judges of discharging their duties for improper motives or on extraneous consideration."

The rationale underlying this proposition is that to ascribe motives to a Judge is to sow the seed of distrust in the minds of the public about the administration of justice as a whole. Nothing can be more pernicious in its consequences than to prejudice the minds of public against Judges of the Court who are responsible for implementing the law. Judges do not defend their decisions in public.[13] With the introduction of truth as a valid defence to an allegation of contempt, by an amendment to the Contempt of Courts Act, 1971 in 2006,[14] a judge may have to do just that if the judgment is claimed to have been prompted by improper motives.

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10. AIR 1988 SC 1212 : (1988) 3 SCC 167.
11. AIR 1936 PC 141.
12. AIR 1988 SC at 1214 : (1988) 3 SCC 167.
13. *J.R. Parashar v. Prasant Bhushan*, JT 2001 (7) 189 at 195 : (2001) 6 SCC 735 : AIR 2001 SC 3395.
14. Contempt of Courts Act (Amendment) Act, 2006

The Supreme Court also clarified the point that under the law, in case of contempt in the face of the Supreme Court (criminal contempt), the Supreme Court may take action either on its own motion, or on a motion by the Attorney-General or Solicitor-General, or any other person with the consent of the Attorney-General or the Solicitor-General. If, therefore, a citizen wants to initiate proceedings for contempt he has first to seek the consent in writing of the Attorney-General or the Solicitor-General. The Court further ruled that "Discretion vested in law officers of this Court to be used for a public purpose in a society governed by rule of law is justiciable".

The Supreme Court has clarified the relationship between Art. 129 and the Contempt of Courts Act, 1971, in *Pallav Sheth v. Custodian*.[15]

(b) CONTEMPT OF SUBORDINATE COURTS

In *Delhi Judicial Service Association v. State of Gujarat*,[16] the Supreme Court has given a broad and expansive interpretation to Art. 129 and has thus made a significant contribution towards maintaining the integrity and independence of subordinate courts by taking them under its protective umbrella. The Court has ruled that under Art. 129, it has power to punish for contempt not only of itself but also of High Courts and of the lower courts. This is the inherent power of the Court as 'a court of record' as laid down in Art. 129. Explaining the reasons for taking such a liberal view of its contempt power, the Supreme Court has observed:[17]

> "The subordinate courts administer justice at the grass root level. Their protection is necessary to preserve the confidence of people in the efficacy of courts and to ensure unsullied flow of justice at its base level."

The Court claimed that under Art. 136, it has a very wide and effective power to correct judicial orders of the subordinate courts. Thus, the Supreme Court has a wide power of judicial superintendence overall courts in India. Accordingly, the Court stated:[18]

> "Since this Court has power of judicial superintendence and control over all the courts and tribunals functioning in the entire territory of the country, it has a corresponding duty to protect and safeguard the interest of inferior courts to ensure the flow of the stream of justice in the courts without any interference or attack from any quarter. The subordinate and inferior courts do not have adequate power under the law to protect themselves, therefore, it is necessary that this Court should protect them…. . We therefore hold that this Court being the Apex Court and a superior court of record has power to determine its jurisdiction under Art. 129 of the Constitution and ..... it has jurisdiction to initiate or entertain proceedings for contempt of subordinate courts."

What happened in this case was extremely deplorable. In the State of Gujarat, the police authorities in a district falsely implicated the Chief Judicial Magistrate in a criminal case, misbehaved with him and handcuffed him. The Supreme Court took a very serious view of the misbehaviour of the police authorities and

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15. AIR 2001 SC 2763 : (2001) 7 SCC 549.
For this case, see, *infra*, Ch. VIII, Sec. C(i). *Ram Preeti Yadav v. Mahendra Pratap Yadav*, (2007) 12 SCC 385, at page 389.

16. AIR 1991 SC 2176. See also *Daroga Singh v. B.K. Pandey*, (2004) 5 SCC 26 : AIR 2004 SC 2579.

17. *Ibid.*, at 2200.

18. *Ibid.*, at 2204, 2205.

initiated contempt of court proceedings against them, held them guilty of contempt of court, and awarded them suitable punishments. The Court observed in this connection:[19]

> "The Chief Judicial Magistrate is head of the Magistracy in the District who administers justice to ensure, protect and safeguard the rights of citizens. The subordinate courts at the district level cater to the need of the masses in administering justice at the base level. By and large the majority of the people get their disputes adjudicated in subordinate courts, it is in the general interest of the community that the authority of subordinate courts is protected....."

The Supreme Court acted in this matter under Art. 129. The concerned police officials disputed the authority of the Supreme Court to act in this matter and take cognisance of it, but the Supreme Court ruled that under Art. 129 the Court has been declared to be a court of record and, thus, it has authority to punish not only for its own contempt but also of subordinate courts. The Supreme Court has wide power of judicial supervision over all courts in the country. The jurisdiction and power of a superior court of record to punish contempt of subordinate courts is founded on the premise of its judicial power to correct the errors of the subordinate courts.[20]

(c) CONTEMPT OF HIGH COURTS

A question was raised in *In re: Vinay Chandra Mishra*[21] whether under Art. 129, the Supreme Court can take cognisance of the contempt of a High Court. It was argued that the Supreme Court cannot do so for two reasons: (1) Art. 129 vests the Supreme Court with the power to punish only for the contempt of itself and not of the High Courts; (2) the High Court is itself a court of record having power to punish for its own contempt under Art. 215.[22] The Supreme Court however rejected the contention and ruled that it was empowered to take cognisance of the contempt of a High Court under Art. 129.

The Court has argued that Art. 129 vests power in the Supreme Court not only as the highest court but also as a court charged with appellate and superintending powers over the lower courts and tribunals. To discharge its obligations, the Court "is inherently deemed to have been entrusted with the power to see that the stream of justice in the country remains pure, that its course is not hindered or obstructed in any manner, that justice is delivered without fear or favour and for that purpose all the courts and tribunals are protected while discharging their legitimate duties. To discharge this obligation, this Court has to take cognizance of the deviation from the path of justice in the tribunals of the land, and also of attempts to cause such deviations and obstruct the course of justice".[23] The Court invoked the authority of *Delhi Judicial Service Association v. State of Gujarat.*[24]

(d) CONTEMPT OF ADJUDICATORY BODIES

The Supreme Court has ruled that under Art. 129, it has jurisdiction to take cognisance of the contempt of the Income-tax Appellate Tribunal which performs

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19. *Ibid.*, at 2207.
20. *Ibid.*, at 2201.
21. (1995) 2 SCC 584.
22. See, Ch. VIII, Sec. C(a) *infra.*
23. (1995) 2 SCC, at 603.
24. *Supra*, footnote 16. Also see, *Re Ajay Kumar Pandey*, (1996) 6 SCC 510.

judicial functions and is subordinate to the High Court. The Tribunal has Benches in different parts of the country and is thus a national tribunal and its functioning affects the entire country. Appeals from the Tribunal lie ultimately to the Supreme Court. The Court can take *suo motu* cognisance of the contempt of the Tribunal. In the instant case, the Secretary, Ministry of Law, wrote a letter to the President of the Tribunal adversely commenting on a Tribunal decision in a specific case characterising it as disclosing "judicial impropriety of highest order". The Secretary was held guilty of committing contempt of the Tribunal as he questioned the *bona fides* of the members of the Tribunal in deciding a specific case and asked them to explain the judicial order which they had passed. Thus, he unfairly tampered with the judicial process and interfered with judicial decision-making.[25]

The Court characterized the letter "as an attempt to affect their (tribunal members) decision making" and "a clear threat to their independent functioning". "The letter also tends to undermine confidence in the judicial functioning of the Tribunal".

The decision will go a long way towards ensuring independence of the tribunals. The executive's responsibility is only administrative supervision and control but not controlling or questioning specific tribunal decisions as such.

(e) SUPREME COURT'S POWER CANNOT BE CONTROLLED BY A STATUTE

Entry 77, List I, states: "Constitution, organisation, jurisdiction and powers of the Supreme Court (including contempt of such court), and the fees taken therein; persons entitled to practice before the Court".[26]

Explaining the power of Parliament to enact a law with regard to the contempt of the Supreme Court under entry 77, the Court has observed that such a law may prescribe the procedure to be followed and it may also prescribe the maximum punishment which could be awarded and it may provide for appeal and for other matters. But Parliament has no legislative competence "to abridge or extinguish the jurisdiction or power conferred on this Court under Art. 129 of the Constitution". Parliament's power to legislate in relation to law of contempt relating to Supreme Court is limited.[27] The Court has further observed in this connection:

> "… the power to punish for contempt being inherent in a court of record it follows that no Act of Parliament can take away that inherent jurisdiction of the Court of Record to punish for contempt and the Parliament's power of legislation on the subject cannot, therefore, be so exercised as to stultify the status and dignity of the Supreme Court and/or the High Court…"[28]

The Supreme Court has ruled that its contempt jurisdiction under Art. 129 is "independent of the statutory law of contempt enacted by Parliament under Entry 77 of List I of the Seventh Schedule of the Constitution." The jurisdiction to take cognizance of the contempt as well as to award punishment for it is "constitutional" and, therefore, it cannot be controlled or restricted by any statute. The

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25. *Income-tax Appellate Tribunal v. V.K. Agarwal*, AIR 1999 SC 452 : (1999) 1 SCC 16.
26. See, *infra*, Ch. X.
27. *Delhi Judicial Service Assoication, Tis Hazari Courts v. State of Gujarat*, AIR 1991 SC 2716 at 2199.
28. *Supreme Court Bar Ass. v. Union of India*, AIR 1998 SC 1895 at 1901 : 1998 (4) SCC 409.

constitutionally vested right under Art. 129 cannot be either abridged, abrogated or cut down, by any legislation, such as, the Contempt of Courts Act or the Code of Civil Procedure.[29]

The Court has also asserted reading Arts. 129 and 142[30] together that there is no restriction or limitation on the nature of punishment that the Supreme Court may award while exercising its contempt jurisdiction including suspension of the license to practice of a lawyer held guilty of committing contempt of court. In the instant case, a senior lawyer was found guilty of the offence of the criminal contempt of the court for having interfered with, and obstructed the course of justice "by trying to threaten, overawe and overbear the court by using insulting, disrespectful and threatening language". He was awarded a suspended sentence of simple imprisonment for six weeks as well as his practice licence was suspended for three years.[31]

Later, in the following case,[32] the Court has revised its view as expressed in *Vinay Chandra* and has ruled that under Art. 129, it has no power to suspend the practice licence of an advocate held guilty of contempt of the court. An advocate held guilty of contempt of court may also be guilty of professional misconduct. Action against the advocate may be taken by the Bar Council under the provisions of the Advocates Act, 1961.

(ii) ORIGINAL JURISDICTION

(a) ENFORCEMENT OF FUNDAMENTAL RIGHTS

The Supreme Court has been constituted as the guardian of the Fundamental Rights. Art. 32 empowers the Court to issue writs for enforcement of Fundamental Rights. Art. 32 has been discussed later in the book.[33]

The High Courts can also enforce Fundamental Rights by issuing writs under Art. 226.[34]

(iii) EXTRAORDINARY ORIGINAL JURISDICTION

(a) ELECTION OF THE PRESIDENT AND VICE-PRESIDENT

As noted earlier,[35] disputes concerning election of the President or Vice-President are decided exclusively by the Supreme Court and no other court.

(b) INTER-GOVERNMENTAL DISPUTES

Under Art. 131, the Supreme Court has exclusive original jurisdiction in any dispute between—

(*i*) the Centre and a State;

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29. *Pritam Pal v. High Court of M.P.*, AIR 1992 SC 904 : 1993 Supp (1) SCC 529; *In re Vinay Chandra Mishra*, (1995) 2 SCC 584 : AIR 1995 SC 2348; *Re Ajay Kumar Pandey*, (1996) 6 SCC 510 : AIR 1996 SC 260.
30. For discussion on Art. 142, see, *infra*, Sec. G.
31. Also see, *Lalit Mohan Das v. Advocate General, Orissa*, AIR 1957 SC 250 : 1957 SCR 167.
32. *Supreme Court Bar Association v. Union of India*, AIR 1998 SC 1895 : 1998 (4) SCC 409.
33. For discussion on Art. 32, see, *infra*, Ch. XXXIII, Sec. A.
34. For discussion on Art. 226, see, *infra*, Ch. VIII, Sections C and D.
35. *Supra*, Ch. III, Sec. A(i)(b).

(*ii*) the Centre and a State on one side, and a State on the other side;

(*iii*) two or more States.

A dispute to be justiciable by the Supreme Court under Art. 131 should involve a question, whether of law or fact, on which the existence or extent of a legal right depends. Thus, questions of a political nature not involving any legal aspect are excluded from the Court's purview.

The Supreme Court's jurisdiction under Art. 131 is subject to two limitations, *viz.*, (i) as to the parties; (ii) as to the subject-matter.

In exercise of powers under Art.145 of the Constitution, the Supreme Court framed the Supreme Court Rules, 1966, Part III Orders 22 to 34 which prescribes the procedure to be followed in connection with the filing, hearing and disposal of proceedings under Article 131. Execution of decrees and orders has been provided for by the Supreme Court (Decrees and Orders) Enforcement Order, 1954 issued by the President under Article 142(1) of the Constitution.

PARTIES

The Indian Constitution sets up a federal polity[36] where intergovernmental disputes often arise. It therefore becomes necessary to set up a forum for resolving such disputes. Art. 131 does so by authorising the Supreme Court to settle intergovernmental disputes. As BHAGWATI J., has observed in *State of Karnataka v. Union of India*:[37] "The article is a necessary concomitant of a federal or a *quasi*-federal form of government and it is attracted only when the parties to the dispute are the Government of India or one or more States arranged on either side".

The State of Mysore contested a demand, under the Central Excise Act, for payment of excise duty on agricultural implements manufactured in the factory belonging to the State. The State took the matter to the highest appellate tribunal under the law, *viz.*, the Government of India, which rejected the same. The State then filed a writ petition in the High Court against the Central Government's decision. The High Court rejected the argument that being a dispute between a State and the Centre, the matter lay within the exclusive original jurisdiction of the Supreme Court. It took the view that the Central Government had disposed of the matter as a tribunal and so it was not a party to the dispute, and that for Art. 131 to apply, a dispute must directly arise between the State and the Central Government as the repository of the executive power of the Union.[38]

This judgment of the High Court was affirmed by the Supreme Court on the ground that Government of India acted only as a tribunal and that there was no dispute between the Centre and the States.[39] But there is another aspect of the case which the Court did not refer to. The claim for excise was made by the Central Excise Department and, thus, it could be said that there was a dispute between the Centre and the State.

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36. On Federalism, see, *infra*, Chs. X-XV.
37. AIR 1978 SC at 143.
Also see, *infra*, Ch. XIII, Sec. C.
38. *State of Mysore v. Union of India*, AIR 1968 Mysore 237.
39. *Union of India v. State of Mysore*, AIR 1977 SC 127.

Under Art. 131, the Supreme Court cannot take cognisance of a suit brought by a private individual against a Government. The State of Bihar filed a suit in the Supreme Court under Art. 131 against the Union of India as the owner of Railways, and the Hindustan Steel Ltd., a government company, claiming damages for short supply of iron and steel ordered by the State in connection with the Gandak Project. The Court held that the suit did not lie under Art. 131, because its phraseology excludes the idea of a private citizen, a firm or a corporation, figuring as a disputant either alone or along with a government. "The most important feature of Art. 131 is that it makes no mention of any party other than the Government of India or any one or more of the States who can be arrayed as a disputant."[40] No private party, be it a citizen, or a firm or corporation, can be impleaded as a party in a suit under Art. 131, along with a state either jointly or in the alternative.[41]

It was argued that Hindustan Steel could be regarded as a "State" under Art. 12.[42] But the Court said that the enlarged definition of the "state" given under Art. 12 could not be applied under Art. 131, and Hindustan Steel could not be regarded as a "State" for that purpose.

This means that only inter-governmental disputes can be brought into the Supreme Court under Art. 131, and a State cannot sue under Art. 131 a government company belonging to the Central Government even though it may be deemed to be a 'state' under Art. 12. As to the nature of the dispute which can be brought under Art. 131, the Court stated that the "dispute must arise in the context of the Constitution and the Federalism it sets up," and that "the disputes should be in respect of legal right and not disputes of a political character."

The Court was justified in rejecting the argument based on Art. 12. To accept it would have meant that any dispute between a government and an administrative agency, of which there are numerous, could be brought before the Supreme Court, which would have placed an impossible burden on it. It was well, therefore, that the Court restricted Art. 131 to such disputes as arise between the constituent units of the Indian Union and the Central Government.

Writ petitions filed by individuals and agents of the State of Sikkim and Meghalaya challenging the prohibition of 'on line and internet lottery' had been dismissed by the Karnataka High Court on the basis of Article 131. The Supreme Court reversed the decision of the High Court saying:

> "It is no doubt true that had the State of Sikkim or the State of Meghalaya intended to sue the State of Karnataka independently; in terms of Article 131 of the Constitution the only forum where the dispute between them could have been resolved is this Court alone but when such a lis is brought by the State jointly with their agents who had also independent cause of action and had a legal right to maintain writ application questioning the legality and/or validity of the said notification issued by the State, a suit in terms of Article 131 of the Constitution would not have been maintainable."[43]

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40. *State of Bihar v. Union of India*, AIR 1970 SC 1446, at 1448.
41. *Ibid*, at 1452.
42. For discussion on Art. 12, see, *infra*, Ch. XX, Sec. D.
43. *Tashi Delek Gaming Solutions Ltd. v. State of Karnataka*, (2006) 1 SCC 442, at page 457 : AIR 2006 SC 661.

Art. 131 provides a mechanism for settling inter-governmental disputes quickly and at the highest judicial level. There is a recurring possibility of such disputes arising in a Federal country like India which has a Central Government and a number of State Governments. Thus, the dispute ought to be one between two governments, and not between one government and a private party or an agency or authority of the other government.

DISPUTES

Under Art. 131, the Supreme Court can take cognisance of a dispute involving "any question (whether of law or fact) on which the existence or extent of a legal right depends." Thus, the dispute must involve assertion or vindication of a legal right of the Government of India or a State. "It is not necessary that the right must be a constitutional right. All that is necessary is that it must be a legal right."[44]

Further, the dispute should be in respect of legal rights and not disputes of a political character.[45] "The purpose of Art. 131 is to afford a forum for the resolution of disputes which depend for their decision on the existence or extent of a legal right. It is only when a legal, not a mere political, issue arises touching upon the existence or extent of a legal right that Art. 131 is attracted."[46]

The requirement of Art. 131 is that the dispute must involve a question whether of law or fact, on which the existence or extent of a legal right depends. It is this qualification which provides the true guide for determining whether a particular dispute falls within the purview of Art. 131. As BHAGWATI, J., has observed in *State of Karnataka v. Union of India*:[47]

> "The only requirement necessary for attracting the applicability of Article 131 is that the dispute must be one involving any question "on which the existence or extent of a legal right" depends, irrespective whether the legal right is claimed by one party or the other and it is not necessary that some legal right of the plaintiff should be infringed before a suit can be brought under that Article".

Further, BHAGWATI, J., has observed in *State of Karnataka v. Union of India* defining the scope of Art. 131.[48]

> "What has, therefore, to be seen in order to determine the applicability of Art. 131 is whether there is any relational legal matter involving a right, liberty, power or immunity qua the parties to the dispute. If there is, the suit would be maintainable but not otherwise."

The Supreme Court has power to give whatever reliefs are necessary for the enforcement of the legal right claimed in the suit if such legal right is established.[49] Art. 142 of the Constitution can also be invoked for the purpose.[50]

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44. BHAGWATI, J., in *State of Rajasthan v. Union of India,* AIR 1977 SC at 1402 : (1977) 3 SCC 592.

45. *State of Bihar v. Union of India,* AIR 1970 SC 1446, 1448. For discussion on the dichotomy between a legal dispute and a political dispute for purposes of justiciability and judicial review, see, *infra,* Ch. XL, under "Constitutional Interpretation".

46. *State of Rajasthan v. Union of India,* AIR 1977 SC 1361, 1395 : (1977) 3 SCC 592.

47. AIR 1978 SC 68 : (1977) 4 SCC 608.
See, *infra,* Ch. XIII, Sec. C, for further discussion on this case.

48. AIR 1978 SC at 131 : (1977) 4 SCC 608.

49. *State of Rajasthan v. Union of India, op. cit.*

50. For Art. 142, see, *infra,* Sec. G.

Not many cases have been filed under Art. 131. The significant cases filed so far have raised problems of constitutional law pertaining to federalism.

State of West Bengal v. Union of India

In *State of West Bengal v. Union of India*,[51] the State of West Bengal filed a suit against the Centre seeking a declaration that a Central law was unconstitutional, but the Court upheld the validity of the impugned law.[52]

State of Rajasthan v. Union of India

In *State of Rajasthan v. Union of India*,[53] arose the question whether the term 'state' in Art. 131(a) includes within its scope "State Government". There were general elections in the country for Lok Sabha in 1977 in which the Congress Party was badly defeated. At this time, there were Congress Ministries in several States. The Home Minister, Government of India, through a communication advised the Chief Ministers of these States to advise their Governors to dissolve the State Assemblies under Art. 174(2)(b) of the Constitution,[54] and seek a fresh mandate from the people.

These State Governments filed suits in the Supreme Court against the Central Government under Art. 131 seeking injunctions against dissolution of the State Legislative Assemblies under Art. 356 and holding fresh elections in the States because the ruling party had been defeated in the elections for the Lok Sabha in these States.

The Central Government raised several preliminary objections to the maintainability of the suit, *viz*.:

(1) Art. 131 covers disputes only between the Government of India and a 'State'. There is a distinction between a State and a "State Government";

(2) Art. 131 covers special kinds of disputes in which States, as such, may be interested and not merely Government of a State which may come and go;

(3) There was no denial of any constitutional right to any State.

(4) There was no legal point involved in the case which was based purely on political factors.

(5) The dispute related to the question whether the State Assemblies should be dissolved which did not involve any question on which the existence or extent of a legal right depended.

The Supreme Court rejecting all these contentions held that the matter fell within Art. 131. The Court refused to give a restrictive meaning to Art. 131. It ruled that Art. 131 includes a dispute between Central and State Governments involving a legal right. In the words of CHANDRACHUD J.: "The true construction of Art. 131(a), true in substance and true pragmatically, is that a dispute must arise between the Union of India and a State".[55]

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51. AIR 1963 SC 1241.
52. For fuller discussion on this case, see, *infra*, under Federalism, Ch. XI, Sec. J(ii).
53. AIR 1977 SC 1361 : (1977) 3 SCC 592.
54. See, *infra*, Ch. VI, Sec. E, for discussion on this Article.
55. AIR 1977 SC at 1395 : (1977) 3 SCC 592.

The dispute between the Union of India and a State cannot but be a dispute which arises out of the differences between the Government in office at the Centre and the Government in office in a State. It is not necessary for attracting Art. 131 that the plaintiff must assert a legal right in itself. Art. 131 contains no such restriction. It is sufficient for attracting Art. 131 that the plaintiff questions the legal or constitutional right asserted by the defendant, be it the Government of India or any other State. Such a challenge brings the suit within the terms of Art. 131 for, the question for the decision of the Court is not whether this or that particular legislative assesmbly is entitled to continue in office but whether the Government of India, which asserts the constitutional right to dissolve the assembly on the grounds alleged, possesses any such right.

A State has the *locus* and interest to contest and seek an adjudication of the claim set up by the Union Government. In a federation, the States are vitally interested in defining the powers of the Central Government, on the one hand, and their own, on the other.

In the instant case, asserted the Court, the States through their suits under Art. 131 had, directly and specifically, questioned the constitutional right of the Central Government to issue a directive to the State Governments to render a certain advice to the Governors. The States also questioned the constitutional right of the Central Government to dissolve State Legislatures under Art. 356.[56]

Accordingly, the Supreme Court ruled that "a legal, not a political issue" squarely arose "out of the existence and extent of a legal right" and, therefore, the suits filed by the State governments against the Central Government could not be thrown out as falling outside the purview of Art. 131.

In so far as the dispute related to the exercise of the Centre's power under Art. 356 *vis-a-vis* the State Legislature, it raised a question of legal right. The Court also clarified that under Art. 131, it would have power to give whatever reliefs are necessary for enforcement of the legal right claimed in the suit if such legal right is established.[57]

State of Karnataka v. Union of India

A question of interpretation and applicability of Art. 131 also arose in *State of Karnataka v. Union of India*.[58] The Government of India appointed a commission of inquiry under the Commissions of Inquiry Act, to inquire into certain allegations of corruption and misuse of power by the Chief Minister and a few other Ministers. The State of Karnataka brought a suit against the Centre under Art. 131 for issue of a declaration that the notification appointing the commission was illegal and *ultra vires*.

The main contention of the State was that the Commissions of Inquiry Act does not authorise the Central Government to constitute a commission of inquiry in regard to matters falling exclusively within the State's legislative and executive power. The crucial question thus raised was whether the Central Government

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56. See, *infra*, Ch. XIII, Sec. D, for discussion on this Article.

57. This was the majority view of four Judges; BEG, C.J. and CHANDRACHUD, BHAGWATI and GUPTA, JJ.
GOSWAMI, UNTWALIA and FAZL ALI, JJ., took a restrictive view of Art. 131. Their view accorded more or less with that of the Central Government.

58. AIR 1978 SC 68.

could appoint a commission to inquire into the conduct of the Chief Minister and other Ministers of a State in the discharge of their governmental functions. Needless, to say, the question had an intimate bearing on Centre-State relationship and, thus, on Indian Federalism.[59]

The Union of India raised a preliminary objection against the maintainability of the suit, *viz*., the dispute was not one between the Centre and the State; the inquiry was against the misdeeds of the State Ministers which does not affect the State as such as the Ministers and the State were distinct entities.

By a majority of 4 : 3, the Supreme Court ruled that the suit under Art. 131 by the State was competent and maintainable. The majority Judges were not prepared to take too restrictive a view of Art. 131. They were not prepared to distinguish between the 'State' and its 'Government'. The majority view was that there exists an intergal relationship between the State and its Government and what affects the Government or the Ministers in their capacity as Ministers raises a matter in which the State would be concerned. In the words of CHANDRACHUD, J.:

> "The object of Art. 131 is to provide a high-powered machinery for ensuring that the Central Government and the State Governments act within the respective spheres of their authority and do not trespass upon each other's constitutional functions or powers."

BHAGWATI, J., explained that the State Government is the agent through which the State exercises its executive powers. Therefore, any action which affects the State Government or the Ministers as Ministers, would raise a matter in which the State would be concerned. BHAGWATI, J., thus ruled:

> "...when any right or capacity or lack of it is attributed to any institution or person acting on behalf of the State, it raises a matter in which the State is involved or concerned."

It was also clarified that under Art. 131, it is not necessary that the plaintiff should have some legal right of its own to enforce, before it can file a suit. What is necessary is that the dispute must be one involving any question "on which the existence or extent of a legal right" depends. The plaintiff can bring the suit so long as it has interest in raising the dispute because it is affected by it, even if no legal right of it is infringed provided, of course, the dispute is relateable to the existence or extent of a legal right.

Therefore, a challenge by the State Government to the authority of the Central Government to appoint a commission of inquiry to inquire into the allegations against the State Ministers as regards the discharge of their functions in the State clearly involved a question on which the existence of extent of the legal right of the Central Government to appoint such a commission depended and that was enough to sustain the proceedings brought by the State under Art. 131.[60]

State of Bihar v. Union of India

The State of Bihar filed a suit against the Union of India claiming compensation from the railways for non-delivery of certain goods consigned by the State.

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59. For discussion on Commission of Inquiry, see, M.P. JAIN, *CASES & MATERIALS ON INDIAN ADM. LAW, III, 2465-2644;* JAIN, *A TREATISE ON ADM. LAW, I.*

60. For further discussion on this case, see, *infra,* Ch. XIII, Sec. C., under "Emergency Provisions".

The Court ruled that this was a matter which did not fall under Art. 131 as it was not a dispute arising "in the context of the Constitution and the federalism it sets up. The matter arose out of the legal rights of a private consignor/consignee of goods and thus fell outside Art. 131 and was cognisable by a subordinate court."[61]

Union of India v. State of Rajasthan

A similar question arose again when the State of Rajasthan filed a suit in the ordinary civil court claiming damages for loss suffered by the State on account of damage caused to the goods transported through the railways. The Union of India was impleaded as a party. It was just a commercial contract under which an officer of the State of Rajasthan was entitled to claim delivery of goods consigned as any ordinary consignee. The Court ruled that the claim was one against the Railway Administration and was cognisable by ordinary courts. The Union of India was impleaded as a party only because it was the owner of the railways. It was not a matter to be decided exclusively by the Supreme Court under Art. 131.

The Court pointed out that Art. 131 is attracted only when a dispute arises between or amongst the States and the Union in the context of the constitutional relationship that exists between them and the powers, rights, duties, immunities, liabilities, disabilities, etc. flowing therefrom. "It could never have been the intention of the framers of the Constitution that any ordinary dispute of this nature would have to be decided exclusively by the Supreme Court."[62]

State of Karnataka v. State of Andhra Pradesh

A suit filed by the State of Karnataka against the State of Andhra Pradesh under Art. 131 raising a dispute relating to non-implementation of the binding decision rendered by the Krishna Water Disputes Tribunal constituted under s. 4 of the Inter-State Water Dispute Act, 1956, has been held to be maintainable.[63]

State of Haryana v. State of Punjab

The State of Haryana filed a case under Art. 131 against the State of Punjab and the Union of India seeking a mandatory injunction requiring completion of the Sutlej-Yamuna link canal pursuant to agreement between the two states for division of river waters.

It was argued that the suit was not maintainable in view of Art. 262.[64] But the court rejected the contention saying that there was no water dispute under Art. 262 as the states had already agreed to share river water.

The court issued a mandatory injunction directing the State of Punjab to complete the canal and make it functional within a year. The court also directed the Central Government to discharge its own constitutional obligation to ensure that the canal is completed as expeditiously as possible.[65]

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61. *State of Bihar v. Union of India*, *supra*, footnote 40.
62. *Union of India v. State of Rajasthan*, AIR 1984 SC 1675.
63. *State of Karnataka v. State of Andhra Pradesh*, AIR 2001 SC 1560.
Also see, Ch. XIV, Sec. E., *infra.*
64. See, *infra*, Ch. XIV, Sec. E.
65. *State of Haryana v. State of Punjab*, (2002) 2 SCC 507 : AIR 2002 SC 685; See also *State of Haryana v. State of Punjab*, (2004) 12 SCC 673 : (2004) 5 JT 72.

(c) OTHER FEATURES OF ART. 131

In the context of Art. 131, the phrase "cause of action" used in Order 23 Rule 6(a) of the Supreme Court Rules 1966, means that the dispute between parties referred to in clauses (a) to (c) of Art. 131 must involve a question on which the existence or extent of a legal right depends,[66] and a plaint which does not disclose such a "cause of action" or is *ex facie* barred by law, is liable to be rejected under Order 23 Rule 6(b) of those Rules.[67]

The Supreme Court observed in *State of Bihar v. Union of India*[68] that the distinguishing feature of Art. 131 is that the Court is not required to adjudicate upon the disputes in exactly the same way as ordinary courts of law are normally called upon to do for upholding the rights of the parties and enforcement of its orders and decisions. The Court is only concerned to give its decision on questions of law or of fact on which the existence or extent of a legal right claimed depends. Once the Court comes to its conclusion on the cases presented by any disputants and gives its adjudication on the facts or the points of law raised, the function of the Court under Art. 131 is over.

Article 131 does not prescribe that a suit must be filed in the Supreme Court for complete adjudication of the dispute envisaged therein, or the passing of a decree capable of execution in the ordinary way as decrees of other courts are. It is open to an aggrieved party to present a petition to the Supreme Court containing a full statement of the relevant facts and praying for the declaration of its rights as against other disputants. Once that is done, the function of the Supreme Court under Art. 131 is at an end.

This statement seemed to suggest that the only remedy which the Supreme Court could grant under Art. 131 was a declaration. This view was held to be erroneous in *State of Rajasthan v. Union of India.* It has now been held that the Supreme Court has power to grant whatever relief may be necessary for enforcement of the legal right claimed in the suit if such legal right is established.[69] The Court has ruled in *State of Karnataka v. State of Andhra Pradesh* that under Art. 131, the Court can pass any order or direction as may be found necessary to meet the ends of justice.[70]

In *State of Haryana v. State of Punjab,*[71] the Supreme Court issued a mandatory injunction directing the State of Punjab to complete the construction of a canal and make it functional within one year. If it did not do so, the Union of India was to get it done through its own agency.

(d) EXCLUSION OF ART. 131 JURISDICTION

Art. 131 opens with the words "subject to the provisions of this Constitution". Thus, the jurisdiction under Art. 131 may be excluded by other provisions of the Constitution.

The Constitution excludes the exclusive original jurisdiction of the Supreme Court under Art. 131 in the following matters:

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66. *State of Haryana v. State of Punjab,* (2004) 12 SCC 673, at p.690 : (2004) 5 JT 72.
67. *Ibid at* p. 703, 706.
68. *Supra,* footnote 61.
69. AIR 1977 SC at 1403.
70. See, *supra,* footnote 50.
71. (2002) 2 SCC 507 : AIR 2002 SC 685.

(1) According to the proviso to Art. 131, as mentioned above, the Court's jurisdiction does not extend to a "dispute arising out of any treaty, agreement, covenant, engagement, sanad or other similar instrument which having been entered into or executed *before* the commencement of the Constitution, continues in operation after such commencement or which provides that the said jurisdiction shall not extend to such a dispute."[72]

Reference may also be made in this connection to Art. 363 which excludes the above-mentioned disputes from the jurisdiction-original or appellate—of the Supreme Court and all other courts.[73]

The President may, however, refer any dispute excluded from the Court's jurisdiction under Art. 131 to the Supreme Court for its advisory opinion under Art. 143.[74]

(2) Under Art. 262(2), Parliament may by law exclude Supreme Court's jurisdiction in adjudication of any dispute or complaint with respect to use, distribution or control of the waters in any inter-State river or river valley.

Parliament has enacted the Inter-State Water Disputes Act, 1956.[75] Sec. 11 of the Act provides that neither the Supreme Court nor any other court shall have jurisdiction in respect of any water dispute which could be referred to a Tribunal under the Act.

A Tribunal was appointed under the Act to decide upon the apportionment of Krishna River Water. The Tribunal evolved two schemes. The State of Andhra Pradesh filed a suit under Art. 131 against the States of Karnataka and Maharashtra and the Union of India for proper implementation of the schemes evolved by the Tribunal. It was objected that as the suit related to 'water disputes' it was barred under Art. 262(2) read with the Water Disputes Act. The Supreme Court overruled the objection saying that the suit did not relate to the settlement of a 'water dispute' but enforcement of the decision of the Tribunal. The suit was held maintainable under Art. 131.[76]

(iv) APPELLATE JURISDICTION

The Supreme Court is primarily a court of appeal and enjoys extensive appellate jurisdiction. This jurisdiction may be discussed under the following heads:

(a) CONSTITUTIONAL MATTERS

Under Art. 132(1), an appeal lies to the Supreme Court from any judgment, decree or final order, whether in a civil, criminal or other proceeding, of a High Court if it certifies that the case involves a substantial question of law as to the interpretation of the Constitution.

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72. *State of Seraikella v. Union of India,* AIR 1951 SC 253 : 1951 SCR 474; *Umeg Singh v. State of Bombay,* AIR 1955 SC 540 : (1955) 2 SCR 164; *Jagannath v. Harihar,* AIR 1958 SC 239 : 1958 SCR 1067.

73. For discussion on Art. 363, see, Ch. XXXVII, Sec. E, *infra*.

74. For discussion on Art. 143, see, *infra,* Sec. F.

75. See, Ch. XIV, Sec. E, *infra,* under the heading "River Water Disputes".

76. *State of Andhra Pradesh v. State of Karnataka,* (2000) 6 JT 1 70 : AIR 2001 SC 1560 : (2000) 9 SCC 572*;* See also *Haryana v. State of Punjab,* (2002) 2 SCC 507 : AIR 2002 SC 685; *State of Haryana v. State of Punjab, (*2004) 12 SCC 673 : (2004) 5 JT 72*;* See also *Atma Linga Reddy v. Union of India, (*2008) 7 SCC 788, at page 790 : AIR 2009 SC 436.

According to Art. 132(3), where such a certificate is given, any party in the case may appeal to the Supreme Court on the ground that any such question has been wrongly decided.

A very broad power is thus conferred on the Supreme Court to hear appeals in constitutional matters. No difficulty will be felt in bringing a constitutional controversy before the Court which has been made the final authority in the matter of interpretation of the Constitution.[77]

When the appeal is not competent under Art. 132, the Supreme Court will not hear it even if the High Court has granted the necessary certificate.[78]

The implication of Art. 132(3) is that the appellant who comes before the Supreme Court under this Article is not entitled to challenge the propriety of the decision appealed against on a ground other than that on which the High Court granted the certificate. If, however, on appeal, a question is sought to be raised before the Supreme Court, other than the one on which the High Court has granted the certificate, it is necessary to seek the permission of the Supreme Court.[79]

This means that the appellant should ordinarily confine himself to the constitutional law point involved.[80] Such a restriction is necessary so that the facility with which appeals in constitutional matters can reach the Supreme Court may not be misused by the appellant raising all sorts of extraneous pleas once his appeal has come before the Court on the ground that it involves a substantial question of constitutional law.[81]

This Article symbolises the Supreme Court as the final court of constitutional interpretation.[82] Questions of constitutional interpretation are thus placed in a special category irrespective of the nature of the proceedings in which they arise. Such questions can always be taken in appeal to the Supreme Court so that this Court may have the last say. As divergent interpretations of a constitutional provision by various High Courts would create difficulties for the people, it is desirable that such questions are decided authoritatively as soon as possible. Hence Art. 132 provides a machinery for this purpose. The Supreme Court has commented on Art. 132 as follows:[83]

> "The principle underlying the Article is that the final authority of interpreting the Constitution must rest with the Supreme Court. With that object the Article is freed from other limitations imposed under Arts. 133 and 134 and the right of the wildest amplitude is allowed irrespective of the nature of the proceedings in a case involving only a substantial question of law as to the interpretation of the Constitution."

An appeal lies to the Supreme Court after a High Court grants a certificate. Such a certificate can be granted if the following conditions are fulfilled:

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77. On 'Constitutional Interpretation', see, *infra*, Ch. XL.
78. *Syedna Taher v. State of Bombay*, AIR 1958 SC 253, 255 : 1958 SCR 1010.
79. *Darshan Singh v. State of Punjab*, AIR 1953 SC 83 : 1953 SCR 319; *Thansingh Nathmal v. Supdt. of Taxes*, AIR 1964 SC 1419, 1422 : (1964) 6 SCR 654; *State of Mysore v. Chablani*, AIR 1969 SC 325, 327.
80. *State of Bombay v. Jagmohandas*, AIR 1966 SC 1418 : (1966) 2 SCR 277.
81. Also see, *Hamdard Dawakhana v. Union of India*, AIR 1965 SC 1167 : (1965) 2 SCR 192; *Ajodhya Bhagat v. State of Bihar*, AIR 1974 SC 1886 : (1974) 2 SCC 501.
82. On Constitutional Interpretation, see, Ch. XL, *infra*.
83. *State of Jammu & Kashmir v. Ganga Singh*, AIR 1960 SC 356, 359.

(1) An appeal lies only from "any judgment decree or *final* order" of a High Court. No appeal lies from an *interim* order of a High Court. According to the explanation appended to Art. 132, the expression 'final order' includes an order deciding an issue which, "if decided in favour of the appellant, would be sufficient for the final disposal of the case".[84]

A person had a mining lease from the Orissa Government. The State Government cancelled the lease. The lessee could not file a suit against the Government immediately to establish his rights because under s. 80, CPC, he was required to give a two months' notice to the Government before filing the suit. He, therefore, filed a writ petition in the High Court. Without going into the merits of the case, the High Court ordered the Government to desist from disturbing the lessee's possession for three months. For the purpose of appeal under Art. 132, the Supreme Court treated the High Court order as 'final' as it finally disposed of the writ petition and the fact that the order was to operate for a limited duration would not make it other than a final order for the purpose of Appeal under Art. 132 against such order.[85]

(2) Article 132(1) uses the expression "civil, criminal or other proceeding". The purpose of referring to "other proceeding" is to emphasize that adjudications made in proceedings which cannot be included in the description of 'civil' or 'criminal' would still fall under Art. 132(1) in case they raise a substantial question of law as to the interpretation of the Constitution.

There are certain proceedings which may be regarded as neither civil nor criminal, *e.g.*, proceeding for contempt of court; for exercise of disciplinary jurisdiction against lawyers or other professionals, such as, chartered accountants.

Proceedings relating to taxation laws are not excluded. The object of taxation laws is to collect revenue for the state and such laws directly affect the civil rights of the taxpayers. If a tax is levied by the State not in accordance with law, any proceeding to obtain relief would be regarded as a civil proceeding.

Article 132 excludes no decision if it involves a substantial question of constitutional interpretations provided that the decision may be characterized as a "judgment, decree, or final order".[86]

(3) The case ought to involve a question of law as to interpretation of the Constitution. It means that decision on the question of constitutional law should be necessary for the proper decision of the case.

The question of interpretation can arise only if two or more possible constructions are sought to be placed on a constitutional provision—one party suggesting one construction and the other a different one. But where

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84. See, *Prem Chand v. State of Bihar,* AIR 1951 SC 14; *Jethanand & Sons v. State of Uttar Pradesh,* AIR 1961 SC 794 : (1961) 3 SCR 754; *Syedna Taher v. State of Bombay, supra.*

85. *State of Orissa v. Madan Gopal,* AIR 1952 SC 12 : 1952 SCR 28. See also *Tamilnadu Mercantile Bank Shareholder Welfare Assn. (2) v. S.C. Sekar,* (2009) 2 SCC 784 : (2008) 13 JT 49.

86. *Narayan Row v. Ishwarlal,* AIR 1965 SC 1818; *Ramesh v. Govindlal Motilal Patni,* AIR 1966 SC 1445, 1447.

the parties agree on the true interpretation of a constitutional provision, or do not raise any question in respect thereof, it is not possible to hold that a question of interpretation of the Constitution has arisen.[87]

(4) The question involved must be a "substantial question". A question is not 'substantial' when the law on the subject has been finally and authoritatively settled by the Supreme Court, and what remains to be done by the High Court is only to apply that interpretation to the facts before it.[88]

A 'substantial' question does not mean a question of general importance but a question regarding which there is a difference of opinion.

(b) OTHER FEATURES OF ART. 132

(1) Technically, the Supreme Court can hear an appeal under Art. 132(1) from the decision of a single High Court Judge on grant of the necessary certificate by him. But the Supreme Court has emphasized that this should be done "in very exceptional cases where a direct appeal is necessary and in view of the grave importance of the case an early decision of the case must in the larger interest of the public or similar reasons be reached".[89]

In ordinary circumstances, an appeal from a single judge should first be taken to a Division Bench of the High Court and then an appeal can be brought before the Supreme Court on grant of the necessary certificate by the Division Bench.

(2) If the High Court refuses to grant the necessary certificate, under Art. 132, the Supreme Court can still hear the appeal under Art. 136.[90]

(c) CIVIL MATTERS

Under Art. 133(1), an appeal lies to the Supreme Court from any judgment, decree or final order in a *civil* proceeding of a High Court if it certifies—

(*a*) that the case involves a substantial question of law of general importance; and

(*b*) that in the opinion of the High Court, the said question needs to be decided by the Supreme Court.

Before 1972, there was a right of appeal to the Supreme Court from a decision of a High Court if the subject-matter involved in the dispute was valued at Rs. 20,000 or more. This has now been changed. The change has been effected because valuation test is not a true yardstick for the right to appeal to the Supreme Court.

On the one hand, it is not necessary that important questions of law must be involved in every case valuing Rs. 20,000 or more. On the other hand, an impor-

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87. *State of Jammu & Kashmir v. Ganga Singh*, AIR 1960 SC 356, 359.

88. See, *T.M. Krishnaswami Pillai v. Governor-General in Council*, AIR 1947 FC 37; *State of Mysore v. Chablani*, AIR 1958 SC 325; *Bhagwan Swarup v. State of Maharashtra*, AIR 1965 SC 682 : (1964) 2 SCR 378.

89. *Union of India v. Jyoti Prakash Mitter*, AIR 1971 SC 1093, 1100 : (1971) 1 SCC 396.
Also see, *R.D. Agrawala v. Union of India*, AIR 1971 SC 299 : (1970) 1 SCC 708.

90. See, *infra*, Sec. D., for discussion on Art. 136.

tant question of law can arise in any case whatsoever may be the value of the subject-matter involved. Now, an appeal may go to the Supreme Court in any case involving an important question of law even though the value of the subject-matter involved may not be large.

Article 133 discards the distinction between appellate and original jurisdictions of the High Court. Art. 133 deliberately uses words which are as wide as language can make them. It includes all judgments, decrees and orders passed in the exercised of appellate or ordinary original civil jurisdiction.

No appeal in a civil matter lies to the Supreme Court as a matter of right. An appeal can lie only on a certificate of the High Court which is issued when the above two conditions are satisfied.

Under Art. 133(2), any party appealing to the Supreme Court under Art. 133(1), may urge as a ground that a substantial question of law as to the interpretation of the Constitution has been wrongly decided.

Under Art. 133(3) unless Parliament provides otherwise, no appeal lies to the Supreme Court from the judgment, decree or final order of a single High Court Judge.

For purposes of Art. 133(1), the proper test to determine whether a question of law is substantial or not is whether it is of general public importance, or whether it directly and substantially affects the rights of the parties, and if so, whether it is either an open question in the sense that it is not finally settled by the highest court, or is not free from difficulty, or calls for discussion of alternative views.

A question of law which is fairly arguable, or when there is room for difference of opinion on it, or when the court thinks it necessary to deal with that question at some length and discuss alternative views, would be regarded as a substantial question of law. But, it would not be so if the question is practically covered by the decision of the highest court, or the general principles to be applied in determining the question are well-settled, and the only question is that of applying these principles to the particular facts of the case.[91]

The Supreme Court has emphasized that for grant of the certificate, the question, howsoever important and substantial, should also be of such pervasive import and deep significance that in the High Court's judgment it imperatively needs to be settled at the national level by the highest court, otherwise the Apex Court will be flooded with cases of lesser magnitude.[92]

The High Court must specify in the certificate the substantial question of law requiring determination by the Supreme Court and the reasons in support of issuance of the certificate.

A certificate on a question of law by the High Court is not bad because it does not specify the substantial question of law to be decided by the Supreme Court. The Court can hear the appeal if it is satisfied that the appeal involves substantial questions of law of great importance.[93]

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91. *Nathoo Lal v. Durga Prasad,* AIR 1954 SC 355 : (1955) 1 SCR 51; *Chunnilal Mehta v. Century Spinning & M. Co. Ltd.,* AIR 1962 SC 1314 : 1962 Supp (3) SCR 549; *Khas Busra Coal Concern v. Ram Nagina Singh,* AIR 1968 Cal. 391; *M. Gopaiah v. SMSLC Coop. Soc.,* AIR 1981 AP 182; *Durga Associates, Raipur v. State of U.P.,* AIR 1982 All. 490.

92. *State Bank of India v. N. Sundara Money,* AIR 1976 SC 1111 : (1976) 1 SCC 822.

93. *State of Kerala v. Attesee (Agro Industrial Trading Corp.),* AIR 1989 SC 222 : 1989 Supp (1) SCC 733.

The certificate granted by the High Court does not obligate the Supreme Court to hear the case, and it is entitled to determine whether the certificate was rightly granted, and whether the conditions pre-requisite to the grant were satisfied.

The grant of the certificate is within the discretion of the High Court but the discretion is a judicial one and it must be judicially exercised. Therefore, the certificate must show on its face that the High Court's discretion was invoked and exercised. If on the face of a High Court's order, it is apparent that the Court has misdirected itself and considered that its discretion was fettered when it was not, or that it had no discretion, then the Supreme Court will either remit the case to the High Court, or treat it as falling under Art. 136.[1]

When there is no justification for issuing the certificate by the High Court, the Supreme Court can always revoke it. In *Express Newspapers Ltd. v. State of Madras*,[2] the SupremeCourt revoked the certificate granted by the High Court as, in the opinion of the Supreme Court, on facts, no substantial question of law was involved.[3]

When the High Court has given such a certificate then the appeal before the Supreme Court is not limited only to the specific question of law, but the entire appeal will be before the Court.[4] In an appeal to the Supreme Court under Art. 133, a question of constitutional law may also be raised [Art. 133(2)].

No appeal lies to the Supreme Court, under Art. 133, from the decision of a single Judge of the High Court, but Parliament has power to provide otherwise [Art. 133(3)].

In exercising its jurisdiction under Article 133, the Supreme Court does not ordinarily interfere with findings of fact and it is all the more reluctant to do so when there are concurrent findings of the two courts below.[5] This, however, is not an absolute rule. The Court may interfere if findings of fact are unsupported by evidence on record, or are based on a misreading of evidence, or on non-advertence to material evidence bearing on the question and to the probabilities of the case, or where the appreciation of evidence by the court below has resulted in miscarriage of justice.[6]

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1. *Nar Singh v. State of U.P.*, AIR 1954 SC 457 : 1955 (1) SCR 238; *Ahmedabad Mfg. and Calico Printing Co. v. Ramtahel*, AIR 1972 SC 1598 : 1972 (1) SCC 898; *Biswabani Pvt. Ltd. v. Santosh Kumar*, AIR 1980 SC 226 : (1980) 1 SCC 185.

2. AIR 1981 SC 968 : (1981) 2 SCC 479. Also see, *M. Satyanarayana v. State of Karnataka*, AIR 1986 SC 1162 : (1986) 2 SCC 512.

3. *M. Satyanarayana v. State of Karnataka*, AIR 1986 SC 1162; *Biswani Pvt. Ltd. v. S.K. Dutta*, AIR 1980 SC 226 : (1980) 1 SCC 185; *M.M.Gupta v. State of J&K*, AIR 1982 SC 1579 : 1983 (3) SCC 412.

4. *V.T.S. Chandrasekhar Mudaliar v. Khulandaivelu Mudaliar*, AIR 1963 SC 185 : 1963 (2) SCR 440; *Raghavamma v. Chenchamma*, AIR 1964 SC 136 : (1964) 2 SCR 933; *Balai Chandra v. Shewdhari Jadav*, AIR 1978 SC 1062.

5. *Rajinder Chand v. Mst. Sukhi*, AIR 1957 SC 286 : 1956 SCR 889; *T.P. Daver v. Lodge Victoria*, AIR 1963 SC 1144 : 1964 (1) SCR 1; *Union of India v W.P. Factories*, AIR 1966 SC 395 : 1966 (1) SCR 580; *Ram Sharan Yadav v. Thakur Muneshwar Nath Singh*, AIR 1985 SC 24 : 1984 (4) SCC 649; *Bhupinder Singh v. State of Punjab*, AIR 1988 SC 1011 : 1988 (3) SCC 513; *State of Andhra Pradesh v. Kalva Suryanarayana*, AIR 1992 SC 797 : 1992 (2) SCC 732; *State of Himachal Pradesh v. Maharani Kam Sundri*, AIR 1993 SC 1162. *Gafar v. Moradabad Development Authority*, (2007) 7 SCC 614, at page 621 : (2007) 10 JT 196.

6. *D.C. Works Ltd. v. Saurashtra*, AIR 1957 SC 264; *Nathan v. S. V. Marthu Rao*, AIR 1965 SC 430; *Catholics v. Paulo Aviro*, AIR 1959 SC 31; *Ramji Dayawala & Sons Ltd. v. Invest Import*, AIR 1981 SC 2085 : (1981) 1 SCC 80; *Ganga Bishan v. Jai Narain*, AIR 1986 SC 441 : (1986) 1 SCC 75; *Kamu v. M. Muthayya*, AIR 1993 SC 1689 : 1993 Supp (2) SCC 135.

Except for exceptional circumstances, the Supreme Court would not allow a plea or a question to be raised for the first time before it, if the same has not been raised earlier in the courts below,[7] especially if it is a question of fact,[8] or a mixed question of law and fact,[9] but the Court may allow the contention to be raised if it goes to the root of the jurisdiction and authority of the concerned body.[10]

A new plea on a pure question of law not involving any investigation into facts may be raised for the first time in the Supreme Court.[11] Nor does the Supreme Court interfere with the discretion of the High Court unless the court has acted on some wrong principle, or committedsome error of law, or has failed to consider matters which demand consideration, or has ignored various relevant considerations.[12]

The Supreme Court has emphasized that judicial discretion is to be exercised according to the well established judicial principles, according to reason and fair play, and not according to whim and caprice. Judicial discretion means sound discretion governed by law. It must not be arbitrary, vague and fanciful.[13]

When the appellant/respondent applies for a larger relief, the Supreme Court has power to mould the relief and grant a smaller relief than what is prayed for.[14]

WHAT IS A CIVIL PROCEEDING?

Article 133 covers all civil proceedings. The term 'civil proceeding' includes all proceedings affecting civil rights which are not criminal.

Proceedings under Art. 226 are regarded as civil proceedings for purposes of Art. 133.

Does an appeal lie to the Supreme Court under Art. 133 from a decision of the High Court on a writ petition under Art. 226 pertaining to a revenue matter? It was argued, in the first place, that the writ proceeding before the High Court is not a 'civil proceeding' within the meaning of Art. 133. In the second place, even if a proceeding for the issue of a writ under Art. 226 may be characterised as a

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7. *K. Chettiar v. A.S.P.A Chettiar,* AIR 1967 SC 1395 : (1967) 1 SCR 275; *M.R.S.T Corp. v. S.T. Authority,* AIR 1972 SC 2110 : (1973) 4 SCC 222; *Bombay Municipality v. Advance Builders,* AIR 1972 SC 793 : (1971) 3 SCC 381; *Dalpat Abasaheb Solunke v. B.S. Mahajan,* AIR 1990 SC 434 : (1990) 1 SCC 305; *State Bank of Travancore v. E.J. Joseph,* AIR 1993 SC 1265 : 1993 Supp (2) SCC 530; *Kurukshetra University v. Jyoti Sharma,* AIR 1998 SC 3385 : (1998) 6 SCC 763.

In *Asstt. Collector of Central Excise, Guntur v. Ramdev Tobacco Company,* AIR 1991 SC 506 : (1991) 2 SCC 119, the Supreme Court entertained a pure question of law even if it was not raised before the High Court.

8. *M.O.H. Uduman v. M.O.H. Aslum,* AIR 1991 SC 1020 : (1991) 1 SCC 412.

9. *Shibji Khetshi Thacker v. Commissioner of Dhanbad Municipality,* AIR 1978 SC 836 : (1978) 2 SCC 167; *Uduman v. Aslum,* AIR 1991 SC 1020 : (1991) 1 SCC 412; *M.P. Electricity Board v. Vijaya Timber Co.,* AIR 1997 SC 2364 : (1997) 1 SCC 68.

10. *Municipal Board, Saharanpur v. Imperial Tobacco of India Ltd.,* AIR 1999 SC 264 : (1991) 1 SCC 566.

11. *Bombay Municipality v. Advance Builders,* AIR 1972 SC 793 : (1971) 3 SCC 381; *State of Punjab v. R.N. Bhatnagar,* AIR 1999 SC 647 : (1999) 2 SCC 380.

12. *Devendra Pratap v. State of U.P.,* AIR 1962 SC 1334 : 1962 Supp (1) SCR 315; *Union of India v. Kamalabai,* AIR 1968 SC 377 : (1968) 1 SCR 463; *Ramji Dayawala, infra,* footnote 13.

13. *Ramji Dayawala & Sons (P.) Ltd. v. Invest Import,* AIR 1981 SC 2085 : (1981) 1 SCC 80.

14. *Divisional Level Committee v. Harswarup Drug Udyog,* AIR 1999 SC 878 : (1999) 2 SCC 272.

'civil proceeding', it cannot be so treated when the aggrieved petitioner seeks relief against the levy of tax or revenue claimed to be due to the state.

The Supreme Court rejected the argument. The Court has defined a 'civil proceeding' as one in which a person seeks to enforce by appropriate relief the alleged infringement of his civil rights against another person or the state, and which, if the claim is proved, would result in the declaration-express or implied of the right claimed, and the relief, such as, payment of debt, damages, compensation, delivery of specific property, enforcement of personal rights, determination of status *etc*.

A proceeding for relief against infringement of a civil right of a person is a "civil proceeding" even if the infringement be in purported enforcement of a taxing statute. Through a writ petition, the extraordinary jurisdiction of the High Court to issue writs granting relief in special cases to persons aggrieved by the exercise of authority-statutory or otherwise-by public officers or authorities is invoked. The writ is "special and exclusive".

Where a revenue authority seeks to levy tax or threatens action in purported exercise of powers conferred by an Act relating to revenue, the primary impact of such an act or threat is on the civil rights of the party aggrieved. When relief is claimed in that behalf, it is a civil proceeding, even if a relief is claimed not in a suit but by resort to the extraordinary jurisdiction of the High Court to issue writs.[15]

(d) CRIMINAL MATTERS

The provisions in the Constitution (Art. 134) regulating criminal appeals to the Supreme Court are so designed as to permit only important criminal cases to come before it.

Article 134 confers a limited criminal appellate jurisdiction on the Supreme Court. The Supreme Court hears appeals only in exceptional criminal cases where justice demands interference by the Apex Court. It was necessary to restrict the flow of criminal appeals to the Supreme Court otherwise a large number of such appeals would have made it physically impossible for the Court to cope with them.

In the first place, under Art. 134(1)(*a*), an appeal lies to the Supreme Court from any judgment, final order or sentence of a High Court in a criminal proceeding if the High Court has, on appeal, reversed an order of acquittal of an accused person and sentenced him to death.

The word 'acquittal' in this provision has been interpreted rather broadly. 'Acquittal' does not mean merely that the trial should have ended in a complete acquittal but would also include a case where an accused has been acquitted of the charge of murder and convicted of a lesser offence, and, on appeal, the High Court reverses the decision of the trial court and convicts the accused of murder; it would amount to reversing an order of acquittal and the accused is entitled to appeal to the Supreme Court.

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15. *Narayan Row v. Ishwarlal,* AIR 1965 SC 1818, 1822 : (1966) 1 SCR 190.
A**lso** see, *Arbind Kumar v. Nand Kishore,* AIR 1968 SC 1227 : (1968) 3 SCR 322.

In *Tarachand*,[16] the accused was charged for murder under s. 302, IPC. The trial court convicted him under s. 304, IPC, instead of s. 302. On appeal, the High Court reversed the order of the trial court and convicted him under s. 302, IPC, and sentenced him to death. The Supreme Court held that the accused was entitled to appeal under Art. 134(1)(*a*) as the word "acquittal" therein does not mean complete acquittal.

No appeal would lie under this provision if the High Court reverses an order of conviction of an accused and acquits him. Under Art. 134(1)(*a*) an appeal lies *as of right* to the Supreme Court.[17]

In the second place, under Art. 134 (1)(*b*), an appeal lies to the Supreme Court if the High Court has withdrawn for trial a case from a lower court and sentenced the accused to death.

Thirdly, under Art. 134(1)(*c*), the Supreme Court can hear an appeal in a criminal case if the High Court certifies that the case is a fit one for appeal to the Supreme Court.

Under Art. 134 (1)(*c*), *prima facie*, a High Court appears to enjoy an unqualified power to grant fitness certificates in criminal cases. But to control the flow of criminal appeals to itself, the Supreme Court has laid down certain guiding norms for the High Court to follow in granting such certificates. Generally, it is not to be granted as a matter of course on the mere ground that the impugned decision is erroneous. It is to be granted only when some exceptional or special circumstances exist, such as, infringement of essential principles of justice, or some difficult questions of law of great public or private importance, or when there has been in substance no fair trial.[18]

A certificate should be granted when a case involves a substantial question of law and not mere questions of fact.[19]

The Supreme Court has frequently impressed on the High Courts that they should exercise their discretion to grant the certificate not mechanically but judicially and after applying their mind.[20] The Supreme Court said in *Babu v. State of Uttar Pradesh*,[21] that the power under Art. 134(1)(*c*) conferred on the High Court is discretionary which is to be exercised on judicial principles.

The jurisdiction conferred on the Supreme Court is not that of an ordinary court of criminal appeal. Before granting a certificate, the High Court must be satisfied that it involves some substantial question of law or principle. The certificate itself should give an indication of what substantial question of law or principle is involved in the appeal to bring it within the scope of Art. 134(1)(*c*). The High Courts should exercise their discretion sparingly and with care.

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16. *Tarachand v. State*, AIR 1962 SC 130 : 1962 (2) SCR 775.
17. *Chandra Mohan Tiwari v. State of Madhya Pradesh*, AIR 1992 SC 891 : (1992) 2 SCC 105.
18. *Mohinder Singh v. State*, AIR 1953 SC 415; *State of Bihar v. Bhagirath*, AIR 1973 SC 2198 : (1973) 3 SCR 937; *Chittaranjan v. State of West Bengal*, AIR 1963 SC 1696 : (1964) 3 SCR 237; *Sidheswar v. State of West Bengal*, AIR 1958 SC 143 : 1958 SCR 749.
19. *Haripada Dey v. State of West Bengal*, AIR 1956 SC 757 : 1956 SCR 639; *Mohanlal v. State of Gujarat*, AIR 1968 SC 733 : (1968) 2 SCR 685.
20. *Narsingh v. State of Uttar Pradesh*, AIR 1954 SC 457.
21. AIR 1965 SC 1467.

The grant of a certificate by a High Court does not preclude the Supreme Court from determining whether it has been properly granted or not. Where the Apex Court has found that the certificate is not in compliance with the requirements of Art. 134(1)(*c*), it has declined to accept the certificate.

In *Baladin v. State of Uttar Pradesh*,[22] the Allahabad High Court, at the end of the judgment, just recorded the order "Leave to appeal to Supreme Court granted." Refusing to accept the appeal, the Supreme Court held that the High Court had exercised its discretion mechanically and not 'judicially'. The High Court's order did not show what had induced it to grant this leave, or what points of outstanding importance required to be settled. It was not enough to say "leave to appeal is granted".

In *State of Assam v. Abdul Noor*,[23] the Supreme Court declined to accept the certificate as it did not indicate any reason as to why the High Court granted the certificate.[24]

Under Art. 134(1)(*c*), the jurisdiction of the Apex Court is attracted by reason of the certificate granted by the High Court. Where the Supreme Court declines to accept the certificate under Art. 134(1)(*c*), it may permit the appellant to apply under Art. 136 in proper cases.[25]

Article 134(1)(*c*) is there to meet only extraordinary cases; normal right to appeal has been given by the other two clauses of Art. 134 (1). Under Art. 134(1)(*c*), the Supreme Court does not act as a general court of criminal appeal. It does not, therefore, go into pure questions of fact and weigh and appraise evidence afresh unless there are circumstances which make the Court feel that there has been a miscarriage of justice.[26] The main function of the Court is to see that the accused gets a fair trial on proper evidence.[27]

Generally, the Supreme Court does not interfere with the finding of fact arrived at after proper appreciation of evidence by the courts below. However, if such a finding is perverse, based on no evidence or based upon such evidence which is inadmissible or is the result of imaginative hypothesis, conjectures, illegal assumptions and presumptions, the Supreme Court is entitled to reappreciate the evidence to ascertain the decision of the lower court.[28]

Where the two courts below came to different conclusions, the Supreme Court appreciated the entire evidence to see whether the findings of the trial court were so unreasonable and unrealistic as to call for interference therewith. The Supreme

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22. AIR 1956 SC 181 : 1956 Cri LJ 345.
Also see, *Sunder Singh v. State of Uttar Pradesh*, AIR 1956 SC 411 : 1956 Cri LJ 801; *State of Assam v. Abdul Noor*, AIR 1970 SC 1365 : (1970) 3 SCC 10.

23. AIR 1970 SC 1365, 1366 : (1970) 3 SCC 10.

24. *Thakara v. State of Maharashtra*, (1969) 3 SCC 369.

25. *Baladin v. State of Uttar Pradesh*, AIR 1956 SC 181; *State of Assam v. Abdul Noor*, AIR 1970 SC 1365 : (1970) 3 SCC 10.
For Art. 136, see, *infra*, Sec. D.

26. *A.J. Peiris v. State of Madras*, AIR 1954 SC 616 : 1954 Cri LJ 1638; *Vijendrajit v. State of Bombay*, AIR 1953 SC 247; *Mohinder Singh v. State of Punjab*, AIR 1965 SC 79.

27. *Darshan Singh v. State of Punjab*, AIR 1953 SC 83 : 1953 SCR 319.

28. *Ramanbhai Naranbhai Patel v. State of Gujarat*, (2000) 1 SCC 358 : 2000 SCC (Cri) 113; *State of Punjab v. Jugraj Singh*, (2002) 3 SCC 234 : AIR 2002 SC 1083. See also *State of MP v. Dharkole*, (2004) 13 SCC 308 : AIR 2005 SC 44.

Court restored the conviction recorded by the trial court as the High Court decision, based as it was on insignificant and flimsy reasons, was not sustainable.[29]

The Supreme Court is very reluctant to interfere with concurrent findings of fact save in most exceptional cases, as for example, when facts have been arrived at disregarding legal principles, or where the conclusion arrived at by the courts below is improper and perverse, or where the evidence is such that no tribunal could legitimately infer from it that the accused is guilty, or when the accused has been convicted even though evidence is wanting on a most material part of the prosecution.[30]

Where in a serious charge of murder, conviction of the accused was based solely on the evidence of an eye-witness, the Court may examine his evidence to satisfy itself as to whether the courts below were justified in placing reliance upon the said testimony. In the instant case, after examining the evidence of the eye witness the Supreme Court reversed the conviction of the appellant and set him free.[31]

In a case where both the courts below instead of dealing with the intrinsic merits of the evidence of the witnesses, have acted perversely by summarily disposing of the case, ignoring the manifest errors and glaring infirmities appearing in the case, the Court thought it fit to interfere.[32]

Under Art. 134(2), Parliament is authorised to enlarge the criminal appellate jurisdiction of the Supreme Court. Accordingly, Parliament has enacted the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970, further authorising the Supreme Court to hear appeals from a High Court in the following two situations:

(1) If the High Court has on appeal reversed an order of acquittal of an accused and sentenced him to imprisonment for life or for a period of not less than 10 years. In such a situation, appeal to the Supreme Court lies even on facts and as a matter of right.[33]

(2) The High Court has withdrawn for trial before itself any case from a subordinate court and has convicted the accused and sentenced him to imprisonment for life or for a period of not less than 10 years.

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29. *State of Uttar Pradesh v. Vinod Kumar,* AIR 1992 SC 1011. Also, *State of Uttar Pradesh v. Ravindra Prakash Mittal,* AIR 1992 SC 2045; *Sukhchain Singh v. State of Haryana,* (2002) 5 SCC 100 : 2002 SCC (Cri) 341.

30. *Damodaran v. T.C.,* AIR 1953 SC 462 : 1953 Cr LJ 1928; *Mathew v. T.C.,* AIR 1956 SC 241 : (1955) 2 SCR 1057; *Badri Rai v. State of Bihar,* AIR 1958 SC 953 : 1959 SCR 1141; *Janak Singh v. State of Uttar Pradesh,* AIR 1972 SC 1853 : (1973) 3 SCC 50; *Dadarao v. State of Maharashtra,* AIR 1974 SC 388 : (1974) 3 SCC 630; *Ajaib Singh v. State of Haryana,* (1992) Supp (2) SCC 338 : (1992) SCC (Cri) 941, *State of Uttar Pradesh v. Vinod Kumar,* AIR 1992 SC 1011 : (1992) 2 SCC 536; *Sudama Pandey v. State of Bihar,* (2002) 1 SCC 679 : AIR 2002 SC 293.

31. *Mohanlal v. State of Rajasthan,* AIR 2000 SC 3441 : (1999) 9 SCC 209.

32. *Narendra Pratap Narain Singh v. State of Uttar Pradesh,* AIR 1991 SC 1394 : (1991) 2 SCC 623.

33. *Podda Narayana v. State of Andhra Pradesh,* AIR 1975 SC 1252 : (1975) 4 SCC 153; *Ram Kumar Pande v. State of Madhya Pradesh,* AIR 1975 SC 1026 : (1975) 3 SCC 815; *Chandra Mohan Tiwari v. State of Madhya Pradesh,* AIR 1992 SC 891 : (1992) 2 SCC 105.

(e) ISSUE OF CERTIFICATE BY A HIGH COURT

Appeals to the Supreme Court in constitutional (Art. 132), civil (Art. 133), and criminal matters (Art. 134) lie on a certificate being granted by the concerned High Court. To facilitate the grant of such a certificate, and to reduce any delay in completing this formality, certain provisions have been made by Art. 134A.

A High Court may grant a certificate, if it deems fit to do so, on its own motion. In the alternative, an oral application can be made on behalf of the aggrieved party immediately after the judgment, decree, final order or sentence. The High Court can thereafter decide, as soon as may be, whether a certificate may be given in that case to take an appeal from its decision to the Supreme Court.[34]

The Supreme Court has emphasized that Art. 134A does not constitute an independent provision for issue of a certificate. Art. 134A has been enacted to make good the deficiencies in Arts. 132, 133 and 134 regarding the time and manner in which an application for a certificate under any of these Articles can be made before the High Court and as to the power of the High Court to issue a certificate *suo motu* under any of these Articles.

Article 134A is ancillary to Arts. 132(1), 133(1) and 134(1)(*c*). The High Court can issue a certificate only when it is satisfied that the conditions in Arts. 132, 133 or 134, as the case may be, are satisfied. A single judge granted a certificate under Art. 134A without referring to the article under which the appeal could be filed. The Supreme Court revoked the certificate as the case could fall under Art. 133(1), but such a certificate could not be granted because of the bar imposed by Art. 133(3). The Supreme Court however permitted the appellant to apply under Art. 136.[35]

D. APPEAL BY SPECIAL LEAVE : ART. 136

Over and above the constitutional provisions mentioned above regulating the Supreme Court's appellate jurisdiction, Art. 136(1) empowers the Supreme Court to grant, in its discretion, special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.[36]

Article 136 runs as follows:

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

Article 136(2) excludes from the scope of Art. 136(1) any judgement or order passed by a tribunal functioning under a law relating to the Armed forces.[37]

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34. *Keshava v. Ramachandra,* AIR 1981 Kant. 97 holds that a party which fails to make an oral application cannot make a written application later.

35. *State Bank of India v. S.B.I. Employees' Union of India,* AIR 1987 SC 2203 : (1987) 4 SCC 370.

36. This, however, is subject to Art. 363; see, *supra,* Sec. C(iii)(d).
Also see, Ch. XXXVII, Sec. E., *infra,* for discussion on Art. 363. See generally The Supreme Court Rules, 1956, Order XVI.

37. The Supreme Court has suggested that appeals be provided for from courts martial to the courts. "Absence of even one appeal with power to review evidence, legal formulation, conclusion and adequacy or otherwise of punishment is a glaring lacuna in a country where a counterpart civilian convict can prefer appeal after appeal to hierarchy of courts", the Supreme Court has observed: see, *THE HINDU* (Int'l Ed.), Sept. 4, 1982 at p. 7.

Article 136 confers a special jurisdiction on the Supreme Court. It opens with a *non-obstante* clause, *viz.* "Notwithstanding anything in this chapter". This means that the power of the Supreme Court under Art. 136 is unaffected by Arts. 132, 133, 134 and 134(A).

The power given to the Supreme Court by Art. 136(1) is in the nature of residuary power. The power is plenary in the sense that there are no words in Art. 136 qualifying that power. It is a sweeping power, exercisable outside the purview of ordinary law to meet the pressing demands of justice. The Supreme Court has characterised its power under Art. 136 as "an untrammelled reservoir of power incapable of being confined to definitional bounds; the discretion conferred on the Supreme Court being subjected to only one limitation, that is, the wisdom and good sense of justice of the Judges".[38]

The Supreme Court has described the nature of its power under Art. 136 as follows:[39]

> "The exercise of jurisdiction conferred by Art. 136 of the Constitution on this Court is discretionary. It does not confer a right to appeal on a party to litigation; it only confers a discretionary power of widest amplitude on this Court to be exercised for satisfying the demands of justice. On the one hand, it is an exceptional power to be exercised sparingly, with caution and care and to remedy extraordinary situations or situations occasioning gross failure of justice; on the other hand, it is an overriding power whereunder the court may generously step in to impart justice and remedy injustice."

The Supreme Court has commented from time to time on the plenitude of its power under Art. 136. For example, in *Durga Shankar v. Raghu Raj*,[40] the Court has observed:

> "The powers given by Art. 136 of the Constitution however are in the nature of special or residuary powers which are exercisable outside the purview of ordinary law, in cases where the needs of justice demand interference by the Supreme Court of the land. The article itself is worded in the widest terms possible. It vests in the Supreme Court a plenary jurisdiction in the matter of entertaining and hearing appeals, by granting of special leave, against any kind of judgment or order made by a court or tribunal in any cause or matter and the powers could be exercised in spite of the specific provisions for appeal contained in the Constitution or other laws. The Constitution for the best of reasons did not choose to fetter or circumscribe the powers exercisable under this article in any way".

The power has been held to be plenary, limitless,[41] "adjunctive", and unassailable on the grounds of unconstitutionality.[42] A word of caution was sounded in *M.C. Mehta v. Union of India*[43] to the effect that judicial discretion has to be exercised in accordance with law and set legal principles. Also where an order was

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38. *Kunhayammed v. State of Orissa*, AIR 2000 SC 2587, 2593 : (2000) 6 SCC 359.
39. *Narpat Singh v. Jaipur Development Authority*, (2002) 4 SCC 666, at 674 : AIR 2002 SC 2036. *N. Suriyakala v. A. Mohandoss*, (2007) 9 SCC 196 : (2007) 3 JT 266.
40. AIR 1954 SC 520 : (1955) 1 SCR 267.
41. *Esher Singh v. State of A.P.*, (2004) 11 SCC 585, 603 : AIR 2004 SC 3030*; A.V. Papayya Sastry v. Govt. of Andhra Pradesh*, (2007) 4 SCC 221, 237 : AIR 2007 SC 1546.
42. *Zahira Habibullah Sheikh v. State of Gujarat*, (2004) 5 SCC 353 : AIR 2004 SC 3467.
43. (2004) 6 SCC 588, 613 : AIR 2004 SC 4618. See also *Ramakant Rai v. Madan Rai*, (2003) 12 SCC 395, 403 : AIR 2004 SC 77; *Aero Traders (P) Ltd.v. Ravinder Kumar Suri*, (2004) 8 SCC 307 : AIR 2005 SC 15*; Esher Singh v. State of A.P. (Supra)*

passed without jurisdiction by the Supreme Court, it was corrected in a subsequent SLP arising out of the same proceedings before the High Court.[44]

The Supreme Court has observed in *Pritam Singh v. The State*,[45] that the power under Art. 136—

> "is to be exercised sparingly and in exceptional cases only, and as far as possible, a more or less uniform standard should be adopted in granting special leave in the wide range of matters which can come up before it under this Article. By virtue of this Article, we can grant special leave in civil cases, in criminal cases, in income-tax cases, in cases which come up before different kinds of tribunals and in a variety of cases."

The Court has emphasized:

> "The only uniform standard which in our opinion can be laid down in the circumstances is that Court should grant special leave to appeal in those cases where special circumstances are shown to exist."

In conclusion, the Court has said:

> "Generally speaking, this Court will not grant special leave, unless it is shown that exceptional and special circumstances exist, that substantial and grave injustice has been done and that the case in question presents features of sufficient gravity to warrant a review of the decision appealed against."

Despite earlier pronouncements that the jurisdiction under Art. 136 should be utilized for determining only substantial questions of law and not for redeeming injustice in individual cases, the power has been utilized increasingly to determine individual controversies because a case has "failed to receive the needed care, attention and approach…and the conscience of this Court pricks it or its heart bleeds for imparting justice or undoing injustice".[46]This element of emotional subjectivity in the assessment of what constitutes an "injustice" would necessarily result in greater uncertainty in the outcome of a proceeding before the Supreme Court. Matters are disposed of "as a one time measure without laying down any law or creating precedent".[47] The Court has, on occasion, while setting aside the judgment of the High Court not interfered with the relief granted having regard to the circumstances of the case and in the interest of justice.[48] Recently, such "individualized justice" was deprecated by a Constitution Bench[49]as sending out confusing signals and ushering in judicial chaos "highlighting the statement, that equity tends to vary with the Chancellor's foot". More recently, the Court reiterated that "Circumspection and circumscription must…induce the Court to interfere with the decision under challenge only if the extraordinary flaws or grave injustice or other recognised grounds are made out".[50]

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44. *Neeraj Munjal v. Atul Grover*, (III) (2005) 5 SCC 404 : AIR 2005 SC 2867.
45. AIR 1950 SC 169 : 1950 SCR 453.
46. *Jamshed Hormusji Wadia v. Board of Trustees, Port of Mumbai*, (2004) 3 SCC 214, 244 : AIR 2004 SC 1815.
47. *Fokatlal Prabhulal Bhatt v. State of Gujarat*, (2004) 12 SCC 445, 447 : (2005) 5 SCALE 594; *Paramjit Gambhir v. State of M.P.*, (2003) 4 SCC 276 : AIR 2003 SC 1338.
48. *State of Punjab v. Savinderjit Kaur*, (2004) 4 SCC 58, 62 : AIR 2004 SC 1887*; Inder Prakash Gupta v. State of J&K*, (2004) 6 SCC 786, 799 : AIR 2004 SC 2523; *ONGC Ltd. v. Sendabhai Vastram Patel*, (2005) 6 SCC 454 : (2005) 7 JT 465.
49. *Secy., State of Karnataka v. Umadevi*, (2006) 4 SCC 1 26 : AIR 2006 SC 1806. See also under Art. 142 fn.
50. *Shivanand Gaurishankar Baswanti v. Laxmi Vishnu Textile Mills*, (2008) 13 SCC 323, at Page 347.

This means that once special leave is granted by the Court, and the matter is registered as an appeal, the Court does not take into cognisance all the points which may arise on appeal and decide them on merits.[51]

The Court has taken the stand that the discretionary power which is available to it at the stage of grant of special leave would be available to the Court even at the time of hearing the appeal. Thus, only those points can be urged at the final hearing of the appeal which were fit to be urged at the preliminary stage when leave to appeal was asked for. It would be illogical to adopt different standards at two different stages of the same case.[52] Even if leave is granted limited to a particular question, the Court is not bound to restrict itself to that question at the time of the final disposal of the appeal[53] provided notice of the additional questions to be determined is issued to the respondent who must also have been given an opportunity of being heard.[54]

Merely because a party has complied with the directions to give an undertaking as a condition for obtaining stay it cannot be presumed to create an impression on the other parties that he is, by such undertaking, giving up the statutory or constitutional remedies.[55]

The scope of Art. 136(1) is very comprehensive and it invests the Supreme Court with a plenary jurisdiction to hear appeals. Art. 136(1) is couched in the widest possible terms. Thus, where a criminal case arose out of a private dispute purely personal nature under commercial transaction and a settlement is arrived at by the parties to such transactions the Court was of the view that continuing the criminal proceedings would be a futile exercise and quashed the FIR and all consequent proceedings.[56] The broad and overriding nature of Art. 136 will be evident from its following features:

(1) Under Art. 136, in suitable cases, the Supreme Court can even disregard the limitations contained in Articles 132 to 134 on its appellate jurisdiction and hear appeals which it could not otherwise hear under these provisions.[57]

Arts. 132-134 provide for regular appeals from the High Courts to the Supreme Court. But there may still remain cases falling outside the purview of these Articles where it may appear necessary to hear appeals in the interest of justice. The power of the Supreme Court under Art. 136 is unaffected by Arts. 132, 133, 134 and 134A in view of the expression "notwithstanding anything in this Chapter" occurring in Art. 136.

(2) Articles 132 to 134 permit appeals only against decisions of the High Courts. Art. 136, on the other hand, does not impose any such restriction.

Art. 136 uses the phrase 'any court' and thus empowers the Supreme Court to hear appeals from judgments given not only by the High Courts but even by a subordinate court, if the situation demands that its order should be quashed or reversed even without going through the usual procedure of filing an appeal in

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51. See *infra*.
52. *Taherkhatoon v. Salambin Mohammad*, AIR 1999 SC 1104 : (1999) 2 SCC 635.
53. *Suresh Chandra v. State of UP*, (2005) 6 SCC 130 : AIR 2005 SC 3120.
54. *Punjab State Electricity Board v. Darbara Singh*, (2006) 1 SCC 121 : AIR 2006 SC 387.
55. *Southern Railway Officers Assn. v. U.O.I.*, (2009) 9 SCC 24; citing *P.R.Deshpande v. Maruti Balaram Haibatti*, (1998) 6 SCC 507 : AIR 1998 SC 2979.
56. *Jadish Chanana v. State of Haryana*, (2008) 15 SCC 704.
57. *Delhi Judicial Service Assn. v. State of Gujarat*, AIR 1991 SC 2176 : (1991) 4 SCC 406.

the High Court. Thus, in *Rajendra Kumar v. State*,[58] the Supreme Court heard an appeal from the decision of the Chief Judicial Magistrate. The appellant did not go to the High Court but came straight to the Supreme Court. The Supreme Court did however observe that it does not ordinarily entertain such petitions.

As the Supreme Court has stated in this connection:[59]

> "… the Court has special residuary power to entertain appeal against any order of any court in the country. The plenary jurisdiction of this Court to grant leave to hear appeals against any order of a court or tribunal, confers power of judicial superintendence over all courts and tribunals in the territory of India including subordinate courts of Magistrate and District Judge. This Court has, therefore, supervisory jurisdiction overall courts in India".

(3) The word 'order' in Art. 136(1) has not been qualified by the adjective 'final' as is the case in Arts. 132, 133 and 134. The Supreme Court thus has power to hear an appeal even from an interlocutory or an interim order. In practice, however, the Court does not ordinarily grant leave to appeal from an interlocutory order, but it can do so in an exceptional case.[60] Ordinarily, the parties are directed to approach the High Court for the recall, stay or modification of the interim order.[61]At times, the Supreme Court has, while dismissing such petitions requested the High Court to dispose of the matter preferably within a time frame. Use of imperative words such as "directed" and fixing a time frame within which the High Court "shall" dispose of a matter have, on occasion, led to a confrontation between the High Court and the Supreme Court.[62]

Where, for example, it appears *prima facie* that the order in question cannot be justified by any judicial standard, the ends of justice and the need to maintain judicial discipline require the Supreme Court to intervene.[63]

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58. AIR 1980 SC 1510 : (1980) 3 SCC 435.
Also see, *Usha K. Pillai v. Raj K. Srinivas*, AIR 1993 SC 2090 : (1993) 3 SCC 208, where the Supreme Court heard an appeal directly from a Magistrate's order. See also *Nawab Shaqafat Ali Khan v. Nawab Imdad Jah Bahadur*, (2009) 5 SCC 162 : (2009) 3 JT 652.

59. *Delhi Judicial Service Assn. v. State of Gujarat*, AIR 1991 SC 2176 at 2194 : (1991) 4 SCC 406.

60. *Union of India v. Swadeshi Cotton Mills*, AIR 1978 SC 1818 : (1978) 4 SCC 295; *United Commercial Bank v. Bank of India*, AIR 1981 SC 1426 : (1981) 2 SCC 766; *Joginder Nath Gupta v. Satish Chander Gupta*, (1983) 2 SCC 325; *U.P. Rajya Krishi Utpadan Mandi Parishad v. Sanjiv Rajan*, (1993) Supp. (3) SCC 483 : (1993) 2 LLJ 66; *Baby Samuel v. Tukaram Laxman Sable*, (1995) Supp (4) SCC 215; *Southern Petrochemical Industries Corp. v. Madras Refineries Ltd.*, AIR 1998 SC 302 : (1998) 9 SCC 209; *Godfrey Phillips India Ltd. v. Girnar Food and Beverages (P.) Ltd.*, (1998) 9 SCC 531. *Hardesh Ores (P) Ltd. v. Timblo Minerals (P.) Ltd.*, (2004) 4 SCC 64 : AIR 2004 SC 1884.
See for example:*Videocon Properties Ltd v. Bhalchandra Laboratories (Dr)*, (2004) 3 SCC 711, 718 : AIR 2004 SC 1787*; M. Gurudas v. Rasaranjan*, (2006) 8 SCC 367 : AIR 2006 SC 3275*; Deoraj v. State of Maharashtra*, (2004) 4 SCC 697 : AIR 2004 SC 1975; *Atma Ram Properties (P) Ltd. v. Federal Motors*, (2005) 1 SCC 705 : (2004) 10 JT 410*; M.P. Housing Board v. Anil Kumar Khiwani*, (2005) 10 SCC 796 : AIR 2005 SC 1863*; Kishor Kirtilal Mehta v. Lilavati Kirtilal Mehta Medical Trust*, (2007) 10 SCC 21 : (2007) 8 Scale 36; *Prakash Harishchandra Muranjan v. Mumbai Metropolitan Region Development Authority*, (2009) 3 SCC 432 : AIR 2009 SC 2082; *AIADMK v. Govt. of Tamilnadu*, (2009) 5 SCC 452 : (2007) 11 SCALE 607.

61. *Reserve Bank of India v. Sharada Devi*, (2005) 10 SCC 178.

62. *Spencer & Co v. Vishwadarshan Distributors(Pvt.) Ltd.*, (1995) 1 SCC 259*; Tirupati Balaji Developers (P) Ltd. v. State of Bihar*, (2004) 5 SCC 1 : AIR 2004 SC 2351.

63. *Union of India v. Era Educational Trust*, (2000) 5 SCC 57 : AIR 2000 SC 1573.

(4) The term 'determination' in Art. 136 signifies an effective expression of opinion which ends a controversy or a dispute by some authority to whom it is submitted under a valid law for disposal.

The expression 'order' also has a similar meaning except that it need not operate to end the dispute.

Determination or order must be judicial or *quasi*-judicial: a purely administrative or executive direction cannot be the subject matter of appeal to the Supreme Court. As the Supreme Court has observed:[64]

> "The essence of the authority of this Court being judicial, this Court does not exercise administrative or executive powers, *i.e.* character of the power conferred upon this court original or appellate, by its constitution being judicial, the determination or order sought to be appealed from must have the character of a judicial adjudication…"[65]

(5) Article 136(1) does not define the nature of proceedings from which the Supreme Court may hear appeals, and, therefore, it could hear appeals in any kind of proceedings whether civil, criminal, or relating to income-tax, revenue or labour disputes, *etc.*

(6) Article 136(1) confers on the Supreme Court power to hear appeals from orders and determination of any tribunal other than a military tribunal. This aspect of Art. 136(1) is very significant and is discussed in detail below.[66]

(7) Under Art. 136(1), the Supreme Court may hear appeal even though the ordinary law pertaining to the dispute makes no provision for such an appeal.

(8) Being a jurisdiction conferred by the Constitution, it cannot be diluted or circumscribed by ordinary legislative process: it can be curtailed or modified only by constitutional process.

(9) The Supreme Court may hear an appeal even where the Legislature declares the decision of a court or tribunal as final. Thus, in *Raigarh*,[67] the Supreme Court heard an appeal from an order of the Railway Rates Tribunal, Madras, in spite of s. 46A of the Railways Act, 1890, laying down that the decision of the tribunal shall be final.

(10) Under Art. 136(1), the Supreme Court has plenary jurisdiction to grant leave and hear appeals against any order of a court or tribunal. This confers on the Supreme Court power of judicial superintendence over all courts and tribunals in India including subordinate courts of magistrate and district judge.[68]

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64. *Union of India v. Era Educational Trust*, (2000) 5 SCC 57 : AIR 2000 SC 1573.

65. SHAH, J., in *Jaswant Sugar Mills v. Lakshmi Chand*, AIR 1963 SC 677 : 1963 Supp (1) SCR 242.

66. Sec. E, *infra.*

67. *Mahendra Saree Emporium (II) v. G.V. Srinivasa Murthy*, (2005) 1 SCC 481 : AIR 2004 SC 4289. In *Raigarh Jute Mills v. Eastern Rly.*, AIR 1958 SC 525 : 1959 SCR 236. Also see, *Union Carbide Corporation v. Unon of India*, (1991) 4 SCC 584 : AIR 1992 SC 248; *Usha K. Pillai v. Raj K. Srinivas*, AIR 1993 SC 2090 : (1993) 3 SCC 208; *Prashant Ramachandra Deshpande v. Maruti Balaram Haibatti*, (1995) Supp (2) SCC 539; *Union of India v. West Coast Paper Mills*, (2004) 2 SCC 747 : AIR 2004 SC 1596.

68. *Delhi Judicial Service Assn. v. State of Gujarat*, AIR 1991 SC 2176 : (1991) 4 SCC 406. See, *supra*, under "Court of Record", Sec. C(i)(b).

(11) The scope of this special appellate jurisdiction of the Supreme Court is very flexible. There are no words in Art. 136 itself qualifying the power of the Supreme Court. The matter lies within the complete discretion of the Supreme Court and the only limit upon it is the "wisdom and good sense of the Judges" of the Court.[69]

The Supreme Court has emphasized that Art. 136(1) does not confer on any one any right to appeal. It confers on the Supreme Court an overriding and extensive power to grant special leave to appeal which is in the discretion of the Court.[70] As the Supreme Court has stated: "By virtue of this article we can grant special leave in civil cases, in criminal cases, in income-tax cases, in cases which come up before different kinds of tribunals, and any variety of other cases."[71]

Under Art. 136(1), the Supreme Court can hear appeals in cases which fall outside the scope of Arts. 132, 133 and 134. The Supreme Court can hear appeal even when the High Court has refused to grant the certificate of fitness either under Arts. 132, 133 or 134.[72] Appeals on the basis of incompetent certification by the High Court under Articles 134(1)(c) and 134-A may be treated as a proceeding arising under Art. 136.[73]

(12) Art. 136 confers no right of appeal upon any party; it only vests a discretion in the Apex Court to intervene by granting leave to a petitioner to enter in its appellate jurisdiction not open otherwise and as of right.

Article 136 involves two steps, *viz.*, (i) granting special leave to appeal; and (ii) hearing the appeal. A petition seeking grant of special leave to appeal and the appeal itself, though both these stages are dealt with by Art. 136, these are to distinctly separate stages. The first stage continues up to the disposal of prayer for special leave to file an appeal. The second stage commences if and when the leave to appeal is granted and special leave petition is converted into an appeal.

At the first stage, while hearing the petition for special leave to appeal, the Supreme Court considers the question whether the petitioner should be granted such leave or not. At this stage, the Court does not exercise its appellate jurisdiction; it merely exercises its discretionary jurisdiction to grant or not to grant leave to appeal. If the petition seeking leave to appeal is dismissed, it only means that the Court feels that a case for invoking its appellate jurisdiction has not been made out. If leave to appeal is granted, then the appellate jurisdiction of the Court gets invoked. The appeal is then heard on merits.

(13) A special leave petition can be filed under Art. 136 by a person who is a party to the decision against which the appeal is sought to be filed. But a person who is not a party to the case, but is adversely affected thereby may also file the special leave petition.[74] It is within the Court's discretion to grant leave to appeal

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69. *Balakrishna Iyer v. Ramaswami Iyer*, AIR 1965 SC 195 : 1964 (7) SCR 838.
70. *Municipal Board v. Mahendran*, AIR 1982 SC 1493 : (1982) 3 SCC 331; *Laxman Marotrao Navakhare v. Keshavrao*, AIR 1993 SC 2596 : (1993) 2 SCC 270; *Hari Singh v. State of Haryana*, (1993) 3 SCC 114 : 1993 SCC (Cri) 631.
71. *Pritam Singh v. State*, AIR 1950 SC 169 : 1950 SCR 453.
72. *Achyut v. State of West Bengal*, AIR 1963 SC 1039 : (1963) 2 SCR 47; *Manickchand v. Elias*, AIR 1969 SC 751 : (1969) 1 SCC 206.
73. *State of Gujarat v. Salimbhai Abdulghaffar Shaikh*, (2003) 8 SCC 50, 54 : AIR 2003 SC 3224.
74. *See for example:State of Uttaranchal v. Sehnaz Mirza*,(2008) 6 SCC 726 : (2008) 7 JT 547.

to anyone. The Supreme Court has itself clarified the position in this respect in *Arunachalam*:[75]

> "Art. 136 of the Constitution neither confers on anyone the right to invoke the jurisdiction of the Supreme Court nor inhibits anyone from invoking the Court's jurisdiction. The power is vested in the Supreme Court but the right to invoke the Court's jurisdiction is vested in no one. The exercise of the power of the Supreme Court is not circumscribed by any limitation as to who may invoke it."

(13a) Generally, an appeal by a person who was not a party to the proceedings is not entertained.[76] However it has been held that a State has the locus standi to file an appeal even for the limited purpose of expunging adverse remarks made by the High Court against the Chief Minister.[77] An appeal by the son of the deceased victim against the order of acquittal of the accused has also been held to be maintainable.[78] So also an appeal by a person who is not a party as such in the proceeding but against whom an adverse remark is made has been entertained and the offending remarks deleted.[79]

(13b) The exercise of appellate jurisdiction under Art. 136 not being dependent on Order 41 of the Code of Civil Procedure,[80] it has been held[81] that the respondent cannot file a cross –objection on the ground that no rules have been framed by the Supreme Court governing its own practice and procedure. "If the judgment of the High Court was partly against the respondent, it ..(should) have filed an application seeking leave to appeal".

This appears to be contrary to an observation in an earlier part of the same judgment that a " person who has entirely succeeded before a court or tribunal below cannot file an appeal solely for the sake of clearing himself from the effect of an adverse finding or an adverse decision on one of the issues as he would not be a … 'person aggrieved' ".[82]

(14) In what circumstances will the Supreme Court grant leave to appeal under Art. 136 is a question to which no precise or definite answer can be given. Nor has the Court ever attempted to define its ambit meticulously or exhaustively.

In *Dhakeswari,*[83] the Court has stated in this connection: "It is not possible to define.... the limitations on the exercise of the discretionary jurisdiction vested in the Court by Article 136. The limitations whatever they may be, are implicit in the nature and character of the power itself. It being an exceptional and overriding power, naturally it has to be exercised sparingly and with caution and only in

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75. *Arunachalam v. P.S.R. Setharathnam,* AIR 1979 SC 1284 at 1287 : (1979) 2 SCC 297. Also see, *Food Corporation of India v. P.S.R. Setharathnam,* AIR 1979 SC 1406, 1409.
76. *Tirupati Balaji Developers (P) Ltd. v. State of Bihar,* (2004) 5 SCC 1 : AIR 2004 SC 2351.
77. *State of Maharashtra v. Public Concern for Governance Trust,* (2007) 3 SCC 587 : AIR 2007 SC 777.
78. *Esher Singh v. State of A.P.,* (2004) 11 SCC 585, 604 : AIR 2004 SC 3030.
79. *Samya Sett v. Sambhu Sarkar,* (2005) 6 SCC 767 : AIR 2005 SC 3309 for a full discussion on the subject.
80. *UBS AG V. State Bank of Patiala,* (2006) 5 SCC 416, 424 : AIR 2006 SC 2250.
81. *Jamshed Hormusji Wadia v. Board of Trustees, Port of Mumbai,* (2004) 3 SCC 214, 244 : AIR 2004 SC 1815.
82. This is also contrary to the views expressed in other decisions on the expunging of adverse remarks. See Note (1B) under Note N.
83. *Dhakeswari Cotton Mills Ltd. v. CIT,* AIR 1955 SC 65 : 1955 (1) SCR 941.

special and extraordinary situations. Beyond that, it is not possible to fetter the exercise of this power by any set formula or rule."

What, however, the Court has stated is that it being a special power it is to be exercised only in those cases where special circumstances are shown to exist,[84] and that whenever there is an injustice done to a party in a proceeding before a court or tribunal, or there is a miscarriage of justice, or when a question of law of general public importance arises, or a decision shocks the conscience of the Court, this jurisdiction can always be invoked. Article 136 is the residuary power of the Supreme Court to do justice where the Court is satisfied that there is injustice.[85]

In *Commr., Central Excise & Customs v. M/s. Venus Castings (P) Ltd.*[86] the Supreme Court granted leave to appeal because of the uncertainty of law. The matter arose under the Central Excise Act, 1944, and the rules made thereunder. In the instant case, on the specific question of law, different High Courts had taken different views. Accordingly the Supreme Court observed : "when there is uncertainty as to the state of law, it is eminently proper for this court to grant leave in such a matter and settle the legal position."[87] Again an application which could have been dismissed on the ground that the appellant has no *locus* standi was entertained because the court felt that as a constitutional court "we felt it to be our duty to lay down the law correctly so that similar mistakes are not committed in future."[88] A point of law has been decided in an infructuous appeal because of the divergence of views expressed by different High Courts on the issue.[89] Again, an application which could have been dismissed on the ground that the appellant has no *locus standi* was entertained because the Court felt that as a Constitutional Court "we felt it to be our duty to lay down the law correctly so that similar mistakes are not commited in future".[90]

The Supreme Court is not only a court of law but a court of equity as well.[91]

The Court has stated in this connection:[92]

> "It is not the policy of this Court to entertain special leave petitions and grant leave under Article 136 of the Constitution save in those cases where some substantial question of law of general or public importance is involved or there is manifest injustice resulting from the impugned order or judgment".

It would be open to the Supreme Court to interfere with concurrent findings of fact, if the infirmity of excluding, ignoring and overlooking the abundant materials and the evidence, if considered in proper perspective would have led to a conclusion contrary to the one taken by courts below.[93]

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84. *Ibid.*
85. *C.C.E. v. Standard Motor Products*, AIR 1989 SC 1298 : (1989) 2 SCC 303.
86. AIR 2000 SC 1568 : (2000) 4 SCC 206.
87. *Ibid*, at 1571.
88. *Raju Ramsing Vasave v. Mahesh Deorao Bhivapurkar*, (2008) 9 SCC 54, at page 74 : (2008) 9 JT 445.
89. *State of Delhi v. Sanjeev*, (2005) 5 SCC 181 : AIR 2005 SC 2080.
90. *Raju Ramsing Vasave v. Mahesh Deorao Bhivarpurkar*, (2008) 9 SCC 54 at page 74 : (2008) 9 JT 445.
91. *Chandra Bansi Singh v. State of Bihar*, AIR 1984 SC 1767 : (1984) 4 SCC 316.
92. *Kunhayammed v. State of Kerala*, AIR 2000 SC 2587, 2595 : (2000) 6 SCC 359. See also *Central Bank of India v. Madhulika Guruprasad Dahir*, (2008) 13 SCC 17 at page 175.
93. *Dubaria v. Har Prasad*, (2009) 9 SCC 346.

The reason for granting leave to appeal sparingly is that there is heavy backlog of cases in the Court and, therefore, it becomes necessary for the Court to restrict fresh intake of cases.

(15) A petition for grant of special leave to appeal may be rejected for several reasons, such as:

(i) the petition is time-barred;
(ii) defective presentation;[1]
(iii) petitioner lacks *locus standi* to file the petition;
(iv) conduct of the petitioner disentitles him to any indulgence by the court;[2]
(v) the question raised in the petition is not considered fit for consideration by the Court, or does not deserve to be dealt with by the Apex Court.

(16) Notwithstanding concurrent findings of trial court and High Court the lack of quality or credibility of evidence may call for interference.[3]

(17) After granting special leave to appeal under Art. 136, the Court can revoke the leave granted by it, if the respondent brings to the notice of the Court facts which would justify such revocation. The Court will do so in the interest of justice.[4]

(18) Generally speaking, under Art. 136, the Supreme Court hears an appeal from an adjudicatory order and not from an administrative order. An adjudicatory order is "an order that adjudicates upon the rival contentions of parties and it must be passed by an authority constituted by the state by law for the purpose in discharge of the State'' obligation to secure justice to its people."[5]

Accordingly, in the case noted below,[6] the court refused to hear appeal from an order made by the Chief Justice of India under S. 11 of the Arbitration and Conciliation Act, 1996, appointing an arbitrator. The order was characterised as non-adjudicatory.

This view of the Court was subsequently held to be erroneous by the majority of a larger Bench in[7] which was of the opinion that the power of appointment was judicial and therefore susceptible to appeal under Art. 136. Apart from the fact that the decision appears to be contrary to the express provisions of the statute, it is not clear what remedy would be available to a litigant against an order of the Chief Justice of India.[8] Interestingly, a single judge in Chambers has held that in deciding an issue under section 11, the Rules framed by the Supreme Court for

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1. *State of Punjab v. Ashok Singh Garcha,* (2009) 2 SCC 399 : (2009) 1 SCALE 367.
2. See for example *Prestige Lights Ltd. v. SBI,* (2007) 8 SCC 449, at page 462 : (2007) 10 JT 218.
3. *A. Subair v. State of Kerala,* (2009) 6 SCC 587 : (2009) 8 JT 415. See also *State of Punjab v. Sohan Singh,* (2009) 6 SCC 444 : AIR 2009 SC 1887, no interference if two views are possible and the one adopted by the High Court is plausible. See also *Devaki Antharjanam v. Sreedharan Namboodiri,* (2009) 7 SCC 798 : (2009) 5 SLT 374, no remand for re-determination of facts after 12 years on the Supreme Court approving executing court's determination.
4. *Penu Balakrishna M. Ariya v. Ramaswami Iyer,* AIR 1965 SC 195 : 1964 (7) SCR 49.
5. For further discussion on this point, see, Sec. E, *infra.*
6. *Konkan Rly. Corpn. Ltd. v. Rani Construction Pvt. Ltd.,* (2002) 2 SCC 388 : AIR 2002 SC 778.
7. *SBP & Co. v. Patel Engineering Ltd.,* (2005) 8 SCC 618 : AIR 2006 SC 450.
8. See minority view of C.K. THAKKER, J (*Ibid,* at page 687).

the hearing of matters by a bench of at least two judges did not apply as he was not functioning as a court.[9] The ratio in SBP has been distinguished in *Punjab Agro Industries Corpn. Ltd. v. Kewal Singh Dhillon*,[10] which said that the observation that against an order under Section 11 of the Act, only an appeal under Article 136 of the Constitution would lie, is only with reference to the orders made by the Chief Justice of a High Court or by the designate Judge of *that High Court* and do not apply to a subordinate Court functioning as designate of the Chief Justice. The distinction between "designates" has been made without reference to any legal principle and indicates perhaps that the decision in SBP requires reconsideration.

(17A) Although ordinarily the Supreme Court does not discuss the evidence, it may do so when it finds that crucial circumstances have escaped the notice of the courts below in order to prevent injustice being caused.[11]

(18) The Court has power to mould relief according to the circumstances of the case.[12]

(19) Generally the court after pointing out the legal error remands the matter back to the High Court, Tribunal or authority for ascertaining the facts or applying the law indicated by it to the ascertained facts. But this practice is not inflexible. Hence where a poor widow was fighting for about a decade to service benefits of her husband, the Supreme Court in order to give a quietus to the litigation decided the claim itself instead of remanding the matter to the High Court.[13]

(a) EFFECT OF DISMISSAL OF SPECIAL LEAVE PETITION

When a special leave petition is dismissed *in limine* by the Supreme Court, when the Court merely says "dismissed" without giving any reasons, all that the Court decides in such a situation is that it was not a fit case where special leave to appeal should have been granted under Art. 136; it would only mean that the court was not inclined to exercise its discretion in granting leave to file the appeal.[14] The Supreme Court says nothing about the merits of the case, or the correctness or otherwise of the order from which leave to appeal is sought. The requirement for appellate courts to give reasons when summarily dismissing an appeal, does not apply to the Supreme Court as it is the final court.[15]

This means that the order of the Apex Court creates no *res judicata;* it lays down no law for the purposes of Art. 141.[16] The mere rejection of special leave petition by the Supreme Court cannot by itself be construed as "the imprimatur"

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9. *Rodemadan India Ltd. v. International Trade Expo.Centre Ltd.,* (2006) 11 SCC 651 : AIR 2006 SC 3456.

10. (2008) 10 SCC 128, at page 131 : (2008) 9 JT 256.

11. *Pannayar v. State of Tamil Nadu by Inspector of Police,* (2009) 9 SCC 152.

12. *Koluthara Exports Ltd. v. State of Kerala,* (2002) 2 SCC 459 : AIR 2002 SC 973; *Om Construction Co. v. Ahmedabad Municipal Corpn.,* (2009) 2 SCC 486 : AIR 2009 SC 1944.

13. *Basanti Prasad v. Chairman, Bihar School Examination Board,* (2009) 6 SCC 791 : (2009) 8 JT 243.

14. *Saurashtra Oil Mills Assn. v. State of Gujarat,* (2002) 3 SCC 202 : AIR 2002 SC 1130. *Hemalatha Gargya v. CIT,* (2003) 9 SCC 510 : (2002) Supp (4) SCR 382*; Narcotics Control Bureau v. Dilip Prahlad Namade,* (2004) 3 SCC 619 : AIR 2004 SC 2950.

15. *Bolin Chetia v. Jogadish Bhuyan,* (2005) 6 SCC 81 : AIR 2005 SC 1872. See also *A. Rajendra Kumar v. Registrar, Supreme Court of India,* (2005) 13 SCC 443.

16. For Art. 141, see, *Infra,* Sec. J.

of the Supreme Court on the correctness of the decision sought to be appealed against. As the Supreme Court has observed in the case mentioned below:[17]

> "It is true that the said Special Leave Petitions were dismissed summarily but that would not mean that this Court approved the view that was taken by the High Court".

When the Supreme Court summarily dismisses a special leave petition under Art. 136, by such dismissal, the Court does not lay down any law, as envisaged by Art. 141 of the Constitution, nor does it constitute a vinding precedent. [18]

The main High Court decision does not merge with the order of the Apex Court. The aggrieved party may pursue any statutory remedy which may be open to him to challenge the decision in question. For instance, he may move a writ petition in the High Court under Art. 226 to challenge the decision,[19] or may move a petition in the High Court to review its own decision.[20]

If the order of the High Court had been obtained by practising fraud on the Court, the High Court can recall that order despite the fact that the SLP against that order may have been dismissed.[21] If a special leave petition from an order is dismissed, no leave will be granted to challenge a refusal to review the original order. A subsequent petition challenging the refusal of the lower court to review its earlier order has also been held to be not maintainable.[22]

Benches of the Supreme Court are bound to respect earlier orders coordinate or "co-equal" benches and the summary dismissal of a Special Leave Petition by one bench concludes the issues raised in such petition *inter partes*,[23] but not as far as other similarly placed petitioners were concerned.[24]

The view expressed in *Batiarani Gramiya Bank v. Pallab Kumar*[25] that an earlier Special Leave petition in an identical matter being dismissed without be-

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17. *Commr. of Income Tax v. Manjunatheswar Packing Products and Champhor Works*, AIR 1998 SC 1478 : (1998) 1 SCC 598.

18. For Art. 141, see, *infra*, Sec. J. See *Union of India v. Jaipal Singh*, (2004) 1 SCC 121 : AIR 2004 SC 1005.

19. *Workmen of Cochin Port Trust v. Board of Trustees of the Cochin Port Trust*, AIR 1978 SC 1283 : (1978) 3 SCC 119; *Indian Oil Corporation v. State of Bihar*, AIR 1986 SC 1780. Also see, *infra*, Ch. VIII, for Art. 226.

20. *Indian Oil Corporation Ltd. v. State of Bihar*, AIR 1986 SC 1780 : 1986 Supp SCC 527; *M/s. Rup Diamonds v. Union of India*, AIR 1989 SC 674 : (1989) 2 SCC 356; *Supreme Court Employees' Welfare Association v. Union of India*, AIR 1990 SC 334 : (1989) 4 SCC 187; *Yogendra Narayan Chowdhary v. Union of India*, AIR 1996 SC 751 : (1996) 7 SCC 1; *V.M. Salgaocar & Bros. v. I.T. Commr.*, AIR 2000 SC 1623; *Kunhayammed v. State of Kerala*, AIR 2000 SC 2587 : (2000) 6 SCC 359, *Govt. of West Bengal v. Tarun K. Roy*, (2004) 1 SCC 347, 510 : (2003) 9 JT 130.

The Court has overruled its earlier view expressed to the contrary in several cases *e.g.*, *Sree Narayana Dharma Sanghom Trust v. Swami Prakasananda*, (1997) 6 SCC 78 : (1997) 5 JT 100; *Maharashtra v. Prabhakar Bhikaji Ingle*, AIR 1996 SC 3069 : (1996) 3 SCC 463.

For review power of the High Court, see, *infra*, Ch. VIII, Sec. C.

21. *A.V. Papayya Sastry v. Govt. of Andhra Pradesh*, (2007) 4 SCC 221 : AIR 2007 SC 1546.

22. *Shanker Motiram Nale v. Shiolalsingh Gannusingh Rajput*, (1994) 2 SCC 753; *M.N.Haider v. Kendriya Vidyalaya Sangathan*, (2004) 13 SCC 677.

23. *Satrucharla Vijaya Rama Raju v. Nimmaka Jaya Raju*, (2006) 1 SCC 212 : AIR 2006 SC 543; See also *Gurdev Singh v. State of Punjab*, (2003) 7 SCC 258 : AIR 2003 SC 4187.

24. *HMT Ltd. v. P. Subbarayudu*, (2003) 10 SCC 156 : AIR 2004 SC 3280.

25. (2004) 9 SCC 100.

ing admitted, need not be mentioned in a subsequent Special Leave Petition,[26] appears to be inconsistent with this view.[27]

The situation is somewhat different when the special leave petition is dismissed through a reasoned or speaking order. Whatever the Supreme Court says in its dismissal order amounts to law for the purposes of Art. 141 and this is binding on the parties as well as the courts and tribunals below. [28]Beyond this, the Court gives no decision on merits and, therefore, the decision appealed against can be challenged through a writ petition, or a review petition in the High Court or the tribunal concerned. The Apex Court has observed in the *Supreme Court Employees' Welfare Association*:[29]

> "When Supreme Court gives reasons while dismissing a special leave petition under Article 136, the decision becomes one which attracts Article 141".

In another case,[30] the Court has observed:

> "An order refusing special leave to appeal may be a non-speaking order or a speaking one. In either case it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed".

Once a special leave petition filed against a High Court decision is withdrawn without obtaining leave from the Supreme Court to file another special leave petition, a fresh special leave petition against the same decision is not maintainable. The ban on filing a fresh special leave petition is based on public policy.[31] Similarly, when a special leave petition is dismissed by the Supreme Court, a second special leave petition for appeal is not maintainable. The principle of *res judicata* comes into play in such a context,[32] unless the earlier order of the Supreme Court is established to be contrary to an existing law.[33]

(b) COURT'S DISCRETION

It is a well established principle that even though the Court may grant special leave to appeal, the discretionary power vesting in the Court at that stage continues to remain with the Court even at the time of hearing the appeal on merits. This principle is applicable to all kinds of appeals admitted by special leave un-

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26. *Ibid* at page 111.

27. See in this connection *Union of India v. Shantiranjan Sarkar,* (2009) 3 SCC 90 : (2009) 1 JT 467.

28. *Union of India v. All India Services Pensioners Ass.,* AIR 1988 SC 501 : (1988) 2 SCC 580.

29. *Supra,* footnote 20.

30. *Kunhayammed v. State of Kerala,* AIR 2000 SC 2587, at 2600 : (2000) 6 SCC 359.
Also, *K. Rajamouli v. A.V.K.N. Swamy,* AIR 2001 SC 2316 : (2001) 5 SCC 37.

31. *Upadhyay & Co. v. State of Uttar Pradesh,* (1999) 1 SCC 81 : AIR 1999 SC 509; *Union of India v. Sher Singh,* AIR 1997 SC 1796 : (1997) 3 SCC 555; *Yogendra Narain Chowdhury v. Union of India,* AIR 1996 SC 751 : (1996) 7 SCC 1.

32. *M.N. Haider v. Kendriya Vidyalaya Sangathan,* (2004) 13 SCC 677. After dismissal of a special leave petition on merits by the Supreme Court, the High Court cannot review the self-same order. The court observed : "After the dismissal of the special leave petition by this Court, on contest, no review petition could be entertained by the High Court against the same order. The very entertainment of the review petitions, in the facts and circumstances of the case was an affront to the order of this Court."
Abhai Maligai Partnership Firm v. K. Santhakumaran, AIR 1999 SC 1486 : (1998) 7 SCC 386.

33. *Neeraj Munjal v. Atul Grover (III), (*2005) 5 SCC 404 : AIR 2005 SC 2867.

der Art. 136, irrespective of the nature of the subject-matter.[34] This means that only those points could be urged at the final hearing of the appeal which were fit to be urged at the preliminary stage when leave for appeal was asked for, as it would be illogical to adopt different standards at two different stages of the same case. Also, the Court after declaring the correct legal position, may still say that it would not exercise its discretion to decide the case on merits and that it would decide on the basis of equitable considerations in the fact situation of the case and "mould the final order".[35]

The Supreme Court has observed on this point in *Taherakhatoon*:[36]

> "… even though we are now dealing with the appeal after grant of special leave, we are not bound to go into merits and even if we do so and declare the law or point out the error—still we may not interfere if the justice of the case on facts does not require interference or if we feel that the relief could be moulded in a different fashion…"

In the instant case, the Supreme Court while pointing out the errors committed by the High Court in its decision, nevertheless, refused to interfere with the decree passed by the High Court. The Supreme Court declared that "in the peculiar circumstances referred to above, this is not a fit case for interference" and moulded relief in favour of the plaintiff.[37]

The width of the discretion may extend to a situation where although the appeals are found to be not maintainable, yet having regard to arguments being advanced at length including submissions on merit, the Supreme Court may decide on the merit of the appeals.[38]

In an appeal from an order condoning delay in preferring first appeal the Court awarded costs of Rs.10,000 while dismissing the appeal.[39]

(c) DISMISSAL OF APPEAL

After the Supreme Court grants leave to appeal, the Court hears the appeal on merits. After hearing the arguments of the parties, the Court gives its decision.

The Court may dismiss the appeal with or without giving reasons for the same, or the Court may pass an order of reversal, modification or merely affirmation of the decision of the lower court or tribunal. In any such situation, the decision appealed against gets merged with the decision of the Apex Court. This means that after the Supreme Court, the original decision appealed against cannot be challenged through a writ petition under Art. 226 in a High Court. Nor can the lower court or tribunal review its decision against which the Supreme Court has disposed of the appeal.[40]

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34. See, *Pritam Singh v. The State*, AIR 1950 SC 169 : 1950 SCR 453; *M/s. Bengal Chemical & Pharmaceutical Works Ltd. v. Their Workmen*, AIR 1959 SC 633 : 1959 Supp (2) SCR 136.
35. *Municipal Board, Pratapgarh v. Mahendra Singh Chawla*, AIR 1982 SC 1493 : (1982) 3 SCC 331.
36. *Taherakhatoon v. Salmabin Mohammad*, AIR 1999 SC 1104, 1110 : (1999) 2 SCC 635.
37. See also *ONGC Ltd. v. Sendhabhai Vastram Patel*, (2005) 6 SCC 454 : (2005) 7 JT 465.
38. *Villianur Iyarkkai Padukappu Maiyam v. U.O.I.*, (2009) 7 SCC 561 : (2009) 8 JT 339.
39. *C.K. Prahalada. v. State of Karnataka*, (2008) 15 SCC 577.
40. *Kunhayammed v. State of Kerala*, AIR 2000 SC 2587 : (2000) 6 SCC 359.

(d) RESTRICTIONS

Article 136 imposes no restriction or limitation on the power of the Supreme Court to hear appeals. The constitutional provision confers a plenary jurisdiction on the Court. Nevertheless, the Court has sought to impose on itself some restrictions in exercising this vast appellate jurisdiction. This has been done with a view to reduce the flow of appeals to itself so that it is not faced with a huge backlog of cases.

EXHAUSTION OF REMEDIES

The Court has imposed on itself a restriction that before invoking the jurisdiction of the Court under Art. 136, the aggrieved party must exhaust any remedy which may be available under the law before the lower appellate authority or the High Court.[41]

Ordinarily, the Supreme Court does not hear an appeal from the decision of a single judge of the High Court, as such an appeal ought to go to the Division Bench of the High Court. This, however, is a self-imposed restriction and not a matter ousting jurisdiction of the Supreme Court. When in a case, the High Court Judge committed patent error, the Supreme Court heard an appeal from the single judge.[42]

DELAY

An appeal must be filed without undue delay although Art. 136 prescribes no period of limitation for the purpose. But the Court does not like stale claims to be raked up.

The Court has power to condone delay in approaching it to enable it to do substantial justice to the parties concerned.[43] The Court shows a liberal attitude in condoning delay when the government is the appellant. One reason for such an approach is that bureaucratic delay is proverbial. Secondly, the Court feels that if the state is denied an opportunity to appeal because of delay, it may be the loss of the society as a whole.[44]

CONCILIATION

To curtail wasteful expenditure of public monies on litigation between the State and Public Sector Undertakings or between public sector undertakings inter se, the Supreme Court has directed the Government of India and the State Governments to set up a Committee to monitor disputes between them to ensure that no litigation comes to Court or to a Tribunal without the matter having been first

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41. *Nirma Ltd. v. Lurgi Lentges Energietechnik Gmbh* (2002) 5 SCC 520 : AIR 2002 SC 3695. For a detailed discussion this point, see, *infra.*

42. *State of Uttar Pradesh v. Harish Chandra,* AIR 1996 SC 2173 : (1996) 9 SCC 309. *Dipak Chandra Ruhidas v. Chandan Kumar Sarkar,* (2003) 7 SCC 66 : AIR 2003 SC 3701*; Virender Kumar Rai v. Union of India,* (2004) 13 SCC 463.

43. *Union of India v. Cynamide India Ltd.,* AIR 1987 SC 1802 : (1987) 2 SCC 720; *Harsharan Varma v. Union of India,* AIR 1987 SC 1969 : 1987 Supp SCC 310; *State of Uttar Pradesh v. Rafiquddin,* AIR 1988 SC 162; *Madurai Kamraj University v. K. Rajayyan,* AIR 1988 SC 385 : 1988 Supp SCC 97.

44. *Chief G.M. Telecom v. G. Mohan Prasad,* (1999) 6 SCC 67; *State of Bihar v. Kameshwar Prasad Singh,* AIR 2000 SC 2306 : (2000) 9 SCC 94.

examined by the Committee and cleared it for litigation. The Court has also directed that:

"It shall be the obligation of every Court and every Tribunal where such a dispute is raised hereafter to demand a clearance from the Committee in case it has not been so pleaded and in the absence of the clearance, the proceedings would not be proceeded with"[45] and further wherever appeals, petitions, etc. are filed without the clearance of the High-Powered Committee so as to save limitation, the appellant or the petitioner, as the case may be, shall within a month from such filing, refer the matter to the High-Powered Committee, After such reference to the High-Powered Committee is made, the operation of the order or proceedings under challenge shall be suspended till the High-Powered Committee resolves the dispute or gives clearance to the litigation. If the High-Powered Committee is unable to resolve the matter for reasons to be recorded by it, it shall grant clearance for the litigation.

The machinery contemplated is only to ensure that no litigation comes to court without the parties having had an opportunity of conciliation before an in-house committee and does not in any way efface the statutory remedies of the State or the statutory corporations.[46] It has recently been clarified that the emphasis on one month's time was only to show the urgency needed and merely because there is some delay in approaching the Committee that does not make the action illegal[47].

CONSISTENCY IN REVENUE APPEALS

If the Revenue accepts the decision on a point of law in the case of one assessee without challenging it further by way of an appeal, it is not open to the Revenue to challenge its correctness in the case of other assessees without just cause.[48]

(e) RELIEF

Under Art. 136, the Supreme Court can give whatever relief may be necessary and proper in the facts and circumstances of the specific case. The Court has power to mould relief according to the circumstances of the specific case.[49] The Court can also invoke its power under Art. 142 for this purpose.[50]

A few instances of moulding relief may be cited here.

A police officer was promoted to the post of Deputy Superintendent of Police in 1975 under directions issued by the High Court to that effect. The State ap-

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45. *Oil and Natural Gas Commission v. CCE,* 1995 Supp (4) SCC 541 : (1992) 61 ELT 3.
46. *Mahanagar Telephone Nigam Ltd. v. Chairman, Central Board, Direct Taxes,* (2004) 6 SCC 431 : AIR 2004 SC 2434; *Oil & Natural Gas Commission v. CCE,* (2004) 6 SCC 437, at page 438 : (1994) 70 ELT 45.
47. *CIT v. Oriental Insurance Co. Ltd.*, (2008) 9 SCC 349 : (2008) 10 SCALE 253.
48. *Berger Paints India Ltd. v. CIT,* (2004) 12 SCC 42, 47 : (2004) 4 JT 252; *C.K. Gangadharan v. CIT,* (2008) 8 SCC 739, 744 : (2008) 10 SCALE 426.
49. *Collector of Customs & Central Excise v. Oriental Timber Industries,* AIR 1985 SC 746 : (1985) 3 SCC 85; *Dipak Kumar Biswas v. Director of Public Instruction,* AIR 1987 SC 1422 : (1987) 2 SCC 252; *Municipal Board of Pratabgarh v. Mahendra Singh Chawla,* AIR 1982 SC 1493 : (1982) 3 SCC 331; *Divisional Manager A.P. SRTC v. P. Lakshmoji Rao,* (2004) 2 SCC 433, 441 : AIR 2004 SC 1503.
50. See, *infra,* under Art. 142: "Power to do Complete Justice", Sec. G.

pealed to the Supreme Court under Art. 136. In the year 2000, the Supreme Court ruled that the decision of the High Court was not sustainable. The Supreme Court however ruled that the benefit conferred on the concerned officer under the High Court direction should not be withdrawn.[51]

In *Badrinath v. Govt. of Tamil Nadu*,[52] the appellant was appointed in the junior scale in IAS in 1957 and was promoted to the selection grade in 1972. Thereafter, he was not promoted to the super-time scale. His appeal to the Government was rejected. He filed a writ petition is the High Court which was rejected. He then filed an appeal in the Supreme Court under Art. 136. The Court held that the refusal to promote him was not justified.

The Court then had to decide what relief to give him. Should the Court send the matter to the State Government for reconsideration in the light of its decision, or should the Court itself issue a *mandamus* to the State Government to promote him? In view of "the special and peculiar circumstances of the case", the Court itself issued *mandamus* to the State Government to promote the appellant to super-time scale with effect from the date his promotion was due.

The Court asserted that it can mould relief to meet the peculiar and complicated requirements of a case to enable it to reach justice wherever found necessary. "The power of this Court to mould relief in the interests of Justice in extraordinary cases cannot be doubted".[53]

The power has been used for various purposes such as issuing directions for recording/registering marriages[54] expunging adverse remarks made in the judgment against the subordinate courts[55] and imposing exemplary costs of Rs. 5 lakhs on the Union of India for having illegally retained possession of property for 32 years.[56]

(f) APPEALS IN CONSTITUTIONAL/CIVIL CASES

Under Article 136, the Supreme Court can hear appeal in a case involving substantial question of constitutional law if the High Court refuses to grant the necessary certificate under Art. 132.[57] Similarly, the Supreme Court may entertain appeal in a civil case where substantial question of law is involved but which is not covered by Article 133, as for example, when the High Court may have refused to grant a fitness certificate.[58]

Ordinarily, the Supreme Court does not entertain an appeal against an exercise of discretion by the court below if it has been exercised along sound judicial lines. But if the discretion is exercised arbitrarily or unreasonably, or is based on a misunderstanding of the principles that govern its exercise, or the order has been passed without jurisdiction, or if there is a patently erroneous interpretation of law by the High Court, the Supreme Court would intervene if there has been a

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51. *State of Bihar v. Kameshwar Prasad Singh*, AIR 2000 SC 2306 : (2000) 9 SCC 94.
52. (2000) 8 SCC 395 : AIR 2000 SC 3243.
53. *Ibid*, at 434. For *Mandamus*, see, Ch. VIII, *infra*.
54. *Seema v. Ashwini Kumar*, (2005) 4 SCC 443 : (2005) 11 JT 97.
55. *Kailasbhai Shukharam Tiwari v. Jostna Laxmidas Pujara*, (2006) 1 SCC 524 : AIR 2006 SC 741.
56. *Union of India v. Raja Mohd. Amir Mohd. Khan*, (2005) 8 SCCC 696 : AIR 2005 SC 4383. See also *Suman Kapur v. Sudhir Kapur*, (2009) 1 SCC 422 at page 441 : AIR 2009 SC 589.
57. *Supra*, Sec. C(iv)(a).
58. *Supra*, Sec. C(iv)(e).

resultant failure of justice.[59] So also if the court below acts without jurisdiction, or in violation of principles of natural justice[60] or without a proper appreciation of material on record or the submissions made[61] interference under Art. 136 is warranted.

Ordinarily, the Supreme Court does not appreciate evidence, or go behind the findings of fact arrived at by the courts below, much less concurrent findings, unless there is sufficient ground for doing so.[62] The Court can, however, appreciate evidence on record to avoid miscarriage of justice.[63] If in giving the findings the lower court ignored or misread and misconstrued certain important pieces of evidence, and the Supreme Court comes to the conclusion that, on the evidence taken as a whole, no court could properly, as a matter of legitimate inference, arrive at the conclusion that the lower court has arrived,[64] or where the two lower courts of appeal were under a clear misapprehension as to the findings of fact by the trial court, or where the lower courts arrive at the findings not on proper consideration of the law on the subject, or where appreciation of evidence by the courts below on the face of it appears to be erroneous causing miscarriage of justice, the court would examine the evidence itself.[65] The position however is different if it is a mixed question of law and fact.[66]

Order XVI Rule 4(b) of the Supreme Court Rules which provides that

> "SLPs shall be confined only to the pleadings before the Court/Tribunal whose order is challenged. However, the petitioner may, with due notice to the respondent, and with the leave of the Court urge additional grounds, at the time of hearing".

Thus a new plea put forward for the first time in the form of written submissions after the hearing was concluded was not entertained.[67]

Neverthless the Supreme Court is extremely reluctant to entertain an entirely new plea, not raised earlier before the lower courts, but being raised for the first

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59. *Santosh v. Mul Singh,* AIR 1958 SC 321 : 1958 SCR 1211: *Baldota Bros. v. Libra Mining Works,* AIR 1961 SC 100; *Syed Yakoob v. Radhakrishnan,* AIR 1964 SC 477 : 1964 (5) SCR 64; *Ajit Singh v. State of Punjab,* AIR 1967 SC 856 : 1967 (2) SCR 143.

60. *National Organic Chemical Industries Ltd. v. Miheer H. Mafatlal,* (2004) 12 SCC 356, 359 : AIR 2004 SC 3933*; Divine Retreat Centre v. State of Kerala,* (2008) 3 SCC 542, at page 565 : AIR 2008 SC 1614.

61. *Panchanan Mishra v. Digambar Mishra,* (2005) 3 SCC 143 : AIR 2005 SC 1299.

62. *Barsay v. State of Bombay,* AIR 1961 SC 1762 : 1962 (2) SCR 195; *Surasaibalini v. Phanindra Mohan,* AIR 1965 SC 1364 : 1965 (1) SCR 861; *Tatayya v. Jagapathiraju,* AIR 1967 SC 647 : 1962 Supp (3) SCR 324; *Chettiar v. Chettair,* AIR 1968 SC 915 : 1968 (2) SCR 897; *Digvijay Singh v. Pratap Kumari,* AIR 1970 SC 137; *Parle Praducts v. J.P. & Co.,* AIR 1972 SC 1359 : (1972) 1 SCC 618; *Banwari Lal v. Trilok Chand,* AIR 1980 SC 419 : (1980) 1 SCC 349; *Vasudha Srivastava v. Kamla Chauhan,* AIR 1992 SC 1454 : (1992) 1 SCC 645; *Union of India v. Rajeshwari & Co.,* AIR 1986 SC 1748 : (1986) 3 SCC 426.

63. *Shashi Jain (SMT) v. Tarsem Lal (DEAD),* (2009) 6 SCC 40 : AIR 2009 SC 2617.

64. *White v. White,* AIR 1958 SC 441; *A.P. State Financial Corp. v. Vajra Chemicals,* AIR 1997 SC 3059 : (1997) 7 SCC 76.

65. *Heramba Brahma v. State of Assam,* AIR 1982 SC 1595 : (1982) 3 SCC 351; *D.V. Shanmugham v. State of Andhra Pradesh,* AIR 1997 SC 2583 : (1997) 5 SCC 349.

66. *Suresh Kumar Jain v. Shanti Swarup Jain,* AIR 1997 SC 2291, at 2298 : (1997) 9 SCC 298.

67. *State of Rajasthan v. H.V.Hotels (P) Ltd.,* (2007) 2 SCC 468, 475 : AIR 2007 SC 1122; *K.A. Nagamani v. Indian Airlines,* (2009) 5 SCC 515 : (2009) 4 JT 674.

time in appeal before it, especially when the new plea is founded on facts.[68] For example, the Supreme Court did not permit the plea of *mala fides* being raised before it for the first time as it being essentially a question of fact needed to be supported by relevant material.[69] Again whether there is a novation or alteration of a contract is a mixed question of law and fact and cannot be raised before the Supreme Court for the first time.[70] A document which is produced by the respondent for the first time at the stage of arguments can be considered if it forms the basis of the petitioner's claim.[71]

If, however, a point of fact plainly arises on the record, or a point of law is relevant and material and can be decided on the basis of material on record without any further evidence being taken,[72] or the plea was urged before the trial court and was rejected but was not then repeated before the High Court, or if it is a question of considerable importance likely to arise in similar suits, or if it goes to the jurisdiction of the lower court, the Supreme Court may permit the plea to be raised.[73] If it is a pure question of law going to the root of the case, the plea may be allowed to be raised with the permission of the Court.[74]

In one case, the Supreme Court permitted the question of constitutional validity of the relevant statute to be raised for the first time before it. Accordingly, the

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68. *R.J. Singh Ahluwalia v. Delhi,* AIR 1971 SC 1552 : (1970) 3 SCC 451; *Chinta Lingam v. Union of India,* (1970) 3 SCC 768 : AIR 1971 SC 474. *Deputy Custodian General of Evacuee Property v. Daulat Ram,* AIR 1973 SC 1381 : (1973) 3 SCC 621; *S.N. Mathur v. R.K. Mission,* AIR 1974 SC 2241 : (1974) 2 SCC 730; *Surendra Kumar Aggarwal v. Satya Varshneya,* AIR 1981 SC 1234 : (1979) 4 SCC 750; *K.L. Malhotra v. Smt. Prakash Mehra,* AIR 1991 SC 99 : (1991) 4 SCC 512; *State of Madhya Pradesh v. Nandlal Jaiswal,* AIR 1987 SC 251 : (1986) 4 SCC 566.

69. *Jindal Industries Ltd. v. State of Haryana,* AIR 1991 SC 1832 : 1991 Supp (2) SCC 587. Also, *Bhandara Distt. Central Coop. Bank Ltd. v. State of Maharashtra,* AIR 1993 SC 59 : 1993 Supp (3) SCC 259; *Municipal Commr. Chinchwad New Township Municipal Council v. Century Enka Ltd.,* (1995) 6 SCC 152 : AIR 1996 SC 187. See also *Ramesh Chand Ardawatiya v. Anil Panjwani,* (2003) 7 SCC 350 : AIR 2003 SC 2508; *State of Punjab v. Darshan Singh,* (2004) 1 SCC 328 : AIR 2003 SC 4179; *Sopan Sukhdeo Sable v. Asst. Charity Commr.,* (2004) 3 SCC 137, 151 : AIR 2004 SC 1801*; State. v. V. Jayapaul,* (2004) 5 SCC 223, 229 : AIR 2004 SC 2684*; Durgo Bai v. State of Punjab,* (2004) 7 SCC 144, 148 : AIR 2004 SC 4170*; CCE v. J.K. Udaipur Udyog Ltd.,* (2004) 7 SCC 344, 352 : AIR 2004 SC 4437*; Sidheshwar Sahakari Sakhar Karkhana Ltd. v. CIT,* (2004) 12 SCC 1, 24 : AIR 2004 SC 4716*; Vividh Marbles (P.) Ltd. v. Commercial Tax Officer,* (2007) 3 SCC 580, 586 : (2007) 4 JT 448.

70. *Shakti Tubes Ltd. v. State of Bihar,* (2009) 7 SCC 673, 684 : (2009) 9 JT 386.

71. *Ramashray Singh v. New India Assurance Co. Ltd.,* (2003) 10 SCC 664 : AIR 2003 SC 2877.

72. *State of Rajasthan v. K.C. Thapar,* AIR 1965 SC 913; *State of Uttar Pradesh v. Anupam Gupta,* AIR 1992 SC 932 : 1993 Supp (1) SCC 594; *Bhanwar Lal v. T.K.A. Abdul Karim,* AIR 1992 SC 2166 : 1993 Supp (1) SCC 626; *National Insurance Co. Ltd. v. Swaranlata Das,* AIR 1993 SC 1259. *M. Gurudas v. Rasasanjan, (*2006) 8 SCC 367 : AIR 2006 SC 3275.

73. *B.K. Bhandar v. Dhamangaon Municipality,* AIR 1966 SC 249 : 1965 (3) SCR 499; *Chandrika v. Bhaiyalal,* AIR 1973 SC 2391 : (1973) 2 SCC 474; *Most Rev. P.M.A. Metropolitan v. Moran Mar Marthoma,* AIR 1995 SC 2001 : 1995 Supp (4) SCC 286; *Vasant Kumar Radhakisan Vora v. Board of Trustees of the Port of Bombay,* AIR 1991 SC 14 : (1991) 1 SCC 761; *Union of India v. Baleshwar Singh,* (1994) Supp (2) SCC 587 : 1994 SCC (L&S) 1158.

74. *Vimal Chandra Grover v. Bank of India,* (2000) 5 SCC 122, at 134 : AIR 2000 SC 2181; *Kunal Singh v. Union of India,* (2003) 4 SCC 524: AIR 2003 SC 1623*; Municipal Corpn. of Greater Mumbai v. Kamla Mills Ltd.,* (2003) 6 SCC 315 : AIR 2003 SC 2998*; Union of India v. Upper Ganges Sugar & Industries Ltd.,* (2005) 1 SCC 750 : AIR 2005 SC 778*; Ajit Kumar Nag v. General Manager (PJ) Indian Oil Corporation,* (2005) 7 SCC 764 : AIR 2005 SC 4217*; Pushpa Devi Bhagat v. Rajinder Singh,* (2006) 5 SCC 566, 575 : AIR 2006 SC 2628.

Supreme Court set aside the High Court's judgment and sent the matter back to it so that it may decide the question of constitutional validity of the Act.[75]

In a preventive detention case, the Court allowed a new plea to be raised, *viz*., non-consideration of detenu's representation by the government, because the plea was important as it was fatal to detention and it could be determined on the material available to the Court.[76]

(g) APPEALS IN CRIMINAL CASES

The Scope of Article 134 providing for appeals to the Supreme Court in criminal matters is limited. On the other hand, Article 136 is very broad-based and confers a discretion on the Court to hear appeals "in any cause or matter." Therefore, criminal appeals may be brought to the Supreme Court under Article 136 when these are not covered by Article 134,[77] or when the High Court refuses to grant a fitness certificate, or the certificate has not been granted properly, or when the matter falls outside the Act of Parliament extending criminal appellate jurisdiction of the Supreme Court.

It is in the area of criminal cases that the residuary jurisdiction of the Supreme Court is very frequently invoked. The Supreme Court, however, does not grant leave to appeal in criminal matters liberally. It does so only when exceptional and special circumstances exist, substantial and grave injustice has been done, and the case in question presents features of sufficient gravity to warrant a review of the decision appealed against, or there has been a departure from legal procedure such as vitiates the whole trial, or if the findings of fact "were such as were shocking" to the judicial conscience of the Court.[78]

As under Article 134(1)(*c*), so under Article 136, the Supreme Court does not act as an ordinary court of criminal appeal to which every High Court judgment in a criminal case can be brought up for scrutiny of its correctness. The Court does not, generally speaking, allow facts to be reopened, or act as a court to review evidence.[79] These rules are not, however, absolute; these rules constitute a self-imposed restriction by the Court, and may be relaxed whenever there has been a failure of justice.

If the trial is vitiated by some illegality or irregularity of procedure, if it "shocks the conscience of the Court," or if "by disregard to the forms of legal process or some violation of the principles of natural justice or otherwise" sub-

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75. *M/s Noorulla Ghazanfarulla v. Municipal Board of Aligarh,* AIR 1981 SC 2176 : (1982) 1 SCC 484.

76. *Harish Pahwa v. State of Uttar Pradesh,* AIR 1981 SC 1126 : (1981) 2 SCC 710. Also see, *K.P.M. Basheer v. Union of India,* AIR 1992 SC 1353 : (1992) 2 SCC 295.

77. *Supra,* Sec. C(iv)(d).

78. *Pritam Singh v. State,* AIR 1950 SC 169 : 1950 SCR 453; *Sadhu Singh v. Pepsu,* AIR 1954 SC 271 : 1954 Cr LJ 727; *Haripada Dey v. State of West Bengal,* AIR 1956 SC 757 : 1956 SCR 639; *Ram Jag v. State of Uttar Pradesh,* AIR 1974 SC 606 : (1974) 4 SCC 201; *State of Uttar Pradesh v. Ballabh Das,* AIR 1985 SC 1384 : (1985) 3 SCC 703; *State of Uttar Pradesh v. Ram Swarup,* AIR 1988 SC 1028 : 1988 Supp SCC 262; *State of U.P. v. Pheru Singh,* AIR 1989 SC 1205 : 1989 Supp (1) SCC 288; *Mahesh v. Delhi,* (1991) Cr LJ 439; *State of U.P. v. Anil Singh,* AIR 1988 SC 1998 : 1988 Supp SCC 686.

79. *Mohinder Singh v. State of Punjab*, AIR 1965 SC 79 : 1965 (1) Cr LJ 112; *Gokul v. State of Rajasthan*, AIR 1972 SC 209 : (1972) 4 SCC 812; *Krishan Lal v. State of Haryana*, AIR 1980 SC 1252 : (1980) 3 SCC 159; *Sheonandan Paswan v. State of Bihar*, AIR 1987 SC 877; *Suresh Chandra Bahri v. State of Bihar*, AIR 1994 SC 2420; *Arjun v. State of Rajasthan*, AIR 1994 SC 2507.

stantial and grave injustice has been done, or there is no evidence to support the findings of fact, or the conclusions of the High Court are manifestly perverse, are based on surmises and conjectures and are unsupportable by evidence, the Supreme Court may go behind the findings of fact arrived at by the courts below.[80]

The Court does not interfere with concurrent findings "unless the findings are vitiated by errors of law, or the conclusions reached by the courts below are so patently opposed to well-established principles as to amount to miscarriage of justice," or where the interest of justice so requires.[81] In *Mathura Prashad v. State of Madhya Pradesh*,[82] the Supreme Court interfered with concurrent findings of fact of the courts below on the ground that the findings "suffer from the vice of perversity".

The Supreme Court does not permit a fresh plea, not raised before any court earlier, to be raised before it in a special appeal. But it may permit a jurisdictional point, or a point of pure law which goes to the root of the case, to be raised before it.[83] In *R.J. Singh v. Delhi*,[84] prosecution of the appellant under the Prevention of Corruption Act was sanctioned by the Ministry of Industrial Development. Under the Business Allocation Rules, it should have been sanctioned by the Home Ministry. The Supreme Court permitted challenge to the validity of the sanction even though it had not been raised earlier. The Court sustained the objection and, consequently, the prosecution failed.

The accused claimed for the first time before the Supreme Court that he was aged below 18 years on the date of occurrence of the offence and so he was entitled to the benefits of the State Children Act.[85] Ordinarily the Supreme Court would not entertain such a fact based new plea. But the Court deviated from this technical rule in the instant case having regard to the underlying intendment and beneficial provisions of the socially progressive statute read with Art. 39(*b*) of the Constitution.[86]

The Supreme Court does not interfere with the sentence passed by the lower courts unless there is an illegality in it, or it is harsh or unjust in the facts and cir-

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80. *Nihal Singh v. State of Punjab*, AIR 1965 SC 26; *Rahim Beg v. State of Uttar Pradesh*, AIR 1973 SC 343; *Balak Ram v. State of U.P.*, AIR 1974 SC 2165; *State of Uttar Pradesh v. Babul Nath*, (1994) 6 SCC 29 : 1994 SCC (Cri) 1585; *Dukhmochan Pandey v. State of Bihar*, (1997) 8 SCC 405; *Meena v. State of Maharashtra*, (2000) 7 SCC 21 : 2000 CrLJ 2273.

81. *Budhsen v. State of Uttar Pradesh*, AIR 1970 SC 1321; *State of U.P. v. Sheo Ram*, AIR 1974 SC 2267; *Dulichand v. Delhi Administration*, AIR 1975 SC 1960; *Rafiq v. State of Uttar Pradesh*, AIR 1981 SC 559; *Indira Kaur v. Sheo Lal Kapoor*, AIR 1988 SC 1074; *Balak Ram v. State of Uttar Pradesh*, AIR 1974 SC 2165; *Lala Ram v. State of Uttar Pradesh*, AIR 1990 SC 1185; *Nain Singh v. State of Uttar Pradesh*, (1991) 2 SCC 432; *Ranbir Yadav v. State of Bihar*, AIR 1995 SC 1219; *Lal Mandi v. State of West Bengal*, AIR 1995 SC 2265; *Ram Sanjiwan Singh v. State of Bihar*, (1996) 8 SCC 552; *S. Gopal Reddy v. State of Andhra Pradesh*, AIR 1996 SC 2184; *Nayudu Srihari v. State of Andhra Pradesh*, (1996) 10 SCC 393; *State of Punjab v. Jugraj Singh*, JT 2002 (2) SC 147 : (2002) 3 SCC 234; *Sukhbir Singh v. State of Haryana*, (2002) 3 SCC 327 : AIR 2002 SC 1168.

82. AIR 1992 SC 49. Also see, *State of Uttar Pradesh v. Dan Singh*, AIR 1997 SC 1654; *Ramanbhai Naranbhai Patel v. State of Gujarat*, (2000) 6 SCC 359 : AIR 2000 SC 2587; *Orsu Venkat Rao v. State of A.P.*, (2004) 13 SCC 243 : AIR 2004 SC 4961.

83. *Sahib Singh Mehra v. State of Uttar Pradesh*, AIR 1965 SC 1451; *Asst. Collector v. N.T.Co. of India*, AIR 1972 SC 2563; *B.C. Goswami v. Delhi Administration*, AIR 1973 SC 1457 : (1974) 3 SCC 85.

84. AIR 1971 SC 1552 : (1970) 3 SCC 451.

85. *Gopinath Ghosh v. State of West Bengal*, AIR 1984 SC 237 : 1984 Supp SCC 228.

86. For Art. 39(b), see, Ch. XXXIV, *infra*.

cumstances of the case, or it is unduly lenient, or it involves any question of principle, or where the High Court does not exercise its discretion judicially on the question of sentence.[87] Although the Court will not ordinarily make an order placing the appellant in a more disadvantageous position had the appeal not been preferred[88] in a criminal appeal by an accused against the sentence imposed by the High Court, the sentence was in fact enhanced.[89]

The Supreme Court does not interfere with the High Court's finding of acquittal unless that finding is clearly unreasonable, or unsatisfactory, or perverse, or manifestly illegal, or grossly unjust, or is vitiated by some glaring infirmity in the appraisal of evidence,[90] or the High Court completely misdirects itself in reversing the order of conviction by the trial court, or it results in gross miscarriage of justice.[91] The fact that another view could also have been taken of the evidence on record would not justify interference with the judgment of acquittal.[92] And though in criminal matters ordinarily the Court does not interfere with concurrent findings of fact but can in an appropriate case it may do so for the ends of justice.[93]

In *Arunachalam v. P.S.R. Setharatnam* ,[94] the Supreme Court considered an important question having a bearing on criminal appeals under Art. 136. A was acquitted of murder charge on appeal by the High Court. The State did not file an appeal against this decision, but the brother of the deceased got leave to appeal to the Supreme Court on appraisal of evidence, the Court set aside the order of acquittal and convicted A. Objections raised on behalf of the accused relating to the maintainability of the special leave petition under Art. 136 were rejected. CHINNAPPA REDDY, J., speaking for the Court laid emphasis on the plenary appellate jurisdiction of the Supreme Court under Art. 136 and observed:

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87. *State of Maharashtra v. M.H. George,* AIR 1965 SC 722 : 1965 (1) SCR 123; *Nathusingh v. State of Madhya Pradesh,* AIR 1973 SC 2783 : (1974) 3 SCC 584; *Kodavandi v. State of Kerala,* AIR 1973 SC 467 : (1973) 3 SCC 469.

88. *Jamshed Hormusji Wadia v. Board of Trustees, Port of Mumbai,* (2004) 3 SCC 214, 244 : AIR 2004 SC 1815.

89. *Deo Narain Mandal v. State of UP,* (2004) 7 SCC 257 : AIR 2004 SC 5150. See also *Gir Prasad v. State of UP.,* (2005) 13 SCC 372 : (2006) 2 SCC (Cr) 250.

90. *Deputy Chief Controller v. Kosalram,* AIR 1971 SC 1283; *State of Uttar Pradesh v. Sahai,* AIR 1981 SC 1442 : (1982) 1 SCC 352; *State of U.P. v. Hari Ram,* AIR 1983 SC 1081 : (1983) 4 SCC 453; *Rajesh Kumar v. Dharamvir,* (1997) 4 SCC 496 : 1997 CRLJ 2242; *Satbir v. Surat Singh,* AIR 1997 SC 1160; *State of Uttar Pradesh v. Abdul,* AIR 1997 SC 2512 : (1997) 10 SCC 135; *Anvaruddin v. Shakoor,* AIR 1990 SC 1242 : (1990) 3 SCC 266; *Gauri Shankar Sharma v. State of Uttar Pradesh,* AIR 1990 SC 709 : 1990 Supp SCC 656; *State of U.P. v. Banne,* (2009) 4 SCC 271 : (2009) 3 JT 552. For Art. 39(b), see, Ch. XXXIV, *infra.*

91. *State of Uttar Pradesh v. Ashok Kumar Srivastava,* AIR 1992 SC 840 : (1992) 2 SCC 86; *State of Rajasthan v. Narayan,* AIR 1992 SC 2004 : (1992) 3 SCC 615; *State of Uttar Pradesh v. Anil Singh,* AIR 1988 SC 1998; *Appabhai v. State of Gujarat,* AIR 1988 SC 696.

92. *State of Uttar Pradesh v. Harihar Bux Singh,* AIR 1974 SC 1890 : (1975) 3 SCC 167; *State of U.P. v. Jashoda Nandan Singh,* AIR 1974 SC 753; *Mohan Lal Hargovind Dass v. Ram Narain,* AIR 1980 SC 1743; *State of Andhra Pradesh v. P. Anjaneyulu,* AIR 1982 SC 1598; *Mool Chand v. Jagdish Singh Bedi,* (1993) (2) SCC 714 : 1993 SCC (Cri) 767; *State of Uttar Pradesh v. Dan Singh,* AIR 1997 SC 1654 : (1997) 3 SCC 747; *State of Maharashtra v. Ashok Chotelal Shukla,* AIR 1997 SC 3111; *State of Punjab v. Karnail Singh,* 2003 11 SCC 271 : AIR 2003 SC 3609; *Shri Gopal v. Subhash,* (2004) 13 SCC 174, 180 : AIR 2004 SC 4900.

93. *S.V.L.Murthy v. State represented by CBI, Hyderabad,* (2009) 6 SCC 77.

94. AIR 1979 SC 1284 : (1979) 2 SCC 297.

> "It is now the well established practice of this Court to permit the invocation of the power under Art. 136 only in very exceptional circumstances, as and when a question of law of general public importance arises or a decision shocks the conscience of the Court. But, within the restrictions imposed by itself, this Court has undoubted power to interfere even with findings of fact, making no distinction between judgments of acquittal or conviction, if the High Court, in arriving at those findings, has acted "perversely or otherwise improperly".

Of special significance are the observations of the Court on the question whether a private party, distinguished from the state, could invoke the Court's jurisdiction under Art. 136. The Court observed on this point:

> "Appellate power vested in the Supreme Court under Art. 136 of the Constitution is not to be confused with ordinary appellate power exercised by appellate courts and appellate tribunals under specific statutes…. It is a plenary power 'exercisable outside the purview of ordinary law' to meet the pressing demands of justice… Art. 136 of the Constitution neither confers on anyone the right to invoke the jurisdiction of the Supreme Court or inhibits anyone from invoking the Court's jurisdiction. The power is vested in the Supreme Court but the right to invoke the Court's jurisdiction is vested in no one. The exercise of the power of the Supreme Court is not circumscribed by any limitation as to who may invoke it."

Therefore A moved a petition in the Supreme Court challenging the constitutional validity of these proceedings *vis-a-vis* Art. 21. In *P.S.R. Sadhanantham v. Arunachalam,*[1] the main question to consider was: Did the brother of the deceased have *locus standi* to file the appeal? The Supreme Court refused to hold that the brother of the deceased could be regarded as an "officious meddler" who had no business nor grievance when the commission of a grievous crime was going unpunished. Art. 136 is a "special jurisdiction"; it is a "residuary power" "extraordinary in its amplitude". The Court advocated a liberalisation of the traditional, narrow, rule of *locus standi*.

This case establishes the position that the powers of the Supreme Court in appeals under Art. 136 are not restricted by the appellate provisions contained in the Criminal Procedure Code, or any other statute. When exercising appellate jurisdiction, the Supreme Court has power to pass any order.[2]

The power has also been utilized *suo motu* to direct retrial and to transfer criminal trials outside a State [3]to transfer proceedings pending before the High Court to itself;[4]to transfer an undertrial prisoner to another jail;[5]to direct an enquiry by the Registrar General of the Supreme Court to assess whether a witness had been coerced into giving contradictory evidence and if so who coerced her.[6]While allowing the appeal of an accused, an order of acquittal was recorded in favour of a non- appealing co-accused[7] and in respect of a co-accused whose

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1. AIR 1980 SC 856 : (1980) 3 SCC 141.
2. *Delhi Judicial Service Association v. State of Gujarat*, (1991) 4 SCC 2176 : (1991) 4 SCC 406; *Chandrakant Patil v. State*, AIR 1998 SC 1165 : (1998) 3 SCC 38.
3. *Zahira Habibullah Sheikh v. State of Gujarat*, (2004) 4 SCC 158 : AIR 2004 SC 3114.
4. *Kalyan Chandra Sarkar v. Rajesh Ranjan*, (2005) 1 SCC 801 : 2005 SC (Cr) 449.
5. *Ibid.*
6. *Zahira Habibullah Sheikh v. State of Gujarat*, (2005) 4 SCC 292 : 2005 SCC (Cr) 931.
7. *Gurucharan Kumar v. State of Rajasthan*, (2003) 2 SCC 698; *Pawan Kumar v. State of Haryana*, (2003) 11 SCC 241 : AIR 2003 SC 2987*; Anjlus Dungdung v. State of Jharkhand*, (2005) 9 SCC 765 : AIR 2005 SC 1394.

special leave petition had been dismissed[8] and the sentence imposed had been undergone.[9]

E. APPEALS FROM TRIBUNALS UNDER ART. 136

An outstanding feature of Article 136(1) is that it empowers the Supreme Court to hear appeals not only from courts but also from tribunals in any cause or matter.

In the modern era of 'social welfare' state, there is a vast extension in governmental operations, activities and responsibilities so much so that it is known as the administrative age. Many functions undertaken by a modern government give rise to opportunities for adjudication and, thus, India along with other democratic countries has come to have a host of varied adjudicatory bodies outside the regular judicial hierarchy.[10]

Though the Indian Constitution makes provisions for a well-ordered and well-regulated judicial system, yet it will be wrong to assume that the courts monopolise the entire business of adjudication. Side by side with the courts, a plethora of bodies and officials also carry on adjudicatory functions under powers conferred on them by legislation and determine innumerable classes of applications, claims and controversies between the administration and individuals, or between the individuals themselves. Most of these adjudicatory bodies are characterised as "*quasi-judicial*", indicating thereby that these are not courts "pure and simple", butpartake of some features of both courts as well as the administration. '*Quasi-judicial*' indicates a process which is both judicial as well as administrative at one and the same time.[11]

In this context, the use of the word 'tribunal' in Article 136 assumes a special significance, for it indicates that the Supreme Court can hear appeals from the decisions of such bodies as may not be courts in the traditional sense. The word 'tribunal' has been used in Art. 136 in contradistinction to 'courts'. While all courts are tribunals, all tribunals are not courts. As innumerable adjudicatory bodies function outside the judicial hierarchy, it is extremely desirable that there be some forum to correct any misuse of power or procedural irregularities committed by such bodies. This function is now discharged by the Supreme Court under Article 136. To leave these innumerable adjudicatory bodies outside the pale of any judicial control would be to create innumerable little despots which could misuse their powers, or exercise them improperly, and thus negate the concept of Rule of Law.

The statutes creating these bodies may at times provide for some form of judicial control over them, but many a time, the statutes provide for no such control; on the other hand, some statutes even go to the extent of declaring decisions by these bodies "final," thus barring a recourse to courts, under ordinary legal processes, by an individual suffering from a sense of grievance against a decision of

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8. *Akhil Ali Jehangir Ali Sayyed v. State of Maharashtra,* (2003) 2 SCC 708 : 2005 SCC (Cr) 931.

9. *Lella Srinivasa Rao v. State of A.P.,* (2004) 9 SCC 713, 719 : AIR 2004 SC 1720.

10. On Administrative Adjudication, see, JAIN, *TREATISE ON ADMINISTRATIVE LAW, I,* Ch. XIV; JAIN, *CASES AND MATERIALS ON INDIAN ADMN. LAW, II,* Ch. XIII.

11. For discussion on the Tribunal system in India, see, JAIN, *A TREATISE ON ADMN. LAW,* I, Ch. XIII; JAIN, *INDIAN ADMN. LAW—CASES AND MATERIALS,* II, Chs. XII.

such an adjudicatory body. The great merit of Article 136 is that, irrespective of any statutory provision to the contrary, the Supreme Court can control these adjudicatory bodies by hearing appeals from their decisions and pronouncements. Without some kind of judicial control there is a danger that tribunals might degenerate into arbitrary bodies, which would be foreign to a democratic constitution. This is the heart of the matter and the reason why the Supreme Court should exercise jurisdiction over tribunals.

(a) WHAT IS A TRIBUNAL?

Regarding the exercise of the Supreme Court's jurisdiction over tribunals, the first relevant question to answer is : what is a 'tribunal'?

Whether a body would be deemed to be a 'tribunal' or not under Art. 136, is a question full of difficulties. Definitive norms have not yet been laid down to answer the same with certainty, and the result has not always been rational. As for example, the Central Board of Revenue exercising appellate power under s. 190, and the Central Government exercising power under s. 191 of the Sea Customs Act have been held to be tribunals, but not the customs officers even though they also exercise some judicial powers.[12]

First and foremost, for a body to be a tribunal it should be a *quasi*-judicial body, exercising some judicial function. This in itself is quite a difficult question to answer and a full discussion on it can be had more properly under Administrative law.[13]

No body which is purely administrative or executive or legislative in nature without exercising any judicial functions would fall under the purview of Art. 136.[14]

For a body to fall under the purview of Art. 136, it does not have to be a fullfledged court; it is sufficient if it exercises *quasi*-judicial functions.[15] But then, while most of the *quasi*-judicial bodies may be held to be tribunals, it is not necessary that each and every such body may be so characterised.

The very first case which came before the Supreme Court calling for characterization of the term 'tribunal' in Art. 136 was *Bharat Bank v. Employees of Bharat Bank*.[16] The question which arose before the Supreme Court in the instant case was whether the Supreme Court could entertain an appeal under Art. 136 against an award of an industrial tribunal.

MUKHERJEA, J., who was in the minority expressed a negative view on this question. He took the view that the tribunal's function was merely an extended form of the process of collective bargaining and was more akin to administrative rather than to judicial functions. In his view, therefore, the Supreme Court could not grant special leave to appeal from an award of an industrial tribunal. On the other hand, the majority took an affirmative view. The majority view was that

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12. *Indo-China Steam Navigation v. Jasjit Singh,* AIR 1964 SC 1140 : (1964) 6 SCR 594.
13. JAIN, *A TREATISE ON ADMN. LAW*, I, Ch. IX; JAIN, *CASES AND MATERIALS ON INDIAN ADM. LAW*, I, Ch. VIII. Also, *infra*, Ch. VIII under "*Certiorari*".
14. *Bharat Bank v. Employees of Bharat Bank, supra; Express Newspapers v. Union of India*, AIR 1958 SC 578 : 1959 SCR 12.
15. *B.K. Bhandar v. Dhamangaon Manicipality*, AIR 1966 SC 249 : 1965 (3) SCR 499; *Chandrika v. Bhaiyalal,* AIR 1973 SC 2391 : (1973) 2 SCC 474.
16. AIR 1950 SC 188 : 1950 SCR 459.

while the tribunal was not a court, its functions and duties, nevertheless, were of the same nature as those of a body discharging judicial functions. According to the tribunal rules, evidence is taken, witnesses are examined, cross-examined and re-examined.

According to MAHAJAN, J., the industrial tribunal has all the necessary attributes of a court of justice. It discharges no other function except that of adjudicating a dispute. Such a tribunal could be characterised as a *quasi*-judicial body because it is outside the regular judicial hierarchy. Nevertheless, it discharges functions which are basically judicial in nature. Accordingly, it was held that the Supreme Court could grant special leave to appeal under Art. 136 against an award of an industrial tribunal.

The Supreme Court observed in *Bharat Bank*:[17]

> "The intention of the Constitution by the use of the word 'tribunal' in the article seems to have been to include within the scope of Article 136 tribunals adorned with similar trappings as court but strictly not coming within that definition."

This was an epoch-making decision as it gave an expansive orientation to Art. 136 and at the same time brought the vast net-work of *quasi*-judicial bodies under judicial control which would promote Rule of Law in the country. It clarified that the expression "tribunal" as used in Art. 136 does not mean a court, but includes within its ambit all adjudicatory bodies, provided they are constituted by the state and are invested with judicial, as distinguished from purely administrative or executive, functions.

In *Jaswant Sugar Mills v. Lakshmi Chand*,[18] a conciliation officer acting under the Industrial Disputes Act, 1950, while granting or refusing permission to alter the terms of employment of the workmen at the instance of the employer, was held to be not a tribunal, although he acts in a *quasi*-judicial capacity in the matter. To be a tribunal, a body, besides being under a duty to act judicially, should be one which has been constituted by, and invested with a part of the judicial function of, the state. An order passed by the Chief Justice of the High Court at Allahabad transferring case from the Lucknow Bench to the Allahabad Bench was held to be a judicial order passed by a tribunal justifying interference under Art. 136.[19]

In deciding whether an authority acting judicially and dealing with the right of the citizens is a tribunal or not, the principal incident is the investiture of the 'trappings of a court', such as, authority to determine matters in cases initiated by parties, sitting in public, power to compel attendance of witnesses and to examine them on oath, duty to follow fundamental rules of evidence (though not the strict rules of the Evidence Act), provision for imposing sanctions by way of imprisonment, fine, damages, or mandatory or prohibitory orders to enforce obedience to their commands. The list is illustrative; some, though not necessarily all such trappings, will ordinarily make the authority which is under a duty to act judicially, a 'tribunal'.

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17. AIR 1950 SC 188, 195 : 1950 SCR 459.
18. AIR 1963 SC 677 : 1963 Supp (1) SCR 242.
19. *Manju Varma (Dr.) v. State of U.P.*, (2005) 1 SCC 73 : (2004) 9 JT 569.

As regards the conciliation officer, no procedure is prescribed for the investigation to be made by him; he is not required to sit in public; no formal pleadings are tendered; he is not empowered to compel attendance of witnesses. He does not deliver a determinative judgment or makes an award affecting the rights and obligations of the parties. He is not constituted to adjudicate on industrial disputes. His order merely removes a statutory ban in certain eventualities laid upon the common law right of an employer to dismiss, discharge or alter the terms of employment according to contract between the parties. Thus, not invested with the judicial power of the state, a conciliation officer cannot be regarded as a 'tribunal'.

Similarly, the Court refused to hear an appeal from an arbitrator appointed under s. 10A of the Industrial Disputes Act. He has been held not to be a tribunal because he lacks the basic, the essential, the fundamental requisite of being a tribunal, *viz*., of being invested with the inherent judicial power of the state. The appointment of an arbitrator is based on the agreement of the parties concerned and he is, thus, a nominee not of the state but of private parties. To be a tribunal, the power of adjudication must be derived from a statute or statutory rule and not from an agreement of parties.[20]

Following *Jaswant Sugar*, the Supreme Court has ruled in *Meenakshi*,[21] that the appropriate Government or authority while granting or refusing permission for retrenchment of workmen under section 25-N of the Industrial Disputes Act, 1947, is not a tribunal. The power of the Government is not very different from that of a conciliation officer. The Court has also ruled that the decision taken by the Government under section 25-N permitting retrenchment of workers is not final as it could lead to an industrial dispute.

Whether a body is a 'tribunal' or not can be decided by applying several tests:

(i) it should not be an 'administrative' body pure and simple, but a '*quasi*-judicial' body as well;

(ii) it should be under an obligation to act 'judicially';

(iii) it should have some 'trappings of a court';

(iv) it should be constituted by the state;

(v) the state should confer on it its inherent judicial power, *i.e*., power to adjudicate upon disputes.

These criteria are not exhaustive but 'illustrative'. A body does not have to fulfil all these criteria to be characterised as a tribunal. How much of each of these criteria should a body possess before being characterised as a 'tribunal' has been left vague and indefinite.

The fact is that many of the statements made by the Supreme Court in the two cases, *viz. Jaswant Sugar Mills* and *Hind Cycles*, describing the characteristics of a tribunal are tautological and circular, and some of the tests are overlapping, or of not much substance. For example, to insist that a body should not be 'administrative' but '*quasi*-judicial' and, further, to insist that it should have inherent judicial power of the state, appear to be tautological, for how can a body be 'judicial' or '*quasi*-judicial' without having the state's judicial power. The fact that

20. *Engineering Mazdoor Sabha v. Hind Cycles*, AIR 1963 SC 874 : 1963 Supp (1) SCR 625.
21. *Workmen of Meenakshi Mills Ltd. v. Meenakshi Mills Ltd.*, AIR 1994 SC 2696, 2717 : (1992) 3 SCC 336.

a body is *quasi*-judicial and thus adjudicates upon disputes shows that it has some inherent judicial power. Similarly, to lay too much emphasis on 'trappings of a court' to judge whether a body has judicial power or not is to make external forms, rather than intrinsic nature of its function, determinative of the nature of the body.

In many cases cited above, *e.g.*, *Hari Nagar Sugar Mills* and *Indo-China Steam Navigation*, the Central Government, or the Board of Revenue have been held to be 'tribunals' even though these bodies hardly exhibit any trappings of a court. And, in many cases, the Court has first decided whether the body is '*quasi*-judicial' or not, and then proceeded to see whether it has followed principles of 'natural justice' or not.[22]

It is common knowledge that statutes create adjudicatory bodies without prescribing the procedure they have to follow and, in such cases, courts insist that these bodies follow natural justice which guarantees the minimal basic features of a judicial procedure. There is thus no need to insist, nor has it been done invariably in every case, that a body should follow a more elaborate procedure than natural justice to be called a tribunal.

Insisting too much on external features would result in a large number of adjudicative bodies becoming free from judicial review, resulting in a negation of the Rule of Law on which the Court itself has laid so much emphasis from time to time. Perhaps, it may be more rational and simpler to put the matter in a different perspective.

What the Court appears to be saying in substance in the *Jaswant Sugar Mills* case, shorn of all verbiage, is that a conciliation officer, although he follows a *quasi*-judicial procedure of hearing the parties, *etc*., before he makes some orders, is not actually performing an adjudicatory function, as he does not seek to decide on the rights and wrongs of a labour-management controversy. What he seeks to do is to bring the contesting parties together and iron out differences between them by the process of persuasion and negotiation. This implies that even though he acts in a non-partisan and impartial manner, and in some matters after hearing the parties concerned, in the totality of his functioning he is only seeking to promote a compromise between the parties and is not himself engaged in adjudication upon the dispute.

A distinction can certainly be drawn between a *quasi*-judicial adjudicatory body and one which, though following a *quasi*-judicial procedure, is non-adjudicatroy in nature. Looked at from this angle, *Jaswant Sugar Mills* case raises no difficulty.

As regards *Hind Cycles*, this author had said in a previous edition:[23]

> The ruling in the *Hind Cycles* case is somewhat difficult to support on logical grounds, apart from policy considerations (which the Court might have had), of discouraging questions of labour-management relations from coming to it very often. Essentially, an arbitrator under s. 10A of the Industrial Disputes Act, derives his powers from the state-made statute, performs the same task as an industrial tribunal, *viz*., that of adjudication (and not reconciliation), follows a *quasi*-judicial procedure and gives a binding and enforceable award. He does

22. *Siemens Eng. & Mfg. Co. v. Union of India*, AIR 1976 SC 1785 : (1976) 2 SCC 981.
23. JAIN, *INDIAN CONSTITUTIONAL LAW*, 138 (1987).

> not fundamentally differ from a labour tribunal, and the parties only decide as to 'who' should act as an arbitrator and on what matter would he adjudicate and for the rest he functions within the four walls of the Act. The Court has itself accepted that his position is higher than that of an ordinary arbitrator under the Arbitration Act. All these attributes are, therefore, sufficient to make him a tribunal.

Since then, in *Gujarat Steel Tubes Ltd. v. Its Mazdoor Union*,[24] the Supreme Court has held that an arbitrator appointed under s. 10A of the I.D.A can be regarded as a 'tribunal' for purposes of s. 11A of the same Act. The Court has said that the arbitrator under s. 10A has power to bind even those who are not parties to the reference and the source of the force of the arbitrator's award derives from the parent statute. This ruling makes it possible to hold that such an arbitrator is a 'tribunal' for the purposes of Art. 136 as well.[25] Perhaps, one can say that *Hind Cycles* is no longer tenable in view of *Gujarat Steel*.

In the previous edition, this author had suggested:[26]

> It is, however, suggested that it would be simpler if the Court generally adopts the rule that it would hear appeals under Art. 136 from *quasi*-judicial bodies. Being a discretionary jurisdiction, the Court may refuse to grant leave to appeal in cases which raise no important issue, or may confine the appeal to such points as in its view need its thoughtful pronouncements. To draw a distinction between *quasi*-judicial bodies and tribunals, and that, too, by applying vague criteria, is only to make an already complicated law all the more difficult and uncertain.

The Supreme Court has now come very close to this position. Under Art. 324 of the Constitution read with the Election Symbols (Reservation and Allotment) Order, 1968, the Election Commission has power to adjudicate upon disputes with regard to recognition of political parties, or rival claims to a particular symbol for purposes of election. In *A.P.H.L. Conference, Shillong v. W.A. Sangma*,[27] the Supreme Court had to decide the question concerning the character of the Election Commission while adjudicating upon the dispute with regard to the recognition of political parties or rival claims to a particular symbol for purposes of election. The question was whether the Supreme Court could hear an appeal from the Election Commission while adjudicating upon such a dispute, which raised the question whether the Commission could be regarded as a 'tribunal' for purposes of Art. 136?

The Court answering in the affirmative pointed out that in previous decisions, several tests have been laid down to determine whether a particular body is a 'tribunal' or not for purposes of Art. 136. These tests are not exhaustive in all cases and not all these tests need be present in a given case. While some tests may be present others may be lacking. For a body to be a 'tribunal' it is absolutely necessary that it must be "constituted by the state" and it must be "invested" with "ju-

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24. AIR 1980 SC 1896 : (1980) 2 SCC 593.
25. This appears to be implicit in *Royal Education Society v. LIS (India) Construction Co. (P.) Ltd.*, (2009) 2 SCC 261 : AIR 2009 SC 1650 in which an award of an Arbitral Tribunal was modified.
26. JAIN, *INDIAN CONSTITUTIONAL LAW*, 138 (1987).
27. AIR 1977 SC 2155 : (1977) 4 SCC 161.

dicial as distinguished from purely administrative or executive functions". This is an 'unfailing' test. According to the Court:[28]

> The principal test which must necessarily be present in determining the character of the authority as tribunal is whether that authority is empowered to exercise any adjudicating power of the state and whether the same has been conferred on it by any statute or a statutory rule.

The Court found that this test is fulfilled when the Election Commission is required to adjudicate a dispute between two parties. The Commission exercises a part of the State's judicial power which is conferred on it through Art. 324 and the rules made thereunder. In deciding this dispute, the Commission exercises a judicial function and has a duty to act judicially. Hence the Election Commission is a 'tribunal' while acting as such. Although the Commission has various administrative functions to discharge, but that does not mean that while adjudicating upon a dispute it does not exercise a judicial power conferred on it by the state.

It is not necessary for a body that the only function discharged by it ought to be adjudicatory before it can be characterised as a tribunal. A body may be regarded as administrative for certain purposes but *quasi*-judicial for other purposes. The question needs to be determined keeping in view the exercise of power with reference to the particular subject-matter although in some other matters the exercise of functions may be of a different kind. The Commission is created by the Constitution and is invested by law with not only administrative powers but also with certain judicial power of the state, however, fractional the same may be.[29]

The Supreme Court has held in *Income-tax Commissioner, Calcutta v. B.N. Bhattacharya*,[30] that the Settlement Commission established under the Income-tax Act is a 'tribunal' for the purpose of Art. 136. Its proceedings have been declared to be judicial as the Commission has considerable powers and its determinations affect the rights of the parties; its obligations are *quasi*-judicial. "When a body is created by statute and clothed with authority to determine rights and duties of partics and to impose pains and penalties on them it satisfies the test laid down in *Associated Cement Co.* case."[31]

Under Art. 136, the Supreme Court has heard appeals, among others, from the following adjudicatory bodies holding them to be tribunals:

(1) Industrial Tribunal functioning under the Labour Disputes Act, 1947;[32]

(2) Central Administrative Tribunal;[33]

(3) Election Commission and election tribunals;[34]

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28. *Ibid*, at 2163.

29. For Election Commission, see, Ch. XIX, *infra*.
The main function of the Commission is to organise and supervise elections in the country which basically is an administrative function.

30. AIR 1979 SC 1724 : (1980) 3 SCC 54.

31. *A.C. Companies v. P.N. Sharma*, AIR 1965 SC 1595 : 1965 (2) SCR 366; see, footnote 44, *infra*.

32. *Bharat Bank v. Employees of Bharat Bank*, AIR 1950 SC 188 : 1950 SCR 459; *J.K. Iron and Steel Co. v. Mazdoor Union*, AIR 1956 SC 231 : 1955 (2) SCR 1315.

33. *CSIR v. K.G.S. Bhatt*, (1989) 4 SCC 635 : AIR 1989 SC 1972.

34. *Durga Shankar v. Raghu Raj Singh*, AIR 1954 SC 520 : 1955 (1) SCR 267.

(4) Railway Rates Tribunal;[35]

(5) Income-tax Appellate Tribunal[36] and Settlement Commission;[37]

(6) Custodian General acting under s. 27 of the Administration of Evacuee Property Act;[38]

(7) Authority under the Payment of Wages Act;[39]

(8) Central Government acting under section 111(3) of the Companies Act, 1956, while deciding a dispute regarding registration of shares between a company and the person who has purchased these shares;[40]

(9) Central Government exercising powers of revision under s. 30 of the Mines and Minerals (Regulation & Development) Act, 1957.[41]

(10) Central Government hearing appeals in customs matters;[42]

(11) State Government engaged in revisional proceedings under s. 7(F) of the U.P. (Temporary) Control of Rent and Eviction Act;[43]

(12) State Government acting under Rule 6(6) of the Punjab Welfare Officers Recruitment and Conditions of Service Rules, 1952, issued under the Factories Act, 1948;[44]

(13) Board of Revenue, Rajasthan.[45]

It can be seen from the above list that the Supreme Court has held that even the government while exercising adjudicatory powers under various statutes may be treated as a 'tribunal' and appeals heard therefrom.

At this stage, it is necessary to clarify one point. In Administrative Law, the term 'tribunal' is usually used for an adjudicatory body which is autonomous and independent of the Administration.[46]

But the significance attached to 'tribunal' in Art. 136 is much broader a concept as autonomy of the adjudictory body from the Administration is never an issue under Art. 136. This is evidenced by the fact that even the government acting in an adjudicatory capacity has been held to be a tribunal for purposes of Art. 136.

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35. *Raigarh Jute Mills v. Eastern Railway,* AIR 1958 SC 525 : 1959 SCR 236; *S.S. Light Railway Co. v. U.D. Sugar Mills Ltd.,* AIR 1960 SC 695 : 1960 (2) SCR 926.
36. *Dhakeswari Cotton Mills Ltd. v. Commr. of Income-tax,* AIR 1955 SC 65 : 1955 (1) SCR 941; *Sovachand v. Commr., Income-tax,* AIR 1959 SC 59.
37. *CIT v. Bhattacharjee,* AIR 1979 SC 1725 : (1979) 4 SCC 121.
38. *Indira Sohan Lal v. Custodian,* AIR 1956 SC 76; *Purshotamlal v. Chamanlal,* AIR 1961 SC 1371 : 1962 (1) SCR 297; *Bishambhar Nath Kohli v. State of Uttar Pradesh,* AIR 1966 SC 573 : 1966 (2) SCR 158.
39. *Works Manager v. C.M. Pradhan,* AIR 1959 SC 1226 : 1960 (1) SCR 137.
40. *Harinagar Sugar Mills v. Shyam Sunder Jhunjhunwala,* AIR 1961 SC 1669 : 1962 (2) SCR 339.
41. *M.P. Industries Ltd. v. State of India,* AIR 1966 SC 671; *Shivji Nathubhai v. State of India,* AIR 1960 SC 606 : 1960 (2) SCR 775.
42. *Dunlop India Ltd. v. Union of India,* AIR 1977 SC 597; *Ahura Chemical Products v. Union of India,* AIR 1981 SC 1782 : (1981) 4 SCC 277.
43. *Shri Bhagwan v. Ram Chand,* AIR 1965 SC 1767 : 1965 (3) SCR 218.
44. *A.C. Companies v. P.N. Sharma,* AIR 1965 SC 1595 : 1965 (2) SCR 366.
45. *Delhi Cloth & General Mills v. State of Rajasthan,* AIR 1980 SC 1552 : (1980) 4 SCC 71.
46. See, footnote 13, cited on p. 338, *supra.*

The Speaker acting under the X Schedule to the Constitution (known as the Anti-Defection Law),[47] deciding a question of disqualification of a member of the Legislature arising as a result of his defection has been held to be a 'tribunal'.[48] But the Inquiry Committee under the Judges (Inquiry) Act[49] cannot be treated as a tribunal for the purposes of Art. 136 because the report of the Committee finding a Judge guilty of misbehaviour is merely in the nature of recommendation for his removal which may or may not be acted upon by Parliament. As the Committee's report holding that the Judge is guilty of any misbehaviour is not "final and conclusive", "it is legally not permissible to hold that the Committee is a tribunal under Art. 136." It is true that the Committee is to act judicially while investigating into the charges framed against the Judge. But its report is in the nature of a recommendation on which further action may or may not be taken by Parliament.[50]

The Court has maintained that one of the considerations to hold a statutory body as a tribunal under Art. 136 is 'finality' or 'conclusiveness' and the "binding nature of the determination by such authority".

On this basis, as discussed earlier, the committee appointed by the Speaker of the Lok Sabha/Chairman of the Rajya Sabha to inquire into the conduct of a Supreme Court Judge is not a tribunal for purposes of Art. 136.

The district judge has power to take disciplinary action against ministerial servants. It has been held that the High Court while exercising appellate power from the district judge does not act as a 'tribunal', but acts purely administratively since it does not resolve any dispute or controversy between two adversaries; it only exercises its power of control over the subordinate judiciary.[51] The Supreme Court has observed:

> "In certain matters even Judges have to act administratively and in so doing may have to act *quasi*-judicially in dealing with the matters entrusted to them. It is only where the authorities are required to act judicially either by express provisions of the statute or by necessary implication that the decision of such an authority would amount to a *quasi*-judicial proceeding. When Judges in exercise of their administrative functions decide cases it cannot be said that their decisions are either judicial or *quasi*-judicial decisions.... In the appeal before the High Court, the High Court was following its own procedure, a procedure not normally followed in judicial matters. The High Court was not resolving any dispute or controversy between two adversaries. In other words, while deciding this appeal there was no lis before the High Court. The High Court was only exercising its power of control while deciding this appeal...."[52]

It is submitted that the above observation is based on some confusion of ideas. According to the principles of Administrative Law, an administrative function discharged according to the principles of natural justice is characterised as *quasi*-judicial. There are many bodies which though do not decide any 'lis' yet act according to natural justice and are thus characterised as *quasi*-judicial. The High Court in hearing an appeal from district judge in disciplinary proceedings may

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47. *Supra*, Ch. II.
48. *Kihota Hollohon v. Zachilhu,* AIR 1993 SC 412 : 1992 Supp (2) SCC 651.
49. *Supra*, Sec. B
50. *Sarojini Ramaswami v. Union of India,* AIR 1992 SC 2218, 2248 : 1991 Supp (2) SCC 723; *supra*, Sec. B.
51. *Infra*, Ch. VIII, sec. F.
52. *Dev Singh v. Registrar, Punjab & Haryana High Court,* AIR 1987 SC 1629 : (1987) 3 SCC 169.

not follow the provisions of the Civil Procedure Code, but it still has to follow natural justice.[53] There are any number of judicial pronouncements in which disciplinary proceedings against students, employees, government servants have been held to be *quasi*-judicial. Many bodies held to be tribunals (see the list above) do not decide any 'lis'. On this view, there is no reason why the district judge as well as the High Court in the above situation cannot be regarded as tribunals for purposes of Art. 136.

In contrast to the above, reference may be made to *Commissioner of Police v. Registrar, Delhi High Court*,[54] where the Supreme Court heard an appeal from a decision of the Administrative Committee of the Delhi High Court. The factual matrix in which the case arose was as follows: former Prime Minister Narasimha Rao was summoned to appear before a criminal court on a charge of bribing a few members of Parliament.[55] Narasimha Rao being entitled to proximate security under the Special Protection Group Act, 1988, the Commissioner of Police, Delhi, and the Director of the Special Protection Group applied to the Delhi High Court for permission to shift the venue of the trial from the Tis Hazari Complex to some other safe place in Delhi for security reasons. The Administrative Committee of five Judges of the High Court refused to concede the point. An appeal was then filed before the Supreme Court under Art. 136 read with Art. 142. The Court accepted the request of the Commissioner and quashed the decision of the High Court. Rejecting the objection that the kind of order passed by the Administrative Committee of the High Court being an administrative order, was not amenable to the Supreme Court's Jurisdiction under Art. 136,[56] the Court observed that its jurisdiction under Art. 136 "is plenary in nature and this Court can determine its own jurisdiction and its effort in that regard would be final." The Court also justified hearing the appeal in the instant case by stating that the appeal was filed not only under Art. 136 but under Art. 142 as well.

The case is an exception to the rule as here an acknowledged administrative decision has been held subject to an appeal to the Supreme Court under Art. 136. It is difficult to envisage what impact is this pronouncement going to have on the future growth of case-law in India under Art. 136. Will this case be treated, because of the delicacy of the matter involved, as a one time exception to the general rule that under Art. 136, the Supreme Court hears appeals only from *quasi*-judicial decisions, or will its lead to a relaxation of this rule, and give a new dimension to Art. 136 in the near future.

Then, the relevance of Art. 142 in this connection is not very clear. Art. 142 does not confer any additional appellate jurisdiction on the Supreme Court as such. Art. 142 enables the Court to make an order to do complete justice in the matter it is hearing in exercise of its jurisdiction. Art. 142 does not seem to expand the jurisdiction of the Supreme Court. It does however enhance the power of the Court to give relief in a matter it is deciding. This means that the matter in question should otherwise fall within its jurisdiction.[57]

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53. JAIN, *A TREATISE ON ADMINISTRATIVE LAW*, Chs. IX, XIII; JAIN, *CASES & MATERIALS ON INDIAN ADMINISTRATIVE LAW*, Chs. VIII, XII.
54. AIR 1997 SC 95.
55. See, Ch. II, *supra*, under "Parliamentary Privileges", Sec. L.
56. Reference was made in this connection to *Dev Singh v. Registrar, P&H High Court*, *supra*, footnote 52.
57. For discussion on Art. 142, see, *infra*, Sec. G.

Although the earlier view was that an order passed by the Chief Justice nominating an arbitrator under section 11 of the Arbitration and Conciliation Act, 1996 was not appealable because the Chief Justice does not act as a tribunal[58], it has now been held that an order passed by the Chief Justice appointing an arbitrator is a judicial order[59] and hence is appealable[60].

(b) EXHAUSTION OF ALTERNATIVE REMEDIES

Another limitation imposed by the Supreme Court on itself is that it does not usually entertain appeals against an order of a tribunal unless the appellant has exhausted the alternative remedies provided by the relevant law. As for example, the Court has discouraged the practice, at times resorted to by the appellants, of seeking to move the Supreme Court straightaway from the tax tribunal without first taking recourse to the available technique of the tribunal making a reference to the High Court.[61]

The Court has imposed this restriction in view of the heavy rush of cases.

The rule of exhaustion of remedies, however, is not inflexible or rigid as it is a self-imposed restriction. This means that the Supreme Court may relax it if special circumstances are present.[62] Some examples of relaxation of this rule are given below:

(i) The Supreme Court heard an appeal from the C.T.O.'s order, without the appellant exhausting all his remedies. In the instant case, the C.T.O. instead of exercising his own judgment in the matter of assessment, followed, even against his own judgment, the instructions given to him by his superior officer. The assessee had not been given an opportunity to meet the point made against him by the superior officer. The assessment was thus made behind the assessee's back and there was thus breach of natural justice.[63]

(ii) The Supreme Court heard an appeal from the Income-tax Tribunal's order as there was breach of natural justice and the tribunal had refused to state a case to the High Court; the High Court had also refused to ask the tribunal to state a case to it.[64]

(iii) The Court heard an appeal from the Income-tax tribunal as the assessee had lost his remedy of reference to the High Court from the tribunal by one day's delay without his fault.[65]

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58. *Konkan Railway Corporation Lit. v. Rani constructions Pvt. Ltd.*, (2002) 2 SCC 388 : AIR 2002 SC 778.
59. *SBP & Co. v. Patel Engg. Ltd.*, (2005) 8 SCC 618 : AIR 2006 SC 450.
60. *Jain Studios Ltd. v. Shin Satellite Public Co Ltd.*, (2006) 5 SCC 501 : AIR 2006 SC 2686; See also *Punjab Agro Industries Corpn. Ltd. v. Kewal Singh Dhillon*, (2008) 10 SCC 128, at page 132 : (2008) 9 JT 256.
61. *Ballabhdas v. State of Bihar*, AIR 1966 SC 814 : 1962 Supp (2) SCR 967; *C.I.T. v. K.W. Trust*, AIR 1967 SC 844 : 1967 (2) SCR 7.
62. *Bal Ram Prasad Rawat v. State of Uttar Pradesh*, AIR 1981 SC 1575 : (1981) 3 SCC 249; *S.G. Chemicals & Dyes Trading Employees' Union v. S.G. Chemicals & Dyes Trading Ltd*., (1986) 2 SCC 624 : 1986 (2) SCR 126; *M.V. "Vali Pero" v. Fernandeo Lopez*, AIR 1989 SC 2206 : (1989) 4 SCC 671.
63. *Mahadayal Premchandra v. C.T.O.*, AIR 1958 SC 667 : 1959 SCR 551.
64. *Dhakeshwari Mills'* case, AIR 1955 SC 65 : 1955 (1) SCR 941.
65. *Baldeo Singh v. C.I.T.*, AIR 1961 SC 736. Also, *C.I.T. v. National Finance*, AIR 1963 SC 835 : 1962 Supp (2) SCR 865.

(iv) The Supreme Court heard an appeal directly from the order of the Collector of Customs, without exhausting the statutory remedies available, as it raised some important points of law.[66]

(v) The Supreme Court granted special leave to appeal from the order of the Asst. Sales Tax Commissioner, without exhaustion of the remedies under the law. It would have been futile for the assessee to go to the High Court as on the point in issue it had already given a ruling in another case which was adverse to the assessee. The Supreme Court felt that it was one of those extraordinary cases where ends of justice would be better served by granting appeal and thus avoid a circuitry of action.[67]

(vi) It is not mandatory for an appellant under Art. 136 to have exhausted the remedy under Art. 226, the reason being that the High Court's jurisdiction under Art. 226 is discretionary and its scope is rather limited and so an appeal under Art. 136 cannot be thrown out on the ground that the appellant did not exhaust Art. 226.[68]

(vii) In the case mentioned below,[69] the Supreme Court heard an appeal directly against an assessment order made by the commercial tax officer without the assessee exhausting departmental remedies and the procedure by way of writ petition under Arts. 226 and 227.[70] The reason was that in another case, the High Court had already decided the law point against the assessee and there was, therefore, no point in again bringing the same law point before the High Court.

(c) GROUNDS FOR APPEAL

On what grounds does the Supreme Court hear appeals from the tribunals?

The matter has been considered by the Court in a large number of cases. While some general guidelines have been laid down in this connection, there emerges no specific general formula pertaining to it.

Art. 136(1) empowers the Supreme Court to grant special leave to appeal in its discretion. The provision is couched in very wide terms. The constitutional provision lays down no norms to regulate Court's discretion in the matter of hearing appeals. The Supreme Court's approach has been conditioned by two main considerations, *viz.*:

(*i*) the Court's power under Art. 136 is extraordinary and discretionary and should, therefore, be used in exceptional circumstances; and,

(*ii*) this power should be exercised whenever there is a miscarriage of justice.

Though wide and undefinable with exactitude is the power of the Court under Art. 136, yet the pre-requisites or its interference to set right the decisions of tribunals can generally be categorised as follows:

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66. *Indo-China Steam Navigation Co. v. Jasjit*, AIR 1964 SC 1140 : 1964 (6) SCR 594.
67. *Lakshmi Rattan Engg. Works v. Asst. Commr.*, (1968) II SCJ 1.
68. *Master Construction Co. v. State of Orissa*, AIR 1966 SC 1047 : 1966 (3) SCR 99; *P.D. Sharma v. State Bank of India*, AIR 1968 SC 985 : 1968 (8) SCR 91. For discussion on Art. 226, see *infra*, Ch. VIII, sec. C.
69. *Onkar Nandlal v. State of Rajasthan*, AIR 1986 SC 2146 : (1985) 4 SCC 404.
70. For discussion on Arts. 226 and 227, see, Ch. VIII, *infra.*

(1) The tribunal acts in excess of its jurisdiction conferred on it by the parent law;

(2) The tribunal fails to exercise a patent jurisdiction;[71]

(3) The tribunal has acted illegally;[72]

(4) The tribunal has erroneoulsy applied well-accepted principles of jurisprudence;

(5) The order of tribunal is erroneous;[73]

(6) The tribunal acts against the principles of natural justice,[74] or has approached the question in a manner likely to result in injustice, *e.g.*, if it has denied a hearing to a party, or has refused to record his evidence, or has acted in an arbitrary or despotic fashion, or has not given a fair deal to a litigant;[75]

(7) There is a patent error of law in the tribunal decision'[76]

(8) The tribunal order is unjust.[77]

These categories are not exhaustive but are merely illustrative. As the Court's jurisdiction under Art. 136 is discretionary, its parameters cannot be exhaustively defined. Generally, the main consideration on which the Supreme Court acts is that under Art. 136, it is its duty to see that injustice is not perpetrated or perpetuated by the tribunals.[78]

When an award of the industrial tribunal regarding bonus was challenged under Art. 136, the Court held that it would interfere only where the award passed by the tribunal was wholly unreasonable and was the result of the failure of the tribunal to take into account the necessary relevant facts.[79]

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71. *J.K. Iron & Steel Co. v. Mazdoor Union*, AIR 1956 SC 231 : 1955 (2) SCR 1315; *Clerks of C.T. Co. v. C.T. Co.*, AIR 1957 SC 78; *D.C. Works v. Dharangdhara Municipality*, AIR 1959 SC 1271 : 1960 (1) SCR 388. *Chief Administrator-cum-Jt. Secretary, Govt. of India v. D.C. Dass*, AIR 1999 SC 186 : (1999) 9 SCC 53.
For further discussion on this topic, see, *infra*, Ch. VIII, sec. D, under *Certiorari*.

72. *Sangram Singh v. Election Tribunal* , AIR 1955 SC 425 : 1955 (2) SCR 1.

73. *Bhikaji Keshao v. Brij Lal Nandlal*, AIR 1955 SC 610; *Siemens Eng. & Mfg. Co. v. Union of India*, AIR 1976 SC 1785 : (1976) 2 SCC 981.

74. *Dhakeshwari Cotton Mills v. Commr. of Income-tax*, AIR 1955 SC 65 : 1955 (1) SCR 941; *Bhagat Ram v. State of Himachal Pradesh*, AIR 1983 SC 454; *J.K. Iron and Steel Co. v. Iron & Steel Co. Mazdoor*, AIR 1956 SC 231 : 1955 (2) SCR 1375; *Clerks and Depot Cashiers of the Calcutta Tramways v. Calcutta Tramways*, AIR 1957 SC 78 : 1956 SCR 772; *H.H. Industries v. F.H. Lala*, AIR 1974 SC 526; *City Corner v. P.A. to Collector*, AIR 1976 SC 143 : (1976) 1 SCC 124.
For further discussion on 'Natural Justice', see, *infra*, Ch. VIII under '*Certiorari*'; JAIN, *A TREATISE ON ADMINISTRATIVE LAW I*, Chs. IX-XII; JAIN, *CASES AND MATERIALS ON INDIAN ADM. LAW*, I, Chs. VIII-XI.

75. *Municipal Board v. State Transport Authority*, AIR 1965 SC 458 : 1963 Supp (2) SCR 373; *Mohan Lal v. Bharat Electronics Ltd.*, AIR 1981 SC 1253 : (1981) 3 SCC 225.

76. *Kays Concern v. Union of India*, AIR 1976 SC 1525; *Hindustan Antibiotics v. Workmen*, AIR 1967 SC 948 : 1967 (1) SCR 652; *Mohan Lal v. Management, Bharat Electronics*, AIR 1981 SC 1253 : (1981) 3 SCC 225.
For discussion on the concept of 'Patent Error of Law' see, *infra*, Ch. VIII, sec. D, under '*Certiorari*'.

77. *Manoj Kumar Rai v. Union of India*, AIR 1993 SC 882 : 1993 Supp (2) SCC 355.

78. *D.C. Mills v. C.I.T.*, AIR 1955 SC 65 : 1955 (1) SCR 941; *Mohan Lal v. Management, Bharat Electronics Ltd.*, AIR 1981 SC 1253 : (1981) 3 SCC 225.

79. *Standard Vacuum Refining Co. v. Workmen*, AIR 1961 SC 895 : 1961 (3) SCR 536.

In *Dunlop India Ltd. v. Union of India*,[80] the Supreme Court set aside a decision of the Appellate Collector of Customs holding that V.P. Latex be classified under item 39 of the Indian Tariff Act insead of under item 82(3), thus subjecting it to a much higher duty. The Collector's order was set aside under Art. 136 because "the order is *ex facie* based on an irrelevant factor....." The Collector had assessed the duty on the basis of the "ultimate use" of the commodity which is absolutely irrelevant. Under the Act, the taxing event is importing into or exporting from India, and the condition of the article at the time of import is a material factor to determine the classification of the head under which the duty would be leviable.

The Central Administrative Tribunal issued directions re-fixing seniority amongst officers in class A of the Indian Defence Services. The Government of India filed special leave to appeal to the Supreme Court against the tribunal decision, "not for sake of justice or injustice, legality or illegality of any provision but because it may have to pay few thousands, may be few lakhs more." The Supreme Court refused to interfere with the tribunal decision with the remark; "Effect of Tribunal's order is that it cured the injustice perpetrated due to absence of exercise of power by the Government [under the Rules]. Substantial justice being one of the guidelines for exercise of power by this Court the order is not liable to interference..... Justice is alert to differences and sensitive to discrimination. It cannot be measured in terms of money. The government of a welfare state has the gruelling task of being fair and just and so being justice oriented in its approach and outlook."[81]

The Supreme Court does not interfere with the conclusion arrived at by the Tribunal if it has taken all the relevant factors into consideration and there has been no misapplication of the principles of law.[82]

The Supreme Court invariably insists that the tribunal ought to give a reasonable opportunity of being heard to the parties concerned.[83] The State Administrative Tribunal cancelled the appointment of a person in a proceeding in which that person was not impleaded as a party. The Supreme Court set aside the tribunal order as it amounted to a grave error of law.[84]

The Court has spelled out of Art. 136 an obligation on tribunals to give reasons for their decisions on the plea that the Court could not effectively exercise its appellate jurisdiction if tribunals fail to give reasons for their orders. Therefore, in the absence of reasons, tribunal's order may be quashed and it may be directed to rehear the matter and dispose it according to law.[85]

The Court does not usually interfere with a tribunal's findings of fact.[86] The Court's attitude is to concern itself with seeing "whether a tribunal of reasonable

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80. AIR 1977 SC 597 : (1976) 2 SCC 241.
81. *India v. M.P. Singh*, AIR 1990 SC 1098 : 1990 Supp SCC 701.
82. *C.I.T. v. H. Hock Larsen*, AIR 1986 SC 1695; *D.C.M. v. Union of India*, AIR 1987 SC 2414 : (1988) 1 SCC 86.
83. *Municipal Board v. State Transport Authority*, AIR 1965 SC 458; *M.P. Industries v. Union of India*, AIR 1966 SC 671; *Bhagat Ram v. State of Himachal Pradesh*, AIR 1983 SC 454 : (1983) 2 SCC 442. Also see, *infra*, under High Courts, Ch. VIII, sec. D.
84. *J. Jose Dhanapaul v. S. Thomas*, (1996) 3 SCC 587 : 1996 (2) LLJ 646.
85. *Harinagar Sugar Mills v. Shyam Sunder*, AIR 1961 SC 1669 : 1962 (2) SCR 339; *Travancore Rayons v. Union of India*, AIR 1971 SC 862 : 1969 (3) SCC 868.
86. *Kays Constructions Co. v. Its Workmen*, AIR 1959 SC 208 : 1958 (2) LLJ 660; *Hindustan Antibiotics v. Workmen*, AIR 1967 SC 948; *Hansraj Gupta and Co. v. Union of India*, AIR 1973 SC 2724 : (1973) 2 SCC 637; *Chief Administrator-cum-Jt. Secretary to the Govt. of India v. Dipak Chandra Das*, AIR 1999 SC 186.

and unbiased men could judicially reach such a conclusion".[87] It would, therefore, interfere with the findings of fact only if there are special circumstances, *e.g*., absence of all legal evidence to support the same;[88] the findings are based on irrelevant considerations;[89] the tribunal has spoken in two voices and has given inconsistent and conflicting findings;[90] the conclusion is pure speculation and not one which any reasonable mind could judicially reach on the data set out;[91] when the findings are perverse and that no reasonable person can come to such findings on the materials before the tribunal;[92] or inconsistent with the evidence on record;[93] or are tainted with serious infirmity;[94] or when the relief given by it is wrong.[95] It would not interfere with the tribunal's findings of fact merely on the ground that these are erroneous and based on a misappreciation of evidence.[96]

The Drug Controller found that the appellant's renewed license was forged and fabricated. The High Court affirmed the finding in a writ petition. In the appeal before the Supreme Court under Art. 136, the orders of the Drug Controller and that of the High Court were challenged as erroneous by producing a certificate by the licensing authority that the renewed certificate bore his signature. This certificate had not been produced before the Drug Controller or the High Court. The Supreme Court refused to take the certificate into consideration. The Court also refused to interfere with the findings of the Drug Controller "being essentially a finding of fact" based on material placed before him.[97]

Normally, in exercising its jurisdiction under Art. 136, the Supreme Court does not interfere with the findings of fact concurrently arrived at by the tribunal and the High Court unless there is a clear error of law or unless some important piece of evidence has been omitted from consideration.[98]

When a tribunal arrives at its decision in effect by considering material which is irrelevant to the inquiry, or bases its decision on material which is partly relevant and partly irrelevant, or bases its decision partly on evidence and partly on conjectures, surmises and suspicions then it raises an issue of law and the Supreme Court can go into this matter.[99]

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87. *Jamuna Pd. Mukhariya v. Lachhi Ram,* AIR 1954 SC 686 : 1955 (1) SCR 608.
88. *Workmen of the Motipur Sugar Factory v. Motipur Sugar Factory,* AIR 1965 SC 1803 : 1965 (3) SCR 588; *Bhagat Ram, supra*; *Shaw Wallace v. Workmen,* AIR 1978 SC 977 : (1978) 2 SCC 45; *Radhakrishna Dash v. Administrative Tribunal,* AIR 1988 SC 674 : (1988) 2 SCC 229.
89. *Dhirajlal Girdharilal v. I.T. Commr*., AIR 1955 SC 271.
90. *P.S. Mills v. P.S. Mills Mazdoor Union,* AIR 1957 SC 95, 192 : 1956 SCR 872.
91. *Jamuna v. Lachhi, supra; L. Michael v. Johnson Pumps Ltd*., AIR 1975 SC 661 : (1975) 1 SCC 574.
92. *National Engineering Industries v. Hanuman,* AIR 1968 SC 33 : 1968 (1) SCR 54; *Bank of India v. Degala Suryanarayana,* AIR 1999 SC 2407 : (1999) 5 SCC 762.
93. *Macropollo v. Macropollo,* AIR 1958 SC 1012.
94. *Oil & Natural Gas Commission v. Workmen,* AIR 1 973 SC 968 : (1973) 3 SCC 535.
95. *India v. K.N. Sivdas,* AIR 1997 SC 3100 : (1997) 7 SCC 30.
96. *Tata Iron & Steel v. Modak,* AIR 1966 SC 380; *National Seeds Corp. Ltd. v. Prem Prakash Jain,* (1998) 8 SCC 500; *Mohan Amba Prasad Agnihotri v. Bhaskar Balwant Aher,* AIR 2000 SC 931 : (2000) 3 SCC 190.
97. *Medimpex (India) Pvt. Ltd. v. Drug Controller-cum-Chief Licensing Authority,* AIR 1990 SC 544 : 1989 Supp (2) SCC 665.
98. *Mehar Singh v. Shri Moni Gurudwara Prabandhak Committee,* AIR 2000 SC 492 : (2000) 2 SCC 97.
99. *Dhiraj Láal Girdharilal v. C.I.T.* AIR 1955 SC 271.

The Court does not also interfere with the exercise of discretion by a tribunal in a matter which falls within its discretion under the relevant law, unless there are some special reasons for such interference,[1] *e.g.*, when a tribunal does not exercise its discretion thinking that it has none, or exercises discretion on irrelevant considerations.[2]

A question is not allowed to be raised for the first time in an appeal before the Supreme Court.[3] It would refuse a question to be developed before it when it had neither been urgedbefore the High Court nor before the Appellate Tribunal.[4] But if it is a question of law arising on admitted facts, the Court may allow it to be argued before it even if it was not raised before the court below.[5] In the following case, the Supreme Court set aside the award of the industrial tribunal on the ground that it "acted in total oblivion of the legal position as propounded by this Court in various judgments".[6]

The power of the Supreme Court to grant special leave to appeal under Art. 136(1) is not denuded even when it is declared in the parent statute under which the tribunal functions that its decision is final.[7]

It may be interesting to note that so far the Supreme Court has been rather liberal in granting leave to appeal from labour tribunals. In case of these tribunals, the Court has not confined itself to questions of jurisdiction, of natural justice or patent error of law, but has assumed somewhat wider fuction to settle important principles of industrial law.[8] The reasons for this approach have been that a large number of such tribunals function in the country to settle labour-management relations under the Industrial Disputes Act, 1947. The Legislature while laying down procedural norms has not yet codified the entire body of substantive legal principles applicable to these controversies, and has left the same to be developed from case to case. The labour tribunals thus enjoy enormous discretion to decide matters and they do not merely interpret a body of rules and apply the same to concrete factual situations, but also perform the much more creative function of building a corpus of rules, according to their notion of socioeconomic justice, and such a delicate task could not be left finally to industrial tribunals. There exists no provision for appeals to any court or tribunal from the decisions of the labour tribunals, and, therefore, the aggrieved parties usually invoke the Supreme Court's jurisdiction.

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1. *Registrar of Trade Marks v. Ashoka Chandra,* AIR 1955 SC 558 : 1955 (2) SCR 252; *Bishambar Nath v. State of Uttar Pradesh,* AIR 1966 SC 573 : 1966 (2) SCR 158.
2. *Sangram Singh v. Election Tribunal,* AIR 1955 SC 425 : 1955 (2) SCR 1; *N.E. Industries v. Workmen,* AIR 1968 SC 538 : 1968 (1) SCR 779; *Hindustan Steels Ltd. v. A.K. Roy,* AIR 1970 SC 140 : (1969) 1 SCC 825.
3. *U.C. Bank v. Secy., State of U.P. Bank Union,* AIR 1953 SC 437; *Nain Singh Bhakuni v. Union of India,* AIR 1998 SC 622 : (1998) 3 SCC 348.
4. *Bharat Fire & Gen. Ins. Ltd. v. C.I.T.,* AIR 1964 SC 1800; *Moulin Rouge Pvt. Ltd. v. Commercial Tax Officer,* AIR 1998 SC 219; *Padmavati Jaikrishna v. Addl. C.I.T.,* AIR 1987 SC 1723 : (1987) 3 SCC 448.
5. *State Bank, Hyd. v. V.A. Bhide,* AIR 1970 SC 196; *Asst. Collector, Central Excise v. N.T. Co.,* AIR 1972 SC 2563 : (1972) 2 SCC 560.
6. *Workmen v. Management of R.B. Co. Ltd.,* AIR 1992 SC 504 : (1992) 1 SCC 290.
7. *Durga Shankar Mehta v. Raghuraj Singh,* AIR 1954 SC 520 : 1955 (1) SCR 267.
8. *A.C.C. Ltd. v. Cement Workers Union,* AIR 1972 SC 1552 : (1972) 4 SCC 23; *The Management of Kirloskar Electric Co. v. Their Workmen,* AIR 1973 SC 2119 : (1973) 2 SCC 247.

The Supreme Court has taken the view that certainty in the area of labour law is very essential as it is a significant factor in the socioeconomic development of the country. If the numerous labour tribunals are left free to interpret and apply the law, great uncertainty would arise as there is no central forum to introduce uniformity of approach amongst these bodies. So the Supreme Court has taken upon itself the task of defining, ascertaining, refining and laying down a uniform system of labour law. Though the Court takes the formal position that it does not sit as a regular court of appeal over labour tribunals,[9] yet the fact remains that, in practice, it has emerged as the supreme law-maker, and a senior policy-making partner, in the area of substantive industrial law.[10]

The Supreme Court has not played a similar role under Art. 136 with respect to any other branch of tribunal adjudication. It was because of the Supreme Court decision in *Bharat Bank*[11] that over time the Supreme Court has come to play such a significant role in adjudication of labour disputes. Had the Supreme Court refused to hear appeal from an industrial tribunal, the development of labour law might have taken an entirely different course.

F. ADVISORY JURISDICTION

The Supreme Court has been given an advisory jurisdiction as well.

According to Art. 143(1), when it appears to the President that a question of law or fact has arisen, or is likely to arise, which is of such a nature and of such public importance, that it is 'expedient' to obtain the opinion of the Supreme Court upon it, he may refer it to the Court for its consideration. The Court then *may*, after such hearing as it thinks fit, report to the President its opinion thereon.

Under Art. 143(2), a matter which is excluded from the Supreme Court's jurisdiction under Art. 131 may be referred to it for opinion and the Court *shall*, after such hearing as it thinks fit, report to the President its opinion thereon.[12]

A report under the above provisions is to be made by the Court in accordance with an opinion delivered in open court [Art. 145(4)] with the concurrence of the majority of Judges [Art. 145(5)]. A Judge who does not concur has liberty to deliver a dissenting opinion [Art. 145(4)]. The reference is to be heard by a Bench of not less than five Judges [Art. 145(3)]. Thus, the procedure in respect of the exercise of the advisory jurisdiction has, as far as possible, been approximated to a judicial hearing.

The scope of Art. 143(1) is quite broad. There is no condition that the President can refer only such questions as pertain to his powers, functions and duties or those of the Central Government. The President can seek the opinion of the

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9. The Court has stated in *Shaw Wallace v. Workmen*, AIR 1978 SC 977, that its jurisdiction under Art. 136. "can be invoked ordinarily only when there is a manifest injustice, fundamental flaw in law or perverse findings of fact."

In the instant case, the Court dismissed the special leave to appeal from the labour court decision as there was some basis, some material, to validate the award, and there was supportive testimony for findings of fact.

10. For a critique of this role of the Supreme Court see, Solomon E. Robinson, Supreme Court and s. 33 of the Industrial Disputes Act, 1947, 3 *JILI* 161, 182; Law Commission, XIV Report, I, 50.

11. *Supra*, footnote 96 : AIR 1950 SC 188

12. On Art. 131, see, *supra*, under 'Original Jurisdiction', Sec. C (iii)(d).

Supreme Court on any question of law or fact which appears to him to be of such a nature and of such public importance that it is expedient to obtain the Court's opinion. Of course, in this matter, the President acts on the advice of the Cabinet. Thus, questions relating to constitutional validity of the proposed legislation,[13] or 'powers, privileges and immunities' of State Legislatures[14] have been referred to the Supreme Court for opinion.

It is not necessary that only a question which has actually arisen may be referred to the Court for its opinion. The President may make a reference even at an anterior stage, namely, when the question is likely to arise in future. It is a matter essentially for the President to decide whether the question is of such a nature and of such public importance that it is expedient to seek the Court's opinion thereon.

The President is entitled to refer to the Supreme Court for its opinion any question of law or fact whether or not it has any relation to the entries in Lists I and III,[15] or whether it falls in the Central sphere or in the State sphere. What Art. 143(1) requires is the President's satisfaction that—(*i*) a question of law or fact has arisen or is likely to arise, and (*ii*) the question is of such a nature and of such public importance that it is expedient to obtain the Court's opinion on it. The satisfaction of the President on both these counts would justify reference to the Supreme Court. Questions regarding the validity of a statute in force or a proposed Bill may be referred to the Court as Art. 143(1) contemplates reference of a question of law which is 'likely to arise'.

The phraseology of the constitutional provision is quite broad to cover all types of references. The Court has stated recently that it is "well within its jurisdiction to answer/advise the President in a reference made under Art. 143(1) of the Constitution of India if the questions referred are likely to arise in future or such questions are of public importance or there is no decision of this Court which has already decided the question referred:[16]

The Court has now clarified that it cannot be asked, under Art. 143(1) to reconsider any of its earlier decisions. The President can refer only such legal question as has not been decided by the Court earlier. The Court has reasoned that when in its adjudicatory jurisdiction, it has pronounced an authoritative opinion on a question of law, there neither remains any doubt about the question of law nor does it remain *res integra* so as to require the President to know what the true position of law on the question is. The Court can review its earlier decision only under Art. 137.[17]

The Supreme Court has rejected the contention that under Art. 143, the President can ask the court to reconsider any of its previous decisions. The Court has observed that under the Constitution, the Court enjoys no appellate jurisdiction over itself. The Court cannot convert its advisory jurisdiction into an appellate one. "Nor is it competent for the President to invest us with an appellate jurisdiction over the said decision through a Reference under Article 143 of the Constitution". To interpret Art. 143(1) as conferring on the executive power to ask

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13. *Re The Special Courts Bill, 1978, infra.*
14. *Re The Powers, Privileges and Immunities of State Legislatures, infra.*
15. *Infra*, Chs. X and XI.
16. *Gujarat Assembly Election Matter*, (2002) 8 JT 389, 404, 405.
17. For discussion on Art. 137, see, *infra*, Sec. H.

the Supreme Court to revise its own decision, would cause a serious inroad into the independence of the judiciary.[18]

The Supreme Court has to confine itself to the questions referred to it by the President; it cannot travel beyond the reference. The circumstances that the President has referred only some questions regarding the validity of a Bill or an Act, and not others which also appear to arise, is no good reason for declining to entertain the reference.[19]

As has been stated by A.N. RAY, C.J., in *Re Presidential Poll* :[20]

> "This Court is bound by the recitals in the order of reference under Art. 143(1). We accept the statement of facts set out in the reference. The truth or otherwise of the facts cannot be enquired or gone into nor can this Court go into the question of *bona fides* or otherwise of the authority making the reference. This Court cannot go behind the recital. This Court cannot go into disputed questions of fact in its advisory jurisdiction under Art. 143(1)."

In Art. 143(1), the use of the word 'may' indicates that the Supreme Court is not obligated to express its opinion on the reference made to it. It has a discretion in the matter and may, in a proper case, for good reasons, decline to express any opinion on the question submitted to it. Such a situation may perhaps arise if purely socio-economic or political questions having no constitutional significance are referred to the Court, or a reference raises hypothetical issues which it may not be possible to answer without a full setting of facts in which the issues are to operate. It is to ensure against such a contingency that the Article uses the word 'may' and enables the Supreme Court to refuse to answer questions if it is satisfied that it should not express its opinion having regard to the questions and other relevant facts and circumstances.

The Court has emphasized that 'abstract' or speculative or hypothetical or too general questions should not be referred to it for advisory opinion. The Court has asserted that if a reference made to it is "vague and general", or if for any appropriate reason, the Court considers it "not proper or possible" to answer the reference, the Court may return it by pointing out the impediments in answering it. The Court has said that the plain duty and function of the Court is to consider the question on which the President has made the reference and report to the President its opinion. If for any reason, the Court considers it not proper or possible to answer the question, it would be entitled to return the reference by pointing out the impediments.[21]

The Court has refused to answer a reference in Special Reference No. 1 of 1993.[22]

However, in Art. 143(2), the use of the word 'shall' indicates that the Supreme Court has to give its opinion on a reference made thereunder.[23] There is a reason

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18. In *the Matter of Cauvery Water Disputes Tribunal*, AIR 1992 SC 522, 553, 554 : 1993 Supp (1) SCC 96(2).
Also see, *infra*, Ch. XIV, Sec. E.

19. *In re The Kerala Education Bill*, 1957, AIR 1958 SC 956 : 1959 SCR 995; see, *infra*, p. 357.

20. See, *supra*, Ch. III, Sec. A(i)(a); also, *infra*, p. 359.

21. See, *Re The Special Courts Bill*, *infra*, p. 359.

22. (1994) 1 SCC 680. For details, see below.
Also see, *M. Ismail Faruqui v. Union of India*, (1994) 6 SCC 360 : AIR 1995 SC 605.

23. *In re The Kerala Education Bill*, 1957, AIR 1958 SC 956 : 1959 SCR 995; *Keshav Singh's* case. AIR 1965 SC 745 : 1965 (1) SCR 413.

for this dichotomy between Arts. 143(1) and 143(2). Whereas it may be possible to agitate before the courts the matters falling under Art. 143(1) by adopting suitable procedures and techniques, the matters referred to in Art. 143(2) are banned from judicial scrutiny of the Supreme Court, High Court or any other court because of the operation of Arts. 131 and 363[24] and there is no other way to get a judicial verdict on these matters, if it ever becomes necessary, except through the machinery of Art. 143(2). Hence the Supreme Court is constitutionally obligated to give its opinion if ever it is sought on the type of questions referred to in Art. 143(2).

Before the advent of the Supreme Court, the Federal Court exercised an advisory jurisdiction under s. 123 of the Government of India Act, 1935.[25] Art. 143(1) is a close replica of s. 213, one major difference being that while only a question of law could be referred to the Federal Court, both questions of law or of fact can now be referred to the Supreme Court for advice.

Some of the principles of constitutional interpretation which the Federal Court laid down in its advisory opinions in relation to the interpretation of the federal provisions of the Government of India Act, 1935, have very well stood the test of time and remain valid and controlling even to-day in interpreting the Constitution.[26] Its opinion in *In re Levy of Estate Duty*,[27] has influenced the shaping and formulation of the entries regarding estate duty and succession duty in the Constitution.[28] Its opinion on the validity of the Hindu Women's Rights to Property Act, 1937, by interpreting it restrictively and confining its operations to such property as fell within the Central sphere, saved the great measure of social reform which had been achieved after years of hard toil on the part of the social reformers.[29]

During the last fifty years since the Constitution came into force, several references have been made to the Supreme Court under Art. 143(1), but none under Art. 143(2). These references are:

(1) *In re the Delhi Laws Act*, in 1951;[30]
(2) *In re the Kerala Education Bill*, in 1958;[31]
(3) *In re Berubari*, in 1960;[32]
(4) *In re the Sea Customs Act*, in 1962;[33]
(5) *Keshav Singh's* case in 1965;[34]
(6) *In re Presidential Poll*, in 1974;[35]
(7) *In re the Special Courts Bill*, in 1978;[36]

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24. *Supra*, Sec. C(iii)(c) and (d); *infra*, Ch. XXXVII, Sec. F.
25. AIR 1960 SC 845 : 1960 (3) SCR 250; *infra*, Sec. I(b).
26. *In re The C.P. Petrol Tax* case, 1939 FCR 18; *infra*, Ch. X.
For federal Court, see, Sec. I(b), *infra.*
27. 1944 FCR 317.
28. *Infra*, Ch. XI.
29. *In re The Hindu Women's Rights to Property Act*, 1937, 1941 FCR 12.
30. AIR 1951 SC 332; *supra*, Ch. II.
31. AIR 1958 SC 996; *infra*, Ch. X.
32. AIR 1960 SC 845; Ch. V.
33. AIR 1963 SC 1760; *infra*, Ch. XI.
34. AIR 1965 SC 745; *supra*, Ch. II, Sec. I.
35. AIR 1974 SC 1682; *supra*, Ch. III.
36. AIR 1979 SC 478, *infra*, Ch. XXI.

(8) *Re In the matter of Cauvery Water Disputes Tribunal*, in 1992;[37]

(9) *Re In the matter of Ram Janmabhoomi;*[38]

(10) *Reference on the Principles and Procedure regarding appointment of Supreme and High Court Judges in 1998.*[39]

(11) Gujarat Assembly Election Matter.[40]

(12) In re the Gujarat Gas Act[41]

A brief description of each of these cases is given below:

(a) Delhi Laws Act

The Supreme Court's pronouncement in the *Delhi Laws Act* case gave timely guidance to the Central Executive regarding the scope and extent of its legislative power under the Delhi Laws Act.[42] It thus avoided embarrassment to the Central Government and difficulties to the people which might have arisen had any Act extended to Delhi or any other Part C State were to be declared *ultra vires*.

(b) Berubari

In re Berubari gave timely guidance to the Central Government as to how it should implement the Indo-Pakistan Boundary Agreement between the Prime Ministers of India and Pakistan. Had the agreement been implemented in the way the government was contemplating (through an Act of Parliament), great embarrassment would have been caused to it had the Act been declared unconstitutional later, as it was bound to be in view of the Supreme Court's opinion.[43]

(c) Kerala Education Bill

In re The Kerala Education Bill sought the Supreme Court's opinion on the constitutional validity of certain provisions of the Kerala Education Bill which had been reserved by the Governor for the President's consideration.[44] The public opinion in Kerala was greatly agitated because of the Bill. Reference of the matter to the Court saved the Central Government from political embarrassment as well as mollified public opinion and helped in the removal of the lacunae in the Bill which the Supreme Court pointed out in its opinion.[45]

In its advisory opinion in this case, the Court settled the following two significant points concerning the scope of Art. 143(1).

(1) The Court rejected the contention that what was referred to the Court for its opinion was not a statute already put into force, but a Bill which was yet to be enacted. The Court argued that Art. 143(1) does contemplate the reference of a question of law that is "likely to arise".

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37. AIR 1992 SC 522. For details, see, *infra*, Ch. XIV, Sec. E.
38. (1993) 1 SCC 642; Ch. III, *supra.*
39. AIR 1999 SC 1; see, *supra*, Sec. B(d).
40. (2002) 8 SCC 237 : (2002) 8 JT 389.
41. In re Special Reference No. 1 of 2001:(2004) 4 SCC 489 : AIR 2004 SC 2657.
42. *Supra*, Ch. I, sec. K.
For detailed discussion on this case, see, JAIN, *A TREATISE ON ADM.*, I, 61, 62; *CASES & MATERIALS ON INDIAN ADM. LAW*, I, 38-46.
43. For details of case, see, *infra*, Ch. V, under "Cession of Territory".
44. See, *infra*, Ch. VI, sec. D.
45. *Infra*, Chs. XXI and XXIX.

(2) It was argued that questions about the validity of some other provisions of the Bill also arose but these were not referred to the Court. Hence, the reference was an incomplete one and the Court should not entertain such a reference. The Court rejected the argument saying that "it is for the President to determine what questions should be referred and if he does not entertain any serious doubt on the other provisions it is not for any party to say that doubts arise also out of them" and the Court "cannot go beyond the reference and discuss those problems".

The circumstance that the President has not thought fit to refer other questions regarding constitutional validity of other provisions of the Bill cannot be a good or cogent reason for declining to entertain this reference and answer the questions touching matters over which the President does entertain some doubt.[46]

(d) Sea Customs

In re The Sea Customs Act, the President forwarded for the Supreme Court's opinion questions regarding the validity of provisions of a draft Bill seeking to amend certain provisions of the Sea Customs Act, 1878, and the Court was thus able to clarify a knotty problem of Centre-State relationship.[47]

(e) Keshav Singh

Keshav Singh's case fully justified the institution of advisory opinion. A complete deadlock was reached between the U.P. Legislature and the Allahabad High Court over the relative Court-Legislature role in the matter of legislative privileges. The matter could not go to the Supreme Court in appeal as the U.P. Legislature would not invoke the Court's appellate jurisdiction after having once taken the position that courts have nothing to do with the legislature's power to commit a person for its contempt.[48] Momentous issues had thus arisen threatening the very basis of the Constitution and resort to the advisory opinion technique proved a satisfactory way out of the impasse.

An objection was raised in *Keshav Singh* against the validity of the reference. It was argued that the questions referred to the Court did not relate to any entry in List I or List III and, as such, they did not concern with any of the persons, duties or functions conferred on the President. The Court rejected the argument saying that the words of Art. 143(1) are of wide amplitude to empower the President to forward to the Court for its advisory opinion any question which in his opinion is of such a nature or of such public importance that it is expedient to obtain the opinion of the Court thereon. "*Prima facie*, the satisfaction of the President on both these counts would justify the reference".[49]

The Court also expressed the view, referring to the use of the word 'may' in Art. 143(1) in contrast with the use of the word 'shall' in Art. 143(2), that under Art. 143(1), the Court is not bound to give advisory opinion in every case if it feels that it would be inadmissible for it to express its advisory opinion having regard to the nature of the questions forwarded to it and having regard to other relevant facts and circumstances. In the words of the Court:[50]

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46. AIR 1958 SC at 965.
47. *Infra*, Ch. XI, Sec. C.
48. *Supra*, Ch. II, Sec. 1.
49. AIR 1965 SC at 756.
50. *Ibid.*

> "In other words, whereas in the case of reference made under Art. 143(2) it is the constitutional obligation of this Court to make a report on that reference embodying its advisory opinion, in a reference made under Art. 143(1) there is no such obligation. In dealing with this latter class of reference, it is open to this Court to consider whether it should make a report to the President giving its advisory opinion on the questions under reference."

(f) Presidential Poll

On April 29, 1974, the Central Government referred to the Court an important question for advice. The term of the President was coming to an end on August 24, 1974. The State of Gujarat was at this time under the presidential rule and its legislature had been dissolved.[51] The main question for consideration in *In re Presidential Poll* was whether the election of the President could be held in the absence of an elected State Assembly.[52]

The Central Government was of the opinion that on a true and correct interpretation of Arts. 54, 55, 56 and 71 of the Constitution, the election could be held. But, as a controversy had been raised on the question both within and outside Parliament, the Government thought it fit to seek the advice of the Supreme Court so that all doubts might be set at rest. It is for the Supreme Court to decide upon the validity of the election of the President. It was, therefore, advisable that the opinion of the Court be sought beforehand so that any future embarrassment could be avoided in case the Court later declared the President's election invalid on the ground of non-existence of a State Legislature.

(g) Special Courts

After the emergency during 1975-77,[53] the newly installed Janata Government decided to try certain persons holding high political offices during the emergency (1975-77), and to expedite their trial it decided to set up special courts. The Special Courts Bill was referred to the Court for advice on its constitutionality and the Court suggested that some modifications be made therein. These modifications were duly incorporated into the Bill when it was enacted in an Act later.[54]

During the hearing of the reference before the Court, the following several significant questions were raised regarding the scope of Art. 143(1) and the maintainability of the reference.

(1) The reference was hypothetical and speculative because the Bill was yet to become an Act.

Rejecting the contention, the Court argued that it was a fact that the Bill was pending before Parliament. There was nothing speculative about the existence of the Bill and there was nothing hypothetical about its contents. The Bill could undergo changes in course of time but that would not make it speculative. The Court observed in this connection:[55]

> "The Special Courts Bill is there in flesh and blood for anyone to see and examine. That sustains the reference, which is founded upon the satisfaction of the President that a question as regards the constitutional validity of the Bill is

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51. On Emergency, see, *infra*, Ch. XIII, Sec. B.
52. *Supra*, Ch. III, Sec. A.
53. On the Emergency of 1975-1977, see, *infra*, Ch. XXXIII, Sec. F.
54. *Infra*, Ch. XXI.
55. AIR 1979 SC at 491.

likely to arise and that the question is of such a nature and of such public importance that it is expedient to obtain the opinion of this Court upon it."

In the past also references had been made in regard to contemplated legislation and not in regard to Acts which had been enacted.[56]

(2) The reference was vague, general and of an omnibus nature. The only question referred was whether the Bill was constitutional. This was a very broad question. The whole Bill had been referred without mentioning specifically which of the provisions of the Bill could be open to attack under the Constitution and on what grounds. Those specific points on which Court's advice was sought had not been mentioned.

The Court agreed that a reference in such broad and general terms would be difficult to answer because it gave no indication of the specific points on which the opinion of the Court was sought. "It is not proper or desirable that this Court should be called upon to embark upon a roving inquiry into the constitutionality of a Bill or an Act". It ought not to be expected of the Court that it would examine each constitutional provision to find out under which of these provisions could the validity of the Bill be challenged.

The Court said that in the beginning it was "so much exercised over the undefined breadth of the reference" that it was contemplating to return the reference to the President. But, then, after perusing the briefs presented to the Court by the lawyers of the various parties, and after listening to the oral arguments advanced by them, it was possible to narrow down the legal controversies surrounding the Bill, to crystallise the issues arising for the consideration of the Court, and to ascertain the points of dispute needing the opinion of the Court. The Court emphasized:[57]

> "We hope that in future, whenever a reference is made to this Court under Art. 143 of the Constitution, care will be taken to frame specific questions for the opinion of the Court.... the risk that a vague and general reference may be returned unanswered is real..."

(3) Since Parliament was seized of the Bill, it was its exclusive function to decide upon the constitutionality of the Bill.

The Court rejected this argument saying that under the Indian Constitution the power of reviewing the constitutionality of legislation was vested in the Supreme Court and the High Courts. The Court observed on this point:

> "The right of the Indian judiciary to pronounce a legislation void if it conflicts with the Constitution is not merely a tacit assumption but is an express avowal of our Constitution. The principle is firmly and wisely embedded in our Constitution that the policy of law and the expediency of passing it are matters for the legislature to decide while interpretation of laws and questions regarding their validity fall within the exclusive advisory or adjudicatory functions of Courts."[58]

(4) Since the Bill was pending in Parliament for consideration, it would affect Parliament's sovereignty, and it would be encroaching on the functions and

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56. *In the Estate Duty* case, AIR 1944 SC 73; *In the Kerala Education Bill* case, AIR 1958 SC 956; *supra; In the Sea Customs Bill*, AIR 1963 SC 1760; *supra*.
57. AIR 1979 SC at 493.
58. *Ibid*, at 494.

privileges of Parliament, if the Court were to withdraw the question of validity of the Bill for its consideration.

The Court rejected the contention saying that in dealing with the reference, the Bill was not being withdrawn from Parliament. The Court was under a constitutional obligation to consider the reference made to it by the President under Art. 143(1) and report thereon. As the question of constitutional validity of the Bill fell within the Court's domain, no function or privilege was "wittingly or unwittingly" being encroached upon.

(5) The Court rejected the argument that the reference virtually abrogated Art. 32. The proceeding under Art. 32(1) were of an entirely different nature from the proceeding under Art. 143(1). If the Court were to pronounce on the question referred to it by the President, "there is neither supplanting nor abrogation of Art. 32".[59]

(6) It would be futile for the Court to pronounce on the constitutional validity of the Bill, for whatever view it might take, Parliament was free to pass the Bill or not as it pleased.

The Court rejected the argument saying that the argument was based on an unrealistic basis, "its assumption being that the Parliament will not act in a fair and proper manner". True, whatever the Court would say could not deter the Parliament from proceeding with the Bill as it pleased, and no Court would issue a writ or order restraining the Parliament from proceeding with the consideration of the Bill pending before it, yet it could not be assumed that if the Court were to hold the Bill to be unconstitutional "Parliament will proceed to pass it without removing the defects from which it is shown to suffer". The Court further observed on this point:[60]

> "Since the constitutionality of the Bill is a matter which falls within the exclusive domain of the courts, we trust that the Parliament will not fail to take notice of the Court's decision".

(7) The Court rejected the argument that the reference raised a purely political question. The question of constitutionality of the Bill was not a political question. The Court said: "The question referred by the President for our opinion raises purely legal and constitutional issues which is our right and function to decide". The President had not asked the opinion of the Court as to the desirability of passing the Bill, or the soundness of the policy underlying it or whether special Courts ought to be set up, or not, or whether political offenders should be prosecuted or not.

(8) It was argued that considering the repercussions of the exercise of advisory jurisdiction, the Court should "in the interest of expediency and propriety," refuse to answer the reference. The Court disagreed with this contention. The question referred to the Court raised a purely constitutional issue and it was neither difficult nor inexpedient to answer the reference.

In the end, the Court held the reference made by the President as maintainable and, accordingly, proceeded to report its opinion thereon.[61] During the course of

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59. *Ibid,* at 495.
On Art. 32, see, *infra,* Ch. XXXIII, Sec. A.
60. *Ibid,* at 495.
61. For discussion on this case, see, *infra,* under Arts. 14 and 21, Chs. XXI and XXVI.

its opinion in the instant case, the Court also made the following comments on Art. 143:

(1) Art. 143(1) is couched in broad terms.

(2) Under Art. 143(1), the President is empowered to make a reference even on questions of fact provided the other conditions of the article are satisfied.

(3) It is not necessary that the question on which the opinion of the Supreme Court is sought must have arisen actually. The President may make a reference at an anterior stage, *i.e*., at the stage when the President is satisfied that the question is likely to arise.

(4) The satisfaction whether the question has arisen or is likely to arise and whether it is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, is a matter essentially for the President to decide.

(5) The duty and function of the Supreme Court under Art. 143(1) is to consider the question referred to it by the President and report its opinion to him, provided of course the question is capable of being pronounced upon and falls within the power of the Court to decide.

(6) If, for any appropriate reason, the Court considers it not proper or possible to answer the question, it would be entitled to return the reference by pointing the impediments in answering it.

(7) Even in matters falling under Art. 143(2) [which uses the word 'shall' and not 'may' as in Art. 143(1)], the Court may be justified in returning the reference unanswered if it finds for a valid reason that the question is incapable of being answered.[62]

On the question of the binding nature of an advisory opinion under Art. 143(1), the Court has expressed the view that while it is always open to the Supreme Court to re-examine the question already decided by it and to overrule, if necessary, in so far as all other courts are concerned they ought to be bound by it. Earlier the Supreme Court had expressed the view in some cases that the advisory opinions do not have the force of law. **See**, *U.P. Legislative Assembly*;[63] *St. Xaviers College*.[64] In *St. Xaviers College,* RAY, C.J., observed that even if an advisory opinion may not be binding, it is entitled to great weight. Some High Courts have taken the view that an advisory opinion is law declared by the Supreme Court within the meaning of Art. 141.[65]

(h) Cauvery Waters

In the matter of *Cauvery Water Disputes Tribunal*, the main question referred to the Court for its advisory opinion was whether the Tribunal established under the Inter-State Water Disputes Act, 1956, has power to grant an interim relief to

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62. This is in contrast with what the Court had observed earlier in *Keshav Singh's* case, see, *supra*.

63. AIR 1965 SC 745, 762, 763.

64. AIR 1974 SC 1389; *infra*, Ch. XXX.

65. See, *Ram Kishore Sen v. Union of India*, AIR 1965 Cal 282; *Chhabildas Mehta v. Legislature Assembly*,
Gujarat State, (1970) 2 Guj LR 729.
For Comments on Art. 141, see, *infra*, Sec. J.

the parties to the dispute. The issues involved in this case are discussed later in this book.[66]

In this case again, the question whether the opinion given by the Supreme Court on a Presidential for Reference under Art. 143 is binding on all courts was debated. However, the Court refused to express any definitive opinion on the point for two reasons;

(1) the specific question did not form part of Presidential Reference in the instant case;

(2) any opinion expressed by the Court in the instant case would again be advisory.

Thus, the Court "leaves the matter where it stands" with, however, the following observation:[67]

> "It has been held adjudicatively that the advisory opinion is entitled to due weight and respect and normally it will be followed. We feel that the said view which holds the field today may usefully continue to do so till a more opportune time."[68]

(i) Ram Janmabhumi

In Special Reference No. 1 of 1993, the question referred to the Supreme Court for its advisory opinion was whether a Hindu temple or religious structure existed at a particular place in Ayodhya. The question referred to the Court was formulated as follows:[69]

"Whether a Hindu temple or any Hindu religious structure existed prior to the construction of the Ram Janma Bhumi—Babri Masjid.... in the area on which the structure stood."

The Supreme Court refused to give its opinion on this reference for several reasons. According to the majority opinion, the matter under reference was already the subject-matter of litigation in the lower courts, wherein the dispute between the parties would be adjudicated, and, therefore, the reference made under Art. 143(1) became superfluous and unnecessary.

Two of the Judges (AHMADI & BHARUCHA, JJ.) in a separate concurring opinion maintained that the Supreme Court could decline to answer a question referred to it under Art. 143 if it considers it to be not proper or possible to do so, but the Court must indicate its reasons. These learned Judges gave the following reasons for refusing to answer the reference in the instant case:

(1) The reference favoured one religious community and disfavoured another. The purpose of the reference was, therefore, opposed to secularism and was unconstitutional; the reference served no constitutional purpose.

(2) The Government proposed to use the Court's opinion as a springboard for negotiations. It did not propose to settle the dispute in terms of the Court's opinion.

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66. For a fuller discussion on this case, see, *infra*, Ch. XIV, Sec. E.
67. AIR 1992 SC 552, at 558.
68. Also see, *infra*, Secs. F. and J. on this point.
69. (1993) 1 SCC 642.

(3) To answer the reference it would be necessary to take evidence of experts, such as, historians, archaeologists and have them cross-examined.

(4) The principal protagonists of the two stands would not appear in the reference. Any opinion expressed by the Supreme Court would be criticised by one or both sides. This would impair the Court's credibility and compromise the dignity and honour of the Court.

(j) Supreme Court/High Court Judges

The reference was made by the President in July, 1998.[70] In *Advocates-on-Record Association v. Union of India,*[71] the Supreme Court had laid down the procedural norms for the appointment of the Judges of the Supreme Court and the High Courts. The decision was rendered by a Bench of 9 Judges and five judgments were delivered. As doubts arose about the interpretation of the law laid down by the Supreme Court in the above-mentioned case, the President made a reference to the Supreme Court under Art. 143(1) seeking clarification on certain points.

Nine questions were referred to the Court for its advisory opinion. These questions pertained to the following three main points:

(1) Consultation between the Chief Justice of India and other Judges in the matter of appointment of the Supreme Court and the High Court Judges;

(2) Transfer of High Court Judges and judicial review thereof;

(3) The relevance of seniority in making appointments to the Supreme Court.[72]

(k) Gujarat Assembly Election Matter

The reference under Art. 143(1) arose as a result of premature dissolution of the Gujarat Legislative Assembly. The main question raised in the reference was regarding the time-frame within which election to the Assembly must be held.[73]

(l) The Gujarat Gas Act

The Gujarat State Legislature passed an Act by name "the Gujarat Gas (Regulation of Transmission, Supply and Distribution) Act, 2001" ("the Gujarat Act"), which came into force w.e.f. 19-12-2000. The object of the enactment is to provide for regulation of transmission, supply and distribution of gas, in the interests of the general public and to promote gas industry in the State, and for that purpose, to establish a Gujarat Gas Regulatory Authority. The State Legislature passed the said enactment by tracing its legislative competence under Entry 25 of List II of the Seventh Schedule of the Constitution. Parliament has passed various enactments under Entry 53 of List I dealing with the matters of petroleum and petroleum products. *In re Special Reference No. 1 of 2001,*[74] the following questions were referred to this Court under clause (1) of Article 143:

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70. *In re : Presidential Reference,* AIR 1999 SC 1; see, *supra,* Sec. B(d).
71. *Supra,* Sec. B(d).
72. For detailed discussion on these points, see, *supra,* this Chapter, Sec. B and *infra,* Ch. VIII.
73. (2002) 8 SCC 237 : (2002) 8 JT 389.
For further discussion on this case, see, Ch. XIX, *infra.*
74. (2004) 4 SCC 489 : AIR 2004 SC 2647.

(*1*) Whether natural gas in whatever physical form including liquefied natural gas (LNG) is a Union subject covered by Entry 53 of List I and the Union has exclusive legislative competence to enact laws on natural gas.

(*2*) Whether States have legislative competence to make laws on the subject of natural gas and liquefied natural gas under Entry 25 of List II of the Seventh Schedule to the Constitution.

(*3*) Whether the State of Gujarat had legislative competence to enact the Gujarat Gas (Regulation of Transmission, Supply and Distribution) Act, 2001.

The Court construed Entry 53 of List I, and held that Parliament has got power to enact legislation for regulation and development of oilfields, mineral oil resources; petroleum, petroleum products, other liquids and substances declared by Parliament by law to be dangerously inflammable. Natural gas product extracted from oil wells is predominantly comprised of methane and is not independent of other petroleum products. The Court therefore concluded that "natural gas" is included in Entry 53 of List I and regulation of oilfields and mineral oil resources necessarily encompasses the regulation as well as development of natural gas and the Union Government alone has got legislative competence to enact laws in that regard. The Court was of the opinion that Entry 25 of List II was limited to the gas manufactured and used in gasworks. In view of this and having regard to the specific nature of Entry 53 covering any petroleum and petroleum products, the Court answered the reference by holding that The Gujarat Gas (Regulation of Transmission, Supply and Distribution) Act, 2001, in so far as it related to natural gas or liquefied natural gas was without any legislative competence and the Act to that extent was ultra vires the Constitution.

(m) Advisory Opinions in the U.S.A., Australia and Canada

The U.S. Constitution has no specific provision like Art. 143(1) authorising the President to make a reference to the U.S. Supreme Court seeking its opinion on any question. The U.S. Constitution is based on the doctrine of Separation of Powers.[75] Art. III, s. 2(1) of the U.S. Constitution provides that the judicial power vested in the Supreme Court shall extend to "cases" and "controversies".

The U.S. Supreme Court has consistently refused to render advisory opinions on abstract legal questions as it does not wish to exercise any non-judicial function. Giving of such an advice, it has been feared, might involve the Court in too direct participation in legislative and administrative processes. The reluctance of the Court is formally based on the doctrine of separation of powers which forms one of the bases of the U.S. Constitution.

In 1793, when Secretary of State Jefferson enquired of the Supreme Court whether it would give advice to the President on questions of law arising out of certain treaties, the Court refused saying that there was no such provision in the Constitution, and that it was not proper for the highest Court to decide questions extra-judicially,[76] Again, in *Muskrat v. U.S.,*[77] the Court refused to give an advi-

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75. See, Ch. III, Sec. F., *supra.*
76. DOUGLAS, *MARSHALL TO MUKHERJEA,* 25-26. Also, THAYER, *LEGAL ESSAYS,* 53 (1923).
77. 219 US 346.
Also, SCHWARTZ, *THE SUPREME COURT,* 142 (1957).

sory opinion arguing that under the Constitution its jurisdiction extends to a 'case or controversy' and so it cannot give an opinion without there being an actual controversy between adverse litigants. The Court has consistently refused to decide abstract, hypothetical or contingent questions.

Similar has been the approach of the High Court of Australia,[78] as the Australian Constitution has no provision parallel to Art. 143(1) of the Indian Constitution. However, to some extent, a similar purpose is served by permitting an Attorney-General to bring proceedings in the High Court to secure a determination of the validity of National or State legislation after its passage by the Legislature whether before or after it has come into force.[79]

In Canada, the Governor-General in Council is empowered to refer important questions of law touching on the validity or interpretation of the Dominion or Provincial legislation.[80] The practice of obtaining advisory opinions from the Judiciary has been very extensively used in Canada. It has almost become the normal strategy for determining constitutional issues. Protesting voices have, however, been raised against a too frequent use of this technique to settle constitutional controversies.[81]

The Judicial Committee of the Privy Council, which functioned as the highest Court of appeal from India before Independence, is obligated under sec. 4 of the Judicial Committee Act, 1833, to tender advice to the Crown on any matter other than appeals presented to it.

(n) Evaluation of the System of Advisory Opinions

The practice of invoking advisory judicial opinions is not universally approved. A serious objection raised against it is that opinions are sought on hypothetical questions, in the absence of concrete factual situations, without there being a real controversy in existence, and that it is inexpedient and inconvenient for the courts to express their opinions in the absence of the factual situation within which a rule is to operate.

Many legal questions can properly be appreciated in the context of concrete factual situations; since a reference to the court seeking its advice does not present actual facts, the court is unable to see the problem in the background of an actual controversy between the litigants. The court depends upon assumptions and its advisory opinions, are, therefore, nothing more than 'speculative opinions on hypothetical questions.'[82] It is not possible for the judiciary to lay down a principle adequately and safely without understanding its relation to concrete facts to which it may be applied.

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78. *In re Judiciary and Navigation Acts*, 29 CLR 25 (1921).

79. *Attorney-Gen. for Victoria v. Commonwealth*, 71 CLR 237 (1945); SAWER, The Supreme Court and the High Court of Australia, *6 Jl of Public Law*, 482, 491 (1957).

80. See, s. 60 of the *Canadian Supreme Court Act*, 1960.

81. MACDONALD, The Privy Council and Canadian Const., 29 *Can. B.R.* 1020 (1951); DAVISON, The Constitutionality and Utility of Advisory Opinions, 2 *Univ. of Toronto L.J.*, 347 (1950); RUBIN, The Nature, Use, and Effect of Reference Cases in Canadian Constitutional Law, 6 *McGill L.J.*, 168 (1959-60).

82. EARL HALSBURY in *Att. Gen. for Ontario v. Hamilton Street Rly.*, (1903) A.C. 524; FELIX FRANKFURTER, A Note on Advisory Opinions, 37 *Harv. L.R.* 1006; also his *LAW AND POLITICS*, 25 (1939); JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY*, 306 (1941); PYLEE, *THE FEDERAL COURT OF INDIA*, 276-287 (1966).

The great weakness of a decision without a true case is that, being rendered in *vacuo*, it is divorced from the real life of actual facts. Advisory opinions may thus move in an unreal atmosphere. The interests of future litigants may also be prejudiced by the Court laying down principles in the abstract.[83] It may be inconvenient for them to agitate the matter later when an actual controversy arises.[84] It is also argued that when an actual controversy comes before a court along with full facts, the court has a manoeuvrability and a flexibility of approach in deciding the issues raised but the same flexibility of approach is not available to the court when cut and dry questions are put to it for advice, for then it has to move within the framework of the questions, and its freedom of approach to legal issues is cabined and restricted by the way the questions are framed, and to safeguard itself from being misunderstood in future, the court may have to hedge its answers with all kinds of 'buts', 'ifs' and 'provideds'.

On the other hand, there are quite a few advantages of advisory jurisdiction: it can provide guidance to the government on questions of its legal powers and may promptly remove any cloud of uncertainty in the public mind, regarding the validity of any legislation or governmental action. An advance judicial opinion regarding the validity of a legislative measure may avoid inconvenience which may otherwise arise by its being declared invalid later.[85] Also, to depend solely on a real controversy for deciding a constitutional issue means that the court's jurisdiction depends on the whims of private litigants, and vital questions of constitutional law may remain clouded and unanswered by the highest Court for long till a suitable case arises and reaches the Court.

The ordinary court procedure is time-consuming and expensive as the case must pass through several courts before reaching the highest Court and for all this period a cloud of uncertainty would hang around the law, and the ultimate decision may very much depend on how and when a question is raised.

All these arguments for and against advisory opinions however lead to one conclusion: it is advisable that the highest Court has advisory jurisdiction but it should be invoked only sparingly and not frequently and only in such cases where factual situations are ripe, or where legal issues are capable of being formulated precisely and can be considered by the Court without much of a factual data, and political questions should not be referred to the Court for advice.

Most of the above objections are diluted by the safeguards subject to which only the Supreme Court in India may be consulted, *viz*.:

(1) It has an option to give or not to give its opinion on issues referred to it and, therefore, it can withhold its opinion *inter alia* if it feels that the reference suffers from prematurity or from lack of facts, or if the facts on which the reference is based are disputed, or if the reference is of a political nature *etc*.

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83. *Att. Gen. for Br. Col. v. Att. Gen. for Canada*, (1914) A.C. 153, 162; *In re Regulation and Control of Aeronautics in Canada*, (1932) A.C. 54, 66.

84. FREUND, Umpiring the Federal System, 54 *Col. L.R.* 561, 574; also, FREUND, A Supreme Court in a Federation, 53 *Col. L.R.* 597, 613.

85. BOWIE AND FRIEDRICH, *STUDIES IN FEDERALISM*, 107-111 (1954); SCHWARTZ, *AMERICAN CONST. LAW*, 149 (1955); MCWHINNEY, *JUDICIAL REVIEW*, 181 (1969).

(2) Judicial procedure is used in hearing the reference and opinion is delivered in open court so that the reasons on which it is based are subject to public scrutiny.

(3) Questions on which opinion is sought have to be framed by the Executive, for the Court is to give its opinion on problems of law or fact presented to it by the Executive in the reference.

Further, much depends as to how, in practice, the technique is used, and here the Indian experience cannot be said to be discouraging so far. On the whole, the institution of advisory opinions has functioned well in India and has proved to be creative in value so far as the constitutional interpretation is concerned. It has been used wisely and sparingly so far as is evident from the fact that over a period of 50 years only twelve references have been made to the Supreme Court of which the Court refused to entertain only one reference, *viz., In the matter of Ram Janma Bhumi.*

The reference procedure has been used in India so far only when substantial constitutional issues have been involved. Abstract and hypothetical questions have not generally been referred. References have been made only when issues have become clarified and crystallised by public discussion and were mature enough for judicial opinion.

Only in one or two references so far has the Court complained that it was handicapped by a lack of sufficient factual data to enable it to give its opinion. As for example, in *In re Levy of Estate Duty*, certain questions regarding future legislation on levy of estate duty were referred to the Federal Court for opinion, but no draft Bill was submitted. So, in answering the questions, the Judges had to make certain assumptions and reservations and they had no clear appreciation of the context in which the legal issues posed were to operate. In fact, one of the Judges hearing the reference, even refused to give his opinion, because the reference was enveloped in a 'thick fog of hypothesis' and 'uncertainties'. However, the two other Judges did give their opinion on the reference.

In the *Kerala Bill* case also, the Court pointed out that the questions referred had not arisen out of actual application of any specified section of the Bill to the facts of any particular case and so the questions were necessarily 'abstract or hypothetical' in nature. In the *Kerala Bill* case, though facts were absent, yet it differed from the *Estate Duty* case in so far as a Bill enacted by the State Legislature was before the Court and so it did not have to function in a complete vacuum.

The difficulties pointed out in these cases suggest that the reference, to elicit a meaningful judicial opinion, should be made, as far as possible, when the case is ripe and factual context and all relevant data are available. However, this much can be said for the *Kerala* reference that the Central Government had not much choice in the matter. Had it sought amendments in the Bill by the Kerala Legislature on its own accord, its political motives would have been questioned because the Central and the State Governments belonged to two different political parties. So, an objective assessment of the defects of the Bill by the Supreme Court was the best alternative available.

The controversy was set in legalistic and constitutional terms and the reference did not raise any political issue although the motivation behind the reference might have been political. On the whole, however, the full matter may be said to be the precursor

of healthy conventions in the area of federalism insofar as even when the Centre could have vetoed the Bill, it did not do so without seeking an opinion of a forum whose objectivity and impartiality none could challenge.[86]

G. POWER TO DO COMPLETE JUSTICE : ART 142(1)

Under Art. 142(1), in the exercise of its jurisdiction, the Supreme Court is entitled to pass any decree, or make any order, as is necessary *for doing complete justice* in any cause or matter pending before it.[87] Therefore although the ambit of the power is wide it should "be limited to the short compass of the actual dispute before the court and not to what might reasonably be connected with or related to such matter".[88]

The expressions 'cause' or 'matter' include any proceeding pending in the Court and would cover almost every kind of proceeding in the Court including civil or criminal.

Article 142(1) confers very wide powers on the Supreme Court to do complete justice in any case. The Court has given a broad and purposive interpretation to this provision.

The jurisdiction and powers of the Supreme Court under Art. 142 are supplementary in nature and are provided for doing complete justice in any matter. In course of time, the Apex Court has given a much wider dimension and ambit to Art. 142, practically raising the provision to the status of a new source of substantive power for itself.

Article 142(1) contains no limitations regarding the causes or the circumstance in which the power can be exercised nor does it lay down any condition to be satisfied before such power is exercised. The exercise of the power is left completely to the discretion of the highest court. Referring to Art. 142(1), the Supreme Court in *Supreme Court Bar Association v. Union of India*, has characterised its own role in these words:[89]

> "Indeed the Supreme Court is not a court of restricted jurisdiction of only dispute-settling. The Supreme Court has always been a law-maker and its role travels beyond merely dispute-settling. It is a problem-solver in the nebulous areas…"

In the same case, the Court has described the nature of its power under Art. 142 as follows:

> "The plenary powers of the Supreme Court under Art. 142 of the Constitution are inherent in the Court and are complementary to those powers which are specifically conferred on the Court by various statutes though are not limited by those statutes. These powers also exist independent of the statutes with a view to do complete justice between the parties. These powers are of very wide amplitude and are in the nature of supplementary powers. This power exists as a separate and independent basis of jurisdiction apart from the statutes. It stands upon the foundation and the basis for its exercise, may be put on a different and perhaps even wider footing, to prevent injustice in the process of

86. *Infra*, Ch. X, Sec. K.
87. *Delhi Electric Supply Undertaking v. Basanti Devi*, AIR 2000 SC 43, 49 : (1999) 8 SCC 229.
88. *Zahira Habibullah Sheikh v. State of Gujarat*, (2004) 5 SCC 353 : AIR 2004 SC 3467.
89. AIR 1998 SC 1895 : (1998) 4 SCC 409.

> litigation and to do complete justice between the parties. This plenary jurisdiction is, thus, the residual source of power which this Court may draw upon as necessary whenever it is just and equitable to do so and in particular to ensure the observance of the due process of law, to do complete justice between the parties, while administering justice according to law....."[90]

The Supreme court has exhibited a wavering attitude as regards the scope of Art. 142.

The nature of the power must lead the Court to set limits for itself within which to exercise those powers.

In some cases, the Court has laid down the restriction on itself with regard to Art. 142(1), *viz.*, the Court does not exercise the power to override any express statutory provisions. The power is not to be exercised in a case where there is no basis in law to form an edifice for building up a superstructure.

Article 142 is curative in nature; the power under Art. 142 is meant to "supplement" and not to "supplant" substantive law applicable to the case under consideration. Substantive statutory provision dealing with the subject-matter of a given case cannot be altogether ignored by the Supreme Court while making order under Art. 142.

The Apex Court has ruled that though its power under Art. 142 is broad, it cannot be exercised against a Fundamental Right.[91] In *Prem Chand*,[92] the Court had suggested that its power under Art. 142(1) cannot be exercised against a definite statutory provision. It was observed in that case:[93]

> ".....The wide powers which are given to this Court for doing complete justice between the parties, can be used by this Court for instance, in adding parties to the proceeding pending before it, or in admitting additional evidence, or in remanding the case, or in allowing a new point to be taken for the first time. It is plain that in exercising these and similar other powers, this Court would not be bound by the relevant provisions of procedure if it is satisfied that a departure from the said procedure is necessary to do complete justice between the parties."

In *A.R. Antulay v. R.S. Nayak*,[94] the Supreme Court has observed in relation to Art. 142:

> "… however wide and plenary the language of the article, the directions given by the Court should not be inconsistent with, repugnant to, or in violation of the specific provisions of any statute".

But, then, there are a member of cases, where the Court has expressed the view that the scope of Art. 142, which is a constitutional provisions, cannot be cut down by a statutory provision. Accordingly, the Court has observed:

> "Indeed, these constitutional powers cannot, in any way, be controlled by any statutory provisions but at the same time these powers are not meant to be ex-

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90. Also see, *Delhi Electric Supply Undertaking v. Basanti Devi*, AIR 2000 SC 43 at 49 : (1999) 8 SCC 229.
91. *Prem Chand v. Excise Commr., infra*, footnote 92.
92. *Prem Chand v. Excise Commissioner*, AIR 1963 SC 996 : 1963 Supp (1) SCR 885.
93. *Ibid.*, at 1003.
94. Also see, *A.R. Antulay v. R.S. Nayak*, AIR 1988 SC 1531 : (1988) 2 SCC 602.

> ercised when their exercise may come directly in conflict with what has been expressly provided for in statute dealing expressly with the subject".[95]

In *Delhi Judicial Service Assn.*,[96] the Supreme Court has observed that its power under Art. 142(1) to do complete justice is entirely of a different level and of a different quality and that any prohibition or restriction contained in ordinary laws can not act as a limitation on the constitutional power of the Supreme Court. Once the Court is in seision of a matter before it, "it has power to issue any order or direction to do 'complete justice' in the matter. This constitutional power of the Apex Court cannot be limited or restricted by provisions contained in statutory law." Thus, no enactment made by a legislature can limit or restrict the power of the Supreme Court under Art. 142, though the Court must take into consideration the statutory provisions regulating the matter in dispute.[97]

In *Union Carbide*,[98] the Court has taken a very broad view of Art. 142. The Court has observed in relation to the scope of its powers under Art. 142:

> "The proposition that a provision in any ordinary law irrespective of the importance of the public policy on which it is founded, operates to limit the powers of the Apex Court under Art. 142(1) is unsound and erroneous..... The [Court's] power under Article 142 is at an entirely different level and of a different quality. Prohibitions or limitations or provisions contained in ordinary laws cannot, *ipso facto*, act as prohibitions or limitations on the constitutional powers under Art. 142.... Perhaps, the proper way of expressing the idea is that in exercising powers under Art. 142 and in assessing the needs of 'complete justice' of a cause or matter, the Apex Court will take note of the express prohibitions in any substantive statutory provision based on some fundamental principles of public policy and regulate the exercise of its power and discretion accordingly. This proposition does not relate to the powers of the Court under Art. 142, but only to what is or is not 'complete justice' of a cause or matter and in the ultimate analysis of the propriety of the exercise of the power."

Under section 25 of the Delhi Special Police Establishment Act, 1946, Central Bureau of Investigation (CBI) cannot investigate a cognizable offence committed within a State without the consent of the concerned State Government. But the Supreme Court has ruled that it can under Art. 142(1) direct CBI to investigate such an offence within a State without the consent of the concerned State Government. The Court has asserted that the exercise of its power under Art. 142(1) is not conditioned by any statutory power, because statutory provisions cannot override constitutional provisions. Art. 142(1) being a constitutional power cannot be limited or conditioned by any statutory provision. The Court has explained the scope of Art. 142 in the following words:

> "The constitutional plenitude of the powers of the Apex Court is to ensure due and proper administration of justice and is intended to be co-extensive in each case and to meeting any exigency. Very wide powers have been conferred

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95. *Supreme Court Bar Association v. Union of India*, AIR 1998 SC 1895 : (1998) 4 SCC 409.

96. *Delhi Judicial Service Assn. v. State of Gujarat*, AIR 1991 SC 2176, at 2210 : (1991) 4 SCC 406.

97. The Court has expressed this view in a number of cases. See, for example, *State of Uttar Pradesh v. Poosu*, AIR 1976 SC 1750 : (1976) 3 SCC 1; *Ganga Bishan v. Jai Narain*, AIR 1986 SC 441 : (1986) 1 SCC 75; *Navnit R. Kamani v. R.R. Kamani*, AIR 1989 SC 9 : (1988) 4 SCC 655; *B.N. Nagarajan v. State of Mysore*, AIR 1966 SC 1942 : (1966) 3 SCR 682; *Harbans Singh v. State of Uttar Pradesh*, AIR 1982 SC 849 : (1982) 2 SCC 101.

98. *Union Carbide Corpn. v. Union of India*, (1991) 4 SCC 584, 634-35 : AIR 1992 SC 248, 278.

> on this Court for due and proper administration of justice and whenever the Court sees that the demand of justice warrants exercise of such powers, it will reach out to ensure that justice is done by resorting to this extraordinary power conferred to meet precisely such a situation."

The power under Art. 142(1) cannot be diluted merely because the Act in question stipulates that the State Government's permission will be necessary if the CBI is to investigate any offence committed within the territorial jurisdiction of a State Government. That may be a statutory obligation governing the relations between the Central Government and the State Government but it cannot control Supreme Court's power under Art. 142(1). The statute does not prohibit investigation by CBI but only requires certain formalities to be completed which has no relevance when the Apex Court makes an order in exercise of its power under Art. 142(1).[1]

The Supreme Court has emphasized that the power given to it under Art. 142 is conceived to meet situations which cannot be effectively and appropriately tackled by the existing legal provisions. The Supreme Court has left the power under Art. 142 "undefined and uncatalogued" so that "it remains elastic enough to be moulded to suit the given situation".[2]

A 3-judge Bench of the Supreme Court rejected the contention that it could not with the aid of Art. 142 cancel mining leases as the power to do so was with the State Government under Mines & Minerals (Development & Regulation) Act, 1957.[3]

While holding that the appointments to the posts of clerks in the subordinate courts in Karnataka without consultation with the State Public Service Commission were not valid, the Supreme Court, nevertheless, exercising its power under Art. 142, ruled on humanitarian grounds not to remove them from service as they had put in more than 10 years of service. These persons deserved "justice ruled by mercy". Accordingly, the Court ruled that these persons be treated as "regularly appointed with all the benefits of the past service."[4]

In a recent case the appellant challenged an order of punishment imposed by departmental authorities. His statutory appeal and revisional application were dismissed. The suit filed by him was dismissed as well as the First and Second Appeals. The only issue before the Supreme Court was the failure of the High Court to frame a substantial question of law. The Supreme Court however went into the facts and found that the order of punishment was indeed unjustified. Instead of remanding the case to the High Court, in exercise of its jurisdiction under Article 142, it set aside the judgment of the High Court confirming the judgments of the two lower courts and decreed the suit in favour of the appellant.[5]

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1. *Mohd. Anis v. Union of India,* (1994) Supp (1) SCC 145 : 1994 SCC (Cr) 248. Also, *Maniyeri Madhavan v. Sub-Inspector of Police*, AIR 1994 SC 1033 : (1994) 1 SCC 536.
2. *Delhi Development Authority v. Skipper Construction Co.*, AIR 1996 SC 2005 : (1996) 4 SCC 622.
3. *M.C.Mehta v. U.O.I.*, (2009) 6 SCC 142 : (2009) 6 JT 434.
4. *H.C. Puttaswamy v. Hon'ble Chief Justice of Karnataka,* AIR 1991 SC 295 : 1991 Supp (2) SCC 421.
5. *Man Singh v. State of Haryana*, (2008) 12 SCC 331. See also *Narendra Gopal Vidyarthi v. Rajat Vidyarthi*, (2009) 3 SCC 287 : (2008) 13 JT 313.

The Supreme Court has again explained the plenitude of the power under Art. 142 and has emphasized in the case mentioned below[6] that the power of the Supreme Court under Art. 142 is "a constituent power transcendental to statutory prohibition". There are no limiting words in Art. 142 "to moulding of relief or taking of appropriate decision to mete out justice or to remove injustice". The expression "complete justice" engrafted in Art. 142(1) is of wide amplitude "couched with elasticity to meet myriad situations". In the ultimate analysis, "it is for the Supreme Court to exercise its power to do complete justice or prevent injustice arising from the exigencies of the cause or matter before it". The question of lack of jurisdiction or nullity of the order of the Supreme Court does not arise."

In exercise of its extra-ordinary jurisdiction the Court may set aside not only the order impugned, but another order if it is of the view that setting aside the order impugned would give rise to another illegality.[7]

In *Vineet Narain v. Union of India*,[8] the Supreme Court has ruled that ample powers are conferred on the Court under Arts. 32, 141, 142 and 144 to issue necessary directions to fill the vacuum till either the legislature steps in to cover the gap or discharges its role.

In *Vishakha*,[9] the Supreme Court has emphasized that it is the duty of the executive to fill the vacuum by executive orders because its field is coterminous with that of the legislature and where there is inaction even by the executive, for whatever reason, the judiciary must step in, in exercise of its constitutional obligations under the aforesaid provisions to provide a solution till such time as the legislature acts to perform its role by enacting proper legislation to cover the field.[10]

Similarly, the deserted wife of a tenant was held to be entitled to continue in occupation of the tenanted premises having regard to the "demands of social and gender justice" under Art. 142 until suitable amendment in the legislation takes place.[11]

Presumably exercising its power under Art.142, the court directed that although no disability pension was payable to an army personnel since the disability was not caused by military service, yet it directed that the amount paid to the legal representatives of the disabled was not to be recovered from them.[12]

In a case where the court found that a respondent was in fact rendering service for a long time in the post of UDC although he was strictly not entitled to be in the UDC grade, the court directed that he should not be reverted to LDC but his seniority should be counted from the date on which he joined in the UDC post.[13]

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6. *Ashok Kumar Gupta v. State of Uttar Pradesh*, (1997) 5 SCC 201 : 1997 SCC (L&S) 1299.
7. *Commissioner of Income Tax, Shimla v. Greenworld Corporation, Parwanoo*, (2009) 7 SCC 69 : (2009) 8 JT 429.
8. AIR 1998 SC 889 : (1958) 1 SCC 226.
9. *Vishakha v. State of Rajasthan*, (1997) 6 SCC 241 : AIR 1997 SC 3011.
For further discussion on this case, see, Ch. XXVI
10. The Supreme Court has used its power to issue directions in a number of cases. For example, see, *Lakshmi Kant Pandey v. Union of India*, AIR 1984 SC 469 : (1984) 2 SCC 244; *State of West Bengal v. Sampat Lal*, AIR 1985 SC 195 : (1985) 1 SCC 317; *Union Carbide Corp. v. Union of India*, AIR 1992 SC 248 : (1991) 4 SCC 584; *Advocate-on-Record Ass. v. Union of India*, (1993) 4 SCC 441 : AIR 1994 SC 268; *Vishakha, op. cit.*
11. *B.P. Achala Anand v. S.Appi Reddy*, (2005) 3 SCC 313 : AIR 2005 SC 986.
12. *Secretary, Ministry of Defence v. A.V.Damodaran (Dead) Through LRS.*, (2009) 9 SCC 140.
13. *Union of India v. Muralidhara Menon*, (2009) 9 SCC 304.

It is thus clear from the above discussion that the Supreme Court's power under Art. 142 is vastly broad based. There are only three restrictions on the exercise of this power:

(i) it can be exercised only when the Court is otherwise exercising its jurisdiction;

(ii) the order which the Court passes is necessary for doing complete justice in the cause or matter pending before it; and

(iii) an order made under Art. 142(1) cannot contravene a constitutional provision though it may by-pass substantive provisions of the relevant statutory laws, if the court feels it necessary.

As regards the power under Art. 142 to do complete justice, the Supreme Court has put the power at its highest in *In re, Vinay Chandra Mishra*,[14] where the Court declared that "statutory provisions cannot override the constitutional provisions" and "Art. 142(1) being a constitutional power it cannot be limited or conditioned by any statutory provision." No enactment made by Central or state legislature can limit or restrict the power of the Supreme Court under Art. 142, though the Court must take into consideration the statutory provisions regulating the matter in dispute. What would be the need of complete justice in a cause or matter, would depend upon the facts and circumstances of each case. The limited view of Art. 142 expressed in *Premchand*[15] was expressly overruled as being "no longer a good law".[16]

The main point which the Court was called upon to decide in *Vinay Chandra* was whether it could suspend an advocate from practice, reading Arts. 129 and 142(1) together, when he was held guilty of contempt of court.[17] It was argued that since the power to suspend an advocate had been vested exclusively in the State Bar Council and the Bar Council of India, the Supreme Court was denuded of its power to impose such punishment. But the Court rejected the argument and ruled that under Arts. 129 and 142(1), it had the power to suspend an advocate from practice for its contempt. The Court ruled that Advocates Act had nothing to do with the contempt jurisdiction of the Court. No statute could restrict or limit the Court's power to take action for contempt against an advocate. The Court observed:[18]

> ".....The disciplinary jurisdiction of the State Bar Councils and the Bar Council of India to take action for professional misconduct is different from the jurisdiction of the courts to take action against the advocates for the contempt of court. The said jurisdiction co-exists independently of each other. The action taken under one jurisdiction does not bar an action under the other jurisdiction".

Therefore, invoking its power under Art. 129 read with Art. 142, the Court awarded to the contemner advocate not only a suspended sentence of imprisonment for six weeks but also suspended him from practice for three years.

Following *Vinay Chandra*, the Court has observed in the case noted below:[19]

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14. (1995) 2 SCC 621.
15. See, *supra*, footnote 92.
16. Also see, *E.S.P. Rajaram v. Union of India*, AIR 2001 SC 581 : (2001) 2 SCC 186.
17. See, *supra*, Sec. C(i)(a).
18. (1995) 2 SCC 621, at 624; *supra*.
19. *Delhi Development Authority v. Skipper Construction Co. (P) Ltd.*, AIR 1996 SC 2005, 2011 : (1996) 4 SCC 622.

> "As a matter of fact, we think it advisable to leave this power undefined and uncatalogued so that it remains elastic enough to be moulded to suit the given situation."

Art. 142 is conceived to meet situations which cannot be effectively and appropriately tackled by the existing provisions of law. For example in *R.K. Anand v. Registrar, Delhi High Court,*[20] a 3-judge Bench appears to have expressed a contrary view holding that the High Court could, in appropriate cases, direct an Advocate who is found to be guilty of committing contempt to prohibit him from appearing in the High Court or lower courts subordinate to it. Thus, where an influential prisoner flouted all laws while in a particular jail, and it was imperative to transfer the prisoner out of the state, even though there was no provision in either the Jail Manual or The Transfer of Prisoners Act,1950, the "legislative vacuum" was filled and directions were given for his transfer to a jail outside the State.[21] Similarly, a decree for divorce on the ground of an irretrievable breakdown of marriage was granted although the Hindu Marriage Act, 1955, under which the matter arose, does not recognize it as one of the grounds on which a court can direct dissolution of marriage.[22] The limited power of review in the Designated Authority under Rule 23 of the Customs Tariff (Identification, Assessment and Collection of Anti-dumping duty on Dumped Articles and for Determination of Injury) Rules, 1995 was extended under this Article.[23]

But the same question was re-agitated before the Supreme Court in *Supreme Court Bar Association v. Union of India,*[24] and this time the Court modified, and toned down, its views as expressed in *Vinay Chandra*. The Court has now ruled that it has no power to suspend an advocate from practice. He should be dealt with under the Advocates Act, 1961, which "contains a detailed and complete mechanism for suspending or revoking the licence of an advocate for his professional misconduct". Regarding Art. 142, the Court has observed:[25]

> "The power to do complete justice under Article 142 is in a way, corrective power, which gives preference to equity over law but it cannot be used to deprive a professional lawyer of the due process contained in the Advocates Act, 1961, by suspending his license to practice in a summary manner, while dealing with a case of contempt of court."

The Court has asserted that it is not a court of restricted jurisdiction of only dispute settling. The Supreme Court "has always been a law maker and its role travels beyond merely dispute settling. It is a problem solver in the nebulous areas". Nevertheless, imposing a self limitation on itself it has said:[26]

> "....The substantive statutory provisions dealing with the subject-matter of a given case, cannot be altogether ignored by this Court, while making an order

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20. (2009) 8 SCC 106 : (2009) 10 JT 1.
21. *Kalyan Ranjan Sarkar v. Rajesh Ranjan,* (2005) 3 SCC 284 : AIR 2005 SC 972.
22. *A. Jayachandra v. Aneel Kaur,* (2005) 2 SCC 22 : AIR 2005 SC 534; See also *Swati Verma v. Rajan Verma,* (2004) 1 SCC 123 : AIR 2004 SC 161*; Jimmy Sudarshan Purohit v. Sudarshan Sharad Purohit,* (2005) 13 SCC 410 *:* (2004) 10 SCALE 362*; Sanghamitra Ghosh v. Kajal Kumar Ghosh,* (2007) 2 SCC 220 : (2006) 10 JT 288.
23. *Designated Authority v. Indian Refractory Makers Assocn.,* 2003 (154) ELT 349 (SC) : (2003) 11 SCC 28
24. AIR 1998 SC 1895 : (1998) 4 SCC 409; *supra*.
25. *Ibid,* at 1907.
26. *Ibid,* at 1909. Also see, *Bonkya v. State of Maharashtra,* AIR 1996 SC 257 : (1995) 6 SCC 447.

> under Article 142. Indeed, these constitutional powers cannot, in any way, be controlled by any statutory provisions but at the same time these powers are not meant to be exercised when their exercise may come directly in conflict with what has been expressly provided for in a statute dealing expressly with the subject."

Therefore, while "prohibitions or limitations in a statute" cannot come in the way of exercise of jurisdiction under Art. 142 to do complete justice between the parties, the Apex Court "will take note of the express provisions of any substantive statutory law and regulate the exercise of its power and discretion accordingly". The Court disapproved the proposition stated in *Vinay Chandra*[27] that "while exercising jurisdiction under Art. 142, this Court can altogether ignore the substantive provisions of a statute, dealing with the subject and pass orders concerning an issue which can be settled only through a mechanism prescribed in another statute."

On Art. 142, the Court has observed that "the power exists as a separate and independent basis of jurisdiction, apart from the statutes". "This plenary jurisdiction is, thus, the residual source of power which this Court may draw upon as necessary whenever it is just and equitable to do so and in particular to ensure the observance of the due process of law, to do complete justice between the parties, while administering justice according to law". The power conferred by Art. 142 being "curative in nature" cannot be construed as power authorising the Court to ignore "the substantive rights of a litigant" while dealing with a cause pending before it". The power conferred by Art. 142 has been held to be "complementary" to those powers specifically conferred on the Court by statutes. Thus in an appropriate case the Court can direct the Commissioner of Income tax to reopen an assessment under the Income Tax Act.[28]

The Court has further observed that it cannot use its power under Art. 142 to "supplant" substantive law applicable to the case or cause under consideration of the Court. Art. 142 cannot be used, even with the width of its amplitude, to build a new edifice where none existed earlier, by ignoring express statutory provisions dealing with a subject and thereby achieve something indirectly which cannot be achieved directly.

The Court has cautioned:

> "It must be remembered that wider the amplitude of its power under Art. 142, the greater is the need of care for this Court to see that the power is used with restraint."

Thus, the plenitude of power conferred on the Supreme Court under Art. 142 needs to be used with care as not to interfere with the performance of their statutory duties and functions by other authorities in accordance with law.

Hence the Court has said that in exercise of its jurisdiction under Art.142 and the High Courts under S. 482 of Criminal Procedure Code would not direct quashing of a case involving crime against society and more so when both trial

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27. *Supra*, footnote 14.

28. *Commissioner of Income Tax, Shimla v. Greenworld Corporation, Parwanoo*, (2009) 7 SCC 69 : (2009) 8 JT 429.

court as also the High Court have found that a *prima facie* case has been made out against the accused.[29]

The court will not exercise the power to direct re-computation of tax based on law declared when the controversy was two decades old on the ground of extreme difficulty by reason of long lapse of time.[30]

To enable the exercise of discretion to be an informed one, the assistance of experts may be availed.[31]

In *M.S. Ahlawat v. State of Haryana*,[32] the Court has held that under Art. 142, it cannot altogether ignore the substantive provisions of a statute and pass orders concerning an issue which can be settled only through a mechanism prescribed in another statute.

Again, in *M.C. Mehta v. Kamal Nath*[33], the Court has stated that Art. 142 cannot be pressed into service in a situation where action under that article would amount to contravention of the specific provisions of the Act. In the instant case, the Court awarded damages against the respondent under the "Polluter Pays Principle". The further question was whether the Court could under Art. 142 impose pollution fine on the polluter under such statutes as the Water (Pollution and Control of Pollution) Act, 1974, the Environment (Protection) Act 1986, and the Air (Prevention and Control of Pollution) Act, 1981. The Supreme Court ruled that to impose punishment under any of these Acts, the polluter must be tried in a court and if the offence is proved then alone he can be punished. Art. 142 can not be pressed into aid in such a situation for to impose fine upon the polluter would amount to contravention of the specific statutory provisions.

However, while the law declared by the Supreme Court is presumed to be in operation from the inception, while declaring the law, in exercise of its powers to do complete justice, it may be direct the declaration to operate prospectively and save the transactions whether statutory or otherwise that were effected on the basis of the earlier law.[34]

Recently, there has been a reiteration of the "restrictive" approach. In *State of Haryana v. Sumitra Devi*,[35] the opinion was that no order can be passed under Art. 142 contrary to statute or statutory rules. .In another case an order passed under Art. 142 was corrected on review as it was passed contrary to a statutory provision.[36] The Constitutional Bench decision in *Secy. State of Karnataka v.*

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29. *Rumi Dhar (SMT) v. State of West Bengal*, (2009) 6 SCC 364 : AIR 2009 SC 2195.
30. *Commissioner of Income Tax, Faridabad v. Ghanshyam (HUF)*, (2009) 8 SCC 412 : (2009) 9 JT 445.
31. *M.C. Mehta v. Union of India*, (2007) 1 SCC 110 : AIR 2007 SC 1087.
32. (2000) 1 SCC 409 : AIR 2000 SC 1997.
33. (2000) 6 SCC 213, 223. However see *Oriental Insurance Co. Ltd. v. Brij Mohan*, (2007) 7 SCC 56, at page 64 : AIR 2007 SC 1971, Also see, *infra*, Ch. XXVI.
34. *Golak Nath v. State of Punjab*, AIR 1963 SC 1643. For a full discussion see Part VII Chapter XL Sec. G: Prospective overruling.
35. (2004) 12 SCC 322 : AIR 2004 SC 1050. See also *Sarat Chandra Mishra v. State of Orissa*, (2006) 1 SCC 638 : AIR 2006 SC 861.
36. *Textile Labour Asscn v. Official Liquidator*, (2004) 9 SCC 741 : AIR 2004 SC 2336.

Umadevi (3)[37] emphasized that "complete justice" under Art. 142 means justice according to law and not sympathy. It said that "equitable considerations or individualization of justice" have resulted in conflicting opinions leading to confusion and uncertainty in the law and that the Court would not grant a relief which would amount to perpetuating an illegality encroaching into the legislative domain.[38]

However the earlier liberal approach as propounded in *Vinay Chandra* also continues to be applied.[39]

The sum and substance of the above observations of the Apex Court seems to be that the scope of Art. 142 is extremely broad. Being a constitutional provision, it can override any statutory provision. But, in practice, the Court does not use its powers under Art. 142 in direct confrontation with any express statutory provision applicable to the case in hand. This is a self-imposed restriction but the Court can by-pass the same if the equitable considerations in a given case so demand.

A large number of cases have been disposed of by the Court invoking its power under Art. 142. From the conspectus of decided cases, it appears that the Court has invoked its power under Art. 142 in different types of cases involving different fact situations for doing complete justice between the parties. The observations of the Court in numerous cases spanning over 60 years also indicate that, at times, the Court has adopted a somewhat narrow view, and, at other times, an extremely broad view, of its power under Art. 142. Particular reliefs have been granted while providing that the case would not be treated as a precedent or by prefacing the direction with a phrase emphasizing the peculiar facts and circumstances of the case.[40]

The discussion above establishes that Art. 142 confers a plenary power on the Supreme Court which is free of any statutory limitations. Ordinarily, the Court does not by-pass statutory provisions under Art. 142, but, if in any situation, the Court feels it necessary to do complete justice to by-pass statutory provisions, it can do so. It can be said that the Supreme Court's power under Art. 142, theoretically speaking, is not conditioned by any statutory provisions, but, in practice, it

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37. (2006) 4 SCC 1, 36 : AIR 2006 SC 1806.

38. (2006) 4 SCC 1, 18 : AIR 2004 SC 32. See also *Teri Oat Estates (P) Ltd. v. U.T. Chandigarh*, (2004) 2 SCC 130 : (2003) 10 SCALE 1016; *A. Umarani v. Registrar, Cooperative Societies*, (2004) 7 SCC 1, 18*; Govt. of W. Bengal v. Tarun K. Roy*, (2004) 1 SCC 347 : (2003) 9 JT 130*; National Aluminium Co. Ltd. v. Presssteel & Fabrications (P) Ltd.*, (2004) 1 SCC 540 : AIR 2005 SC 1514; *Pramod Kumar Saxena v. Union of India*, (2008) 9 SCC 685; *U.P.STRC v. Commissioner of Police*, (2009) 3 SCC 634 : (2009) 2 JT 553; *Leila David v. State of Maharashtra*, (2009) 4 SCC 578 : (2009) 11 JT 252.

39. *Monica Kumar (Dr.) v. State of U.P.*, (2008) 8 SCC 781; *Tamilnadu Mercantile Bank Shareholders Welfare Assn. (2) v. S.C. Sekar*, (2009) 2 SCC 784.

40. See for example *Pure Helium India (P) Ltd. v. Oil & Natural Gas Commission*, (2003) 8 SCC 593 : AIR 2003 SC 4519; *Pohla Singh v. State of Punjab*, (2004) 6 SCC 126AIR 2004 SC 3329*; Bharat Petroleum Corpn Ltd. v. P. Kesavan*, (2004) 9 SCC 772 : AIR 2004 SC 2206; *Swedish Match AB v. SEBI*, (2004) 11 SCC 641 : AIR 2004 SC 4219; *India Umbrella Manufacturing Co. v. Bhagabandei Agarwalla*, (2004) 3 SCC 178 : AIR 2004 SC 1312*; Harigovind Yadav v. Rewa Siddhi Gramin Bank*, (2006) 6 SCC 145 : AIR 2006 SC 3596*; Hari Shankar Singhania v. Gaur Hari Singhania*, (2006) 4 SCC 679 : (2006) 4 SLT 551*; Hari Shankar Singhania v Gaur Hari Singhania*, (2006) 4 SCC 658 : AIR 2006 SC 2488; *Hasham Abbas Sayyad v. Usman Abbas Sayyad*, (2007) 2 SCC 355 : AIR 2007 SC 1077; *State of Kerala v. Mahesh Kumar*, (2009) 3 SCC 654, at page 660 : (2009) 3 JT 424.

would not disregard such provisions unless it is absolutely necessary to do so with a view to do justice between the parties.

CRIMINAL JUSTICE

In the area of criminal justice, under Art. 136 read with Art. 142, the Supreme Court is entitled to stay the execution of the sentence and to grant bail pending the disposal of the application for special leave to appeal.[41] Disposing of an appeal from an order refusing bail to the appellants who were charged *inter alia* with cheating several investors, in exercise of its powers under Art. 142, the Supreme Court granted bail and also issued several directions relating to the realization and disposal of the assets of the appellants to meet the demands of the various depositors.[42]

Under Art. 142(1) coupled with Arts. 32 and 136, the Supreme Court has jurisdiction to quash criminal proceedings if on admitted facts no charge is made out against the accused, or if the proceedings are initiated on concocted facts or false evidence, or if the proceedings are initiated for oblique purposes.[43] The power of the Court under Art. 142 insofar as quashing of criminal proceedings are concerned is not exhausted by ss. 320 or 321 or 482 Cr. P.C., or all of them put together.[44] Thus, while acquitting an accused of charges of rape he was directed to pay compensation to the complainant by way of damages for committing breach of promise to marry her.[45]

The Court can enhance the sentence awarded to the accused while hearing an appeal against his conviction.

In *Chandrakant Patil v. State*,[46] the Court has observed that "power under Article 142 of the Constitution is entirely of different level and is of a different quality which cannot be limited or restricted by provisions contained in statutory law. No enactment made by the Central or State legislature can limit or restrict the power of this Court under Article 142, though while exercising it the Court may have regard to statutory provisions." The Court has however cautioned that it will use its power under Art. 142 "only sparingly" and "not frequently".

In the instant case, the appellant was convicted under TADA and sentenced to 5 years' rigorous imprisonment. While hearing an appeal filed by the accused, the Supreme Court found the sentence to be inadequate and enhanced the sentence to 10 years' imprisonment to meet the ends of justice. The question was raised whether the Supreme Court could enhance the sentence as the Criminal Procedure Code has no such provision. The Court took the view that the Court could do so under its "wide and residual powers to deal with the situation like this, which are well enclosed in Article 142 of the Constitution". It may be noted

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41. *K.M. Nanavati v. State of Bombay,* AIR 1961 SC 112, 120 : (1961) 1 SCR 497.
For inter-relation between Arts. 161 and 142, see, *infra,* under State Executive, Ch. VII.

42. *Arvind Mohan Johri v. State of U.P.,* (2005) 4 SCC 634 : (2005) 11 JT 478.

43. *Union Carbide Corpn. v. Union of India,* (1991) 4 SCC 584 : AIR 1992 SC 248; *Delhi Judicial Service Association v. State of Gujarat,* AIR 1991 SC at 2210; *Keshub Mahindra v. State of Madhya Pradesh,* (1996) 6 SCC 129 : 1996 SCC (Cri) 1124.

44. *R.S. Antulay v. Nayak,* AIR 1988 SC 1531 : (1988) 2 SCC 602; *Arvind Barsaul (Dr.) v. State of M.P.,* (2008) 5 SCC 794; *Monica Kumar (Dr.) v. State of U.P.,* (2008) 8 SCC 781, at page 801 : AIR 2008 SC 2781.

45. *Deelip Singh v. State of Bihar,* (2005) 1 SCC 88 : AIR 2005 SC 203.

46. *Chandrakant Patil v. State,* AIR 1998 SC 1165 : (1998) 3 SCC 38.

that, in the instant case, appeal was filed in the Supreme Court under section 19 of TADA and not under Art. 136.

A young woman was murdered because she resisted being raped by the accused. The trial court acquitted the accused and the High Court concurred with the trial court. On an appeal being filed in the Supreme Court under Art. 136, the Court reversed the lower courts and held him guilty.

It was argued that according to s. 401(3), Cr. P.C., if the Supreme Court found that the acquittal of the accused was wrong, then the case be sent back to the lower court for retrial. The Supreme Court did not agree with this contention, and invoking its power under Art. 142, held the accused guilty and sentenced him to life imprisonment.

The Court argued that the power available to it under Art. 136, is not circumscribed by any limitation. In any case, power under Art. 142 is available to pass such order as may be deemed appropriate to do complete justice. Accordingly, the Court by passed the limitation imposed on it by s. 401(3), Cr. P.C., and itself sentenced the accused.[47]

H. POWER TO REVIEW

Under Art. 137, the Supreme Court has power to review any judgment pronounced or order made by it. But this special power is, however, exercisable in accordance with, and subject to any parliamentary legislation and rules made by the Court itself under its rule making power.

Under Art. 145(e), the Supreme Court is authorised to make rules as to the conditions subject to which the Court may review any judgment or order.[48] In exercise of this power, Order XL has been framed.

According to the rules of the Court, in a civil proceeding, review of a Court decision will lie on the following grounds:

(1) discovery of new and important matter of evidence;

(2) mistake or error apparent on the face of the record;[49]

(3) any other sufficient reason, *e.g.*, that there are in the judgment certain unmerited observations against the petitioner.[50]

The expression, 'for any other sufficient reason' has been given an expanded meaning and a decree or order passed under misapprehension of true state of circumstances has been held to be sufficient ground to exercise the power.[51]

The Apex Court has clarified that a review is by no means an appeal in disguise.

The Court has justified review of its own judgment with the following remarks:[52]

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47. *Dharma v. Nirmal Singh Bitta*, AIR 1996 SC 1136 : (1996) 7 SCC 471.
48. On the rule-making power of the Court, see, Sec. I(f), *infra.*
49. See, *CST v. Pine Chemicals Ltd.*, (1995) 1 SCC 58; *Devidayal Rolling Mills v. Prakash Chimanlal Parikh*, AIR 1993 SC 1982 : (1993) 2 SCC 470.
50. *Dayanand v. Nagaraj*, AIR 1976 SC 2183 : (1976) 2 SCC 932.
51. *S. Nagaraj v. State of Karnataka*, *infra*, footnote 52.
52. *S. Nagaraj v. State of Karnataka*, (1993) Supp. 4 SCC 595.
Also see, *Lily Thomas v. Union of India*, AIR 2000 SC 1650 : (2000) 6 SCC 224.

> "Review literally and even judicially means re-examination or reconsideration. Basic philosophy inherent in it is the universal acceptance of human fallibility… Rectification of an order thus stems from the fundamental principle that justice is above all. It is exercised to remove the error and not for disturbing finality."

In *Hindustan Sugar Mills v. State of Rajasthan*,[53] the Court accepted the review petition because the assumption on which it made certain observations in the earlier decision was shown to be unfounded. These observations were, therefore, deleted from the judgment.

The Court has ruled that it is not precluded from recalling or reviewing its own order if it is satisfied that it is necessary to do so for the sake of justice,[54] or the previous decision suffers from an error apparent on the face of the record.[55]

Review is a serious matter; it is not rehearing of the appeal all over again. A judgment once delivered is final—this is the normal rule. A departure from that principle can be justified only when circumstances of a substantial and compelling character make it necessary to do so. A judgment is not reconsidered except "where a glaring omission or patent mistake or like grave error has crept in the earlier decision".[56] "The mere fact that two views on the same subject are possible is no ground to review the earlier judgment passed by a Bench of the same strength."[57]

As the Supreme Court has observed:[58]

> "It is well settled that a party is not entitled to seek a review of a judgment delivered by this Court merely for the purpose of a rehearing and a fresh decision of the case. The normal principle is that a judgment pronounced by the Court is final and departure from that principle is justified only when circumstances of a substantial and compelling character make it necessary to do so."[59]

For example, the Court will review its judgment if its attention was not drawn to a material statutory provision during the first hearing,[60] or if a manifest wrong has been done and it is necessary to pass an order to do full and effective justice.[61] "A review proceeding cannot be equated with the original hearing of the case, and the finality of the judgment delivered by the Court will not be reconsidered except where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility."[62]

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53. AIR 1981 SC 1681 : (1980) 1 SCC 599.
54. *S. Nagaraj v. State of Karnataka*, (1993) Supp (4) SCC 595.
55. *Sheonandan Paswan v. State of Bihar*, AIR 1987 SC 877 : (1987) 1 SCC 288; *Deo Narain Singh v. Daddan Singh*, (1986) Supp SCC 530.
Also see, *A.R. Antulay and Common Cause*, *infra.*
56. *Chandra Kanta v. Sheik Habib*, AIR 1975 SC 1500 : (1975) 1 SCC 674; *P.N. Eswara Iyer v. Registrar, Supreme Court of India*, AIR 1980 SC 808; *Avtar Singh Sekhon v. Union of India*, AIR 1980 SC 2041 : 1980 Supp SCC 562.
57. *Lily Thomas v. Union of India*, AIR 2000 SC 1650 at 1663 : (2000) 6 SCC 224.
58. *Northern India Caterers v. Lt. Governor of Delhi*, AIR 1980 SC 674 : (1980) 2 SCC 167.
Also see, *Sow Chandra Kante v. S.K. Habib*, (1975) 1 SCC 674 : AIR 1975 SC 1500.
59. *Sajjan Singh v. State of Rajasthan*, AIR 1965 SC 845 : (1965) (1) SCR 973.
60. *Girdhari Lal Gupta v. D.H. Mehta*, AIR 1971 SC 2162 : (1971) 3 SCC 189; *UCO Bank v. Rajinder Lal Capoor*, (2008) 5 SCC 257 : AIR 2008 SC 1831.
61. *O.N. Mohindroo v. Dist. Judge, Delhi*, AIR 1971 SC 107 : (1971) 3 SCC 5.
62. *Chandrakanta v. Shaikh Habib*, AIR 1975 SC 1500 : (1975) 1 SCC 674; *Northern India Caterers, supra*, footnote 58; *Lily Thomas v. Union of India*, AIR 2000 SC 1650 at 1663 : (2000) 6 SCC 224.

Thus review of a judgment or order has been allowed if the order sought to be reviewed is based on a decision *per incuriam*,[63] or on an incorrect assumption of facts or law[64] or a non consideration of a contention made,[65] or if the judgment is inconsistent with the operative portion[66] or an interim order which was granted subject to the outcome of the appeal[67] or to clarify an ambiguity.[68]

The Court has described its review power as follows in *Lily Thomas*:[69]

> "… the power of review can be exercised for correction of a mistake and not to substitute a view. Such powers can be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated like an appeal in disguise. The mere possibility of two views on the subject is not a ground for review."

In this case, the Court refused to review its earlier judgment in *Sarla Mudgal v. Union of India*[70]as there was no error apparent on the face of the record; no new material had come to light after the judgment. The earlier judgment was held not violative of any of the fundamental rights guaranteed to the citizens. Review power cannot be exercised merely because there is possibility of taking a different view.[71]

The expression "error apparent on the face of the record" is an error which is based on clear ignorance or disregard of the provisions of the law. The error should be something more than a mere error; it must be one manifest on the face of the record. An error is not apparent on the face of the record if it is not self-evident and if it requires an examination or argument to establish it.[72]

But, recently, the Supreme Court has given an expansive scope to the Court's power of review. The Court has observed:[73]

> "… to maintain a review petition it has to be shown that there has been miscarriage of justice. Of course, the expression "miscarriage of justice" is all embracing."

In *A.R. Antulay v. R.S. Nayak*,[74] the Supreme Court has stated that it has, *de hors* Art. 137, inherent power *ex debito justitiae* to recall an order made by it

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63. *Vinod Kumar v. Prem Lata*, (2003) 11 SCC 397 : AIR 2003 SC 3854.
64. *Chairman SBI v. All Orissa State Bank Officers Assocn.*, (2003) 11 SCC 607 : AIR 2003 SC 4201; See also *Tushar H. Shah v. Manilal Pitambardas*, (2003) 9 SCC 184 : (2000) 8 SLT 722.
65. *Indian Charge Chrome v. Union of India*, (2005) 4 SCC 67 : AIR 2005 SC 2087; *Noise Pollution (VI), In re*, (2005) 8 SCC 794 : (2005) 8 SCALE 101; *National Insurance Co. Ltd. v Bommithi Subbhayamma*M (2005) 12 SCC 243 : (2006) 131 Com Cases 280.
66. *J.P. Srivastava & Sons (Rampur) (P) Ltd. v. Gwalior Sugar Company Ltd.*, (2004) 7 SCC 193.
67. *K.T.Venkatagiri v. State of Karnataka*, (2003) 9 SCC 1 : AIR 2003 SC 1819.
68. *Arvind Mohan Johri v. State of U.P.*, (2005) 5 SCC 131 : (2005) 5 SLT 516 (2).
69. *Lily Thomas v. Union of India*, AIR 2000 SC 1650 : (2000) 6 SCC 224.
70. See, *infra*, Ch. XXXIV, for this case.
71. *Lily Thomas*, *supra*, at 1666.
72. *P.N. Eswara Iyer v. Registrar, Supreme Court of India*, AIR 1980 SC 808 : (1980) 4 SCC 680; *Chandra Kanta v. Sheikh Habib*, AIR 1975 SC 1500 : (1975) 1 SCC 674; *Sheonandan Paswan v. Bihar*, AIR 1983 SC 1125 : (1983) 4 SCC 104; *State of Haryana v. Prem Chand*, AIR 1990 SC 538; *T.C. Basappa v. T. Nagappa*, AIR 1954 SC 440 : 1955 (1) SCR 250; *Hari Vishnu Kamath v. Ahmad Ishaque*, AIR 1955 SC 233 : 1955 (1) SCR 1104.
For further discussion on the concept of "error apparent on the face of the record", see, Ch. VIII, *infra*.
73. *Suthenthiraraja v. State*, AIR 1999 SC 3700, at 3703 : (1999) 9 SCC 323.
74. AIR 1988 SC 1531 : (1988) 2 SCC 602.

earlier if it was made by the Court by mistake. The Supreme Court being the Apex Court, and there being no higher forum where one could question any of its decisions, it is not only appropriate but also the duty of the Court to rectify the mistake in any of its decisions.

The Court has emphasized that the basic fundamental of the administration of justice is that no man should suffer because of the mistake of the Court. *Ex debito justitiae*, the Court must do justice to him. If a man has been wronged, so long as it lies within the human machinery of administration of justice, the wrong must be remedied. Some of the situations where the Court may exercise such a power are: (1) violation of a fundamental right; (2) violation of the principles of natural justice; (3) mistake of the Court; (4) judgement was obtained by fraud; (5) the Court made the earlier order without jurisdiction.

In the instant case, the Court (Bench of 7 Judges) recalled by majority (5:2) an order made earlier by a Bench of five Judges in *R.S. Nayak v. A.R. Antulay*.[75]

In that case, the Court had transferred a case pending against Antulay in a special court under the Prevention of Corruption Act for trial to the Bombay High Court. The order was made in 1984. This direction was now challenged after four years before the Supreme Court on the ground of "non-perception of certain provisions and certain authorities which would amount to derogation of the constitutional rights of the citizen." The Court now took the view that it was proper for it to act *ex debito justitiae* in favour of the appellant whose fundamental rights have been infringed. The Court had given directions in the earlier case *suo motu* without observing the principle of *audi alteram partem*. This had deprived the appellant of a right of appeal to the High Court and thus he was prejudiced. The said direction had also violated the fundamental rights of the appellant guaranteed to him by Arts. 14 and 21.[76]

The Supreme Court also ruled that the directions given by it in 1984 were violative of the limits of the Court's jurisdiction since the Court could not confer jurisdiction on a High Court which by relevant law was exclusively vested in the Special Judge and the decision was given *per incuriam*.[77] The Court now recalled the direction given by it in 1984 and directed that the corruption case against Antulay be tried by the Special Judge appointed under the Prevention of Corruption Act.

Some of the observations made by the Court on its inherent right to correct its own mistakes may be taken note of here. SABYASACHI MUKHARJI, J, (majority view) observed in this connection:[78]

> "But the Superior Court can always correct its own error brought to its notice either by way of the petition or *ex debito justitiae*".

SABYASACHI MUKHARJI, J., observed at another place:[79]

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75. AIR 1984 SC 684 : (1984) 2 SCC 183.

76. For Art. 14, see, Ch. XXI, *infra;* for Art. 21, see, Ch. XXVI, *infra.*

77. AIR 1988 SC at 1549.
Also see, *In the matter of Cauvery Water Disputes Tribunal*, AIR 1992 SC 522, 555.
The term '*per incuriam*' has been explained by the Court in *Antulay* as follows (AIR 1988 SC at 1548):
"*Per Incuriam*" are those decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned".

78. AIR 1988 SC at 1547.

79. *Ibid*, at 1548.

> "In rectifying the error, no procedural inhibitions should debar this Court because no person should suffer by reason of any mistake of the Court".

And further:[80]

> "[T]he Court has power to review either under section [Art.] 137 or *suo motu* the directions given by this Court".

The learned Judge said at another place:[81]

> "But directions given *per incuriam* and in violation of certain constitutional limitations and in derogation of the principles of natural justice can always be remedied by the Court *ex debito justitiae*."

And, again, he said explaining the scope of the inherent power of the Supreme Court to review *de hors* Art. 137:

> "We are of the opinion that this Court is not powerless to correct its error which has the effect of depriving a citizen of his fundamental rights and more so, the right to life and liberty. It can do so in exercise of its inherent jurisdiction in any proceeding pending before it without insisting on the formalities of a review application. Powers of review can be exercised in a petition filed under Article 136 or Article 32 or under any other provision of the Constitution if the Court is satisfied that its directions have resulted in the deprivation of the fundamental rights of a citizen or any legal right of the petitioner."[82]

In *Ahlawat*,[83] the Supreme Court set aside the order passed by it earlier. The Court observed:

> "To perpetuate an error is no virtue but to correct it is a compulsion of judicial conscience"

The Court has asserted that if it is convinced that it has earlier passed a wrong order in a case, it has power to recall the same and set it aside.

In *Common Cause*,[84] on a review petition, the Court reversed its own earlier judgment[85] on the ground that it suffered from patent error of law resulting in serious miscarriage of justice. In the instant case, the petition of review was allowed.

In 1997, the Supreme Court had held a Central Minister guilty of committing the tort of "malfeasance in office" and imposed exemplary damages of Rs. 50 lacs payable by the Minister to the Central Government. But in its decision in 1999, the Court reversed its earlier decision. It ruled that though the conduct of the Minister was wholly unjustified, "it falls short of 'misfeasance in public office' which is a specific tort and the ingredients of that tort are not wholly met in the case." That being so, there was no occasion to award exemplary damages.

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80. *Ibid*, at 1555.
81. *Ibid*, at 1549.
82. *Ibid*, at 1549.
83. *M.S. Ahlawat v. State of Haryana*, AIR 2000 SC 168 : (2000) 1 SCC 278. However a different view was expressed in *Surendra Kumar Vakil v. Chief Executive Officer*, (2004) 10 SCC 126 : AIR 2004 SC 3088, which held that a point that has been heard and decided will not be reviewed even if the decision is erroneous.
84. *Common Cause-A Regd. Society v. Union of India*, AIR 1999 SC 2979 : (1999) 6 SCC 667.
85. *Common Cause-A Regd. Society v. Union of India*, AIR 1997 SC 1203 : (1997) 3 SCC 433. For a detailed discussion on both these cases, see, JAIN, *A TREATISE ON ADMINISTRATIVE LAW, II*, JAIN, *CASES AND MATERIALS ON INDIAN ADM. LAW, IV*.

Therefore, the direction made by the Court in 1997 to pay Rs. 50 lacs as exemplary damages was now recalled by the court.[86] Nevertheless it has been held that a subsequent judgment of the Supreme Court is no ground for review[87] nor the fact that the earlier order was contrary to a matter of practice[88], nor will the Court re-appreciate the evidence.[89] A point not argued at the hearing of the appeal will not be permitted to be raised in review[90] and a second review petition against a reviewed judgment will not be entertained.[91]

According to the Court Rules, review petition is filed within 30 days from the date of the judgment or order sought to be reviewed [Order XL, r. 2]. Ordinarily, an application for review is disposed of by circulation without any detailed arguments unless otherwise ordered by the Court [Order XL, Rule 3].

To avoid the petition for review being disposed of by circulation, the petition is often couched as an application for clarification. This has been deprecated and has been visited with exemplary costs.[92]

According to the Rules made by the Supreme Court [Order XL of the Supreme Court Rules, 1966], a review in a criminal proceeding is available on the ground of an "error apparent on the face of the record" [Rule 1 of Order XL]. This rule has been broadly interpreted by the Court. As the Court has observed in *Eswara*[93] : "The substantive power is derived from Art. 137 and is as wide for criminal as for civil proceedings… We see no insuperable difficulty in equating the area in civil and criminal proceedings when review power is invoked from the same source."

In *G.L Gupta v. D.N. Mehta*,[94] the Supreme Court reviewed its earlier decision in a criminal appeal because a statutory provision [s. 23-C(2) of the Foreign Exchange Act, 1947], which had a vital bearing on the case, was not brought to its notice. The Court modified the sentence of imprisonment to fine.

CURATIVE PETITIONS

Even after a review petition filed under Art. 137 is rejected by the Court, that may not be the end of the road. The court may still review the case under its inherent power but on very restricted grounds. The court has recently ruled in *Rupa Ashok Hurra v. Ashok Hurra*[95] that while certainty of law is important in India, it cannot be at the cost of justice. The court has observed in this connection :

> "...this Court, to prevent abuse of its process and to cure a gross miscarriage of justice, may reconsider its judgments in exercise of its inherent power:"

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86. Also see, Ch. III, *supra*.
87. *State of M.P. v. Steel Authority of India*, (2002) 10 SCC 144.
88. *Devender Pal Singh v. State*, (2003) 2 SCC 501 : AIR 2003 SC 886.
89. *Kerala SEB v. Hitech Electrothermics & Hydropower Ltd.*, (2005) 6 SCC 651 : (2005) 7 JT 485.
90. *Common Cause v. Union of India*, (2004) 5 SCC 222 : (2004) 9 SCALE 32*; Citibank N.A. v. Standard Chartered Bank*, (2004) 8 SCC 348 : AIR 2005 SC 94*; Govt of Tamil Nadu v. M. Anachu Asari*, (2005) 2 SCC 332 : AIR 2005 SC 1062.
91. *Common Cause v. Union of India*, (2003) 10 SCC 264 : (2002) 7 SCALE 22(1).
92. See *Zahira Habibullah Sheikh v. State of Gujarat*, (2004) 5 SCC 353 : AIR 2004 SC 3467*; APSTRC v. Abdul Kareem*, (2007) 2 SCC 466 : (2007) 2 JT 532.
93. *P.N. Eswara Iyer v. Registrar, Supreme Court of India*, AIR 1980 SC 808; *Suthenthiraraja v. State*, AIR 1999 SC 3700 : (1999) 9 SCC 323. However see, *Zahira Habibullah Sheikh v. State of Gujarat*, (2004) 5 SCC 353 : AIR 2004 SC 3467.
94. AIR 1971 SC 2162.
95. JT 2002(3) SC 609 : (2002) 4 SCC 388.

Such a curative petition under the Court's inherent power can be filed, seeking review of a decision which has become final after dismissal of a review petition under Art. 137, on very strong grounds, such as,

(1) variation of the principle of natural justice—the right to be heard, as for example, when the affected person was not served notice or not heard during the proceedings;
(2) a Judge who participated in the decision—making process did not disclose his links with a party to the case, i.e. the question of bias;
(3) abuse of the process of the court.

The above list of the grounds to move a curative petition is not exhaustive. The court has observed in this connection:

"It is neither advisable nor possible to enumerated all the grounds on which such a petition may be entertained."

While opening the channel of review by way of curative petitions, the court has imposed several severe conditions thereon, for example:

(1) The grounds stated in the curative petition must have been taken earlier in the review petition;
(2) A senior advocate must certify that the above requirements have been fulfilled;
(3) If at any stage of consideration of the curative petition, the bench holds that the petition is without any merit and is vexatious, exemplary costs may be imposed on the petitioner;
(4) The petition has first to be circulated to a bench of three senior-most judges and the judges who passed the judgement complained of. If a majority of these Judges conclude that the matter needs to be heard, it should be listed before the same bench (as far as possible).

This procedural precaution is necessary because "the matter relates to re-examination of a final decision of this court."[1] The requirements are stringently enforced and the jurisdiction to entertain such petitions though frequently invoked, is rarely exercised.[2]

I. MISCELLANEOUS PROVISIONS

(a) TRANSFER OF CASES

To facilitate quick disposal of cases, Art. 139A(1) provides that if cases involving substantially the same questions of law are pending before the Supreme Court and a High Court, or before two or more High Courts, the Supreme Court can withdraw the cases from the High Courts and decide them itself. Once the common issue of law is decided, the cases may be returned to the High Courts under the proviso to Art.139A (1) to decide individual cases in the light of the law so laid down.[3]

All issues which could be raised before the High Court including an objection to the maintainability of the proceeding would not be affected by an order of transfer.[4]

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1. *Ibid*, at 632. See also *Sanjay Singh v. UPSC*, (2007) 3 SCC 720, 732 : AIR 2007 SC 950.
2. *Gurdeep Singh v. State of Punjab*, (2005) 10 SCC 468-470; See also *Shaukat Hussain Guru v. State*, (2008) 6 SCC 776, at page 779 : AIR 2008 SC 2419.
3. *Gnaneshwar B. Pettukota v. Govt. of India*, (2005) 12 SCC 447.
4. *Tata Cummins Ltd. v. State of Jharkhand*, (2005) 11 SCC 496.

The application for the purpose can be made by the Attorney-General or a party to any such case. The questions involved in the cases should be "substantial" and of "general importance".[5] However where an issue between the parties being decided by the Supreme Court is also the subject matter of proceedings between the same parties in the High Courts, transfer of all proceedings to the Supreme Court was directed.[6]

The Supreme Court has ruled that Art. 139A(1) is not exhaustive of the Supreme Court's power to withdraw a case to itself from a lower court. The Court can also act under Arts. 136 and 142(1). The Court has stated: "To the extent power of withdrawal and transfer of cases to the Apex Court is, in the opinion of the Court, necessary for the purpose of effectuating the high purpose of Arts. 136 and 142(1), the power under Art. 139A must be held not to exhaust the power of withdrawal and transfer."[7]

Under Art. 139-A(2), the Supreme Court may also transfer a case from one High Court to another if it deems it expedient to do so for meeting ends of justice.[8] This provision enables the litigants to approach the Apex Court for transfer of proceedings if the conditions envisaged therein are satisfied.[9] The Supreme Court can pass an order of transfer *suo motu.*[10]

As regards Art. 139A(2), the Supreme Court has observed that the power to transfer a case from one State to another is to be used by the Court with caution and circumspection. But if the ends of justice so demand in an appropriate case, the Court would not hesitate to act.

A suit for damages was filed in Punjab against the Union of India for loss of the gurdwara properties by its agents as a result of Blue Star Operation. On a petition by the Union of India, the Supreme Court transferred the case to the Delhi High Court in view of the unusual and sensitive nature of the suit and the extraordinary atmosphere prevailing in Punjab.[11]

A book contained adverse remarks against certain popular leaders of Tamil Nadu thereby hurting the sentiments of the people of that State. A number of political leaders filed suits in the Madras High Court against the author and the publisher. The High Court granted an *ex parte* interim order prohibiting the release of the publication and sale of the book in the State. In such circumstances, at the author's instance, envisaging that atmosphere in the T.N. High Court

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5. For an example of transfer of cases from the High Court to the Supreme Court, see, *Union of India v. M. Ismail Faruqui,* (1994) 1 SCC 265. Also see, *Punjab Vidhan Sabha v. Prakash Singh Badal,* (1987) Supp SCC 610. See also *State of A.P. v. National Thermal Power Corpn. Ltd.,* (2002)5 SCC 203 : AIR 2002 SC 1895*; Union of India v. Radhika Backliwal,* (2003) 2 SCC 316 : (2002) 6 Scale 163*; All India Motor Vehicles Security Association v. Association of Regn. Plates Mfg.,* (2003) 10 SCC 93*; Anil Kumar Srivastava v. State of U.P.,* (2004) 8 SCC 671 : AIR 2004 SC 4299.

6. *International Finance Corpn. v. Bihar State Industrial Development Corpn.,* (2005) 10 SCC 179.

7. *Union Carbide Corpn. v. Union of India,* AIR 1992 SC 248, 273 : (1991) 4 SCC 584. See for example *Commodore Vimal Kumar v. Ruchi Rastogi,* (2008) 12 SCC 62 : (2008) 4 JT 596; *Harbans Lal & Sons v. Ramson Cycles (P.) Ltd.,* (2009) 4 SCC 16.

8. For transfer of writ petitions pending before several High Courts to one High Court, see, *Bank of Madura v. Jugal Kishore Vyas,* (1995) Supp (4) SCC 110.

9. *Union Carbide Corpn. v. Union of India,* (1991) 4 SCC 584 : AIR 1992 SC 248; *Continental Construction Ltd. v. Raj Kumar,* (2004) 13 SCC 444.

10. *Kartar Singh v. State of Punjab,* (1994) 3 SCC 569 : 1994 Cr LJ 3139.

11. *Union of India v. Shiromani Gurdwara Prabandhak Committee,* AIR 1986 SC 1896.

would not be congenial for a fair trial, the Supreme Court directed the suits to be transferred to the Andhra Pradesh High Court.[12]

A case may be transferred by the Supreme Court from one High Court to another if the petitioner has a "reasonable genuine and justifiable" apprehension that he would not get justice, Assurance of a fair trial in the first imperative of the dispensation of justice.[13]

In the wake of widespread communal riots in Gujarat, criminal prosecutions were launched. Several ended in acquittal of the accused. The acquittals were affirmed by the High Court. The appeals from the decisions of the High Court were allowed. Reinvestigation and retrial were directed and the cases were ordered to be transferred to a court of competent jurisdiction under the jurisdiction of the Bombay High Court as there was "ample evidence on record glaringly demonstrating subversion of justice delivery system with no congenial and conducive atmosphere still prevailing" in Gujarat.[14]

(b) FEDERAL COURT'S JURISDICTION EXERCISABLE BY THE SUPREME COURT

According to Article 135, the Supreme Court has jurisdiction and powers with respect to any matter to which the provisions of Article 134 do not apply, if the jurisdiction and powers in relation to that matter were exercisable by the Federal Court immediately before the commencement of the Constitution under any law then existing.

The Federal Court was established in India under the provisions of the Government of India Act, 1935. The court was introduced as an essential element of the federal system which was introduced for the first time in India by the Act of 1935. This court remained in operation until it was replaced by the Supreme Court of India on January 26, 1950.[15] Appeals from the Federal Court lay to the Privy Council.

The purpose of this constitutional provision is to safeguard interests of those litigants who had a right of appeal to the Federal Court, before the advent of the new Constitution, but who might have lost this right by reason of the Supreme Court taking the place of the Federal Court. The provision is, therefore, merely of a transitory nature.

(c) POWER TO SUMMON WITNESSES

Subject to a law made by Parliament in this behalf, the Court is empowered to make, as regards the whole of India, any order for the purpose of securing the attendance of any person, the discovery or production of all documents, or the investigation or punishment of any contempt of itself [Art. 142(2)].

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12. *K. Govindan Kutty v. All India Anna Dravida Mannetra Khazagam*, (1996) 7 SCC 68.
13. *Maneka Sanjay Gandhi v. Rani Jethamalani*, AIR 1979 SC 468 : (1979) 4 SCC 167; *R. Balakrishna Pillai v. State of Kerala*, AIR 2000 SC 2778, 2781 : (2000) 7 SCC 129. See also *Leelawati v. Ramesh Chand*, (2004) 9 SCC 63 : AIR 2004 SC 1488.
14. *Zahira Habibullah Sheikh v. State of Gujarat*, (2004) 4 SCC 158, 202 : AIR 2004 SC 3114.
15. See, GADBOIS, Evolution of the Federal Court of India: An Historical Foot-Note, 5 *JILI*, 19: GADBOIS. The Federal Court of India: 1937-1950, 6 *JILI*, 253; PYLEE, *The Federal Court of India* (1966); JAIN, *OUTLINES OF INDIAN LEGAL HISTORY*, 345-348 (1990).

(d) ENFORCEMENT OF DECREES

Under Art. 142(1), any decree passed, or order made, by the Supreme Court is enforceable, throughout India in such manner as may be prescribed by a law of Parliament, or, pending the enactment of such a law, by the Presidential order.[16]

(e) ALL AUTHORITIES BOUND BY COURT ORDERS

All authorities, civil and judicial, in India are under an obligation to act in aid of the Court [Art. 144].

The Court can hold any authority in contempt of Court if he disregards or disobeys any Court order.[17] The Supreme Court has emphasized that there should be meticulous compliance of the directions issued by the Court[18] and has on occasion constituted a monitoring committee to oversee and ensure compliance with its directions.[19] The judgment of the court must be respected and any time frame specified in such judgment must be adhered to by all concerned even if they were not parties to the original proceedings.[20]

Thus, in *Prakash Singh v. Union of India*[21], after noting the various reports of Commissions recommending the need to amend or replace the Indian Police Act, 1861 wholly insulating the police from any pressure so as to enable them to operate effectively, the Court constituted various bodies to effect the objective, to the Central Government, State Governments and Union Territories for compliance till framing of the appropriate legislation. The directions were to be complied with by the concerned Governments, on or before 31-12-2006 so that the bodies become operational from 2007. The Cabinet Secretary, Government of India and the Chief Secretaries of State Governments/Union Territories were directed to file affidavits of compliance by 3-1-2007[22].

Art. 144 covers not only the courts [Art. 141] but also other civil authorities as well. Art. 144 obligates the authorities to follow not only the law declared by the Court [Art. 141] but also its orders, decrees or directions. Therefore, the scope of Art. 144 is broader than Art. 141.[23]

An Army Public School was held to be bound to give effect in terms of Article 144 to the guidelines of the Supreme Court in Vishaka's case to provide a complaint mechanism to enquire into allegations of sexual harassment.[24]

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16. See, The Supreme Court (Decrees and Orders) Enforcement Order, 1954 (C.O. 47). See further *State of Haryana v. State of Punjab*, (2004) 12 SCC 673, 709-711 : (2004) 5 JT 72.

17. See, *M.L. Sachdev v. Union of India*, AIR 1991 SC 311.

In this case, the Government of India was held guilty of contempt of court for its failure to comply with a mandatory direction issued by the Supreme Court.

In *Dinesh Kumar v. Motilal Nehru Medical College, Allahabad*, AIR 1990 SC 2031, the Supreme Court held that the Governments of Bihar and Uttar Pradesh had committed its contempt for not complying with its directions. The Court imposed exemplary costs against the State Governments. See also *Palitana Sugar Mills (P) Ltd. v. State of Gujarat*, (2004) 12 SCC 645, 665 : (2004) 9 JT 526*; Nair Service Society v. State of Kerala*, (2007) 4 SCC 1, 29.

18. See *In re Lily, Thomas*, AIR 1964 SC 855 : 1964 (6) SCR 229.

19. See for example *M.C. Mehta v. Union of India*, (2006) 3 SCC 429 : (2006) 3 SCALE 615.

20. *Veer Kanwar Singh University Ad-hoc Teachers Association. v. The Bihar State University (C.C.) Service Commission*, 2007 (4) Supreme 376.

21. (2006) 8 SCC 1, at page 6.

22. *Ibid* at page 17.

23. For Art. 141, see, *infra*, under "*Stare Decisis*", Sec. J.

24. *D.S. Grewal v. Vimmi Joshi*, (2009) 2 SCC 210 : (2009) 1 JT 400.

A piquant situation arose out of the Constitutional Bench decision in *Commissioner of Central Excise v. Dhiren Chemical Industries*.[25] Circulars issued by the Central Board of Excise &Customs under section 37-B of the Central Excise Act 1944, are, in terms of that section, binding on all excise officers and "all other persons employed in the execution of the Act"[26]. Circulars were issued by the CBEC construing an Exemption Notification. The Supreme Court construed it otherwise but said that regardless of the interpretation by the Court, if there were circulars interpreting the Notification otherwise, that interpretation would bind the Revenue. Divergent views were expressed on whether the Circulars could survive after the decision of the Court having regard to Articles 141 and 144[27]. The difference of opinion has been referred to a Constitution Bench[28] which disposed of reference saying:

> "Circulars and instructions issued by the Board are no doubt binding in law on the authorities under the respective statutes, but when the Supreme Court or the High Court declares the law on the question arising for consideration, it would not be appropriate for the court to direct that the circular should be given effect to and not the view expressed in a decision of this Court or the High Court."[29]

The Court appears to have misappreciated the question to be decided.The question was not whether the Courts are bound by the Circulars but whether the statutory authorities under the particular Act would have to abide by the Circular despite a decision to the contrary by a court. This question was left unresolved.

"In *Spencer*,[30] the Supreme Court has emphasized upon the obligation of a High Court to come to the aid of the Supreme Court "when it required the High Court to have its order worked out". All authorities, civil or judicial, are mandated by Art. 144 to come to the aid of the Supreme Court. A High Court is a judicial authority covered by Art. 144. "The language of request oftenly employed by this Court in such situations is to be read by the High Court as an obligation, in carrying out the constitutional mandate, maintaining the writ of this Court running large throughout the country".

(f) COURT'S RULE-MAKING POWER

The Supreme Court has been given a rule-making power for regulating generally its practice and procedure including such matters as persons practising before it, procedure for hearing appeals, conditions for reviewing its own judgment, fees, grant of bail, stay of proceedings *etc*.[31]

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25. (2002) 2 SCC 127 : AIR 2002 SC 453*; CCE v. Dhiren Chemical Industries*, (2002) 10 SCC 64 : (2002) 143 ELT 19.

26. Similar provisions exist in the Income Tax Act, 1961 (s. 119) and the Customs Act. 1962 (s.151-A).

27. *Commissioner of Customs v. Indian Oil Corporation*, (2004) 3 SCC 488 : AIR 2004 SC 2799; *Collector of Central Excise v. Maruti Foam*, (2004) 6 SCC 722 : (2006) 144 STC 161; *contra Kalyani Packaging Industry v. Union of India*, (2004) 6 SCC 719 : (2004) 168 ELT 145.

28. *CCE v. Ratan Melting & Wire Industries*, (2005) 3 SCC 57 : (2005) 6 JT 77.

29. *CCE v. Ratan Melting & Wire Industries*, (2008) 13 SCC 1, at page 4 : (2008) 11 JT 412.

30. *Spencer and Co. Ltd. v. Vishwadarshan Distributors Pvt. Ltd.*, (1995) 1 SCC 259 : (1995) 1 JT 113. See also *Tirupati Balaji Developers (P.) Ltd. v. State of Bihar*, (2004) 5 SCC 1, 14 : AIR 2005 SC 2351; *Hombe Gowda Educational Trust v. State of Karnataka*, (2006) 1 SCC 430 : (2005) 10 JT 598; *Deepak Mallik v. Rakesh Batra*, (2005) 13 SCC 113 : (2003) 157 ELT 500.

31. *Ex-Capt. Harish Uppal v. Union of India*, (2003) 2 SCC 45 : AIR 2003 SC 739.

Rules made by the Court need the approval of the President and they are subject to any law made by Parliament [Art. 145].[32] The reason to make the Court's rule-making power subject to the President's approval is that the rules might impose considerable fiscal burden upon the revenues of the country. The matter of fees, for which the Court would make rules, relates to public revenues. These matters could not be left entirely to the Supreme Court; and President's approval is necessary for the burden is to be financed by Parliament and the Executive by imposing taxes.[33] It would appear that this requirement does not apply to the procedure to be adopted by Courts seeking reference of a difference of opinion with an earlier decision to a larger Bench[34].

The Supreme Court's rule-making power is also subject to Fundamental Rights.[35]

(g) OFFICERS AND SERVANTS OF THE SUPREME COURT

Appointment of officers and servants of the Supreme Court are to be made by the Chief Justice, or such other Judge or officer of the Court as the Chief Justice may direct, but the President may by rules direct that appointments are to be made after consultation with the Union Public Service Commission [Art. 146(1)].

Subject to any law made by Parliament, the conditions of service of officers and servants of the Court may be prescribed by rules made by the Chief Justice, or any other Judge or officer of the Court as the Chief Justice may authorise for the purpose. Any such rules, so far as they relate to salaries, allowances, leave or pension, require the approval of the President [Art. 146(2)].

The scheme of Art. 146(2) is that it is primarily the responsibility of Parliament to lay down conditions of service for officers and servants of the Supreme Court. However, so long as Parliament does not do so, the Chief Justice (or any other Judge or officer of the Court authorised by the Chief Justice) may make the rules for the purpose. The rules require the assent of the President to be effective insofar as they relate to salaries, allowances, leave or pensions. The reason for requiring presidential approval is that the rules concerning salaries, *etc*., place financial liability on the Government of India.

In the case mentioned below,[36] the Supreme Court has elaborately discussed the nature of the power conferred on the Chief Justice by Art. 146(2). The Court has ruled that it cannot issue a writ of *mandamus* directing the President to give or withdraw his approval to the rules made by the Chief Justice.[37] The President of India cannot be compelled to grant approval to the rules proposed by the Chief Justice relating to salaries *etc*. Nevertheless, when the Chief Justice submits the rules to the President for approval "it should be looked upon with respect and unless there is very good reason not to grant approval, the approval should always be granted." It was observed further:[38]

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32. *Dinesh Kumar v. Motilal Nehru Medical College,* AIR 1990 SC 2030 : (1990) 4 SCC 627.
33. VIII *CAD,* 643-651.
34. *Central Board of Dawoodi Bohra Community v. State of Maharashtra,* (2005) 2 SCC 673 : AIR 2005 SC 752.
35. *Prem Chand v. Excise Comm.,* AIR 1963 SC 996 : 1963 Supp (1) SCR 885.
36. *Supreme Court Employees Welfare Association v. Union of India,* AIR 1990 SC 334 : (1989) 4 SCC 187.
37. For discussion on *Mandamus,* see, *infra,* Ch. VIII, sec. D.
38. AIR 1990 SC, at 354.

> "If the President of India is of the view that the approval cannot be granted, he cannot straightway refuse to grant such approval, but before doing so, there must be exchange of thoughts between the President and the Chief Justice of India."

The President acts in this matter on the advice of the concerned Minister. The Chief Justice has to apply his mind to the framing of the rules and the Government has to apply its mind to the question of approval of the rules relating to salaries, *etc*. This condition should be fulfilled and it should appear from the records that it has been fulfilled.

The application of mind will include exchange of thoughts and views between the Government and the Chief Justice and it is highly desirable that there should be a consensus between the two. The rules framed by the Chief Justice of India should normally be accepted by the Government and the question of exchange of thoughts and views will arise only when the Government is not in a position to accept the rules relating to salaries, allowances, *etc*.[39]

(h) BENCHES OF DECISIONS

At least five Judges are to sit on the Bench to decide a case involving a substantial question of law as to the interpretation of the Constitution and for hearing a reference by the President under Art. 143 [Art. 145(3)].[40]

A substantial question of interpretation of a constitutional provision does not arise if the law on the subject has been finally and effectively decided by the Supreme Court; no reference to a Bench of five Judges need be made in such a case.[41]

In other matters, the rules made by the Supreme Court may fix the minimum number of Judges who are to sit for any purpose [Art. 145(2)]. Under the Supreme Court Rules [O. VII, Rule 1], subject to other provisions of these Rules, every cause, appeal or matter is to be heard by a Bench consisting of not less than two Judges. If the two Judge Bench considers that the matter ought to be heard by a larger Bench, it refers the matter to the Chief Justice who would constitute a larger Bench [O. VII, Rule 2].

The Supreme Court is required to deliver its judgment in the open court [Art. 145(4)]. No judgment or opinion is delivered by the Court except with the concurrence of a majority of the Judges present at the hearing of the case, though a Judge not agreeing with the majority view is entitled to deliver a dissenting judgment or opinion [Art. 145(5)].

Under Art. 145(5), the concurrence of a majority of Judges present at the hearing of a case is necessary for any judgment or order. When a Bench consists of two Judges, and they differ, the matter is to be referred to the Chief Justice for constituting a larger Bench.[42]

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39. *Ibid*., at 355.
Also see discussion on the parallel provision Art. 229 concerning the High Courts, *infra*, Ch. VIII.

40. *Supra*, Sec. F.

41. *State of Jammu & Kashmir v. Ganga Singh*, AIR 1960 SC 356 : 1960 (2) 346; *Bhagwan Swarup v. State of Maharashtra*, AIR 1965 SC 682 : 1964 (2) SCR 378.

42. *Gaurav Jain v. Union of India*, AIR 1998 SC 2848 : (1998) 4 SCC 270.

The practice of multiple opinions has the disadvantage that it creates confusion in the public mind regarding the law and it becomes difficult to appreciate the law laid down by the Supreme Court, for it is then difficult to extract a reasonably authoritative *ratio decidendi*. Multiple opinions tend to become diffused and repetitive. On the other hand, dissenting opinions stimulate reasoning and help in developing and building up the law.[43]

This aspect of the matter assumes all the greater importance when the Supreme Court does not strictly follow the doctrine of *stare decisis* and regards itself free to overrule its own decision.[44] When it does so, usually the minority opinion in the previous case would become the majority opinion in the subsequent case. Sometimes, Judges may agree in the result in a case but some of them may have some reservations on some principles or propositions, and may explain their point of view in separate concurring opinions.

In the beginning of the career of the Supreme Court, there was a tendency on the part of the Judges to place their individual views on record in matters of interpretation of the Constitution with the result that as many as seven opinions have been delivered in some earlier cases.[45] This tended to make the opinions repetitive and law uncertain. In course of time, however, this tendency has been very much mitigated and group opinions have come to take the place of individual opinions. Most of the time, the Court now delivers single unanimous opinion. In some cases, there may be a majority and a minority opinions. It is only in rare constitutional controversies of great importance that multiple opinions may be delivered.[46]

(i) ADDITIONAL JURISDICTION

Under Art. 138(1), Parliament may confer on the Supreme Court further jurisdiction and powers with respect to any of the matters in the Union List.[47]

Under this constitutional provision, a miscellany of laws enacted by Parliament confer jurisdiction on the Supreme Court. For example, under the Income-tax Act [s. 257], the Supreme Court can hear an appeal from a High Court decision on a reference made to it by the Income-tax Appellate Tribunal.[48] Under section 38, Advocates Act, 1961, an appeal lies to the Supreme Court from a decision of the disciplinary committee of the Bar Council of India.[49]

Jurisdiction has been conferred on the Supreme Court under the Monopolies and Restrictive Trade Practices Act, 1969, the Customs Act, 1962, the Central Excise and Salt Act, 1944 and a number of other Acts.

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43. FREUND, A Supreme Court in a Federation, 53 *Col LR* 614 (1953).
Also, MCWHINNEY, *JUDICIAL REVIEW, op. cit., and his article,* Judicial Concurrence and Dissents, 31 *Can. B.R.* 595 (1953).

44. *Infra,* under *Constitutional Interpretation,* Ch. XL.
For the doctrine of *Stare Decisis,* see, *infra,* Sec. J.

45. See, for example, *Gopalan v. State of Madras,* AIR 1959 SC 27; *In re Delhi Laws Act case, supra,* Ch. II, Sec. N.

46. Multiple opinions delivered in *S.P. Gupta v. Union of India,* AIR 1981 SC 149.
For discussion of this case see, *infra,* Ch. VIII.
Also see, *infra,* Ch. XL.

47. For this List, see, *infra,* Ch. X, Sec. D.

48. See, JAIN, *INDIAN ADM. LAW, CASES & MATERIALS, II,* Ch. XII.

49. See, JAIN, *op. cit.*

Jurisdiction is also conferred on the Supreme Court by several constitutional provisions, such as, Art. 317(1),[50] Arts. 323A and 323B.[51]

Under Art. 138(2), the Supreme Court shall have such jurisdiction and powers with respect to any matter as the Government of India and any State Government may by special agreement confer, if Parliament by law provides for the exercise of such jurisdiction and powers by the Supreme Court.

Under Art. 139, Parliament may by law confer on the Supreme Court power to issue directions, orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warrants* and *certiorari*, or any of them, for any purposes other than those mentioned in Art. 32(2). Under Art. 32(2), the Supreme Court has power to issue these writs for purpose of enforcement of Fundamental Rights.[52] Under Art. 139, power to issue writs may be conferred on the Supreme Court for purposes other than enforcement of Fundamental Rights.

Under Art. 140, Parliament may by law make provisions for conferring upon the Supreme Court such supplemental powers not inconsistent with any provision of the Constitution as may appear to be necessary or desirable for the purpose of enabling the Court more effectively to exercise the jurisdiction conferred on the Court by or under the Constitution.

The Supreme Court has ruled in *In re, Special Courts Bill*, 1973,[53] that as regards conferring additional jurisdiction on the Supreme Court provisions from Arts. 124 to 147 of the Constitution are exhaustive and no more jurisdiction can be conferred on the Supreme Court outside those provisions. Parliament can confer additional jurisdiction on the Supreme Court while exercising its legislative power under Arts. 246(1) and (2).[54] Thus, Parliament can confer jurisdiction on the Supreme Court beyond what Arts. 133(3), 134(2), 138(1), 138(2), 139 and 140 provide. These provisions are to be read in harmony and conjunction with, and not in derogation of other constitutional provisions. Thus, the Court has ruled:

> "The Parliament, therefore, has the competence to pass laws in respect of matters enumerated in Lists I and III not withstanding the fact that by such laws, the jurisdiction of the Supreme Court is enlarged in a manner not contemplated by or beyond what is contemplated by the various articles in Chapter IV, Part V".[55]

For example, preventive detention falls under entry 3 in List III. Parliament is competent while legislating on that topic under Art. 246(2) to provide under Art. 246(1) read with entry 77, List I, that an appeal shall lie to the Supreme Court from an order of detention passed under a preventive detention law.[56]

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50. *Infra*, Ch. XXXVI.
51. *Infra*, Ch. VIII, Sec. I.
52. For discussion on Art. 32(2), see, *infra*, Ch. XXXIII, Sec. A.
53. See, *supra*, Sec. F.
54. For discussion on Art. 246, see, *infra*, Ch. X, Sec. B.
55. AIR 1979 SC at 500.
56. For discussion on 'Preventive Detention', see, *infra*, Ch. XXVII, Sec. B.

Similarly, Parliament can enact under entry 77, List I,[57] that an appeal shall lie as of right to the Supreme Court from any judgment or order of a Special Court both on fact as well as on law. The law relating to Special Courts can be enacted by Parliament under entry 11A of List III.[58]

Under Art. 138(2), the Supreme Court shall have such further jurisdiction as may be agreed between a State and the Central Government by special agreement, if Parliament by law provides for the exercise of such jurisdiction by the court.

Under Art. 134(2) Parliament may by law confer on the Supreme Court further powers to hear appeals from any High Court judgement in a criminal proceeding subject to such conditions as may be specified in such law.

J. DOCTRINE OF *STARE DECISIS*

The doctrine of *stare decisis* or precedents is the distinguishing characteristic of the English common law. It envisages that judicial decisions have a binding force for the future. It is not, however, the whole judgment that is deemed to be so binding. A judgment is authoritative only as to that part of it, called *ratio decidendi*, which is considered to have been necessary for the decision of the actual issues between the litigants. As KEETON suggests, "The *ratio decidendi* of a decision is the principle of law formulated by the Judge for the purpose of deciding the problem before him." In some cases, it may be quite difficult to extract a *ratio*, and the difficulty is enhanced when multiple opinions are delivered in a case.

On the other hand, *obiter dicta* are "observations made by the Judge, but which are not essential for the decision reached. There may be observations upon the broader aspect of the law relating to the problem arising for decision; they may be answers to hypothetical questions raised by the Judge or the counsel in the course of the hearing or they may be observations upon social or other questions, prompted by the facts of the case under consideration".[59]

In the course of the argument and decision of a case, many incidental considerations arise which may all be part of the legal process but which have different degrees of relevance to the central issue. Judicial opinions upon such matters may be merely casual, or wholly gratuitous, or of collateral relevance and are known as *obiter dicta*.[60]

The doctrine of *stare decisis* in Britain envisages that the lower courts are bound by the decisions of the higher courts and, thus, every court in Britain is bound by the decisions of the House of Lords. The Indian Judicial system is also characterised by a scheme of hierarchy of courts, the Supreme Court being the

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57. This entry runs as: "Constitution, organisation, jurisdiction and powers of the Supreme Court (including contempt of such Court)....."

The Court has ruled: "A law which confers additional powers on the Supreme Court by enlarging its jurisdiction is evidently a law with respect to "jurisdiction and powers" of that Court."

For further discussion on entry 77, List I, see, *infra*, Ch. X, Sec. D.

58. Entry 11A, List III, runs as: "Administration of justice; constitution and organisation of all courts, except the Supreme Court and the High Court".

For further discussion on this entry, see, Ch. X, Sec. F., *infra.*

59. *Elementary Principles of Jurisprudence*, 106.

60. ALLEN, *LAW IN THE MAKING*, 248.

Apex Court and, therefore, the doctrine of binding precedent is the cardinal feature of the Indian Legal System.

The Indian Constitution specifically and unequivocally lays down this proposition in Art. 141 which says that "the law declared by the Supreme Court shall be binding on all courts within the territory of India."[61] Thus, all courts are bound to follow the decisions of the Supreme Court. The law declared by the Supreme Court is the law of the land.[62] Judgments of the Supreme Court constitute a source of law.[63]

Article 141 mandates every court subordinate to the Supreme Court to accept the law laid down by the Apex Court.[64] The Supreme Court has explained the rationale underlying Art. 141 as follows: "In the hierarchical system of courts" such as exists in India, "it is necessary for each lower tier", including the High Court, "to accept loyally the decisions of the higher tiers". The better wisdom of the court below must yield to the higher wisdom of the Court above. The Supreme Court has observed:[65]

> "It is inevitable in hierarchical system of courts that there are decisions of the supreme appellate tribunal which do not attract the unanimous approval of all members of the judiciary.... But the judicial system only works if someone is allowed to have the last word and that last word, once spoken, is loyally accepted."

The Supreme Court in *State of Andhra Pradesh v. A.P. Jaiswal*,[66] emphasizing upon the need for the courts to follow the principle of *stare decisis*, has observed:

> "Consistency is the cornerstone of the administration of justice. It is consistency which creates confidence in the system and this consistency can never be achieved without respect to the rule of finality. It is with a view to achieve consistency in judicial pronouncements, the courts have evolved the rule of precedents, principle of stare decisis *etc.* These rules and principles are based on public policy and if these are not followed by courts then there will be chaos in the administration of justice."

The Apex Court has impressed on the High Courts that they should follow the law laid down by the Supreme Court. Judicial discipline requires that clear pronouncements by the Supreme Court, about what the law on a matter is, must be treated as binding by all courts in India. Art. 141 is an imprimatur to all courts that the law declared by the Supreme Court is binding on them.[67] This is of course subject to the fundamental principle that an order obtained by fraud has to be treated as a nullity whether by the court of first instance or by the final court[68].

Article 141 gives a constitutional status to the theory of precedents in respect of law declared by the Supreme Court. Obviously, therefore, the *ratio* of a Su-

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61. For further discussion on Art. 141, see, *infra*, under Constitutional Interpretation, Ch. XL.
62. *Delhi Transport Corp. v. D.T.C. Mazdoor Congress,* AIR 1991 SC 101 : 1991 Supp (1) SCC 600.
63. *All India Reporter Karamchari Sangh v. All India Reporter Ltd.,* AIR 1988 SC 1325 : 1988 Supp SCC 472.
64. *Gauraya v. S.N. Thakur,* AIR 1986 SC 1440 : (1986) 2 SCC 709.
65. *C.C.E. v. Dunlop India Ltd.,* AIR 1985 SC 330 : (1985) 1 SCC 260.
66. AIR 2001 SC 499 : (2001) 1 SCC 748.
67. *C.N. Rudramurthy v. K. Barkathulla Khan,* (1998) 8 SCC 275; *Suganthi Suresh Kumar v. Jagdeeshan,* (2002) 2 SCC 420 : AIR 2002 SC 681.
68. A.*V. Papayya v. Govt. of A.P.,* (2007) 4 SCC 221 : AIR 2007 SC 1546.

preme Court decision is binding on all courts below it.[69] Even the *obiter dicta* of the Supreme Court is regarded as binding by the courts below,[70] though the same cannot be said for those statements which are casual or which are neither clear nor definite.[71] Observations of the Supreme Court on points not argued before it but conceded by the counsel[72] or judgments rendered merely having regard to the facts[73] or directions issued under Art. 142,[74] or interim orders[75] are not binding on the courts below. Further, suggestions or guidelines addressed to the legislature are not binding law.[76]

Once the *ratio* of a Supreme Court decision is discovered, the case is not an authority for a proposition that may seem to follow logically from it and the courts may refuse to extend the principle of a Supreme Court decision.[77] Observations by the Judges in the process of reasoning do not however amount to declaration of law as contemplated by Art. 141.[78] What is of the essence in a decision is its *ratio* and not every observation found therein nor what logically follows from the various observations in the Judgment.[79]

On this point, the Court has observed recently:[80]

> "A decision of this Court is an authority for the proposition which it decides and not for what it has not decided or had no occasion to express an opinion on".

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69. *Rajeshwar Pd. v. State of West Bengal*, AIR 1965 SC 1887 : 1966 (1) SCR 178.

70. *Veerappa v. I.T. Commr.*, AIR 1959 Mad. 56; *I.T. Commr. v. Vazir Sultan*, AIR 1959 SC 814; *Sadhu Singh v. State*, AIR 1962 All. 193; *D.G. Viswanath v. Govt. of Mysore*, AIR 1964 Mys. 132; *Jaswantlal v. Nichhabhai*, AIR 1964 Guj. 283. *Nalu v. State*, AIR 1965 Ori. 7; *Municipal Committee v. Hazara Singh*, AIR 1975 SC 1087; *Union of India v. Rampur Distillery & Chemical Co. Ltd.*, AIR 1981 Del. 348; *Sarwan Singh Lamba v. Unon of India*, AIR 1995 SC 1729 : (1995) 4 SCC 546.

71. *K.P. Doctor v. State of Bombay*, AIR 1955 Bom. 220; *Mohandas Issardass v. Sattanathan*, 56 Bom LR 1156; *Venkata v. Madras*, AIR 1958 AP 173; *Chunilal Basu v. Chief Justice*, Cal HC AIR 1974 Cal 326; *Municipal Corp. of Delhi v. Gurnam Kaur*, AIR 1989 SC 38 : (1989) 1 SCC 101. See also *Oriental Insurance Co. Ltd v. Meena Variyal*, (2007) 5 SCC 428 : AIR 2007 SC 1609.

72. *M.S.M. Sharma v. Shri Krishna Sinha*, AIR 1959 SC 395 : 1959 Supp (1) SCR 806; *Suptdt. & Legal Remembrancer, State of West Bengal v. Corp. of Calcutta*, AIR 1967 SC 997 : 1967(2) SCR 170; *Kulwant Kaur v. Gurdial Singh Mann*, (2001) 4 SCC 262 : AIR 2001 SC 1273; *Municipal Corp. of Delhi v. Gurnam Kaur*, (1989) 1 SCC 101 : AIR 1989 SC 38. See also *Bihar School Examination Board v. Suresh Prasad Sinha*, (2009) 8 SCC 483: (2009) 11 JT 541, relevance of facts and context to be considered.

73. *U.P Brassware Corpn Ltd v. Uday Narain Pandey*, (2006) 1 SCC 479, 491 : AIR 2006 SC 586.

74. *State of U.P. v. Neeraj Awasthi*, (2006) 1 SCC 667, 689 : (2006) 1 JT 19. See also *State of Kerala v. Mahesh Kumar*, (2009) 3 SCC 654 : (2009) 3 JT 424.

75. *State of Assam v. Barak Upatyaka Karmachari Sanstha*, (2009) 5 SCC 694 : AIR 2009 SC 2249.

76. *Mohmed Amin Alias Amin Choteli Rahim Miyan Shaikh v. Central Bureau of Investigation (Through its Director)*, (2008) 15 SCC 49. See also *Vishnu Dutt Sharma v. Manju Sharma*, (2009) 6 SCC 379 : AIR 2009 SC 2254. Mere direction of a Court without considering the legal position is not a precedent.

77. *I.T. Commr. v. Shirin Bai*, AIR 1956 Bom. 586.

78. *Ram Swarup v. State of U.P.*, AIR 1958 All. 119; *Raval Co. v. K.G. Ramachandra*, AIR 1974 SC 818 : (1974) 1 SCC 424.

79. *Orient Paper and Industries Ltd. v. State of Orissa*, AIR 1991 SC 672, 680 : 1991 Supp (1) SCC 81.

80. *General Manager, Northern Rly. v. Sarvesh Chopra*, (2002) 4 SCC 45, at 52.

The Court has also clarified that "a decision which is not express and is not founded on reasons, nor which proceeds on consideration of the issues", cannot be deemed to be a law declared to have a binding effect under Art. 141.[81] When the Supreme Court summarily dismisses a special leave petition[82] on a technical ground, it does not constitute a binding precedent for purposes of Art. 141. When reasons are given, the Supreme Court decision attracts Art. 141; when no reasons are given, Art. 141 is not attracted.

A clarificatory order of the Supreme Court is not a precedent.[83]

Explaining the significance of Art. 141, the Supreme Court has observed in the case noted below:[84] The Court may itself record in its order that it will not operate as a precedent.[85]

> "When the Supreme Court decides a principle it would be the duty of the High Court or a subordinate court to follow the decision of the Supreme Court. A judgment of the High Court which refuses to follow the decision and directions of the Supreme Court or seeks to revive a decision of the High Court which had been set aside by the Supreme Court is a nullity."

No judgment is to be read as a statute. A word or a clause or a sentence in the judgment cannot be regarded as a full exposition of law.[86] When a general principle of law is laid down by the Supreme Court, it is binding on every body.[87] But a Supreme Court decision which is virtually a non-speaking order and which does not set out the facts or the reason for the conclusion or direction given cannot be treated as a binding precedent.[88]

The Court has advised that one of the principles to be followed while applying decisions of Supreme Court is to read it in consonance with the statute governing the field. The Court referred to its earlier decision in *M.C.Mehta* case[89] and explained that the purport of the decision was that if a transport vehicle overtook any other four-wheel motorized vehicle, it would be construed as a contravention of the conditions of the permit which could entail suspension/cancellation of the permit and impounding the vehicle and that such directions must be read in the light of the provisions of MV Act and not dehors the same.[90]

To promote consistency and certainty in the law laid down by the Supreme Court, the ideal situation would be that the entire Court should sit in all cases to decide questions of law. It is for that reason that the U.S. Supreme Court con-

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81. *S. Shanmugavel Nadar v. State of Tamil Nadu*, (2002) 7 SCALE 29 : (2002) 8 SCC 361 : AIR 2002 SC 3484; *Kalyan Chandra Sarkar v. Rajesh Ranjan*, (2005) 2 SCC 42 **:** AIR 2005 SC 921.

82. Sec. D, *supra.*

83. *P.P.C. Rawani (Dr.) v. U.O.I.*, (2008) 15 SCC 332.

84. In the matter of : *Director of Settlements, H.P. v. M.R. Apparao*, JT 2002 (3) SC 304, at 315 : (2002) 4 SCC 638 : AIR 2002 SC 1598. *Official Liquidator v. Dayanand*, (2008) 10 SCC 1, at page 52 : (2008) 11 JT 467.

85. *Jyoti Prakash Rai Alias Jyoti Prakash v. State of Bihar*, (2008) 15 SCC 223.

86. *Union of India v. Dhanwanti Devi*, (1996) 6 SCC 44; *Union of India v. Major Bahadur Singh*, (2006) 1 SCC 368 : (2005) 10 JT 127.

87. *MSL Patil, Asstt. Conservator of Forests, Solarpur v. State of Maharashtra*, (1996) 11 SCC 361.

88. *Govt. of India v. Workmen of State Trading Corpn.*, (1997) 11 SCC 641 : AIR 1999 SC 1532.

89. (1997) 8 SCC 770 : AIR 1998 SC 186,

90. *U.P. SRTC v. Commr. of Police (Traffic)*, (2009) 3 SCC 634 : (2009) 2 JT 553.

sisting of nine Judges sits as a whole to decide cases. But it is not feasible to do so in India. Because of the volume of work coming before the Supreme Court, it is necessary for the Court to sit in benches of two or three Judges.[1]

A Constitution Bench consists of five or more Judges.[2] It is therefore possible for different Division Benches to render inconsistent decisions on points of law from time to time.

To promote consistency and certainty in the development of law, a rule is followed that the statement of law by a Division Bench is considered binding on a Division Bench of equal or smaller number of judges.[3]

Accordingly, a two judge Bench ought to follow the earlier decision of a larger Bench. The law declared by a Division Bench of the Supreme Court is binding on another Division Bench of the same or smaller number of Judges.[4]The decision of the Constitution Bench is binding on all smaller Benches. The Supreme Court has ruled that "no co-ordinate Bench of this Court can even comment upon, let alone sit in judgment over, the discretion exercised or judgement rendered in a cause or matter before another coordinate Bench."[5]

A three-judge Bench decision cannot prevail over an earlier constitutional bench decision of a five-Judge Bench on the ground of being a later decision.[6]

If two decisions of the Supreme Court on the question of law cannot be reconciled, and one of them is of larger Bench while the other is of a smaller Bench, the decision of the larger Bench whether it is earlier or later in point of time should be followed.[7] A Constitution Bench after resolving conflicting views in different decisions, instead of overruling specific judgments, in a rather innovative step clarified that all decisions which ran counter to the principle settled by it would "stand denuded of their status as precedents".[8] If a Bench of two Judges concludes that an earlier judgment of three Judges is so very incorrect that in no circumstances can it be followed, it should not directly refer the matter directly to a five Judge Bench for reconsideration. The two Judge Bench should refer the matter to a three Judge Bench setting out the reasons why it cannot agree with the earlier judgment. If the three Judge Bench also comes to the conclusion that the

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1. See, Art. 145, Cls. (2) and (3); Sec. I(h). Also, *Union of India v. Raghubir Singh*, (1989) 2 SCC 754.

2. *Ibid.*

3. *John Martin v. State of West Bengal*, AIR 1975 SC 775 : (1975) 3 SCC 836; *Indira Nehru Gandhi v. Raj Narain*, AIR 1975 SC 2299 : 1975 Supp SCC 1; *Union of India v. Raghubir Singh*, AIR 1989 SC 1933, 1945 : (1989) 2 SCC 754; *N. Meera Rani v. State of Tamil Nadu*, AIR 1989 SC 2027; *S.H. Rangappa v. State of Karnataka*, (2002) 1 SCC 538; *Chandra Prakash v. State of U.P.*, (2002) 4 SCC 234; *Delhi Development Authority v. Ashok Kumar Behal*, AIR 2002 SC 2940.

4. *Union of India v. Raghubir Singh*, (1989) 2 SCC 754 : AIR 1989 SC 1933 : (1989) 2 SCC 754; *Chandra Prakash v. State of U.P.*, (2002) 4 SCC 234.

5. *Sub-Committee of Judicial Accountability v. Union of India*, (1992) 4 SCC 97.

6. *John Martin v. State of West Bengal*, AIR 1975 SC 775 : (1975) 3 SCC 836.

7. *Poolpandi v. Supdt., Central Excise*, AIR 1992 SC 1795 : (1992) 3 SCC 259; *Pandit Munshi Ram v. Delhi Development Authority*, AIR 2001 Del. 82; *Laxman Thamappa Kotagiri v. G.M. Central Railway*, (2007) 4 SCC 596 : (2005) 1 SCALE 600.

8. *Secy. State of Karnataka v. Umadevi*, (2006) 4 SCC 1, 42 : AIR 2006 SC 1806*; Fairgrowth Investments Ltd. v. Custodian*, (2004) 11 SCC 472, 482 : (2004) 9 JT 124.

earlier three Judge Bench decision is incorrect, then it can refer the matter to a five Judge Bench.[9]

The rule is one of practice based on convenience and judicial propriety, or as some judges have termed it, judicial discipline. Nevertheless, it has been generally followed and enforced except in exceptional circumstances. A judicially unprecedented procedure was adopted by the Court in *Islamic Academy of Education v. State of Karnataka* [10] by constituting a Bench of 5 judges to "interpret" the decision of 11 judges in *T.M.A.Pai Foundation v. State of Karnataka*[11]. Subsequently a Bench of seven judges was constituted to consider the correctness ofthe "interpretation"[12]. Again a larger Bench decision in *India Cement Ltd. v. State of Tamil Nadu*[13] was not followed by a bench of five judges[14] on the ground that the judgment contained "A doubtful expression…apparently by mistake or inadvertence'', that " the apparent error should be ignored' and that " A statement caused by an apparent typographical or inadvertent error in a judgment…should not be read as declaration of such law by the Court'.[15]

When a Division Bench thinks differently from a Bench of the same number of Judges, it should not decide on the correctness or otherwise of the view taken by the earlier Bench, but should refer the case to a larger Bench for decision.[16]

Views expressed by one Bench are binding on coordinate Benches.[17] When there are two conflicting decisions of the Supreme Court rendered by co-equal benches, the question arises which of these two decisions should the High Court follow. Earlier, a view was expressed that the decision of the later date should be followed.[18] But this view is not followed now as it is regarded as too mechanical. The view being propounded now is that the High Court ought to follow the decision which appears to it to state the law more elaborately and accurately.[19]

When the Court is divided, it is the majority judgment which constitutes the "law declared" by the Supreme Court and not the minority view.[20] However, in *Virendra Kumar Srivastava v. U.P.Rajya Sabha Kalyan Nigam* [21], the tests propounded in the majority and minority judgments were applied to determine

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9. *Pradip Chandra Parija v. Pramod Chandra Patnaik*, (2002) 1 SCC 1 : AIR 2002 SC 296.
10. (2003) 6 SCC 697 : AIR 2003 SC 3724.
11. (2002) 8 SCC 481 : AIR 2003 SC 355.
12. *P.A.Inamdar v. State of Maharashtra*, (2005) 6 SCC 537 : AIR 2005 SC 3226. See further discussion under Art. 30.
13. (1990) 1 SCC 12 : AIR 1990 SC 85.
14. *State of West Bengal v. Kesoram Industries*, (2004) 10 SCC 201 : AIR 2005 SC 1646.
15. *Ibid.* at Pp. 292, 297.
16. *Union of India v. Godfrey Phillips India Ltd.*, AIR 1986 SC 806 : (1985) 4 SCC 369; *Union of India v. Raghubir Singh*, AIR 1989 SC, at 1945.
17. *Aarti Gupta v. State of Punjab*, AIR 1988 SC 481 : (1988) 1 SCC 258.
18. *Mattu Lal v. Radhe Lal*, AIR 1974 SC 1596 : (1974) 2 SCC 365; *Basdeo v. Board of Revenue*, AIR 1974 All. 337; *Ganapati v. Waman*, AIR 1981 SC 1956; *Ram Parkash v. Surinder Sharma Smt.*, AIR 1981 P.H. 297; *CST v. Pine Chemicals Ltd.*, (1995) 1 SCC 58; *Arjun Sethi v. L.A. Collector, Cuttack*, AIR 1998 Ori 34; *Gopal Krishna Andley v. 5th Addl. District Judge, Kanpur*, AIR 1981 All 300; *P. Ramanujan v. D. Venkat Rao*, AIR 1982 AP 227; *Pandit Munishi Ram v. DDA, supra*, footnote 7.
19. *Amar Singh Yadav v. Shanti Devi*, AIR 1987 Pat 191.
20. *John Martin v. State of West Bengal*, AIR 1975 SC 775 : (1975) 3 SCC 836; *Harish Verma v. Ajay Srivastava*, (2003) 8 SCC 69 : AIR 2003 SC 3371; *Common Cause v. Union of India*, (2004) 5 SCC 222 : (2004) 9 SCALE 32.
21. (2005) 1 SCC 149 : AIR 2005 SC 411.

whether the respondent corporation was a "state" or not within the meaning on Art. 12.

As regards the binding nature of an advisory opinion, theoretically, it may be true to say that it is not binding as it does not amount to a proper judicial adjudication since there are no parties before the Court. But this is only a technical view to take. In practice, the lower courts regard it as having the same efficacy, authority and value as a judgment of the Supreme Court delivered by it in a case coming before it in the normal manner. As the law regarding several difficult constitutional points is declared by the Supreme Court in its advisory opinions, the lower Courts have to take note of that and apply the same.[22] The Federal Court has itself said that advisory opinions were not to be treated any the less binding on account of being advisory.[23] The matter has already been discussed earlier.[24]

In *Union of India v. Kantilal,*[25] the Supreme Court disapproved of the approach of the Central Administrative Tribunal where the tribunal did take notice of the Supreme Court's decision but, without mentioning any distinguishing features or facts of the case before it, failed to follow the same.

The Supreme Court has emphasized that it would amount to judicial impropriety on the part of subordinate courts and the High Court to ignore the well settled position in law as a result of its decision and to pass a judicial order which is clearly contrary to the settled position. The Court has observed: [26]

> "Such judicial adventurism cannot be permitted and we strongly deprecate the tendency of the subordinate courts in not applying the settled principles and in passing whimsical orders which necessarily has the effect of granting wrongful and unwarranted relief to one of the parties. It is time that this tendency stops."

The Supreme Court has ruled that it can initiate contempt of court proceedings against such High Court Judges as flout the order of the Supreme Court.[27]

When the Supreme Court gives reasons for dismissing a special leave petition under Art. 136,[28] the decision becomes one which attracts Art. 141 and, thus, becomes binding. When, however, the Court dismisses a special leave petition *simpliciter* but gives no reasons for summarily dismissing the petition or does not specifically affirm the reasoning in the order appealed against, the Court does not lay down any law under Art. 141. The effect of a non-speaking order dismissing a special leave petition must, by implication, be taken to be that the Supreme

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22. *Ramkishore v. Union of India*, AIR 1965 Cal. 282.
23. *Province of Madras v. Boddu Paidanna,* AIR 1942 FC 33.
24. *Supra*, Sec. F.
25. This point has been discussed later : see, *Union of India v. Kantilal Hematram Pandya,* (1995) 3 SCC 17 : AIR 1995 SC 1349.
26. *Dwarikesh Sugar Industries Ltd. v. Prem Heavy Engg. Works (P.) Ltd.,* AIR 1997 SC 2477, 2484 : (1997) 6 SCC 450. Also see, *Shivaji Narayan Bachhav v. State of Maharashtra,* AIR 1983 SC 1014 : (1983) 4 SCC 129.
27. *Spencer & Co. Ltd. v. Vishwadarshan Distributors (P.) Ltd.,* (1995) 1 SCC 259.
28. For discussion on Art. 136, see, *supra,* Sec. D.

Court thinks that the case is not a fit one where special leave to appeal should be granted.[29]

The Supreme Court has emphasized upon its law-creative function. The Court has emphasized that the "childish fiction" that the courts only find the law but do not make it must be done away with.[30] Under Art. 141, the law declared by the Supreme Court is of binding character and as commandful as the law made by the Legislature. The Court has further asserted that it is not merely an interpreter of the existing law but much more than that. As a wing of the state, the Court is by itself a source of law. The law is what the Court says it is.[31]

Consequently, the Supreme Court does not regard itself as absolutely bound by its own decisions, especially in the area of interpretation of the Constitution.[32] The words of Art. 141 "binding on all courts", though wide enough to include the Supreme Court, do not actually include the Supreme Court itself. The Court is thus not bound by its own decisions and is free to reconsider them in appropriate cases. This approach is necessary so that along with consistency and uniformity, development of law is not stultified with passage of time. Therefore, while the Supreme Court does usually follow its own decisions, it may, at times, find it necessary to differ from its own previous rulings in the interest of development of law and justice.[33] The Court has observed that if the subject-matter is of fundamental importance to national life, or the reasoning is so plainly erroneous in the earlier decision in the light of the later thought, then "it is wiser to be ultimately right rather than to be consistently wrong."[34] A later judgment will not be followed if it has ignored an earlier decision and was rendered *per incuriam*[35].

On the promulgation of the Constitution, the Federal Court, which functioned under the Government of India Act, 1935, ceased to exist and the Supreme Court was set up instead.[36] Appeals from the Federal Courts and the High Courts lay to the Privy Council which was the ultimate court of appeal from India. The Supreme Court has ruled that while the pre-Constitution decisions rendered by the

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29. *Mathura Prasad Bajoo Jaiswal v. Dossibai N.B. Jeejeebhoy,* (1970) 1 SCC 613 : AIR 1971 SC 2355; *Union of India v. All India Services Pensioners' Association,* AIR 1988 SC 501 : (1988) 2 SCC 580; *Indian Oil Corpn. v. State of Bihar,* AIR 1986 SC 1780 : (1986) 4 SCC 146; *Supreme Court Employees' Welfare Association v. Union of India,* AIR 1990 SC 334 : (1999) 4 SCC 187; *Ajit Kumar Rath v. State of Orissa,* AIR 2000 SC 85, at 93 : (1999) 9 SCC 596.
See, *supra,* Sec. D(a).

30. See, further on this point, Ch. XL, *infra.*

31. *Delhi Transport Corp. v. DTC, Mazdoor Union,* (1991) Supp. (1) SCC 600 : AIR 1991 SC 101; *Nandkishore v. State of Punjab,* (1995) 6 SCC 614; *BIC v. C.T.O.,* (1994) Supp. (1) SCC 310. See also *M. Nagaraj v. Union of India,* (2006) 8 SCC 212, 267 : AIR 2007 SC 71.
Also see, Ch. XL, *infra.*

32. *Bengal Immunity Co. v. State of Bihar,* AIR 1955 SC 661 : 1955 (2) SCR 603; *Bachan Singh v. State of Punjab,* AIR 1982 SC 1325 : (1982) 3 SCC 24.

33. *Punjab Land Development and Reclamation Corpn. Ltd. v. Presiding Officer,* (1990) 3 SCC 682.
For a fuller discussion of this theme, see, *infra,* Ch. XL. See also *T.K. Rangarajan v. Govt. of Tamil Nadu,* (2003) 6 SCC 581, 589 : AIR 2003 SC 3032.

34. *Ganga Sugar Company v. State of Uttar Pradesh,* AIR 1980 286, 294 : (1980) 1 SCC 223.

35. *Babu Prasad Kaikadi v. Babu,* (2004) 1 SCC 681 : AIR 2004 SC 754*; Mukesh Tripathi v. Senior Divisional Manager, LIC,* (2004) 8 SCC 387, 396 : AIR 2004 SC 4179.

36. *Supra.*

Privy Council and the Federal Court are entitled to great weight, those decisions are not binding on the Supreme Court which can take a different view.[37]

The Supreme Court has also insisted that tribunals also follow the doctrine of *stare decisis* . A tribunal is bound to follow the law laid down by the concerned High Court and the Supreme Court. A bench of a tribunal ought to follow the law laid down by an earlier bench. This is part of the judicial discipline. If a subsequent bench feels that the view taken by an earlier bench is incorrect, it ought to refer the matter to a larger bench. This step is necessary so as to avoid any difference of opinion between two co-ordinate benches of the same tribunal.[38]

The Supreme Court has also emphasized that a subordinate court is bound to follow the law as enunciated by the superior courts. This is in essence the doctrine of precedent or *stare decisis*.[39]

K. INDEPENDENCE OF THE SUPREME COURT

The concept of independence of the Judiciary took time to grow in England. Before 1701, the Judges held their office during the Crown's pleasure and, like any other Crown servant, he could be dismissed by the King at will. The Judges were thus subservient to the Executive. This subservience naturally led the Judges to favour the royal prerogative. The most typical example of such an attitude is to be found in the *Hampden's* case (the *Ship Money* case) in which seven out of twelve Judges gave an award in favour of the Crown's prerogative to collect money without parliamentary approval. One of the Judges even propounded the view that "Rex is Lex." In 1616, Coke was dismissed from the office of the Chief Justice of the King's Bench. The judicial independence was secured by the Act of Settlement, 1701, which declared the Judicial tenure to be during good behaviour, and that upon the address of both the Houses of Parliament it would be lawful to remove a Judge. This position regarding security of judicial tenure is now secured by statutes.[40]

An independent judiciary is the *sine qua non* of a vibrant democratic system. Only an impartial and independent Judiciary can stand as a bulwark for the protection of the rights of the individual and mete out even handed justice without fear or favour. The Judiciary is the protector of the Constitution and, as such, it may have to strike down executive, administrative and legislative acts of the Centre and the States. For Rule of Law to prevail, judicial independence is of prime necessity. Being the highest Court in the land, it is very necessary that the Supreme Court is allowed to work in an atmosphere of independence of action and judgment and is insulated from all kinds of pressures, political or otherwise.

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37. *Delhi Judicial Service Association v. State of Gujarat*, AIR 1991 SC 2176, 2202 : (1991) 4 SCC 406. The Supreme Court did not follow the Federal Court decisions in *State of Bihar v. Abdul Majid,* AIR 1954 SC 245, 248-49 : 1954 SCR 786; *Shrinivas Krishnarao Kango v. Narayan Devji Kango*, AIR 1954 SC 379, 387-88 : 1955 (1) SCR 1.

38. *S.I. Rooplal v. Lt. Governor through Chief Secretary, Delhi,* 2000 AIR SCW 19; *State of Andhra Pradesh v. A.P. Jaiswal,* AIR 2001 SC 499 : (2001) 1 SCC 748. See also *Ajay Kumar Bhuyan v. State of Orissa,* (2003) 1 SCC 707 : (2002) 9 SCALE 56.

39. *Ibid.*

40. O. HOOD PHILIPS & PAUL JACKSON, *CONST. OF ADM. LAW* 28-29, 386-387 (1987). Also see, *supra.*

The members of the Constituent Assembly were very much concerned with the question of independence of the Judiciary and, accordingly, made several provisions to ensure this end.[41] The Supreme Court has itself laid emphasis on the independence of the judiciary from time to time. As the Court has observed recently in *Thalwal*:[42] "The constitutional scheme aims at securing an independent judiciary which is the bulwark of democracy".

The concept of "separation of powers between the legislature, the executive and the judiciary" and "independence of judiciary", a fundamental concept, has now been "elevated to the level of the basic structure of the Constitution and are the very heart of constitutional scheme."[43] The Court has rendered several decisions with a view to strengthen not only its own independence but that of the entire judicial system including the subordinate judiciary.[44]

As regards the relationship between Parliament and the Supreme Court, the basic pattern of the Court, its composition, powers, jurisdiction *etc*., the Constitution makes detailed provisions which cannot be touched by ordinary legislative process. But, within the constitutional framework, Parliament has some powers *vis-a-vis* the Court. The minimum number of its Judges is fixed by the Constitution but Parliament has authority to increase, not to decrease, this number.[45] The Constitution confers a security of tenure on the Judges subject to Parliament moving an address for removal of a Judge.[46] The power thus vested in Parliament cannot be misused owing to several safeguards, *viz.*, charges of misbehaviour and incapacity against the Judge concerned have to be enquired and proved, and special majority is required in the two Houses for the motion to be carried;[47] the executive plays no role in this procedure.

The salaries of the Judges are fixed by Parliament by law but it cannot be reduced during the tenure of a Judge.[48] Parliament may prescribe the privileges, allowances, leave and pension of a Judge, subject to the safeguard that these cannot be varied during the course of tenure of a Judge to his disadvantage.[49]

In the area of the Court's jurisdiction, Parliament may provide that an appeal may lie to the Supreme Court in civil matters from the judgment, decree or final order of a single Judge of a High Court.[50] Parliament can enhance the appellate criminal jurisdiction of the Supreme Court by enabling it to entertain and hear appeal from any judgment, final order or sentence in a criminal proceeding in a High Court over and above those cases in which the Court can already hear appeals under Art. 134.[51] Parliament can provide that the Supreme Court shall not have jurisdiction and powers of the Federal Court beyond what it already has un-

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41. AUSTIN, *op. cit.*, 164.
42. *A.C. Thalwal v. High Court of Himachal Pradesh*, (2000) 7 SCC 1, 9 : AIR 2000 SC 2732.
43. *State of Bihar v. Bal Mukund Sah*, AIR 2000 SC 1296, 1317 : (2000) 4 SCC 640.
For comments on this case, see, *infra,* Ch. VIII, Sec. F.
44. See, for example, *S.C. Advocates on Record Ass. v. Union of India*, *supra*; *In re* : *Presidential Reference*, *supra.* Also see, Ch. VIII, *infra.*
45. *Supra*, Sec. B(a).
46. *Supra*, Sec. B(m).
47. *Supra*, Sec. B(m).
48. *Supra*, Sec. B(i).
49. *Ibid.*
50. Art. 133(3); *supra*, Sec. C(iv)(c).
51. Art. 134(2); *supra*, Sec. C(iv)(d).

der Arts. 133 and 134.[52] Parliament can regulate the Supreme Court's power to review its own decisions and orders.[53] Parliament can confer further jurisdiction (quantitatively or qualitatively) on the Supreme Court regarding any matter in the Union or Concurrent List.[54] Parliament can provide that the Supreme Court shall have jurisdiction and powers with respect to any matter as the Government of India and the Government of a State may by special agreement seek to confer on it.[55] Parliament can confer on the Supreme Court power to issue directions, orders or writs, for any purpose other than those mentioned in Art. 32.[56] Parliament can confer supplementary powers on the Supreme Court so as to enable it to exercise its jurisdiction more effectively.[57]

It is clear from these provisions that what Parliament can do is to expand the jurisdiction and powers of the Supreme Court in several respects over and above what the Constitution confers. The effect of all these provisions, therefore, is that whereas the Constitution guarantees to the Supreme Court jurisdiction of various kinds, the matter has not been stereotyped into a rigid pattern for ever but is capable of expansion in the light of experience and the prevailing circumstances.

The rule-making power of the Supreme Court is subject to any law made by Parliament.[58] Parliament may regulate and prescribe the conditions of service of officers and servants of the Supreme Court;[59] may prescribe the manner in which a decree or order passed by the Supreme Court may be enforced;[60] may also pass a law to regulate the Court's power to make an order for securing the attendance of a person, discovery and production of documents or investigation or punishment of contempt of itself.[61] These are, however, procedural matters and do not affect the Supreme Court in any substantive manner.

To enable Parliament to make laws pertaining to the above-mentioned matters, Entry 77, List I, Sch. VII, confers on Parliament power to make law with respect to the constitution, organisation, jurisdiction and powers of the Supreme Court (including contempt of the Court) and the fees taken therein and also as to the persons entitled to practice before it.[62]

The Constitution insulates the Court from political criticism, and, thus, ensures its independence from political pressures and influence, by laying down that neither in Parliament nor in a State Legislature the conduct of a Supreme Court Judge in the discharge of his duties, can be discussed.[63] In the *Keshav Singh* case, the Supreme Court has taken opportunity to underline the significance of this provision. It protects a Judge of the Court from any contempt proceedings which may be taken against him in any House of Parliament or State Legislature for anything that the Judge may do in the discharge of his duties. The provision amounts to an absolute constitutional prohibition against any discussion in a

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52. *Supra*, Art 135, Sec. I(b).
53. Art. 137, *supra*, Sec. H.
54. Art. 138(1), see, *supra*, Sec. I(i) and *infra*, Ch. X.
55. Art. 138(2), Sec. I(i), *supra*.
56. Art. 139; *Infra*, Ch. XXXIII; *supra*, Sec. I(i).
57. Art. 140; Sec. I(i), *supra*.
58. Art. 145; *supra*, Sec. I(f).
59. Art. 146(2); *supra*, Sec. I(g).
60. Art. 142(1), *supra*, Sec. I(d).
61. Art. 142(2); *supra*, Sec. I(c).
62. *Infra*, Ch. X.
63. *Supra*, Ch. II.

House, with respect to a Supreme Court Judge. Reading Arts. 121 and 211 together, it is clear that the conduct of a Supreme Court Judge cannot be discussed in a House except when a motion to remove him is before Parliament.[64]

Further, the Supreme Court's expenses are charged upon the Consolidated Fund of India, which means that this item is non-votable in Parliament although a discussion on it is not ruled out.[65] It is thus not possible for Parliament, howsoever annoyed it may be with the Court, to starve it of funds. And the possibility of Parliament getting annoyed with the Court is not just a figment of the imagination. That such occasions may arise is evidenced by the reaction to the Supreme Court's decision in the *Golaknath* case[66] or the *Kesavanand Bharati* case[67] and earlier in the property cases, which led to the First and the Third Amendments of the Constitution.[68] The extreme controversy between a State Legislature and the High Court concerned which occurred in the *Keshav Singh* case has already been referred to.[69] Therefore, making supply of money to the Supreme Court independent of parliamentary vote is a great step in ensuring the Supreme Court's independence from political pressures.

As regards the Central Executive-Supreme Court relationship, the effective power to appoint Supreme Court Judges has over the years passed from the Executive to the Judiciary itself which has greatly strengthened judicial independence.[70] The Executive has no power to remove a Judge without an address from the House of Parliament,[71] and cannot control the Court's jurisdiction in any manner. However, the rules made by the Supreme Court concerning its staff members are to be approved by the Executive because of the financial implications involved therein. Here, again, the Court has made consultation between the Executive and the Chief Justice compulsory.[72]

Recruitment of the Court's staff is outside the purview of the Executive except that it can by rules provide for consultation with the Union Public Service Commission.[73] Salaries and allowances of the officers and servants of the Supreme Court are to be approved by the Executive, the reason being that ultimately they are to be met out of the Public Exchequer which affects the tax-payer and, therefore, some governmental control over the Court's expenses is necessary.

From the above, it would appear that the constitutional position of the Supreme Court is very strong relatively to the other two organs of government. A reasonable security of tenure has been provided to the Judges which is an important condition to enable them to act in an atmosphere of independence. The Court has been reasonably immunized from the stresses and strains of contemporary politics in the country.

There is however a danger of the judicial independence being eroded somewhat by the prevailing practice of the government re-employing retired Supreme

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64. *Supra*, Ch. II.
65. *Supra*, Ch. II.
66. Ch. XLI, *infra.*
67. *Ibid.*
68. *Infra*, Chs. XXXI, XXXII and XLII.
69. *Supra*, Ch. II; also see, Ch. VI, *infra.*
70. *Supra*, Sec. B.
71. *Ibid.*
72. *Supra.*
73. *Supra.*

Court Judges in various capacities. The only ban imposed by the Constitution on a Supreme Court Judge is that he should not plead or act in any Court or before any authority after retirement.[74]

In the Constituent Assembly, an attempt to put a restriction on re-employment of a retired Supreme Court Judge by the government did not succeed.[75] Ambedkar stated that the judiciary decided issues between citizens and rarely between citizen and the government and, consequently, the chances of the government influencing the conduct of a member of the Judiciary were very remote; in many cases employment of judicial talent in a specialized forum might be very necessary, as for example, the Income-tax investigation Commission; and that relations between Executive and Judiciary were so separate and distinct that the Executive had hardly any chance of influencing the judgment of the Judiciary.[76]

It is obvious that Ambedkar unduly minimised the importance of litigation in which government is a party. Today a very large chunk of the Supreme Court's work consists of deciding cases in which the government figures as a party. Also, the retired Judges are not always appointed, as Ambedkar envisaged, to *quasi*-judicial posts only. Many a time, they are appointed to pure and simple executive posts, for example, as Governors of States.[77]

The Law Commission has also criticised the prevailing practice of re-employing the retired Judges. "It is clearly undesirable that Supreme Court Judges should look forward to other government employment after their retirement. The government is a party in a large number of cases in the highest Court and the average citizen may well get the impression, that a Judge who might look forward to being employed by the government after his retirement, does not bring to bear on his work that detachment of outlook which is expected of a Judge in cases in which government is a party. We are clearly of the view that the practice has a tendency to affect the independence of the Judges and should be discontinued."[78]

The solution of the problem appears to lie in increasing the age of retirement of a Supreme Court Judge from 65 to 70 years, to make liberal pension provisions for the retired Judges, to put a legal ban on a Supreme Court Judge accepting an employment under any government after retirement, and to use his judicial talent in an honorary, and not in a salaried, capacity.

In *Nixon M. Joseph v. Union of India*,[79] a very pertinent and significant question was raised before the Kerala High Court through a public interest petition, *viz.* : should the retired Supreme Court and High Court Judges take any job, or contest election for the legislature. There is no specific bar in the Constitution against this. Nevertheless, K. NARAYANA KURUP J. has expressed a firm opinion

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74. See, *supra*, Sec. B(h).
75. VIII *CAD*, 229-260.
76. *Ibid*, 259-260.
77. The dangers in accepting a political office, like that of a State Governor, are very tellingly revealed by a recent episode. Fatima Beevi, a retired Supreme Court Judge, was appointed the Governor of Tamil Nadu. She appointed Jayalalitha as the Chief Minister. Jayalalitha was at the time disqualified to be a member of the State Legislature. Annoyed by the action of the Governor, the Central Executive recalled her from her office. For details, see, Ch. VII, Sec. A(d), *infra.*
78. Law Comm., *XIV Rep.*, I, 46.
79. AIR 1998 Ker. 385.

against this practice. To maintain the dignity and independence of the judiciary as well as public confidence in the judiciary, it is necessary that a Judge should now allow his judicial position to be compromised at any cost. Justice must not only be done but seen to be done. KURUP, J., has made the following pithy remarks:

> "The general public reposing absolute faith in the judiciary, see in it, justifiably an institution, that can rein in, if not eliminate, the rapacity, nepotism and corruption, especially at high places which have come to be associated with governance. The judiciary should continue to merit the exalted position it occupies in the minds and hearts of the people as the "saviour of democracy". It cannot be gainsaid that the one necessary condition for this is its independence. Independence in the sense free from the executive, meaning the bureaucracy and politicians interference and influence of every type. And fundamental to freedom from such influence and pressures on the judiciary is to eschew active politics and acceptance of positions by judges after retirement."

While the learned Judge was definitely of the opinion that judges be precluded from taking up jobs, or moving into active politics after retirement, he refrained from giving a definitive ruling in the case. As the matter is of national significance, the Judge dismissed the petition in *limine* and left the matter to the Central Government for consideration and necessary action.

In the past, at times, appointment of the Chief Justice raised controversy when a junior Judge was appointed as the Chief Justice by-passing the senior-most Judge.[80] This was regarded as an attempt to interfere with judicial independence. While a rule of automatic promotion of the senior-most Judge to the office of the Chief Justice might not always be satisfactory, by-passing him because his judicial views are not palatable to the government is to strike at the roots of judicial independence. It is hoped that such controversies will not arise in future because of the introduction of new procedure to appoint the Chief Justice.[81]

The Supreme Court of India enjoys far larger powers than any other Apex Court, *e.g.,* House of Lords in Britain or the Supreme Court in the USA. The Court enjoys very extensive jurisdiction. It plays a very significant role in the administration of law and justice in the country. It is the final arbiter and interpreter of the Constitution.[82] Judicial review is the basic structure of the Constitution[83] and this places a special responsibility on the Supreme Court in the area of constitutional interpretation. It is the final court of appeal in matters of private law as well as public law,[84] and has a supervisory role *vis-a-vis* the tribunals[85] and enjoys advisory jurisdiction.[86]

The Supreme Court is at the apex of the national judicial system. It constitutes a constitutional balance wheel acting as countervailing power to the Executive and the Legislature. The Court has played an extremely creative role in keeping the responsible and the parliamentary system of government in proper working

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80. *Supra*.
81. *Supra.*
82. See, *infra*, Ch. XL.
83. Ch. XLI, *infra.*
84. *Supra.*
85. *Supra.*
86. *Supra.*

order,[87] in maintaining the federal balance,[88] in protecting the fundamental rights of the people.[89] The Court has endeavoured to promote a welfare state in India.[90]

But the Court is faced with a serious problem, *viz.*, load of work.[91] Because of the spate of legislative and executive activity, increase in population and explosion of economic activity, there has been an explosion in litigation in India. Creation of tribunals, like the Central Administrative Tribunal, has further added to the load of work on the Supreme Court as appeals from these tribunals lie directly to the Supreme Court.[92]

There seems to be no possibility that the work-load on the Court will decrease in future. On the other hand, it is possible that the load of work on the court may increase. It, therefore, appears to be necessary to think of ways and means to expedite disposal of cases by the Supreme Court.

One obvious step to meet the situation is to further increase the number of judges and to select persons of calibre, aptitude and industry for the purpose. At times, filling of judicial vacancies takes a long time. The Government should devise ways and means to cut-short this period. The Court may also think of establishing specialised Benches according to the major heads of litigation coming before it. If the same judges deal with the same subject-matter over and over again, there can be quick disposal of cases and also a uniformity in decisions making law more certain and thus reducing the number of appeals to the Supreme Court in the long run.

Another method may be to establish all India tribunals, or a Central Appellate Tribunal, to hear appeals from all the various tribunals in the country, leaving only an exceptional appeal to the Supreme Court on questions of law from such a Tribunal.

The Supreme Court itself has suggested setting up of a National Court of Appeal to entertain appeals by special leave from the decisions of the High Courts and tribunals in the country in civil, criminal, revenue and labour cases so that the Supreme Court may concern itself only with entertaining cases involving questions of constitutional law and public law.[93]

The important thing is that in a democratic country, to solve the problem of arrears of cases pending in the courts, the solution is not to deny justice to the people but to expand the judicial system in various ways so as to keep pace with the growth of litigation in the country.[94]

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87. See *U.N.R. Rao, supra,* Ch. II; *Samsher Singh, supra,* Ch. III; *S.R. Bommai v. Union of India*, AIR 1994 SC 1918; see, *infra*, Ch. XIII, Sec. B.

88. Chs. X, XI and XIV, *infra.*

89. See, *infra*, Chapters XX to XXXIII.

90. See, *infra*, Ch. XXXIV, *infra.*

91. R. DHAWAN, *THE SUPREME COURT UNDER STRAIN*: *THE CHALLENGE OF ARREARS* (I.L.I. 1978).

92. See, *infra*, Ch. VIII, Sec. H.

93. *Bihar Legal Support Society v. Chief Justice of India*, AIR 1987 SC 38 : (1986) 4 SCC 767.

94. See, *Law Commission, Fourteenth Report*, 46-63 (1958); *Forty-fourth Report* (1971) and *Forty-fifth Report* (1971); *Fifty-eighth Report on the Structure and Jurisdiction of the Higher Judiciary.* Also see, JAIN, *OUTLINES OF INDIAN LEGAL HISTORY*, 348-362 (Reprint 1997). As on 31st December, 2008, 49,819 cases were pending in the Supreme Court. Court Newa: Vol. III, Issue No. 3 (October-December, 2008). The Supreme Court (Number of Judges) Amendment Bill, 2008 has been introduced in Parliament to further amend the Supreme Court (Number of Judges) Act, 1956 by increasing the number of Judges in the Supreme Court from twenty-five to thirty, excluding the Chief Justice of India.

PART III

STATE GOVERNMENT

CHAPTER V

STATES AND UNION TERRITORIES

SYNOPSIS

A. TERRITORY OF INDIA

India has been characterised as a 'Union of States' [Art. 1(1)]. The territory of India comprises States, Union Territories and any other territory that may be acquired by the Government of India at any time [Art. 1(3)].

Today India has the following 27 States:[1] Andhra Pradesh; Assam; Bihar; Chattisgarh; Gujarat; Haryana; Jharkhand; Kerala; Madhya Pradesh; Tamil Nadu; Maharashtra; Karnataka; Orissa; Punjab; Rajasthan; Uttar Pradesh; Uttaranchal; West Bengal; Jammu & Kashmir; Nagaland; Himachal Pradesh; Manipur; Tripura; Meghalaya; Sikkim; Mizoram[2]; and Arunachal Pradesh.[3]

There are seven Union Territories as follows: Andaman and Nicobar Islands; Chandigarh; Delhi; Goa, Daman and Diu; Dadra and Nagar Haveli; Lakshadweep; and Pondicherry.[4]

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1. Arts. 1(2), 4 and 152 and the First Schedule to the Constitution.
2. Mizoram was a Union Territory. The Constitution (Fifty-Third) Amendment Act, 1986, conferred statehood on Mizoram. For this Amendment, see, Ch. XLII, *infra.*
3. The Constitution (Fifty-fourth) Amendment Act, 1986, conferred statehood on Arunachal Pradesh, another former Union Territory. For this Amendment, see, Ch. XLII, *infra.*
4. The First Schedule to the Constitution.

B. PARLIAMENT'S POWER TO REORGANISE STATES

(a) ADMISSION OF NEW STATES

Parliament is empowered to enact a law to admit into the Union, or establish, new States 'on such terms and conditions as it thinks fit' [Art. 2].

Under this provision, Parliament cannot admit or establish a new Union Territory. This can be done only by a constitutional amendment. Accordingly, constitutional amendments had to be passed under Art. 368 when Portuguese and French territories were taken over by the Government of India and admitted into the Indian Union as Union Territories of Goa, Daman and Diu, Dadra and Nagar Haveli and Pondicherry.[5]

The power to admit new States into the Union under Art. 2, as mentioned above, is very wide. In the very nature of the power it has to be wide. Its exercise is necessarily guided by political issues of considerable complexity many of which may not be judicially manageable. However, the words "on such terms and conditions as it thinks fit" used in Art. 2 do not confer on Parliament "an unreviewable and unfettered power immune from judicial scrutiny". The Supreme Court has observed in relation to Art. 2:[6]

> "The power is limited by the fundamentals of the Indian Constitutionalism and those terms and conditions which the Parliament may deem fit to impose, cannot be inconsistent and irreconcilable with the foundational principles of the Constitution and cannot violate or subvert the constitutional scheme. This is not to say that the conditions subject to which a new state or territory is admitted into the Union ought exactly be the same as those that govern all other States as at the time of the commencement of the Constitution."

Thus, under Art. 2, Parliament cannot over-ride the constitutional scheme. If a law goes beyond the constitutionally permissible latitudes that law can be questioned as regards its validity.[7] "The contention that the *vires* of the provisions and effects of such a law are non-justiciable cannot be accepted".[8]

In an earlier case,[9] the Supreme Court had observed that the power conferred on Parliament under Art. 2 "is not power to override the constitutional scheme."

(b) REORGANISATION OF STATES

Art. 3 enables Parliament to effect by law reorganisation *inter se* of the territories of the States constituting the Indian Union.

The reasons for drafting Art. 3 as it is are as follows. When this article was being drafted, the Princely States had not been fully integrated. There was also in the air the possibility of reorganising the States on linguistic basis. The Constituent Assembly foresaw that such reorganisation could not be postponed for long. Accordingly, Art. 3 was incorporated in the Constitution providing for an easy and simple method for reorganisation of the States at any point of time.

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5. For discussion on Art. 368, see, *infra*, Ch. XLI.
6. *R.C. Poudyal v. Union of India*, AIR 1993 SC 1804, 1845 : 1994 Supp (1) SCC 324.
7. For further discussion on this point, see, *infra*, Ch. IX, sec. B, under the heading "Sikkim".
8. *Poudyal*, AIR 1993 SC, at 1845.
9. *Mangal Singh v. Union of India*, AIR 1967 SC 944, 946 : (1967) 2 SCR 109.

Parliament is empowered to enact a law to reorganise the existing States by establishing new States out of the territories of the existing States, or by uniting two or more States or parts of States, or by uniting any territory to a part of any State; or by altering their boundaries, or by separating territory from, or increasing or diminishing the area of, or by changing the name of, a State [Art. 3].

The power of Parliament is exclusive and plenary[10]. That is why it has been said that "India is an indestructible Union of destructible units".[11]

The exercise of this power by Parliament is subject to the following conditions : (1) A Bill for any such purpose cannot be introduced in a House of Parliament except on the recommendation of the President.

(2) If the Bill affects the area, name or boundaries of a State, then before recommending its consideration to Parliament, the President has to refer the same to the State Legislature concerned for expressing its views on it within such time as he may fix [Proviso to Art. 3].

The term "State" in Art. 3 includes a 'Union Territory', but in case of a 'Union Territory', no reference need be made to the concerned Legislature to ascertain its views and Parliament can itself take any action it likes in the matter [Explanation I to Art. 3].

The purpose of the provision is to give an opportunity to the State Legislature concerned to express its views on the proposals contained in the Bill. Parliament is in no way bound by these views. All that is contemplated is that Parliament should have before it the views of the State Legislature affected by the proposals contained in the Bill, but the Parliament is free to deal with the matter in any manner it thinks fit and may accept or reject what the State Legislature says. Parliament is not bound to accept or act upon the views of the State Legislature.

If the State Legislature fails to express its views within the stipulated time, Parliament is free to proceed with the matter as it likes. If once a Bill has been referred to the State Legislature, it can later be amended by Parliament and no fresh reference to the State Legislature is required to ascertain its views on the proposed amendments.[12]

When Parliament acts, under the above-mentioned constitutional provisions, to admit or create new States, or to reorganise the existing States, it can also effect such amendments in the First and the Fourth Schedules to the Constitution as may be necessary to effectuate the new proposals [Art. 4(1)].[13]

Parliament may also make all consequential, supplemental and incidental provisions as may be necessary to effectuate the new proposals, such as representation of new units in Parliament, setting up of the legislative, executive and judicial organs of the State essential to the effective state administration under the Constitution, expenditure and distribution of revenue, apportionment of assets

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10. *Mullaperiyar Environmental Protection Forum v. Union of India*, (2006) 3 SCC 643, 653 : AIR 2006 SC 1428; See also *State of Orissa v. State of A.P.*, (2006) 9 SCC 591, 595.

11. *Raja Ram Pal v. Speaker, Lok Sabha*, (2007) 3 SCC 184, 248, 291 : (2007) 2 JT 1.

12. *Babu Lal Parate v. State of Bombay*, AIR 1960 SC 51 : 1960 (1) SCR 605.

13. The First Schedule to the Constitution contains the names of the States and the Union Territories and defines their territories and boundaries.

The Fourth Schedule to the Constitution lists the number of seats allotted to the various States and Union Territories in the Rajya Sabha, *supra*, Ch. II.

and liabilities, provisions as to services and other related matters. Any such law enacted under Arts. 2, 3 and 4 is not regarded as an amendment of the Constitution for the purposes of Art. 368 [Art. 4(2)].[14] This means that a law made by Parliament to reorganise the States would not be invalid even if it is inconsistent with any constitutional provision. Parliament thus has plenary and comprehensive powers to pass legislation to reorganise the States and Union Territories and to deal with all problems—constitutional, legal, administrative—arising as a result thereof.

Rejecting a challenge to the constitutional validity of section 108 of the States Reorganization Act, 1956, it was held in *Mullaperiyar Environmental Protection Forum*[15] that the power of Parliament to make law under Articles 3 and 4 is plenary and traverses over all legislative subjects as are necessary for effectuating a proper reorganization of States. Constitutional validity of a law made under Articles 3 and 4 cannot be questioned on the ground of lack of legislative competence with reference to the Lists of the Seventh Schedule and the power of the State to enact laws in List II of the Seventh Schedule is subject to parliamentary legislation under Articles 3 and 4.

Nevertheless, the power does not authorise Parliament to override the constitutional scheme. "No State can, therefore, be formed, admitted or set up by law under Art. 4 by the Parliament which has not effective legislative, executive and judicial organs."[16]

Article 170 fixes the minimum strength of a State Legislature Assembly at 60. When the Haryana State was established in 1966, the strength of the interim legislature was fixed at 54. The provision was challenged as being inconsistent with Art. 170, but the Supreme Court upheld it under Art. 4. *Prima facie*, the provision undoubtedly was an amendment of the Constitution but under Art. 4(2) it was not to be treated as such.[17]

Elucidating the scope of the power conferred upon Parliament by Arts. 2, 3 and 4, the Supreme Court has pointed out in *Mangal Singh v. Union of India,*[18] that the law referred to in Arts. 2 and 3 may alter or amend the First Schedule to the Constitution which sets out the names of the States and description of territories thereof, and the Fourth Schedule allotting seats to the States in the Rajya Sabha.

The law so made may also make supplemental, incidental and consequential provisions which would include provisions relating to setting up of the legislative, executive and judicial organs of the State essential to the effective state administration, expenditure and distribution of revenue, apportionment of assets and liabilities, provisions as to services and other related matters.[19]

Power conferred on Parliament by Arts. 2 and 3 is to establish new States conforming to the democratic pattern envisaged by the Constitution, and is not power to override the constitutional scheme.

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14. Art. 368 lays down the formal procedure to amend the Constitution, See., Ch. XLI, *infra*.
15. *Supra*.
16. *Mangal Singh*, *supra*, note 9, at 946.
17. *Ibid*. See also *Manohar S. Prabhu v. Union of India,* 1987 (1) Bom CR 130.
18. AIR 1967 SC 944, 946.
19. *State of Uttaranchal v Siddharth Srivastava,* (2003) 9 SCC 336 : AIR 2003 SC 4062.

In *Poudyal*,[20] consequent on the conferment of full-fledged statehood on Sikkim within the Indian Union, and the enactment of Art. 371F for the purpose,[21] two crucial questions were raised for the consideration of the Supreme Court:

(1) Can a seat be reserved in the State Legislature for a representative of a group of religious institutions to be elected by them; and

(2) can seats be reserved in favour of a particular tribe far in excess of its population in the State?

Provisions to this effect made in Art. 371F and various enactments were challenged. Art. 371F was challenged on the ground that it was inconsistent with the basic features of the Constitution,[22] *viz.*, equality and secularism.[23] The Court by a majority upheld these provisions in the light of historial, cultural and political background of Sikkim. The majority ruled that "the provisions in the particular situation and the permissible latitudes, cannot be said to be unconstitutional" and that:

> "the impugned provisions have been found in the wisdom of Parliament necessary in the admission of a strategic border-state into the Union. The departures are not such as to negate fundamental principles of democracy."[24]

Since the inauguration of the Constitution, Parliament has passed several Acts to reorganise the States and settle boundary disputes between one State and another. In 1956, an extensive reorganisation of the States was undertaken on a linguistic basis, and Parliament passed the States Reorganisation Act, 1956, for this purpose.[25]

In all, up-to-date Parliament has passed 23 Acts under Arts. 3 and 4 since 1950 to effect changes in the areas, boundaries and names of the States.[26]

In the U.S.A., the consent of the concerned State Legislature is essential before a State can be reorganised.[27] In Australia, in addition to the consent of the State Legislature, the consent of the electors in the affected State is also stipulated.[28] On the other hand, in India, what is needed is a mere reference of the proposals to the concerned State Legislature for expression of its views and, subject to this stipulation, the matter of State reorganisation rests solely with Parliament. But, in practice, it is one thing to have a formal or legal power and quite another thing to exercise it. Keeping the political realities in view, Parlia-

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20. *Supra*, note 6.
21. For Art. 371F, see, Ch. IX, *infra.*
22. See, *infra*, Ch. XLI, for discussion on the Doctrine of Basic Features of the Constitution.
23. See, *infra*, Chs. XXI and XXIX for discussion on these concepts.
24. AIR 1993 SC at 1852.
25. *Report of the States Reorganisation Commission*, (1955).
Besides language and culture, the Commission also took into account such other factors as preservation and strengthening of the unity and security of India; financial, economic and administrative considerations; planning and promotion of the welfare of the people in each State as well as of the nation as a whole.
26. *Report of the Sarkaria Comm.*, 73. A suit has been filed by Maharashtra in 2004 for transfer of certain Marathi-speaking areas in Karnataka. During its pendency, a petition has been filed in 2009 by Maharashtra in the Supreme Court challenging the Constitutional validity of certain provisions of the States Reorganisation Act, 1956 and the Bombay Reorganisation Act, 1960.
27. Art. IV, s. 3(1) of the U.S. Const.
28. Ss. 123 & 124 of the Australian Constitution Act, 1900.

ment is not free to act at its sweet will without some sort of public acceptance of, or acquiescence into, the proposed measure of reorganisation.

Hitherto, proposals for reorganisation have been implemented by Parliament in response to public clamour. Parliament has been given such an extensive power under the Constitution to re-organise the States because the demand for reorganisation of the States on a linguistic basis was already in the air at the time of Constitution-making and the Constitution-makers thought it advisable to devise a machinery to complete the task of reorganisation smoothly and without much difficulty as and when it was taken in hand in future. The consent of the States to reorganisation was not made mandatory as there was an apprehension that some States might not like the idea that parts of their territories be taken away to constitute new States or to be merged with other States.

A question being debated at present is whether there ought to be a few more States by breaking some colossal States existing at present. There are local agitations here and there for carving out a few more States.[29] In principle, there seems to be nothing wrong in having a few more States than the present 27. If the U.S.A., with a population of 27 crores can have 50 States, India with one billion people can also have more than 27 States. It is well known that a big State is administratively unwieldy and unmanageable. Comparatively speaking, a smaller State can be administered more efficiently.

Though India can very well afford to have a few more States, what is necessary is that the new States ought not to be carved out on an *ad hoc* basis in a piecemeal manner keeping only political expediency in view. A commission should be appointed to study the question of formation of States deeply in all its aspects keeping in view *inter alia* such factors as administrative convenience, geographic homogeneity, economic viability *etc*.

C. CESSION OF TERRITORY

The powers given to Parliament to reorganise States cannot be availed of by it to cede any Indian territory to a foreign country. This point was settled by the Supreme Court in an advisory opinion in 1960.[30]

To settle certain boundary disputes, India had agreed to transfer some territory to Pakistan. A question referred to the Supreme Court by the President for advice under Art. 143 was whether Parliament could cede Indian territory to a foreign country by making a law under Art. 3, or was an amendment of the Constitution under Art. 368 necessary?

The Supreme Court held that Art. 3, broadly stated, "deals with the internal adjustment *inter se* of the territories of the constituent States of the Indian Union". The authority of Parliament "to diminish the area of any State" envisages taking out a part of the area of a State and adding it to another State; the area diminished from one State must continue to be a part of India and it "does not contemplate cession of national territory in favour of a foreign country". Thus, Indian territory can be ceded to a foreign country only by enacting a formal

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29. Demands for the creation of Telangana out of Andhra Pradesh and a separate "Bundelkhand" state from Uttar Pradesh, are some present instances.

30. *In ref. on Berubari,* AIR 1960 SC 845 : 1960 (3) SCR 250, *supra,* Ch. IV, Sec. F.

amendment of the Constitution under Art. 368 to modify the First Schedule to the Constitution.

Explaining the above ruling later, the Supreme Court stated in *Maganbhai v. Union of India*,[31] that a constitutional amendment is necessary in a case where *de jure* and *de facto* Indian territory is ceded to a foreign country. But settlement of a boundary dispute between India and another country stands on a different footing. The settlement of a boundary dispute cannot be held to be cession of territory. This matter rests with the Executive.

The factual situation in the instant case was as follows. Hostilities broke out between India and Pakistan on a boundary dispute in Kutch. The matter was then referred by both countries to a tribunal for arbitration. The question arose whether the award of the tribunal could be implemented by an executive act, or was a constitutional amendment necessary? The Supreme Court ruled that it could be done by executive action as it involved no cession of territory, but amounted only to demarcation of the boundary line on the surface of the earth.[32]

31. AIR 1969 SC 783.
32. Also see, *Union of India v. Sukumar Sengupta*, AIR 1990 SC 1692 : 1990 Supp SCC 545.

CHAPTER VI

STATE LEGISLATURE

SYNOPSIS

Like the Central Government, a State Government also is of the parliamentary type and follows closely the model of the Central Government. Structurally the State Government may be resolved into three institutional components *viz.*, the legislative, as represented by the State Legislature; the executive, as represented by the Governor and the Council of Ministers; and the judicial, as represented by the High Court and the subordinate courts.

Generally speaking, the basic structure of the State Government follows closely the pattern of the Central Government, but, in the nature of things, there are some significant differences as well.

A. CONSTITUTION OF A STATE LEGISLATURE

The State Legislature in Andhra Pradesh, Bihar, Maharashtra, Madhya Pradesh, Karnataka, and Uttar Pradesh is bi-cameral having two Houses. It is thus composed of the Governor, Legislative Council (Vidhan Parishad) and Legislative Assembly (Vidhan Sabha) [Art. 168].[1] In all other States, the State Legislature is unicameral having only one House and, therefore, it is composed of the Governor and Legislative Assembly (Vidhan Sabha).

Parliament *may* enact a law for either abolition or creation of Legislative Council in a State, if the Legislative Assembly therein passes a resolution to that effect by a majority of its total membership and by a majority of not less than two-thirds of its members present and voting [Art. 169(1)].

The Parliamentary law may contain such provisions to amend the Constitution as may be necessary to give effect to it [Art. 169(2)], and it will not be deemed to be an amendment of the Constitution for the purposes of Art. 368 [Art. 169(3)].[2]

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1. Also see, The Legislative Councils Act, 1957.
2. For Art. 368, See, Ch. XLI, *infra.*

Thus, Art. 169(1) confers on the States having a second chamber, the right to abolish the same, and on the States not having a second chamber, the right to create one.

The use of the word 'may', in Art. 169(1) seems to give a discretion to Parliament to accept or reject the resolution of the Legislative Assembly of a State for abolition or creation of Legislative Council therein.

The idea of having a second chamber in the States was criticised in the Constituent Assembly on the ground that it was not democratic as it was not representative of the people, that it delayed legislative process and that it was an expensive institution. The idea of a second chamber was supported, however, on the ground that it would check hasty legislation by the popular chamber.[3]

The continued existence of the Legislative Council in a State is made dependent on the wishes of the State Legislative Assembly. Legislative Councils in the States seem to be a dying institution. The Legislative Councils in Tamil Nadu, West Bengal and Punjab have since been abolished.[4]

The Legislative Council of Andhra Pradesh which had been abolished by the Andhra Pradesh Legislative Council Abolition Act, 1985 was created again by the Andhra Pradesh Legislative Council Act, 2005. The abolition was sought to be justified by the then Government on the ground that the Legislative Council was redundant and its continuance was a drain on the State exchequer. It is more probable that the abolition was dictated by political considerations since the Legislative Council was dominated by the opposition party, it posed an obstacle to the passing of controversial legislation and policies. Significantly, when the opposition party came to power, the Legislative Council was revived in the State.

B. COMPOSITION OF THE HOUSES

(i) LEGISLATIVE COUNCIL

The total membership of a State Legislative Council cannot be less than 40, or more than one-third of the total membership in the Legislative Assembly [Art. 171(1)]. The Constitution thus fixes the minimum and the maximum limits regarding the strength of a Legislative Council. The actual strength of each House is however fixed by Parliament, which is as follows: Andhra Pradesh, 90; Bihar, 96; Maharashtra, 78; Madhya Pradesh, 90; Karnataka, 63; Uttar Pradesh, 108.[5]

"Until Parliament by law otherwise provides," a Legislative Council is composed as follows [Art. 171(3)]:

(*a*) 1/3 of its members are elected by electorates consisting of members of municipalities, district boards and such other local authorities in the State as may be specified by an Act of Parliament;

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3. IV *CAD*, 670-688; VII *CAD*, 1303-1318; IX *CAD*, 31, 473-492; AUSTIN, *op, cit*., 158-163.
4. See, The Tamil Nadu Legislative Council Abolition Act, 1986; The West Bengal Legislative Council (Abolition) Act, 1969. See Ch. V (*supra*).
5. See section 10 read with Third Schedule of the Representation of People Act, 1950.

(*b*) 1/12 of its members are elected by electorates consisting of graduates of any University in India, of at least three years' standing, and residing within the State;[6]

(*c*) 1/12 of its members are elected by teachers of at least three years' standing in such educational institutions within the State, of a standard not lower than a secondary school, as Parliament may prescribe by law;

(*d*) 1/3 of its members are elected by the members of the State Legislative Assembly from amongst those who are not its member;

(*e*) the remainder, *i.e.*, 1/6 of its members are nominated by the Governor from amongst those who have a special knowledge or practical experience of literature, science, art, co-operative movement and social service [Art. 171(3)(*e*) and 171(5)].

The members of a Legislative Council under heads (*a*), (*b*) and (*c*), mentioned above, are chosen in such territorial constituencies as Parliament may prescribe by law. These as well as the members under head (*d*) are elected in accordance with the system of proportional representation by means of the single transferable vote [Art. 171(4)].

The purpose underlying the Governor's nominations under head (*e*) is to use the talents of such persons in the State as have achieved distinction in various fields and whose experience and advice may be of value to the State Legislature, but who have neither the time nor the inclination to contest elections.

All attempts hitherto made to bring the Governor's nominations within judicial purview have proved futile. A writ petition under Art. 226 by a member of the Assembly challenging the nomination of C. Rajgopalachari to the Madras Legislative Council in 1952 was rejected on the ground that the petitioner had no personal right "which can be said to have been infringed even in an indirect manner by nomination".[7]

In *Biman v. Dr. H C. Mookherjee*.[8] the Calcutta High Court dismissed an action brought personally against the Governor challenging nominations made by him to the Legislative Council because—

(1) under Art. 163,[9] except in cases where Governor is required to act in his discretion, he is to act on the advice of the Council of Ministers, and so it must be presumed that in making the nomination in question, he must have acted on the advice of the Council of Ministers;

(2) by reason of Art. 163(3), the advice tendered by the Ministers to the Governor cannot be enquired into by the Court;[10]

(3) by virtue of Art. 361,[11] the validity or invalidity of the nominations could not be inquired into by the court as this Article gives a complete protection to the Governor against a Court action.

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6. Parliament may by law prescribe any other qualification as being equivalent to that of a graduate of a University.
7. *In re P. Ramamoorthi*, AIR 1953 Mad. 94.
8. 56 C.W.N. 651.
9. Ch. VII, *infra.*
10. *Infra*, Ch. VII; also, *supra*, Ch. III, Sec. B.
11. *Supra*, Ch. III, Sec. A.

In *Vidyasagar v. Krishna Ballabha*,[12] nominations were challenged on the ground that these had been made by the Chief Minister without referring the matter to the Governor. The Patna High Court rejected the contention. Under the Rules of Business,[13] it was not a matter which had to be referred to the Governor. The court could not go into the question of what advice was tendered to the Governor by the Council of Ministers.[14] The order of nomination had been properly authenticated. The court could not go into the question whether the members nominated had or had not the required qualifications under the Constitution.

In *Har Sharan v. Chandra Bhan*,[15] though the Allahabad High Court stated that the provision for nomination to the Legislative Council has not been made to enable a Minister to enter the Legislature by the backdoor, nevertheless, it refused to interfere, in the absence of an illegality as contrasted from impropriety. The Court however observed that although the Governor was not subject to its jurisdiction, a writ of *quo warranto* could yet be issued to the person nominated if his nomination was held to be illegal.[16]

It will thus be seen that membership of the Legislative Council is not on an elective basis by the people from territorial constituencies; it is by nomination, indirect election or by election from teachers' and graduates constituencies. The above-mentioned scheme of composition of a Legislative Council provides for representation in the House of a wide spectrum of interests. But this scheme is tentative in nature and Parliament may modify the same by law [Art. 171(2)]. Parliament may devise a different scheme for the composition of the upper houses in the States as may be thought necessary from time to time.

The Legislative Council is a continuing body. It is not subject to dissolution. As nearly as possible, one-third of its members retire every two years in accordance with the law of Parliament and their places are filled up by fresh elections or nominations, as the case may be. [Art. 172(2)].

(ii) LEGISLATIVE ASSEMBLY

The Legislative Assembly is the popular chamber, elected directly by the people from territorial constituencies in the State on the basis of adult franchise once in five years. The House may be dissolved earlier. In an emergency, its life may be extended by Parliament by law [Art. 172(1)].[17]

Every citizen of India, not less than 18 years of age, and not suffering from any disqualification [Art. 326],[18] is eligible to be registered as a voter at an election for this House. Disqualifications arise either under the Constitution, or under a law passed by Parliament, or a State Legislature [Art. 326].[19]

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12. AIR 1965 Pat. 321.
13. For "Rules of Business", see, Ch. VII, *infra.*
Also see, *supra,* Ch. III, Sec. E.
14. On this question, see, Ch. VII, *infra.*
15. AIR 1962 All 301.
16. For discussion on *Quo Warranto,* see, Ch. VIII, Sec. D, *infra.*
17. For Emergency Provisions, see, *infra*, Ch. XIII.
18. Also see, *infra,* Ch. XIX, under Elections.
19. See below.

The number of members in a Legislative Assembly may be 60 at the minimum and 500 at the maximum [Art. 170(1)].[20] To elect these members, the State is demarcated into territorial constituencies in such manner that the ratio between the number of members allotted to a constituency and the population therein, so far as practicable, is uniform throughout the State [Art. 170(2)].

Article 170(2) incorporates the principle of "fair and effective representation", or the broad democratic principle of "one person one vote". The constituencies ought to be, as far as possible of equal size although this principle cannot be applied with "arithmetical accuracy".[21]

Upon the completion of each census, the total number of seats in each Assembly, and the division of each State into territorial constituencies, are to be adjusted by such authority and in such manner as Parliament may by law prescribe [Art. 170(3)]. Such readjustment is not to affect representation in the Assembly until its dissolution. Provided that the readjustment shall take effect from such date as the President may, by order, specify.

Until such readjustment takes effect, any election to the Legislative Assembly may be held on the basis of the territorial constituencies existing before such readjustment. However, until the first census after the year 2026[22]. no readjustment of seats in the State Legislative Assembly or division of the State into territorial constituencies need be made [Proviso to Art. 170(3)]. This task is performed by the Delimitation Commission.[23]

Provisions have been made for reservation of seats in various Legislative Assemblies for Scheduled Castes and Scheduled Tribes [Arts. 332 and 334];[24] As regards the Anglo-Indian community, the Governor has authority to nominate one member of the community to the State Legislative Assembly of a State if he is of the opinion that the community needs representation in the Assembly and is not adequately represented therein [Art. 333].[25]

(iii) QUALIFICATIONS AND DISQUALIFICATIONS FOR MEMBERSHIP

A person to be qualified for being chosen as a member in the State Legislature should be a citizen of India, and he should make and subscribe to an oath or affirmation in the prescribed form.[26] He should not be less than 30 years of age in

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20. For the strength of each Assembly, see, the Second Schedule to the Representation of People Act, 1951.

21. *R.C. Poudyal v. Union of India,* AIR 1993 SC 1804, 1848 : 1994 Supp (1) SCC 324.

22. Substituted for "2000" with effect from 2002 by the Constitution (Eighty-fourth Amendment) Act, 2003.

23. *Supra*, Ch. II; *infra*, Ch. XIX, under Elections.

24. *Infra*, Ch. XXXV.

25. *infra*, Ch. XXXV.

26. The form of the oath is given in the Third Schedule to the Constitution. The oath emphasizes that the candidate for the House shall "bear true faith and allegiance to the Constitution of India as by law established" and that he "will uphold the sovereignty and integrity of India". The purpose underlying the oath is to ensure that only a person having allegiance to India is eligible for membership of the Legislature. The use of the expression "make and subscribe" does not imply that the candidate must either be literate or sufficiently educationally qualified so as to comprehend the Constitution. See infra *Baljeet Singh v. Election Commission of India,* AIR 2001 Del 1. The oath must be taken in the prescribed form otherwise it has to be assumed that the legislator has not taken the oath and has not duly entered upon the office. Thus an oath in the name of Sree Narayana Guru on the ground that he worshipped and considered Sree Narayana Guru as God does not conform to the constitutional mandate. *Haridasan Palayil v. The Speaker, Kerala Legislative Assembly,* AIR 2003 Ker 328 : 2003 (3) KLT 119 (DB).

case of the Legislative Council, and 25 years in case of the Assembly. In addition, he should also possess such other qualifications as are prescribed by the Constitution or a Parliamentary law [Arts. 173 and 191(1)(*e*)].

The necessary qualifications and disqualifications have been prescribed by Parliament in the Representation of the People Act, 1951. Thus, a person to fill an elective seat to a State Legislative Council has to be an elector for an Assembly constituency in that State, and to be qualified for the Governor's nomination, he should ordinarily be a resident in that State. For membership of the Assembly, he should be an elector for an Assembly constituency in the State. Also, he should be a member of a Scheduled Caste or Scheduled Tribe[27] if he wants to contest a seat reserved for such castes and tribes. A person belonging to such castes or tribes is not disqualified for being elected to a seat not reserved for them.

The grounds of disqualification laid down in the Act and the Constitution for membership of a State Legislature are similar to those laid down for Parliament.[28]

(a) OFFICE OF PROFIT

One such disqualification is holding of an office of profit, a concept which has already been discussed earlier [Art. 191(1)(a)].[29] It needs to be pointed out, however, that the spirit underlying this disqualification is being flouted in practice by the Chief Minister seeking to 'buy' dissidents in the party by appointing them to lucrative positions in public sector undertakings. As has already been discussed, technically, holding an office in such an autonomous undertaking is not regarded as holding an office under the State Government.

The office of the Chairman of Interim Council of Jharkhand Area Autonomous Council constituted by the State Government under the Jharkhand Area Autonomous Council Act, 1994, has been held to be an office of profit. The Government has complete control over the Council, the Chairman gets an honorarium of Rs. 1700/- per month and other allowances and perquisites.[30] He was getting more than compensatory allowance; Rs. 1700/- p.m. was pecuniary gain to the chairman.[31]

For the purpose of election of the Chairman to Rajya Sabha, the said disqualification could only be removed by Parliament by passing a law for the purposes.[32]

The chairman of one-man commission appointed by the Government of Karnataka was held to be holding an office of profit under Art. 191(1) as a provision

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27. For further discussion on this topic, see, Ch. XXXV, *infra.*

28. *Supra.*Ch. II, Sec. D. A person who is disqualified would be conjointly disqualified for standing for election as well as for continuing as a member of the House to which he has been chosen. *Raveendran Nair v. R. Balakrishna Pillai*, High Court of Kerala O.P. Nos. 13013, 30001 and 34703 of 2001 and Election Petition No. 10 of 2001 Decided On: 01.03.2002 per B.N. SRIKRISHNA, C.J. AND G. SIVARAJAN, J).

29. See discussion under Art. 102(1)(a), Ch. II, Sec. D(a), *supra*. See also Achary: Law and Practice relating to Office of Profit (2006).

30. *Daya Nand Sahay v. Shibu Soren*, AIR 2001 Pat 79; *Shibu Soren v. Dayanand Sahay*, (2001) 7 SCC 425.

31. *Divya Prakash v. Kultar Chand Rana*, AIR 1975 SC 1067 : (1975) 1 SCC 264; *Karbhari Bhimji Rohamare v. Shankar Rao Genuji Kolhe*, AIR 1975 SC 575 : (1975) 1 SCC 252.

32. See, *supra*, Ch. II, Sec. D(b).

for Rs. 5 lakhs was made in the State budget for defraying his expenses of pay and day to day expenses. This was much more than compensatory allowance.[33]

A clerk in Coal India Ltd. — a government owned company—does not hold an office of profit *under* the Government. The Government exercises no control on "appointment, removal, service conditions and functioning" of the person concerned.[34]

A teacher in a municipal school does not hold an office of profit under the State Government and so is not disqualified to contest election for the State Assembly.[35]

The State Legislature is authorised to declare by law that a particular office will not disqualify its holder from membership in the State Legislature [Art. 191(1)(a)].

The Haryana Legislature exempted the chairmen of improvement trusts, but not their members, from the disqualification of the office of profit. This was challenged. Rejecting the challenge, the Supreme Court said that Art. 191(1)(a) gives a wide power to the State Legislature to declare by law what office of profit shall not disqualify its holder from being a member of the Legislature, and "..... so long as this exemptive power is exercised reasonably and with due restraint and in a manner which does not drain out Art. 191(1)(a) of the real content or disregard any constitutional guarantee or mandate, the Court will not interfere".[36]

The legislature can retrospectively remove the disqualification arising because of holding of an office of profit.[37]

(b) DECISION ON DISQUALIFICATION

"If any question arises" whether a member of a House of a State Legislature has become subject to a disqualification or not, it is to be referred to the Governor whose decision thereon is final [Art. 192(1)]. Before giving his decision, however, the Governor is required to obtain the opinion of the Election Commission and is to act in accordance with it [Art. 192(2)].

The Supreme Court has emphasized in the case noted below[38] that under Art. 192(2), the opinion of the Election Commission is a *sine qua non* for the Governor to give a decision on the question whether or not the member concerned of a House of State Legislature has become subject to a disqualification. Under Arts. 191(1) and (2), once a question arises whether a member has incurred a disqualification, it is only the Governor who must decide it but only after taking the opinion of the Election Commission. It is the decision of the Governor taken in

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33. *M.V. Rajashekaran v. Vatal Nagaraj,* (2002) 2 SCC 704 : AIR 2002 SC 742.

34. *Pradyut Bordoloi v. Swapan Roy,* AIR 2001 SC 296, 300 : (2001) 2 SCC 19.
Also see, *Aklu Ram Mahto v. Rajendra Mahto,* AIR 1999 SC 1259 : (1999) 3 SCC 541.

35. *Patel Pandurang Venkanagouda v. H.B. Shivalingappa,* AIR 2000 Knt. 78. See also *Sultan Sadik v. Sanjay Raj Subba,* (2004) 2 SCC 377 : AIR 2004 SC 1377.

36. *Bhagwandas v. State of Haryana,* AIR 1974 SC 2355 : (1975) 1 SCC 249. Also see, *Hedge, supra.*

37. *N. Ibomcha Singh v. L. Chandramani Singh,* AIR 1977 SC 682 : (1976) 4 SCC 291.

38. *Election Commission of India v. Subramanian Swamy (Dr.),* AIR 1996 SC 1810 : (1996) 4 SCC 104.
For comments on this case, see, *supra,* Ch. II, Sec. D(d).

accordance with the opinion of the Election Commission that is final. In effect and substance, the decision of the Governor must depend on the opinion of the Election Commission and none else, not even the Council of Ministers. Thus, in effect, the opinion of the Election Commission is decisive since the final order would be based solely on that opinion.[39] No Court has jurisdiction to interfere with this matter as it lies exclusively within the purview of the Governor and the Election Commission.[40]

The position is similar to that in case of Parliament. Therefore, whatever comments have been made earlier under Art. 103 are relevant to Art. 192.[41]

It may be noted that the above provision becomes applicable when a sitting member of the legislature becomes subject to a disqualification after his election.

If, however, a disqualified person is elected as a member of the State Legislative Assembly, his election can be challenged through an election petition in the High Court.[42] When a person is not qualified to be elected a member, there is no doubt that the election tribunal has got to declare his election to be void.

If a member becomes subject to a disqualification after election, then the procedure laid down in Art. 192 needs to be followed. But what happens when a person lacking in the basic and fundamental qualification, prescribed by the Constitution for membership of the State Legislative Assembly, is elected to the House and no election petition is moved against him challenging his election. The person in question knows that he is disqualified and yet he sits in the House and votes as a member. Under Art. 193, he is subject to a penalty of Rs. 500 per day for knowingly sitting in the House while being disqualified.[43] But the Constitution has prescribed no machinery to recover the penalty from him. In these circumstances, the Supreme Court has ruled that the High Court can, under Art. 226, declare that the concerned member is not entitled to sit in the House and restrain him from functioning as a member thereof.[44]

(iv) ANTI-DEFECTION LAW

Reference may be made to the discussion on Anti-Defection Law in Ch. II which applies not only to the membership of a House of Parliament but also to the membership of a House of State Legislature.[45]

The fact remains that the problem of defection has been much more rampant in the States leading to government instability. For example, the Committee of Governors, reporting in 1971, pointed out that in the States, defection became very widespread after the elections of 1967. From March 1967 to August 1970, there were 1240 defections in the States, and most of these defections took place because of the promise of reward of office, or were engineered by other "means

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39. Also see, *Brundaban v. Election Comm.*, AIR 1965 SC 1892 : 1965 (3) SCR 53; *Election Commission of India v. N.G. Ranga*, AIR 1978 SC 1609 : (1978) 4 SCC 181.
40. *R. Sivasankara Mehra v. Election Commission*, AIR 1968 Mad. 234.
41. *Supra*, Ch. II, Sec. D(d).
42. See, *infra*, Ch. XIX, Sec. D.
43. See, *infra.*
44. *K. Venkatachalam v. A. Swamickan*, AIR 1999 SC 1723 : (1999) 4 SCC 526.
On Writs and Election Matters, see, *infra*, Ch. XIX.
On Art. 226, see, Ch. VIII, Secs. D and E. *infra.*
45. *Supra*, Ch. II, Sec. F.

not too honourable". Many governments fell because of defections which denote selfish, unprincipled political manoeuvring on the part of the defectors. Ultimately, the Anti-Defection Law was passed to discourage defections both at the National as well as the State level.

But, as already stated, this law has not proved very effective in checking defections at the State level. The present law suffers from several weaknesses, *e.g.*, its provisions regarding splits and mergers of the parties are defective because while individual defection is punished under it, collective defection is condoned in the name of split in the party; there is no provision in the law to cover the situation when a political party expels its member or members; Speakers in State Legislatures who have power to decide the question of defection usually play a partisan, rather than a neutral or an objective, role as the decision-maker under the law.[46]

Two members set up by AIADMK were elected to the TN Legislative Assembly in 1991. They were later expelled by the party and they, thus, became "unattached members" of the Assembly. They then joined another party, *viz.*, MDMK. The Speaker declared these members as having incurred the disqualification under Schedule X and they thus ceased to be members of the House.

The members challenged the Speaker's decision but the Supreme Court rejected their contention. The Court held that if a person belonging to a political party which had set him up as a candidate gets elected to the House, and thereafter joins another political party for whatever reasons, either because of his expulsion from the party, or otherwise, he is deemed to have voluntarily given up his membership of the political party and he, thus, incurs the disqualification.

This would be so even if the candidate voluntarily leaves the party which supported his candidature for election and contests the election as an independent candidate.[47]

The term "unattached member" has no relevance or significance for purposes of Schedule X. An elected member continues to belong to that party by which he was set up as a candidate for election as such. This is so notwithstanding that he was thrown out or expelled from that party.[48] This proposition prevents the expelled member from escaping the rigour of the Anti-defection law.

When a person who has been thrown out or expelled from the party which set him up as a candidate and got elected, joins another party, it certainly amounts to his voluntarily giving up the membership of his original party.

(v) OTHER INCIDENTS OF MEMBERSHIP

(a) SIMULTANEOUS MEMBERSHIP

No one can be a member of both Houses of a State Legislature simultaneously. The State Legislature is authorised to enact a law to provide for the vaca-

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46. See, *supra*, Ch. II, Sec. F.

47. *Mahachandra Prasad Singh (Dr.) v. Chairman, Bihar Legislative Council*, (2004) 8 SCC 747 : (2004) 8 SCALE 549.

48. *G. Viswanathan v. Speaker, T.N., Legislative Assembly*, AIR 1996 SC 1060 : (1996) 2 SCC 353.
Also, *W.N. Singh v. Speaker, Manipur Legislative Assembly*, AIR 2002 Gau 58.

tion by a person, who is chosen a member of both Houses, of his seat in one of the Houses [Art. 190(1)].

No person can be a member of the Legislatures of two or more States simultaneously. If a person is so chosen, then, at the expiration of such period as may be specified in the rules made by the President, his seat in all the State Legislatures becomes vacant, unless he has previously resigned his seat in all but one of the Legislatures [Art. 190(2)].[49] This does not prevent persons who are Members of the Rajya Sabha from being elected to the State Legislative Assembly provided they are elected to the State Assembly within a period of six months of their election.[50]

No person can be a member of a State Legislature and of a House of Parliament simultaneously [Art. 101(2)].[51]

(b) TERMINATION OF MEMBERSHIP

A member of the Legislative Council may resign his seat by writing to the Chairman; and that of the Legislative Assembly by writing to the Speaker [Art. 190(3)(b)].

Before the Constitution (Thirty-third) Amendment Act, 1974, was enacted,[52] when a member tendered his resignation, the Speaker/Chairman had no option, and the member's seat fell vacant automatically.[53] But by XXXIII amendment, the position has been changed. The seat now falls vacant when the resignation is accepted by the Speaker/Chairman, and he cannot accept it, if from the information received or otherwise, and after making such inquiry as he thinks fit, the Speaker/ Chairman is satisfied that the resignation is not voluntary or genuine. Thus, if a member resigns under any pressure or duress, the resignation is not effective.

A House may declare a member's seat vacant if he absents himself from all its meetings for a period of sixty days, without the permission of the House. In computing this period of sixty days, no account is taken of any period during which the House is prorogued or adjourned for more than four consecutive days [Art. 190(4)].

A member vacates his seat in a House if he becomes subject to any disqualification [Art. 190(3)(a)]. This is a mandatory provision.[54]

(c) TAKING OF OATH

Before a member takes his seat in the House, he has to make and subscribe, before the Governor or some person appointed by him for this purpose, an oath or affirmation in the prescribed form [Art. 188].[55]

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49. Cl. 3 of the Prohibition of Simultaneous Membership Rules, 1950, prescribes a time-limit of 10 days from the publication of the last of the results for this purpose; *supra,* Ch. II, Sec. E(a).
50. *Ashok Pandey v. K. Mayawati, (*2007) 10 SCC 16, at page 17 : AIR 2007 SC 2259.
51. *Supra*, Ch. II, Sec. E(a).
52. For this Amendment, See, *infra,* Ch. XLII.
53. *Surat Singh Yadava v. Sudama Pd.*, AIR 1965 All 535.
54. See, under Art. 192, *supra.*
55. *Supra*; *Gour Chandra v. Public Prosecutor,* AIR 1963 SC 1198 : 1963 Supp (2) SCR 447.

The oath emphasizes that the member shall bear faith and allegiance to the Constitution of India as by law established and that he will uphold the sovereignty and integrity of India and further that he will faithfully discharge the duty as a member of the Assembly/Council as the case may be.

It is compulsory for a member to take an oath or make an affirmation. Without doing so, he cannot function as a member of the House.[56]

A candidate for election to Lok Sabha [Art. 84(a)] and for a State Assembly [Art. 173(a)] has to *make and subscribe* an oath or affirmation. Similarly, a member of any of these Houses, has to *make and subscribe* an oath or affirmation before taking his seat in the House [Arts. 99 and 188]. The Delhi High Court has refused to infer or imply from the words "make and subscribe" an oath or affirmation any educational qualification for membership of a House. The court has rejected the argument that these Articles must be read in a manner that persons who are unable to comprehend the requirement of making and subscribing the oath or affirmation are ineligible to become members of a House. The court negatived the argument.[57]

(d) PENALTY

A person becomes liable to a penalty of five hundred rupees for each day he sits or votes as a member of the State Legislature: (*i*) without taking the prescribed oath; or (*ii*) when he knows that he is not qualified, or is disqualified, to be a member of the House; or (*iii*) when he knows that he is prohibited from sitting or voting as a member by any law made by Parliament or the State Legislature.

The penalty so incurred by the person may be recovered as a debt due to the State [Art. 193].

(e) SALARIES FOR MEMBERS

Members of a State Legislature are entitled to receive such salaries and allowances as may from time to time be determined by the State Legislature by law [Art. 195].

C. MEETING OF STATE LEGISLATURE

(a) SUMMONING

The Supreme Court in *Rameshwar Prasad (VI) v. Union of India*[58] held that the constitution of any Assembly can only be under Section 73 of the Representation of People Act, 1951. Construing Article 188 of the Constitution it was held that the Assembly comes into existence even before its first sitting commences and is deemed to be duly constituted on issue of notification under Section 73 of the Representation of People Act, 1951.

Normally, the Government is formed by the party commanding the required majority in a State. However the issue has become more complex with the number of political parties in the fray**.** If a political party with the support of other political parties or other MLAs stakes claim to form a Government and satisfies the Governor about its majority to form a stable Government, the Governor can-

56. *K. Anbazhagan v. Secretary, T.N. Legislative Assembly, infra.*
57. *Baljeet Singh v. Election Commission of India,* AIR 2001 Delhi 1.
58. (2006) 2 SCC 1 : AIR 2006 SC 980.

not refuse formation of the Government and override the majority claim because of his subjective assessment that the majority was cobbled together by illegal and unethical means.[59]

The Governor summons a House to meet at such time and place as he thinks fit. It is now a well settled convention that the Governor summons the House not of his own accord but only when advised to do so by the Council of Ministers.[60]

It is the Council of Ministers which provides business for a session of the Legislature, and, therefore, it follows that for the Governor to act otherwise than in accordance with such advice in the matter of summoning a House of Legislature would be without purpose.

Six months should not intervene between the last sitting in one session of the House and the date for its first meeting in the next session [Art. 174(1)].[61]

(b) GOVERNOR'S ADDRESS

At the commencement of the first session of the Legislative Assembly after each general election, and each year thereafter, the Governor is required to address the Legislative Assembly, or both Houses assembled together if a State has two Houses, and inform the Legislature of the causes of its summons [Art. 176(1)].[62]

Like the President's address to Parliament, the Governor's address to the State Legislature also is prepared by the Cabinet.[63] Each House is obligated to provide in its rules of procedure for allotment of time for discussing the Governor's address [Art. 176(2)].[64]

Besides, the Governor is also authorised to address any House, or both Houses assembled together, any time and to require the attendance of the members for that purpose [Art. 175(1)].[65]

The constitutional provision, mentioned above, regarding the Governor's address to the first session of the Legislature has been held to be mandatory. Without the completion of this formality, the Legislature cannot be said to have legally met. The courts have emphasized that the Governor's speech is not an idle formality as its purpose is to announce the executive policies and the legislative programme and, therefore, it serves as a springboard for discussions in the Legislature, either for approval or disapproval of administrative policies.

The inaugural session of the Assembly is held to have begun from the day the Governor addresses it. But if the Governor comes to the Legislature and is not able to complete his speech because of disturbances within the House, and the speech is laid on the Table of the House and the Governor walks out of the House, or where the Governor, instead of reading the entire speech, reads some portions of it from the beginning and some from the end, and the House takes the

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59. *Ibid* at page 130.
60. For discussion on "Council of Ministers" in a State, see, Ch. VII, *infra.*
61. See, *supra*, Ch. II, Sec. G(a).
62. *Supra*, Ch. II, Sec. G(E).
63. *Ibid.*
64. Also See, *Karpoori Thakur v. Abdul Ghafoor,* AIR 1975 Pat 1.
65. *Supra*, Ch. II, Sec. G(b).

speech as read,[66] then the Governor having made due attempt to perform the duty cast on him, his failure to complete the speech only amounts to a procedural irregularity which is curable under Art. 212.[67]

The Constitution makes no provision to meet the contingency arising out of a Governor's unavoidable absence due to illness on the occasion of opening the Legislature. In such a situation, in 1967, the Speaker of the Andhra Pradesh Assembly read the Governor's address. The Speaker ruled that in situations for which the Constitution or the rules make no provision, it is necessary to create conventions, use discretion and wisdom as to what should be done. Simply because the address was read by the Speaker it did not cease to be the Governor's address.[68]

Apart from his right to address the Houses, the Governor also enjoys the right to send messages to any House. The House to which such a message is sent has to consider, with all convenient despatch, any matter required by the message to be taken into consideration [Art. 175(2)].

How the Governor's power to send messages to the House can be used is illustrated in *K.A. Mathialagan v. P. Srinivasan*.[69] The Governor convened the Assembly and in a message prescribed the agenda for the first meeting of the Assembly. This was, of course, done on the advice of the Ministry. The Speaker however permitted a censure motion to be moved against the Ministry. This was not an item within the periphery of the message sent by the Governor and so normally could not be taken up for discussion.

The Madras High Court held that the message of the Governor was a directive and a mandate as to the subjects to be discussed in the Assembly session, and it was "the primordial duty of the Speaker as the holder of office under the Constitution to obey such a mandate and act in accordance with the itemised agenda therein." He ought not to have allowed the no confidence motion against the Ministry to be moved at that stage before he began transacting the business as set out in the Governor's message.

(c) PROROGATION

The Governor may prorogue a House at any time [Art. 174(2)(a)].[70] The Governor exercises this power on the advice of the Council of Ministers.

State of Punjab v. Sat Pal Dang[71] is an extremely interesting case on the point.[72] On the eve of the adoption of the State Budget and passing of the Appropriation Bill, the Speaker adjourned the House for two months on the plea that there was disorder in the House. It was however suspected that the Speaker had done this to thwart a move to pass a vote of no-confidence against him. The adjournment led to a crisis because in the absence of the appropriations being made by the Legislature, the State Government could not withdraw any money from

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66. *Syed Abdul v. State of West Bengal Leg. Ass.*, AIR 1966 Cal. 363; *Yogendra Nath v. State*, AIR 1967 Raj 123.
67. Also, *infra*, Sec. H(d).
68. *Jl. of Parl. Inf.*, 69 (1967).
69. AIR 1973 Mad. 371.
70. For effects of prorogation, See, *supra*, Ch. II, Sec. I(a).
71. AIR 1969 SC 903 : (1969) 1 SCR 478.
72. AIR 1969 SC 903 : 1969 (1) SCR 478.

the Consolidated Fund of the State, and there was thus a danger of the government machinery coming to a standstill. To set matters right, the Governor had to intervene. He prorogued the House and summoned it to meet a week later.

The action of the Governor in proroguing and summoning the House was challenged but the Supreme Court upheld the same. The Court pointed out that "Article 174(2)(a) which enables the Governor to prorogue the legislature does not indicate any restrictions on this power". The power is "untrammelled" by the Constitution, and that the Governor had exercised his power to get rid of the Speaker's adjournment order and to put back the constitutional machinery of the State into life. Governor's action was perfectly understandable as an emergency had arisen. There was no abuse of power by him and no *mala fides* on his part.

Implicit, however, in this remark of the Court is the suggestion that the Governor does not enjoy an absolute discretion to prorogue the House and there may be circumstances when prorogation may be questioned on the ground of want of good faith and abuse by him of his constitutional powers.

The Supreme Court refused to endorse the Madras High Court's observation in an earlier case[73] that the Governor can prorogue the Legislature at any time he pleases and there is nothing wrong in his proroguing the House with a view to issuing an ordinance. However, from a practical point of view, it will be difficult in a situation to prove want of *bona fides* on the part of the Governor for, as stated above, he acts in this matter on ministerial advice.[74]

In *Mathialagan*,[75] the Speaker adjourned the Assembly for three weeks but, in the meantime, the Governor prorogued the Assembly. The Speaker filed a writ petition in the Madras High Court challenging the Governor's order. Rejecting the petition, the court ruled that in proroguing the Assembly, the Governor is bound to act on the aid and advice tendered by the Chief Minister. Further, the court ruled that, in all the circumstances, the Governor, "far from being actuated by *mala fides* or lack of *bona fides*, prorogued the Assembly *bona fide* and duly, in order to get rid of such an adjournment". According to the Constitution, "the Governor is bound on the matter of prorogation by the advice of the Chief Minister."[76]

(d) MISCELLANEOUS PROVISIONS

The quorum of a House has been fixed at 10 members, or 1/10th of its total number of members, whichever is greater. The State Legislature may make a law to change this rule. When there is no quorum in the course of a meeting, the presiding officer should either adjourn the House, or suspend its meeting until there is a quorum.[77]

Generally, matters are decided in a House by a majority of votes of the members present and voting at a sitting. The Speaker or the member presiding does not vote in the first instance, but has a casting vote in case of equality of votes

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73. *In re Veerabhadrayya*, AIR 1950 Mad 243.
74. See, *Bijayananda v. President of India*, AIR 1974 Ori. 52; *infra*, under "Speaker", Sec. D.
75. *K.A. Mathialagan v. Governor*, AIR 1973 Mad. 198.
76. *Ibid.*, at 220.
77. Arts. 189(3) & 189(4); also *supra*, Ch. II, Sec. G(d).

[Art. 189(1)].[78] However, a special, instead of the simple, majority is needed to decide a few matters, *e.g.*, removal of the Speaker or the Deputy Speaker of the Assembly,[79] or the Chairman or the Deputy Chairman of the Council.[80]

A House is entitled to function in spite of any vacancy in its membership [Art. 189(2)]. Any proceedings in a House will be valid notwithstanding that a person not qualified or entitled to do so, sat or voted or otherwise participated in its proceedings [Art. 189(2)].

Subject to the provisions of the Constitution, a House is empowered to make rules for regulating its procedure and conduct of its business [Art. 208(1)].[81] Thus, a House has been given power to make rules to regulate its proceedings. But this power is subject to the Constitution. This means that a House cannot make any rule for regulating its procedure and for conduct of its business which may be inconsistent with the Constitution.

In a State having a bicameral Legislature, the Governor, after consulting the Speaker of the Assembly and the Chairman of the Legislative Council, may make rules regarding the procedure to be followed for communication between the two Houses [Art. 208(3)].

The business of a State Legislature is to be transacted in the official language or languages of the State, or in Hindi, or in English. With the permission of the presiding officer, a member, who cannot adequately express himself in any of these languages, may address the House in his mother-tongue [Art. 210(1)].

It has been provided in the Constitution that after 15 years of the commencement of the Constitution, English would drop out unless the State Legislature otherwise provides by law [Art. 210(2)]. For the States of Himachal Pradesh, Manipur, Meghalaya and Tripura, this time-limit has been fixed at 25 years. For the States of Arunachal Pradesh, Goa and Mizoram, this time limit has been fixed at forty years.[82]

Every Minister as well as the Advocate-General[83] has a right to speak in, and otherwise participate in the proceedings of, the Legislature, or any of its committees of which he may be named a member. He shall not, however, be entitled to vote under this provision [Art. 177].

D. OFFICERS OF STATE LEGISLATURE

(a) SPEAKER/DEPUTY SPEAKER

The position of the Speaker/Deputy Speaker *vis-a-vis* the State Legislative Assembly is similar to that of the Speaker/Deputy Speaker of the Lok Sabha.[84] As

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78. History was made in the Kerala Legislature on February 9, 1982, when the Speaker used his casting vote 7 times in one day in favour of the Government—6 times to defeat opposition amendments to the motion of thanks to the Governor's address and once to get the motion passed by the House.
79. See below, Sec. D.
80. *Ibid.*
81. Also, *supra*, Ch. II, Sec. L(i)(c).
82. Also see, Ch. XVI, *infra.*
83. See, *infra*, Ch. VII, Sec. E.
84. *Supra*, Ch. II, Sec. H.

regards the office of the Speaker, the Madras High Court has observed as follows:[85]

> "The office of Speaker being obviously an office resulting from election or choice, the person so chosen holds the office during the pleasure of the majority. As a Speaker is expected to be a friend of every member and be circumspect in all respects, it is an office of reverence as total impartiality is the basic requisite of the office. The Speaker is undoubtedly a servant of the House, not its Master and the authority transmitted to him by the House is the authority of the House itself which he exercises in accordance with the mandates, interests and well being of the House....."

A State Legislative Assembly has a Speaker and a Deputy Speaker. Both are chosen by the House from amongst its members [Art. 178].

The Deputy Speaker performs the duties of the office of the Speaker when it is vacant. If, however, the office of the Deputy Speaker is also vacant at the time, the Speaker's duties are performed by a member of the House whom the Governor may appoint for the purpose till any of the offices is filled by election [Art. 180(1)].

The Deputy Speaker also acts as the Speaker when he is absent from the House. When both the Speaker and the Deputy Speaker are absent from the House, such person as may be determined by the rules of procedure of the House, and in the absence of such person, such other person as may be determined by the House, acts as the Speaker [Art. 180(2)].

The Speaker/ Deputy Speaker vacates his office as soon as he ceases to be a member of the House [Art. 179(a)]. If the House is dissolved, the Speaker does not vacate his office until immediately before the first meeting of the House after dissolution [Proviso to Art. 179]. The Speaker/Deputy Speaker may resign his office by writing to each other [Art. 179(b)].

The Speaker/Deputy Speaker may be removed from office by a resolution of the House passed by a majority of all the then members of the Assembly. Such a resolution can be moved only after at least 14 days' notice has been given of the intention to move it [Art. 179(c)].

When a no-confidence resolution is under consideration in the House against the Speaker/Deputy Speaker, he does not preside at such sitting of the House though he may be present [Art. 181(1)], but he has a right to speak and take part in the proceedings of the Assembly and he can even vote [Art. 181(2)]. Commenting on this constitutional provision, the Madras High Court has observed in *Mathialagam*:[86]

> "*Eo instanti* when such a resolution comes up for consideration there is a deemed vacancy under the provision of the Constitution and the Speaker even though he is physically present is said to be constitutionally absent and cannot therefore be the presiding officer of the Assembly from that moment."

The Gauhati High Court has ruled that under Arts. 179(c) and 181(2), noted above, the resolution for removing the Speaker has to be considered by the House and the Speaker has no power to reject such a motion. If the Speaker so desires,

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85. *K.A. Mathialagam v. P. Srinivasan,* AIR 1973 Mad 371, 376.
86. *Ibid,* at 382.

he has the opportunity to defend himself in the House against the allegations made against him.[87]

The power to consider or reject such a motion vests in the Assembly and not the Speaker. The members of the Assembly have a constitutional right to move a motion for the removal of the Speaker of the Assembly from his office. By rejecting the motion, the Speaker exceeded his powers under the Constitution and violated the right of the members of the Assembly.

The Speaker/Deputy Speaker receives such salaries and allowances as may be fixed by the Legislature by law, and pending that, as specified in the Second Schedule to the Constitution [Art. 186]. The salaries *etc*. are not subject to the annual vote of the Legislature but are charged on the Consolidated Fund of the State [Art. 202(3)(b)][88].

The office of the Speaker is of great honour. He presides over the sittings of the House and represents the dignity of the House. The following provisions in the Constitution promote the independence and impartiality of the Speaker:

(1) Speaker's salary and allowances are charged on the Consolidated Fund of the State [Art. 202(3)(b)].[89]

(2) Speaker does not vote in the first instance whenever there is voting in the House. He only exercises a casting vote in the case of an equality of votes [Art. 189(1)].[90]

(3) He can be removed from office only by a resolution of the House passed by a special majority in the House [Art. 179(*c*)].[91]

At times, the Speaker's office in the States has become the focal point of controversy, because often the Speaker plays, not an impartial, but a partisan, role. This is illustrated by the following several episodes.

The Governor of Bengal dismissed the U.F. Ministry headed by Mukherjea and installed the Ghosh Ministry.[92] At the first sitting of the Assembly convened thereafter, the Speaker ruled that the new Ministry was unconstitutional. His argument was that the Assembly was the only competent authority to decide whether or not a Ministry can remain in office, only the Assembly can make or unmake the Ministry and that the Governor was only the registering authority. He, therefore, ruled that he could not recognise the new Ministry.

According to the Speaker, dismissal of the Mukherjea Ministry, appointment of the Ghosh Ministry and the summoning of the House on the advice of Chief Minister Ghosh were unconstitutional and invalid as these had been effected behind the back of the House. He adjourned the House *sine die* without permitting it to express its confidence, or lack of it, in the newly installed Ministry.

Undoubtedly, such a ruling is untenable and goes beyond the Speaker's jurisdiction as it is not for him, but for the House as a whole, to recognise or derognise the Ministry. There does not appear to be any instance in the parliamentary

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87. *Nipamacha Singh v. Secretary, Manipur Leg. Ass.*, AIR 2002 Gau 7.
88. See, *infra*, Sec. F(ii), under "Financial Procedure".
89. *Ibid*.
90. See, footnote 78, *supra*.
91. See, footnote 86, *supra*.
92. For details see, *infra*, Ch. VII.

history when a Speaker has taken upon himself the task of deciding whether a government is legal or not, or which government ought to be in office.

The Ministry neither derives authority from the Speaker nor it is answerable in any way to him. Formally, the Ministry derives its authority from the Governor who appoints it and, effectively, from the House to whom it is collectively responsible. The responsibility of the Ministry to the House can be effected only when the Assembly is allowed to function. It is a travesty of the situation that while, on the one hand, the Speaker insists that the House makes or unmakes the Ministry, on the other hand, he makes it impossible for the House to function and give it an opportunity to express its views on the matter.

The Speaker is an officer of the House; his function is to ensure smooth and orderly working of the House. He has no inherent power of his own under the Constitution and, therefore, he cannot arrogate to himself to do what, under the Constitution, is the function of the House. It is for the House, and not the Speaker, to recognise a Ministry or not. In this case, the Speaker was, in effect, seeking to paralyse the House and thwarting it from functioning.

It is a well accepted rule that the Speaker does not give a ruling upon a constitutional question nor decide a question of law. Such questions are meant for decision in the courts and not on the floor of the Legislature.[1] The Speaker gives ruling only on procedural matters. But here he sought to decide a substantive question of constitutional law relating to the Governor's discretionary power[2] and not merely a procedural question. It is also a well established practice that the Speaker does not give a ruling unless the matter is raised on the floor of the House, but the Bengal Speaker gave the ruling *suo motu* without the matter having been raised by a member on the floor of the House.

To tide over the crisis created by the Speaker's action, the Governor prorogued the House and reconvened it after some time, but the Speaker adjourned the House again on the same plea. A constitutional deadlock was thus created which ultimately led to the imposition of the President's rule in Bengal.[3]

A similar constitutional deadlock was sought to be created by the Speaker in Punjab.[4] On the eve of transaction of financial business, the Speaker adjourned the House for two months and, thus, made it impossible to pass the budget. The Governor then prorogued the House, issued an ordinance banning its adjournment without completing the financial business pending before it, and reconvened the House. When the House met, the Speaker reiterated his earlier ruling, held the ordinance illegal, and sought to adjourn the House again. But the House did not disperse and continued its proceedings under the Deputy Speaker and transacted the financial business.

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1. MUKHERJEA, *PARLIAMENTARY PROCEDURE*, 353.
In contrast to the Bengal Speaker, the Punjab Speaker displayed correct attitude when he ruled on December 6, 1967, in the House that he was not concerned with disputing the action of the Governor in appointing the Chief Minister and stated, "If it is felt that the Governor had misused his discretionary powers, the remedy lies with the President and not with the Speaker".

2. On Governor's Discretionary Powers, See, Ch. VII, Sec. C, *infra.*

3. *Infra*, Ch. XIII, Sec. B.

4. *Supra.*

When later the validity of the Appropriation Act was challenged, the Supreme Court held the Act to be constitutionally valid.[5] In the course of its judgment, the Court made certain pungent remarks against the behaviour of the Speaker. The Court characterised the Speaker's second attempt to adjourn the House as null and void. The Court held as unfounded the claim that whatever the Speaker's ruling, it must be treated as final. Points of order can only be raised in relation to interpretation and enforcement of procedural matters. His ruling on the validity of the ordinance could not to be regarded as final or binding. An ordinance can be set at naught by a resolution of the House disapproving it as the Constitution provides.[6] The Speaker was not competent to give such a ruling and it was "utterly null and void and of no effect". The Speaker "acted contrary to law and the injunction of the Constitution".

The above episodes bring in sharp focus the position of the Speaker. Being an officer of the House, he should help and not hinder its proper functioning. The Speaker is the servant and not the master of the House. He is only the spokesman of the House but could not arrogate to himself its powers and functions. The Speaker should not act in a manner so as to interfere with the rights either of the Executive or the Legislature. Such actions on the part of the Speakers make them politically controversial, their impartiality and neutrality questionable, and this injures not only the Speaker's office but the whole parliamentary edifice.

The main bone of contention is the scope of the Speaker's power to adjourn the House. In the Bengal and Punjab situations, the Speaker used this power to paralyse the working of the House. It is, therefore, necessary that suitable conventions be evolved to regulate the functioning of the Speakers as the Constitution, not envisaging that a Speaker would ever adopt an activist role and seek to paralyze the House on which he presides, contains only skeleton provisions concerning this office.

A Committee of the Speakers appointed by the Speaker of the Lok Sabha has said that the powers conferred on the Speaker are intended to enable him to function in the interest of the House. He should not so interpret his powers as to act independently of the House, or to override its authority, or nullify its decisions. "The Speaker is a part of the House, drawing his powers from the House for the better functioning of the House and, in the ultimate analysis, servant of the House not its master."[7] The Committee has suggested that the Speaker should not raise any matter on his own and give his decision on it; he should give his ruling only when a point of order has been raised on the floor of the House, and after he has heard the members, if necessary. The Committee has put the matter in the proper perspective.

Nevertheless, such controversies are not at an end even after the above report. The Speaker of the Tamil Nadu Assembly also sought to play an activist role in 1971 which led to his removal. A few members of the ruling D.M.K. Party crossed the floor. The Speaker advised the Chief Minister to resign and hold fresh elections to the House. The Chief Minister claimed that he was in a major-

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5. *State of Punjab v. Satpal Dang*, AIR 1969 SC 903 : 1969 (1) SCR 478; *supra.*
6. See, *infra*, Ch. VII, Sec. D(ii)(c), for discussion on this topic.
7. Reports of the Committee of Presiding Officers presented at the Speakers' Conference, October 6, 1968.

ity. Thereupon the Speaker adjourned the House for a few days to give time to the Chief Minister to consider his suggestion to dissolve the Assembly.

The Madras High Court in *K.A. Mathialagan v. The Governor*[8] characterised the adjournment as not "a proper or *bona fide* exercise of the power of adjournment" by the Speaker as the ruling party was in majority in the House and there was a good deal of work to be transacted. The Court rightly emphasized that the question of continued confidence of the people in a ruling party having a majority in the Assembly can be and is normally tested only on the floor of the Assembly itself.

(b) CHAIRMAN OF THE LEGISLATIVE COUNCIL

The presiding officer of a State Legislative Council is known as the Chairman. There is also a Deputy Chairman. These two offices correspond to the offices of the Chairman/Deputy Chairman of the Rajya Sabha.[9]

The Chairman/Deputy Chairman are chosen from amongst the members of the Council [Art. 182], and get such salaries as are fixed by law. The Deputy Chairman performs the duties of the office of the Chairman when that office is vacant [Art. 184(1)]. He acts as Chairman when he is absent from any sitting of the Council [Art. 184(2)].

They vacate their offices when they cease to be members of the House [Art. 183(a)]. Any of them can resign his office by writing to the other [Art. 183(b)]. Each can be removed from his office by a resolution passed by the House by a majority of all its members. Such a resolution can be moved after giving at least 14 days' notice [Art. 183(c)]. In addition to these two conditions laid down in the Constitution, it is open to the House concerned to impose any other condition for moving such resolution. Therefore, it is valid for a House to lay down that such a resolution can be moved only if a certain number of members favour its being moved.[10]

The Chairman/Deputy Chairman does not preside over the sitting of the House when a resolution for his removal is under consideration [Art. 185(1)]. He can however speak and participate in the proceedings of the House and also vote in the first instance [Art. 185(2)].

(c) SECRETARIAT FOR THE LEGISLATURE

A House of the State Legislature has its separate secretarial staff. In a bicameral State, it is possible to have posts common to both Houses [Art. 187(1)]. The State Legislature may by law regulate the terms of recruitment and conditions of service of the Staff [Art. 187(2)]. Pending passage of such a law, the Governor may make rules for the purpose after consulting the Speaker, or the Chairman, as the case may be [Art. 187(3)].

E. DISSOLUTION OF THE HOUSE

The question of dissolution of the Lok Sabha has already been discussed earlier.[11] As regards the dissolution of a State Legislative Assembly, to a great ex-

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8. AIR 1973 Mad 198.
For a note on "Powers of the Speaker" see, 16, *J.I.L.I.* 130 (1974).
9. *Supra*, Ch. II, sec. H(b).
10. *A.J. Faridi v. Chairman, U.P. Leg. Council*, AIR 1963 All 75, 78.
11. *Supra*, Ch. II, Sec. I(c).

tent, the position corresponds with the Lok Sabha, and much of what has been said earlier is relevant here also, but some divergences are also noticeable in the case of the State Assemblies.

Article 174(2)(b) merely says that the Governor may from time to time dissolve the Legislative Assembly. The Supreme Court has ruled that neither the Legislature nor its members have any constitutional right to have it undissolved till the expiry of the term specified in Art. 172(1), *i.e.*, five years from the date it holds its first meeting.[12]

The Constitution is silent as to when, and in what circumstances, the Governor may dissolve the House. This matter is, therefore, to be regulated by conventions which might evolve in course of time.

The following two propositions appear to be well settled in this regard:

(1) The Governor may not dissolve the House *suo motu*, without ministerial advice to that effect.[13]

(2) The Governor does not automatically accept the advice of his Council of Ministers to dissolve the House. The matter falls within the area of discretion of the Governor.[14]

A Chief Minister having a majority support can get a dissolution of the House as and when he wants, but dissolution in such circumstances is rather uncommon for a Chief Minister in such a happy position would ordinarily want to enjoy his full term, except when he senses some dissatisfaction in his party and wants to have a show down with the dissidents by calling for fresh elections. But dissolution of the House in other situations raises problems, for example, it remains uncertain whether the Governor may dissolve the House on the advice of a Chief Minister who has lost his majority in the House. The position remains uncertain. There have been cases when dissolution has been refused in such a situation.

In 1953, in Travancore-Cochin (now Kerala), the House was dissolved following the defeat of the Congress Ministry. The Ministry remained in office as a caretaker government till fresh elections were held. But this precedent was not followed in 1955. There was a minority P.S.P. Ministry in office. The Congress Party supported it without participating in the Ministry. But when the Congress withdrew its support and the Ministry was defeated in the House, the Chief Minister sought a dissolution of the House but it was refused. The Congress was invited to form the Ministry. The refusal to dissolve the House was criticised by some political groups as being constitutionally improper and wrong. But, some people justified it on the ground that the Assembly had been elected only a year back, and that the outgoing Ministry from its inception was in a minority, having only 18 followers in a House of 118, and that there was a reasonable prospect of an alternative stable Ministry being formed.

Controversy on the question of dissolution became sharpened after 1967. Before 1967, the Congress Party enjoyed a monopoly of power both at the Centre and the States. In such a context, not many difficulties arose in the working of the Constitution as many problems were sorted out at party level. This state of affairs

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12. *State of Punjab v. Satya Pal*, AIR 1969 SC 903, 911 : 1969 (1) SCR 478.
13. On this point, see, Ch. VII, Sec. C(c) *infra.*
14. On Governor's Discretion, see, *infra*, Ch. VII, Sec. C.

however underwent a sea-change when after the Fourth General Elections, the Congress Party lost its monopoly of power, and multi-party coalition governments were installed in many States. The coalition governments suffered from a lack of internal cohesion, from stresses and strains and instability, because the constituent parties had disparate programmes, policies and outlook.

The process of adjustment in the wake of the break of Congress monopoly of power would have been difficult in any case, but things became more difficult because of the distressing phenomenon of defection, people forswearing allegiance to their party and joining another party with the sole motive of becoming Ministers.[15] This made the State Governments all the more unstable. A question thus arose from time to time whether a Chief Minister, who had a majority to start with as the head of a coalition government, or one party government, but who found himself in a minority by reason of a few of his supporters changing their loyalty, could seek a dissolution of the State Assembly.

A good deal of public discussion has taken place on the question whether a defeated Chief Minister could seek a dissolution. There is a sizable body of opinion that the British conventions are irrelevant to India because of the peculiar phenomenon of defection which is unknown to England, and also because of the multi-party system in India as against a two party system in Britain.

Within a few days of the general elections in 1967, the Congress Ministries in Haryana and Uttar Pradesh lost their majority support because of defections, but both the Chief Ministers resigned without seeking dissolution of the House. After some time, the Congress Ministry in Madhya Pradesh was threatened by defections. The Chief Minister did toy with the idea of seeking dissolution of the House. A good deal of public discussion took place at the time on the question whether a Chief Minister who had lost his majority could seek a dissolution. On the basis of conventions prevailing in Britain, perhaps, the Chief Minister would have got a dissolution. But, as stated above, a sizable body of opinion, particularly the non-Congress parties, regarded the British conventions as irrelevant to India. However, the matter did not crystallise at the time as the Chief Minister resigned without formally asking the Governor to dissolve the House.

In 1967, the ruling alliance, a combination of Jan Sangh and Akali Dal, lost its majority in the Punjab Assembly because of defection of a few Akali members. The Governor refused to accept the advice of the outgoing Chief Minister to dissolve the House, and invited the leader of the defectors to form the government as he claimed that he had been assured support by the Congress and thus had a majority support in the Assembly. The Governor publicly asserted that he was not bound to accept the advice of the outgoing Chief Minister because it was tendered after he had lost majority support in the Assembly, and it was pointless to hold fresh elections and incur enormous expenditure when a stable ministry could be formed.

On the whole, therefore, the position in the State appears to be that the advice of a Chief Minister, who loses his majority, to dissolve the House is not binding on the Governor who would take into account the totality of circumstances and exercise his judgment and discretion and could refuse to dissolve the House if he feels that there is a good prospect for a stable alternative government being

15. S.C. KASHYAP, *THE POLITICS OF DEFECTION* (1969).

formed. It is only when the Governor is satisfied that no other party, or combination of parties, can possibly form a stable government that he would dissolve the House and keep the resigning Ministry in office as a caretaker government till fresh elections are completed. As an alternative, the Governor could recommend President's rule under Art. 356, in which case the Ministry would quit and the Governor would administer the State as the agent of the President,[16] and the legislature could either be dissolved, or kept in suspended animation pending the emergence of a new government. Usually, this is the expedient resorted to whenever a ministry falls, and no alternative ministry appears feasible. All political groups perfer this course of action as none of them wants that a caretaker ministry of one political party should remain in office during the election period.

It is however open to question whether the practice as it has come to be is healthy? Should the Governor not be bound by the advice of the outgoing Chief Minister? Should the expedient of the President's rule be resorted to in such a situation? Dissolution is a democratic way to settle the complexion of the ministry. It may also serve as a disciplining technique for the members of the Legislature who may desist from defection if they know that the House would be dissolved and they would be required to seek re-election if the ministry falls.[17] This may, in the long run, result in governmental stability and the parliamentary system may be the better for it. To set up an alternative ministry by rewarding the defectors with ministerships amounts to putting a premium on defections which may ultimately damage the democratic fabric. On the other hand, there is the question of public apathy towards frequent elections. There is also the question of expenses on holding frequent elections.

Another question worth considering is whether the Chief Minister alone, or the Cabinet, should give advice for dissolution. The question assumes importance in the context of a coalition government comprising many parties. If dissolution is made a matter for the Cabinet to decide then it means that all partners in the government will have to agree for dissolution. This may make dissolution somewhat difficult as all parties in the coalition may not like to face mid-term poll. But if it is for the Chief Minister alone to recommend dissolution, then he may give advice without consulting others.

In Britain, the prerogative to advise dissolution vests in the Prime Minister alone. In India, however, it remains a moot point whether the Governor should accept the Chief Minister's advice without ascertaining the views of other parties in the Cabinet. In 1970, the Kerala Assembly was dissolved on the advice of the Chief Minister alone although he was heading a coalition ministry and he did not consult his other partners. The other parties were taken by surprise and they criticised the dissolution as unjustified. It is a moot point whether this can be taken as a precedent for the future.

The position regarding dissolution of the Assembly at the State level remains uncertain and, so far, it has been more a matter of political expediency. There is, therefore, need for proper conventions to take root in this area. A Committee of the Governors appointed by the President has reported on this question: "If a Chief Minister who enjoys majority support advises dissolution, the Governor must accept the advice, but if he advises dissolution after losing his majority, the

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16. *Infra*, Ch. XIII, Sec. B.
17. *Supra*, under "Anti-defection Law, Sec. B(iv); Ch. II, Sec. F."

Governor need accept the advice only if the Ministry suffers a defeat on question of major policy and the Chief Minister wishes to appeal to the electorate for a mandate on that policy. In the case of a Chief Minister heading a single party government which has been returned by the electorate in absolute majority, if the ruling party loses its majority because of defection by a few members, and the Chief Minister recommends dissolution so as to enable him to make a fresh appeal to the electorate, the Governor may grant a dissolution. The mere fact that a few members of the party have defected does not necessarily prove that the party has lost the confidence of the electorate. If there is a no-confidence motion against a Ministry, and the Chief Minister instead of facing the Assembly, advises the Governor to dissolve the Assembly, the Governor need not accept such advice, but should ask the Chief Minister to get the verdict of the Assembly on the no-confidence motion."[18]

The report maintains that in a multi-party system as it obtains in India, the Governor should weigh all the factors carefully before taking his decision. The position would however greatly improve if the curse of defection could be contained in some way.[19] As already observed,[20] even the Anti-Defection Law which applies to the States as well has failed to curb defections and needs to be strengthened.

On the whole, it may be said that there is reluctance to hold frequent elections as this is an expensive proposition and ordinarily dissolution of the House is refused if it is possible to install an alternative government. In October, 1997, when the Waghela Government in Gujarat lost its majority because of withdrawal of support by the Congress Party, the Governor refused to accept Chief Minister Waghela's advice to dissolve the House. Instead, the Governor gave him one week to prove his majority in the House. Ultimately Waghela resigned and a new government was installed under a new leader from Waghela's party and the Congress Party agreed to support it from outside without participating in the Government.

A contrary situation arose in Goa in 2000. When there was a likelihood of the BJP party losing its majority, the Council of Ministers advised the Governor to dissolve the House which he did. The dissolution was set aside by a learned single judge holding that the Governor was not obliged to accept the advice of the Council of Ministers for the mere asking and should have made an enquiry whether an alternative viable Government could be formed, the reasons for the Council of Ministers seeking dissolution and whether it was really necessary to put a heavy burden on the State Exchequer by holding another election mid-way in the life of the Assembly.[21]

The formal constitutional provisions regarding dissolution of the State Assembly and Lok Sabha are similar in phraseology. An interesting question to consider, therefore, is whether similar conventions should operate at both levels, or whether conventions for dissolution of State Legislatures may differ in some respects from the conventions operating at the Centre in this regard. For several

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18. *Report*, (1971), 53-60.
19. See, Anti-Defection Law, *supra*, Ch. II, Sec. F., Sec. B(iv).
20. *Ibid*.
21. *Jeetendra Deshprabhu v. The Governor of Goa, Raj Bhavan, Goa* (Writ Petition Nos. 84 and 88 of 2002 decided on 8-5-2002 in The High Court of Bombay at Goa).

reasons, it may be said that exactly same conventions need not operate at both levels. There are several differences between the position of the Centre and the States, *viz*.:

(1) While the Governor has, the President does not have, any discretionary power.[22]

(2) Further, while the Governor is a nominee of, and is answerable to, the Central Government, the President is not answerable to any higher authority.

(3) Lastly, while a State can be placed under the President's rule, the Centre cannot be so placed and there a Council of Ministers must always remain in office.[23]

Therefore, it can plausibly be argued that the position of the President differs a great deal from that of the Governor in this respect.[24]

F. FUNCTIONS OF THE STATE LEGISLATURE

The State Legislature performs similar functions for the State as does Parliament for the whole of India. It makes laws, levies taxes, sanctions funds for the public expenditure and criticises and controls the State Executive.

(i) LEGISLATION

A Bill pending in the Legislature does not lapse because of prorogation of the House [Art. 196(3)].[25] When the Assembly is dissolved—

(*i*) a Bill pending in the Legislative Council, which has not been passed by the Legislative Assembly, does not lapse [Art. 196(4)];

(*ii*) a Bill pending in the Legislative Assembly, or which having been passed there is pending with the Legislative Council, lapses [Art. 196(5)];

(*iii*) a Bill passed by the Legislative Council and pending in the Assembly will lapse;

(*iv*) a Bill passed by the Legislative Assembly, when there is only one House, or passed by both Houses in a bi-cameral Legislature, and pending assent of the Governor or of the President does not lapse.[26]

In the area of Legislation, the procedure followed in a State Legislature is practically similar to that followed in Parliament.[27]

An ordinary Bill, other than a Money or Financial Bill, can originate in either House [Art. 196(1)]. In a bi-cameral Legislature, a Bill is passed only when both Houses agree to it [Art. 196(2)].

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22. *Infra*, next Chapter; also see, Ch. III, *supra*.
23. See, Ch. III, Sec. A(iii), *supra.*
24. *Infra*, Chs. VII and XIII.
Also see, M.P. JAIN, Propriety of Dissolution of Lok Sabha, *V JI. of. Const. & Parl. Studies*, 302 (1971)
25. *State of Bihar v. Kameshwar*, AIR 1952 SC 252 : 1952 SCR 889.
26. *Purushottam Nambudri v. State of Kerala*, AIR 1962 SC 694.
27. *Supra*, Ch. II, Sec. G.

If a Bill passed by the Legislative Assembly is rejected by the Legislative Council; or, it does not pass it within three months from the date the Bill is laid before it; or, the Council passes it with certain amendments which the Assembly does not accept, then the Assembly may pass the Bill again, and transmit the same to the Legislative Council. If the Council rejects the Bill again, or does not pass it within one month from the date on which it is laid before it; or, it passes the Bill with amendments not acceptable to the Assembly, then the Bill is deemed to have been passed by both Houses in the form in which it was passed by the Assembly for the second time with such amendments, if any, as have been made or suggested by the Council and have been agreed to by the Assembly [Art. 197(1) and (2)].

The Legislative Council thus acts as a revising chamber and can hold up legislation for a short time but ultimately the will of the Legislative Assembly prevails. The procedure to resolve differences between the two Houses in a State differs from the mechanism of joint session provided for in case of Parliament.[28] The State Legislative Council has thus been given much less importance than Rajya Sabha.

(a) GOVERNOR'S ASSENT

A Bill passed by the Assembly, or by both Houses in case of a bi-cameral Legislature, is presented to the Governor who has several alternatives:

(*i*) he may give his assent to the Bill; or

(*ii*) he may withhold his assent therefrom, or

(*iii*) he may return it to the Legislature for reconsideration, or

(*iv*) he may reserve it for the consideration of the President.

In case (*iii*), the Governor may request the Legislature to consider the desirability of introducing such amendments as the Governor might suggest. It is the duty of the Legislature to reconsider the Bill accordingly, and if it is passed again by the House, or both Houses, with or without amendments, and presented to the Governor again for assent, he "shall not withhold assent therefrom" [Art. 200, First Proviso]. This is similar to the provision dealing with Presidential assent to the Bills passed by Parliament.[29]

In accordance with the system of parliamentary democracy, in cases (i), (ii) and (iii), the Governor acts on the advice of his Cabinet[30]; only in case (iv), he acts in his discretion.[31]-[32]

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28. *Supra*, Ch. II, Sec. J(i)(b).
29. *Supra*, Ch. II, Sec. J(i)(c).
30. On this point, see, Ch. VII, Sec. B, *infra.*
31. *Ibid.*
32. Between 2006 and 2007, several States sought to introduce similar amendments to the Freedom of Religion Act operative in their States. When the Amendment Bills were sent to the respective Governor of these States, they met with dissimilar responses. The Chhattisgarh Governor referred the Bill to the Attorney-General of India for his legal opinion. Similarly the advice of the Solicitor General of India was sought by the Governor of Madhya Pradesh on the Bill. The Governors of Himachal Pradesh and Orissa assented to the Bill without protest. The Governor of Gujarat returned the Bill to the Legislative Assembly for reconsideration. The Government then withdrew the Bill of 2006 in 2008.

The Constitution does not impose any time limit within which the Governor has to make any of the above-mentioned declarations. There is no means to compel the Governor to make a declaration if he keeps a Bill pending before him indefinitely. The scheme of Art. 200 shows that a Bill pending the assent of the Governor does not lapse as a result of the dissolution of the State Assembly.[33]

When the Governor reserves a Bill for Presidential consideration, the enactment of the Bill then depends on the assent or refusal of assent by the President. In case of a reserved Bill, the President may either assent to, or withhold his assent from, the Bill, or may return it back with a message to the Legislature for reconsideration and may even suggest amendments to be made therein. The Bill is then reconsidered within a period of six months from the date of receipt of the message, and if it is again passed by the Houses, or the House, with or without amendments, it is presented again to the President for his consideration [Art. 201].

Nothing is said as to what the President may do thereafter but, presumably, he may follow the same course as explained above. It does not appear that there is any obligation on the President to give his assent to the Bill sent to him after reconsideration. Art. 201 does not prescribe any time-limit within which the President has to come to his decision on a Bill referred to him for assent. The scheme of Art. 201 shows that a Bill reserved by the Governor for Presidential assent does not lapse as a result of the dissolution of the State Assembly. It goes without saying that the term 'President' used in Arts. 200 and 201 stands for the Central Government.

An example of this procedure is provided by the Kerala Agrarian Relations Bill. The Kerala Legislature passed the Bill in 1959, but the Governor reserved it for the President's assent.[34] Meanwhile, the Kerala Legislature was dissolved and fresh elections held. Thereafter, the President sent back the Bill for reconsideration by the Legislature in the light of amendments suggested by him. The Assembly passed the Bill incorporating the suggested modifications and thereafter it received the Presidential assent. This incident shows that a Bill pending assent of the Governor or the President does not lapse by dissolution of the State Legislature. A Bill passed by a Legislature can be reconsidered and amended by the successor Legislature.[35]

The Gujarat Legislature passed the Gujarat Secondary Education Bill In 1973. It was presented to the Governor for his assent. As the Bill provided for temporary take-over of the management of a school in public interest, the Governor reserved the Bill for the assent of the President. The Central Government felt that as the minority institutions were not exempted from the take-over clause, it came in conflict with Art. 30[36] The Central Government accordingly suggested modification of the Bill through an ordinance. The State Government forwarded the draft of the ordinance and the President gave his assent both to the Bill and the ordinance.[37]

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33. *P. Nambudiri v. State of Kerala,* AIR 1962 SC 694, 701-702 : 1962 Supp (1) SCR 753.
34. *Supra*.
35. *P. Nambudiri v. State of Kerala,* AIR 1962 SC 694 : 1962 Supp (1) SCR 753.
36. On Art. 30, see, *infra*, Ch. XXX, Sec. C.
37. See, *Bharat Sevashram Sangh v. State of Gujarat,* AIR 1987 SC 494 : (1986) 4 SCC 51.

Another model of giving of Presidential assent to a state Bill is furnished by the fact situation in *In re The Kerala Education Bill*.[38] The Bill had been reserved for Presidential assent by the Governor of Kerala. The President referred the Bill to the Supreme Court for an advisory opinion and then sent the Bill back to the State for necessary amendments in the Bill by the State Legislature in the light of the Supreme Court's opinion.[39]

Article 200 obligates the Governor to reserve a Bill for President's consideration if, in his 'opinion', it so derogates from the powers of the High Court as to endanger the position which that court is designed to fill by the Constitution. Several constitutional provisions require assent of the Centre to State Bills for their validation.

The circumstances in which a Bill may be reserved by the Governor for Presidential assent are discussed later.[40]

The power of the Governor to reserve a Bill for the President's consideration is discretionary. It is the Governor's discretion whether he should reserve the Bill for the consideration of the President. He can do so whenever he feels that the State Bill goes against the larger interests of the State, or the country as a whole. In this way, the Governor acts as a link between the Union and the States and thereby the Centre is able to keep some control over the functioning of the State Legislatures.[41]

Only a Bill passed by the State Legislature can be reserved for the President's consideration. The Governor cannot give his assent to a Bill passed by the Legislature and then reserve it for President's assent.[42] Similarly, on receiving the President's assent, the Bill becomes law and the Governor's assent is no longer required.[43] The Supreme Court has declared that "the assent of the President is not justiciable".[44]

(ii) FINANCIAL PROCEDURE

The scheme of Legislative control of finance in a State is a close replica of the system prevalent at the Centre.[45]

Under Art. 265, no tax can be levied except by authority of law. No appropriations can be made except by law passed in the prescribed manner. No money is granted, no tax is increased, and no Money or Financial Bill, or an amendment thereto, can be introduced or moved in the Legislature, except on the recommendation of the Governor [Art. 207(1)]. Governor's recommendation is not needed for moving an amendment for reducing or abolishing a tax. Because of Art. 255,

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38. AIR 1958 SC 996; *supra*, Ch. IV, Sec. F.
39. Also see, *infra*, Ch. X, Sec. J.
40. See, Ch. VIII; Ch. X, Sec. K., *infra*. Also see, *supra*, Sec. F(i); *infra*, Ch. XXXII.
41. For discussion on the Governor's discretionary powers, see, *infra*, Ch. VII, Sec. C.
42. *Salubai v. Chandu*, AIR 1966 Bom. 194.
43. *State of Bihar v. Kameshwar*, AIR 1952 SC 252 : 1952 SCR 889.
44. *Hoechst Pharmaceuticals Ltd. v. State of Bihar*, AIR 1983 SC 1019 : (1983) 4 SCC 45; *Bharat Sevashram Sangh v. State of Gujarat*, *supra*, footnote 37.
45. *Supra*, Ch. II, Sec. J(ii).

if the Bill is passed without the Governor's recommendation, the defect is cured when the Governor later gives his assent to the Bill.[46]

In a uni-cameral Legislature, passage of a Money Bill does not present much difficulty. In a bi-cameral Legislature, the Legislative Assembly prevails over the Legislative Council in financial matters, *e.g.*, Money Bill is introduced in the Assembly and not in the Legislative Council [Arts. 198(1) and 207(1)].

After the Money Bill is passed by the Assembly, it is sent to the Council for its consideration and recommendations. It has 14 days to do so from the date it receives the Bill. The Assembly is authorised to accept or reject these recommendations [Art. 198(2)]. If the Assembly accepts any recommendation, the Money Bill is deemed to have been passed in the modified form [Art. 198(3)]. If it rejects all recommendations [Art. 198(4)], or, if the Council fails to return the Bills to the Assembly within 14 days [Art. 198(5)], the Bill is deemed to have been passed by both Houses in the form in which it was originally passed by the Assembly.

(a) MONEY BILL

A Money Bill is one which contains *only* provisions dealing with the following matters;

(*a*) the imposition, abolition, remission, alteration or regulation of any tax;

(*b*) the regulation of the borrowing of money or the giving of any guarantee by the State, or the amendment of the law with respect to any obligations undertaken by the State;

(*c*) the custody of the Consolidated Fund or the Contingency Fund, and payment of money into, or withdrawal from, these Funds;

(*d*) the appropriation of money out of the Consolidated Fund of the State;

(*e*) charging of any expenditure on the Consolidated Fund, or increasing the amount of any charged expenditure;

(*f*) the receipt of money on account of the Consolidated Fund, or the Public Account of the State, or the custody, or issue of such money; or

(*g*) any matter incidental to any of the above matters [Art. 199(1)].[47]

A Bill or amendment is not regarded as a Money Bill by reason only that it provides for the imposition of fines or other pecuniary penalties, or for payment of fees for licences or service rendered or deals with taxation by a local authority [Arts. 199(2) and 207(2)]. This clause makes it clear that a Bill imposing a 'fee' and not a 'tax' is a financial Bill and not a Money Bill.[48] The difference between a 'fee' and a 'tax' is discussed later.[49]

A Money Bill is not introduced in the Assembly without the Governor's recommendation [Art. 207(1)]. The decision of the Speaker on the question whether a particular Bill is a Money Bill or not is final [Art. 199(3)]. A certificate from

46. *Balai Chand v. K.K. Chakrawarti,* AIR 1966 Cal. 81.
47. See, *supra,* Ch. II, Sec. J(ii)(c).
48. *Kewal v. State of Punjab,* AIR 1980 SC 1008 : (1980) 1 SCC 416.
49. See, *infra,* Ch. XI, Sec. H.

the Speaker is endorsed on a Money Bill to the effect that it is a Money Bill when it is transmitted to the Legislative Council and when it is presented to the Governor for assent [Art. 199(4)].

(b) SPEAKER'S CERTIFICATE

The Supreme Court has held in *State of Punjab v. Sat Pal Dang*[50] that the requirement of the Speaker's certificate on the Money Bill [Art. 199(4)] is directory and not mandatory, and, in the absence of the Speaker, the Deputy Speaker could grant the certificate.

In the instant case, the validity of the Appropriation Act was challenged on the ground *inter alia* that it bore the certificate from the Deputy Speaker and not the Speaker. The Court however held that in the absence of the Speaker, the Deputy Speaker validly acts as the Speaker of the Assembly;[51] that the constitutional provision regarding the Speaker's certificate is only directory and not mandatory and so the validity of the proceedings in the House could not be called into question as it was merely an irregularity of procedure.[52]

In the absence of the Speaker's certificate on a Money Bill, there appears to be no constitutional difficulty in treating it as an ordinary Bill and passing it through the Legislative Council accordingly. The Speaker's certificate entitles the Bill to receive a treatment different from what it would otherwise receive as an ordinary Bill in the Legislative Council and at the Governor's hands.

A Financial Bill, *i.e.*, a Money Bill with something else added to it, can originate in the Legislative Assembly only. It is, however, to be passed like an ordinary Bill. A Money Bill, or a Financial Bill, or, an amendment thereto, except an amendment for reducing or abolishing a tax, cannot be moved or introduced without the Governor's recommendation [Art. 207].

(c) GOVERNOR'S ASSENT

Like an ordinary Bill, a Money Bill also needs Governor's assent to become a law. The position in this connection is the same as in case of an ordinary Bill, except that the Governor cannot refer back a Money Bill for reconsideration by the Legislature. He either assents, or refuses to assent, or reserves it for Presidential assent. Similarly, the President cannot refer it back for reconsideration by the Legislature. He either gives or refuses to give his assent to the Money Bill. A Financial Bill stands on the same level as an ordinary Bill in this respect [Arts. 200 and 201].

(iii) LEGISLATIVE CONTROL ON APPROPRIATIONS

(a) CONSOLIDATED FUND

Just as at the Centre, so in a State, legislative control on appropriations is secured through the Consolidated Fund.[53]

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50. AIR 1969 SC 903 : 1969 (1) SCR 478; *supra.*
51. *Supra*, Sec. D.
52. *Infra*, Sec. H(d).
53. *Supra*, Ch. II, Sec. J(ii).

Money can be withdrawn from this Fund only under appropriations made by law, passed in accordance with the procedure laid down in the Constitution for this purpose [Arts. 204(3) and 266(3)].

The Consolidated Fund is formed of all revenue received and all loans raised by the State Government; all money received by the State Government in repayment of loans [Art. 266(1)], and any fees or other money taken by the High Court [Art. 229(3)]. The State Legislature may regulate by law all matters relating to the Fund [Art. 283(2)].

(b) PUBLIC ACCOUNT

All moneys, other than those placed in the Consolidated Fund, received by the State Government [Art. 266(2)], or an officer employed in connection with the affairs of the State, or by any court, are credited to the Public Account of the State [Art. 284].

(c) CONTINGENCY FUND

The State Legislature can also create a Contingency Fund by passing a law to that effect [Art. 267(2)].

(d) EXPENDITURE CHARGED ON CONSOLIDATED FUND

The following items of expenditure are *charged* on the Consolidated Fund [Art. 202(3)]:

(1) the emoluments and allowances of the Governor and other expenditure relating to his office;
(2) the salaries and allowances of the Speaker and Deputy Speaker of the Assembly, and those of the Chairman and the Deputy Chairman of the Council;
(3) debt charges for which the State Government is responsible;
(4) salaries and allowances of the High Court Judges;
(5) sums needed to satisfy any judgment, decree or award of any Court or arbitral tribunal;
(6) any other expenditure declared by the Constitution or the State Legislature by law to be so charged.

In the last category fall the following:

(a) the administrative expenses of the High Court, including all salaries, allowances and pensions payable to its officers and servants [Art. 229(2)];[54]

(b) expenses of the State Public Service Commission, including salaries, allowances and pensions payable to its members or staff [Art. 322].[55]

(e) ANNUAL APPROPRIATIONS

The stages and procedure in respect of annual appropriations for a State are similar to those laid down for Parliament.[56]

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54. *Infra*, Ch. VIII.
55. *Infra*, Ch. XXXVI, Sec. K.
56. For details see, *supra*, Ch. II, Sec. J(ii).

The first stage is the presentation of the Budget by the Executive [Art. 202(2)]. Next, demands for grants are submitted to the Assembly for approval. The estimates of expenditure charged on the Consolidated Fund are open to discussion in the Legislature, but are not subject to vote [Art, 203(1)]. The House has power to assent, or to refuse to assent, or reduce any demand for grant [Art. 203(2)]. No demand for grant can be made except on the Governor's recommendation' {Art. 203(3)], which, in effect, means that only a Minister may move a demand for grant in the Assembly. Members may move cut motions. Demands are also discussed but not voted upon, in the Legislative Council.

After approval of the grants by the Assembly, a Bill is introduced to provide for the appropriation out of the Consolidated Fund of all money required to meet the grants, and the expenditure charged on the Consolidated Fund [Art. 204(1)]. The appropriations contained in the Bill cannot exceed the amount shown in the Budget. No amendment can be proposed to this Bill so as to vary the amount or alter the destination of any grant previously agreed to by the Assembly or to vary the amount of any expenditure charged on the Consolidated Fund. The decision of the person presiding as to whether an amendment is admissible or not under this clause is final [Art. 204(2)].

In a State with a bi-cameral Legislature, the Appropriation Bill goes before both Houses. Being a Money Bill, however, the power of the Legislative Council to deal with it is restricted.

No tax can be levied or collected without due authority of the Legislature expressed in the form of an Act. Supplementary, additional or excess grants, votes on account, votes of credit and exceptional grants can be made by a State Legislature in the same way as by Parliament [Arts. 205 and 206].[57]

Any Bill which, on being brought into operation after enactment, involves an expenditure from the State's Consolidated Fund, is not to be passed by a House without the Governor recommending to the House the consideration of the Bill [Art. 207(3)]. This gives to the Council of Ministers control over expenditure.

A State Legislature may, for timely completion of financial business, regulate by law the procedure of the House or Houses of Legislature in relation to any financial matter [Art. 209]. The purpose of this provision is to speed financial business in the legislature so that any attempts to delay such business may be avoided. An ordinance prohibiting adjournment of a House, except on a motion passed by a majority in the House, until the completion of financial business has been held to be valid. The ordinance was necessary to undo the power of the Speaker to adjourn the House on the eve of the consideration of financial business and thus throwing the governmental machinery into confusion.[58]

(f) COMPTROLLER AND AUDITOR-GENERAL

Lastly, the Comptroller and Auditor-General of India exercises the same functions with respect to financial matters in a State as he does with respect to the Centre.[59]

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57. *Supra*, Ch. II, Sec. J(ii)(b).
58. *State of Punjab v. Satpal Dang, supra*.
59. *Supra*, Ch. II, Sec. J(ii)(s).

The accounts of the State are to be kept in such form, as he may prescribe, with the Presidential approval. He submits the audit reports in relation to the State accounts to the Governor who then causes these reports to be laid before the State Legislature [Art. 151(2)].[60]

(iv) DELIBERATION AND DISCUSSION

Like Parliament, the State Legislature also performs the function of discussing and debating public issues, controlling State Government, and shaping and moulding its polices.

Some of these occasions are provided by the Constitution itself, as for example, discussion on the Governor's address [Art. 176],[61] Budget and Demands for Grants through the mechanism of cut-motions [Art. 203].[62] Apart from these, the rules of procedure of the Houses provide for interpellations, adjournment, motions, resolutions *etc*., much on the same pattern as in Parliament.[63]

G. RELATION BETWEEN THE TWO HOUSES *INTER SE*

(a) NON-MONEY BILLS

This problem arises in a State having bi-cameral Legislature.

In the area of ordinary legislation, the two Houses have co-extensive power; a non-Money Bill may originate in either House and it becomes law only when both Houses pass it in the same form. In case of an inter-House deadlock, the Legislative Assembly ultimately prevails.[64] The Legislative Council cannot do more than hold up the passage of a Bill for some time.

The procedure to resolve differences between the two Houses in a State differs from the mechanism of joint session provided for in case of Parliament.[65] The State Legislative Council has thus been given much less importance than the Rajya Sabha.[66]

The pattern of relationship between the two Houses in a State in non-money matters is designed on the same lines as in Britain, with this difference, however, that whereas in Britain it needs at least a year for the House of Commons to by-pass the House of Lords, no such minimum time-limit has been fixed in case of a State. After the Legislative Council disagrees with the Assembly regarding a particular Legislative measure, the latter may re-enact the same at any time thereafter, and the Legislative Council can then hold up a Bill for a maximum period of one month [Art. 197].[67]

The purpose of having a Legislative Council is not to veto a Bill passed by the Assembly but to revise and reconsider it after allowing an interval of reflection and thought on the Bill in question.

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60. *Ibid.*
61. *Supra*, Sec. C(b).
62. *Supra*, Ch. II, Sec. J(ii).
63. *Supra*, Ch. II, Sec. J(iii).
64. *Supra*, Sec. F(i).
65. *Supra*, Ch. II, Sec. J(i)(b).
66. IX *CAD*, 45, 59.
67. *Supra*, Sec. F(i).

(b) MONEY BILLS

Like Rajya Sabha, the State Legislative Council plays only a subsidiary role in financial matters, the power of purse having been concentrated in the Assembly.

A Money Bill can originate only in the Assembly; the Council is not authorised to effect any changes therein; it can only make recommendations which the Assembly is free to accept or reject; the maximum time allowed to the Council to make its recommendations is 14 days and, finally, whether a Bill is a Money Bill or not is to be decided finally by the Speaker [Art. 199].[68] Even a Financial Bill can originate only in the Assembly [Art. 207].[69]

(c) CONTROL OF THE EXECUTIVE

In the area of control of the Executive, the dominant power lies in the Assembly to which the Council of Ministers is constitutionally responsible [Art. 164(2)].[70]

An interesting constitutional question was raised in Bihar in 1968, *viz.*, whether a motion censuring the Council of Ministers can be moved in the Legislative Council in view of the fact that the Council of Ministers was responsible to the Lower House and not the Upper House. The Chairman held that Art. 164(2) merely indicates the constitutional position of the Ministry *vis-a-vis* the Assembly, and does not bar the Upper House from passing a censure motion against the Ministry, or criticising the conduct of the Ministry or expressing disapproval of the policy of the Ministry. The Council passed the resolution disapproving the policies of the Ministry and calling upon it to resign or, in the alternative, requesting the Governor to dismiss the Ministry, but the resolution had no operative force; neither did the Ministry resign nor was it dismissed by the Governor.

(d) ORDINANCES

Both Houses have co-ordinate powers as regards a Governor's ordinance which is to be laid before both Houses and which ceases to operate if a resolution disapproving it is passed by the Assembly which is agreed to by the Legislative Council [Art. 213(2)(a)].[71]

(e) ABOLITION OF LEGISLATURE COUNCIL

As already pointed out, it lies within the power of the Legislative Assembly to have the Legislative Council abolished.[72]

H. LEGISLATIVE PRIVILEGES

Article 194 is a verbatim reproduction of Art. 105. Therefore, the privileges of a House of a State Legislature correspond with those of the Houses of Parliament.[73] Accordingly, the discussion held earlier on Parliamentary Privileges is

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68. *Supra*, Sec. F(ii).
69. *Ibid.*
70. *Infra*, Ch. VII.
71. *Infra*, Ch. VII, Sec. D(ii)(c).
72. *Supra*, Sec. B(i).
73. *Supra*, Ch. II, Sec. L.

fully relevant to the privileges of a State Legislature. In fact, many cases cited earlier arose in the sphere of State Legislatures under Art. 194.

(a) FREEDOM OF SPEECH

Like Art. 105(1), Art. 194(1) specifically guarantees freedom of speech in the State Legislature. This is to ensure that the elected representatives of the people are able to have their full say on all issues being discussed in the legislature. The Allahabad High Court has held that so long as a Legislator is detained under a valid detention order, he or she has no right to participate in the session of the House and cannot consequently claim any of the rights or privileges available to legislators in the House.[74]

Article 194(2), like Art. 105(2), immunizes a member of a legislature from any proceedings in any Court for anything said or any vote given in the Legislature or a Committee thereof.

The freedom of speech is subject to the provisions of the Constitution subject to the restriction that no discussion is to take place in a House regarding the conduct of a Supreme Court or a High Court Judge in the discharge of his duties [Art. 211].[75] The rules and standing orders relating to the procedure of a House may also curtail the freedom of speech within the House [Art. 194(1)].

The Karnataka High Court has ruled in *Subbiah*[76] that breach of Art. 211 on the floor of the House is a matter not for the court but for determination by the presiding officer of the House. Two members of the Karnataka Legislative Assembly, espousing the cause of general public filed a writ petition in the High Court alleging that a member of the Legislative Council (respondent 2) had made derogatory remarks against the High Court Judges on the floor of the House and, thus, violated Art. 211. The petitioners therefore requested the court to issue a writ directing the Chairman of the Legislative Council (respondent 1) to produce the records of the proceedings of the Council relating to the objectionable remarks and further requested the court to quash the same. The High Court held that the matter was not actionable in the court, and, therefore, it could not call for the records of the House.

The Court pointed out that Art. 212(1) immunizes the proceedings of a House to be challenged on the ground of irregularity of procedure and it is not open to the court to issue a notice to the presiding officer of the House when the proceeding in which it is issued is itself outside the pale of determination by the courts. The question whether a member has contravened Art. 211 while speaking in the House is one for determination by the presiding officer of the House. "Hence, the question of sending for the records and quashing any such proceedings does not arise". Following the Supreme Court's opinion in *Keshav Singh*,[77] the High Court also observed in *Subbiah*:

> "If a Judge in the discharge of his duties passes an order or makes observations which in the opinion of the House amounts to contempt, and the House proceeds to take action against the Judge in that behalf, such action on the part of the House cannot be protected or justified by any specific provision made by

74. *Raghu Raj Pratap Singh alias Raja Bhaiya v. State of U.P*, 2003 (3) AWC 2106.
75. *Keshav Singh's* case, *supra*, Ch. II, Sec. L(i)(a).
76. *A.K. Subbiah v. State of Karnataka Legislative Council*, AIR 1979 Kant 24, 32.
77. *Supra*, footnote 75.

> the latter part of Art. 194(3)..... The conduct of a Judge in relation to the discharge of his duties cannot be the subject-matter of action in exercise of the powers and privileges of the House".[78]

The proposition laid down by the Supreme Court in *P.V. Narsimha Rao v. State*, (CBI/SPE)[79] and in *Raja Ram Pal v. Speaker, Lok Sabha*[80] in relation to the members of Lok Sabha also applies to the members of the State Legislature.

(b) PUBLICATION

Like Art. 105(2), Art. 194(2) lays down that no person is to be liable to any proceedings in any court in respect of the publication under the authority of a House of any report, paper, votes or proceedings.[81]

Article 361(A) immunizes from any Court action publication in a newspaper of a substantially true report of proceedings in a House, unless the publication is proved to have been made with malice. The same immunity applies to broadcasting.[82]

(c) POWER TO MAKE RULES

Like Art. 118(1), Article 208(1) empowers each House of the State Legislature to make rules for regulating, subject to the provisions of the Constitution, its procedure and the conduct of its business.[83]

(d) INTERNAL AUTONOMY

Internal autonomy is conceded to each House of the State Legislature. The validity of any proceedings in the State Legislature cannot be questioned on the ground of 'any alleged irregularity of procedure' [Art. 212(1)].

In *M.S.M. Sharma v. Dr. Krishna Sinha*,[84] the Apex Court has observed that the validity of the proceedings inside the Legislature of a State could not be called in question on the ground that the procedure laid down by the law had not been strictly followed. Art. 212 of the Constitution is a complete answer to any such contention. The court has observed:

> "No court can go into those questions which are within the special jurisdiction of the Legislature itself, which has power to conduct its own business."

Under Art. 212(1), the immunity from judicial interference is confined to matters of irregularity of procedure. No immunity can be claimed if the proceedings are held without jurisdiction, *e.g.*, contrary to any mandatory constitutional or legal provision.[85] If the proceedings in the Legislature are attacked on the ground of illegality or unconstitutionality, judicial review thereof is not barred by Art. 212.[86]

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78. AIR 1979 Kant, 24 at 30.
79. AIR 1998 SC 2120; *supra*, Ch. II.
80. (2007) 3 SCC 184 : (2007) 2 JT 1.
81. *Supra*, Ch. II, Sec. L(i)(b).
82. *Supra*, Ch. II.
83. *Supra*, Ch. II, Sec. L(i)(c).
84. AIR 1960 SC 1186 : (1961) 1 SCR 96 : (1961) 2 SCJ 73.
85. *Kihota v. Zachilhu*, AIR 1993 SC 412 : 1992 Supp (2) SCC 651. Also, *State of Kerala v. Sudarsan Babu*, AIR 1984 Ker. 1.
86. *Om Parkash Chautala v. State of Haryana*, AIR 1998 P & H 80, at 83.

As the Supreme Court has observed in *Keshav Singh*:[87]

> "Art. 212(1) seems to make it possible for a citizen to call in question in the appropriate court of law, the validity of any proceedings inside the legislative chamber, if his case is that the said proceedings suffer not from mere irregularity of procedure, but from an illegality. If the impugned procedure is illegal and unconstitutional, it would be open to be scrutinised in a court of law, though such scrutiny is prohibited if the complaint against the procedure is not more than this that the procedure was irregular".

Thus, the proceedings inside the legislature cannot be challenged in the court on the ground that they have not been carried on in accordance with the rules of business. The House can depart from its own rules of procedure at its own discretion. Where the body has been given complete powers to regulate its own procedure it has by implication also the power to waive or condone the breach of its procedural rules.[88] The working of this principle can be illustrated by the following two cases:

1. In *State of Bihar v. Kameswar Singh*,[89] the original Bill relating to the Bihar Land Reforms Act was signed and authenticated by the Speaker. It contained an endorsement by the Speaker that the Bill was passed by the Assembly on 5-4-1950. The official report of the proceedings prepared later did not mention that the motion to pass the Bill was put to the House and carried.

The Supreme Court ruled that such omission could not, in the face of the explicit statement by the Speaker endorsed on the bill, be taken to establish that the Bill was not put to the House and carried by it. In any case, the omission to put the motion formally to the House, even if true, was a mere irregularity of procedure because the overwhelming majority of the members present and voting were in favour of carrying the motion.

2. In *Mangalore Ganesh Beedi Works v. State of Mysore*,[90] the Supreme Court ruled that the validity of a taxing measure cannot be challenged on the ground that it offends Arts. 197 to 199[91] and the procedure laid down in Art. 202 of the Constitution as Art. 212 prohibits the validity of any proceedings in a State Legislature being called in question on the ground of any alleged irregularity of procedure.

No officer or member of the State Legislature in whom powers are vested by or under the Constitution for regulating procedure, or the conduct of business, or for maintaining order in the Legislature, is to be subject to the jurisdiction of any court in respect of the exercise by him of those powers [Art. 212(2)]. The operation of this constitutional provision is illustrated by the following case.

A member of the Kerala Legislative Assembly was prevented from entering the Assembly hall. The guard was acting under the Speaker's order. The member brought an action against the guard who invoked Arts. 212(2) and 194 to bar

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87. *In re* under Art. 143 (*Keshav Singh*), AIR 1965 SC 745 : 1965 (1) SCR 413; *supra*, Ch. II, Sec. L(ii)(g) and (iv).

88. *Rajnarain v. Atmaram Govind*, AIR 1954 All 319; *Piarelal Singh v. State of Madhya Pradesh*, AIR 1955 Nag. 11; *K.A. Mathialagan v. P. Srinivasan*, AIR 1973 Mad at 385; *S.V. Sirsat v. Leg. Ass. of State of Goa*, AIR 1996 Bom 10.

89. AIR 1952 SC 252 : 1952 SCR 889.

90. AIR 1963 SC 589 : 1963 Supp (1) SCR 275.

91. See, *supra*, for these provisions, under "Functions of the State Legislature, Sec. F.

Court's jurisdiction to take cognisance of any incident which may have taken place within the Legislative Assembly.

The High Court quashed the proceedings against the guard arguing that the persons deployed by the Speaker for maintaining law and order in the Assembly fall within the purview of Art. 212(2). The House and the Speaker can act only through these officers. As the Court observed: "An officer carrying out the orders of the Speaker within the precincts of the House is protected by the provisions contained in the Constitution. Such actions are beyond the cognisance of ordinary courts."[1]

Article 212(2), as is clear from its language, protects only exercise of powers vested in an officer under the Constitution. It does not protect from challenge before the court exercise of any power by such officer which is not vested in him under the Constitution.[2]

(e) SUSPENSION OF A MEMBER

Legislative history was made by the Tamil Nadu Assembly on Dec. 22, 1986, when it expelled 10 of its members (belonging to the opposition Party) from the House and declared their seats vacant.[3] These members had earlier burnt copies of the Constitution in public in the course of an agitation. The resolution passed by the House stated that by their act the members had violated the oath they had taken under Art. 188 of the Constitution,[4] and that by their conduct, they had brought down the esteem and dignity of the Constitution as well as the House and its members as their act was not in tune with the stature and standards expected of members of Legislative Assembly (M.L.A.'s) and, therefore, the House considered them ineligible to be its members.

There is no doubt that a House has power of discipline over its members and also has power to expel a member from the House rendering his seat vacant therein.[5] Members have been expelled from Parliament and State Legislatures but for personal misconduct within the House and not for political action. These members had committed an offence under the Prevention of Insults to National Honour Act, 1971, but it does not impose disqualification from membership as a punishment. There is however a danger that the majority party in the House may invoke the power of expulsion of minority party members for political reasons. Such a step would be anti-democratic. To avert such a danger, it is necessary to observe great caution, care and self-discipline by the majority party in the Legislature in using such a power. Because of Art. 212, it may be extremely difficult to challenge the exercise of such power in a court.[6]

The matter of expulsion of members was brought before the Madras High Court in *K. Anbazhagan v. Secy., T.N. Legislative Assembly*.[7] The High Court dismissed the writ petitions filed by the expelled members challenging their expulsion from the Assembly. The court ruled that the ground of expulsion of the

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1. *Raghunath Panicker v. Kujala Shankappan,* AIR 1987 Ker 159, 163.
2. *Nipamacha Singh v. Secy., Manipur Legislative Assembly,* AIR 2002 Gau. 7. Also see, *supra.*
3. On the power of expulsion, see, *supra,* Ch. II, Sec. L(ii)(c).
4. *Supra,* Sec. B(v)(c).
5. *Supra,* Ch. II, Sec. L(ii)(c).
6. *Supra.*
7. AIR 1988 Mad 277.

members was that their conduct was considered to be derogatory to the dignity of the Constitution as well as that of the Assembly and the members were considered unfit to be members of the Assembly. The House of Commons has the power of expulsion to punish a member in exercise of its disciplinary control over the members with a view to see that such of the members who are unfit, in the opinion of the House, to continue to be its members are expelled from the House. The House can exercise such a power for an action of the member which the House considers to be a misconduct even though it was committed outside the House. Accordingly, the State Assembly also enjoys such a power under Art. 194(3).

It was contended in the instant case that, as the resolution to expel the members was passed by the House without the concerned members having been given an opportunity to put forth their case before the House, the procedure was illegal, arbitrary and the resolution violated Arts. 14 and 21, and, therefore, it was not protected from the court scrutiny under Art. 212. But the court rejected the contention saying that the whole purpose of Art. 212(1) is to shut out any enquiry into the validity of a proceeding in the Assembly on the ground of a defect in procedure. "Absence of opportunity to the person who is likely to be affected by the effect of the decision of the Assembly is undoubtedly a decision which may suffer from irregularity in procedure. The constitutional mandate cannot however be ignored and the Constitution makers clearly intended that the Legislature would not be answerable to a court in the matter of its proceedings on the ground of validity of procedure."

The decision of the Madras High Court is no longer good law and must be taken to have been impliedly overruled by the Supreme Court's decision in *Raja Ram Pal*'s case which for the first time in its history *directly* dealt with the expulsion from membership of the legislature[8] which has now held that Articles 122 and 105 do not foreclose judicial review in cases of "gross illegality or violation of constitutional provisions" . Since any action taken in contravention of natural justice is violative of fundamental rights guaranteed by Articles 14, 19 and 21 of the Constitution if it is shown that no opportunity of hearing was given to the legislator before expulsion, the decision would be susceptible to being set aside by court.[9] A single judge of the Karnataka High Court has held that judicial review is not available at a stage prior to the Speaker/Chairman's decision and a *quia timet* action is not permissible.[10]

A House of the Legislature has power to suspend a member for the whole of its session. Such an order automatically comes to an end when the House is prorogued for when the House is prorogued, all pending business in the House lapses.[11]

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8. (2007) 3 SCC 184 at p. 413 : (2007) 2 JT 1.

9. *Ibid* at page 435. For further discussion see supra Ch. II Note L.

10. *A.K. Subbaiah v. The Chairman, Karnataka Legislative Council,* AIR 2007 Kant145 : 2007 (5) Kar L J 554.

11. Also see, *Jai Singh Rathi v. State of Haryana,* AIR 1970 Punj 379; *Hardwari Lal v. Election Commission of India,* ILR (1977) 2 P & H 269; *Om Prakash Chautala v. State of Haryana,* AIR 1998 P & H 80.

On prorogation of the House, see, *supra,* Sec. C(c).

(f) LAW TO DEFINE PRIVILEGES

Like Art. 105(3), Art. 194(3) authorises the State Legislature to make a law to define the powers, privileges and immunities of each House, its members and the committees. Until, however, so defined, the privileges are to be the same as those enjoyed by the House and its committees and members immediately before the coming into force of S. 26 of the Constitution (Forty-fourth) Amendment Act, 1978.[12] There is no such law till date. However the Supreme Court has in its decision in *Raja Ram Pal* made legislative privileges subject to judicial review so that like a statute passed by the legislature they cannot prevail against Fundamental Rights.

(g) MISCELLANEOUS PROVISIONS

Under Art. 194(4), which is akin to Art. 105(4), [13] privileges are available not only to the members of the Legislature but to all those who have a right to speak, or otherwise to participate, in the proceedings of a House or any committee thereof, such as Ministers and the Advocate-General of the State [Art. 177].

A point of interest which arises in case of a State Legislature, but not Parliament, may be noted. Suppose a newspaper in Bombay commits contempt of the U.P. Assembly by publishing some material derogatory to it. Can the Assembly issue a warrant to enforce the presence of the Editor before it to answer the charge of its contempt, Bombay being outside the territorial jurisdiction of the U.P. Assembly?

It has been held in *Homi Mistry v. Nafisul Hasan*,[14] that the Assembly could do so as no territorial limitation has been placed on the power conferred by Art. 194(3). The Union of India is not formed of independent States surrendering part of their jurisdiction to the Centre and reserving part of the jurisdiction to themselves. It is inconceivable that although the privilege could be exercised against a citizen of India within the State, a citizen outside the State could assail the dignity of the House with impunity.

(h) LEGISLATURE—COURT CONTROVERSY

During the last fifty years since the inauguration of the Constitution, there have arisen several cases pertaining to legislative privileges at the State level raising unnecessary controversies between the Courts and the Houses of State Legislatures.

Reference has already been made to the *Keshav Singh* case where an acute controversy arose on a privilege issue between the Allahabad High Court and the U.P. Legislative Assembly.[15] The controversy was defused when the question was referred to the Supreme Court for its advisory opinion under Art. 143.[16]

The Andhra Pradesh Legislative Council decided to summon the chief editor of a newspaper to the bar of the House to be admonished on March 28, 1984, as he had been held guilty of committing breach of privilege of the House as derogatory comments had been made against the House in his paper. Instead of

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12. *Supra*, Ch. II, Sec. L(v) for comments on this provision.
13. *Supra*, Ch. II, Sec. L.
14. ILR 1957 Bom 218, 238-9.
15. See, *supra*, Ch. II, Sec. L(iv).
16. See, *supra*, Ch. IV, Sec. F. on Art. 143.

complying with the summons, the editor approached the Supreme Court for relief. The Court issued a show-cause notice to the Council, and also passed an interim order to the effect that the editor ought not to be arrested in pursuance of any process or warrant, if issued by the Council.

Disregarding the Court order, the Chairman of the Council asked the Commissioner of Police to produce the editor before the House on the 28th March. This brought the Council and the Court in a position of confrontation. On March 27, the Court passed another order that the Commissioner of Police should not arrest, and should not cause the arrest to be made. In view of the difficult situation in which he was placed, the Commissioner sought clarification from the Council Chairman who reiterated his earlier stand of producing the editor before the bar of the House for implementing the decision of the House to admonish him. The Chairman also directed that the Council Secretary should not receive any summons or notice from the Supreme court.

The Police Commissioner adopted the course of handing over to the editor the Council Secretary's communication which required him to produce the editor before the House. The Commissioner told the editor that he was not arresting him. "If you come on your own, you are welcome." The controversy was ultimately defused for the time being by the Governor proroguing the Council on the advice of the Chief Minister on March 30, 1984.

In *A.M. Paulraj v. Speaker, T.N. Legislative Assembly*,[17] a full bench of the Madras High Court has had occasion to consider certain aspects of privileges of the Legislative Assembly. The petitioner, an editor of a magazine, was sentenced to seven days' simple imprisonment by the Eighth Tamil Nadu Legislative Assembly for contempt of the Seventh Assembly. He challenged the Assembly's decision through a writ petition under Art. 226.[18]

The Speaker of the Assembly refused to receive the notice sent by the Court of the admission of the writ petition. Commenting on this aspect of the matter, the Court observed that the refusal to receive even a court notice of filing of a writ petition under Art. 226 by a person who has been punished for a breach of privilege is based on a misapprehension that the admission and hearing of such a petition amounts to an affront to the Legislature and that there is a confrontation between the High Court and the Legislature. "Such an impression is, in our view, wholly unjustified. Indeed the maintainability of a petition under Art. 226 of the Constitution challenging the decision of a House of Legislature sentencing a citizen to imprisonment for contempt of the House has clearly been upheld by the Supreme Court in *Keshav Singh.* When such a petition is filed, the conflict is not between the High Court and the Legislature but between the citizen and the Legislature. When a citizen approaches the Court contending that as a result of a committal to prison by the Legislature for breach of privilege his Fundamental Right under Art. 21 has been violated, such a petition cannot be thrown out at the very threshold merely on the ground that the decision of a House on an issue of privilege is being challenged." In the instant case, the High Court requested the Advocate General to assist the Court and he did so.

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17. AIR 1986 Mad 248.
18. For discussion on Art. 226, see, *infra*, Ch. VIII.

Ultimately, after hearing the arguments of the Advocate General and the petitioner's lawyer, the High Court dismissed the petition on merits and made the following points in its judgment:

(1) A writ petition is maintainable challenging the decision of a House of a Legislature sentencing a citizen to imprisonment for contempt of the House.

(2) A House can take cognisance of the contempt of the previous House, the reason being that the State Legislature is a continuing institution notwithstanding the fact that the Assembly is dissolved from time to time and new members are being elected.

(3) The question of punishment for a breach of privilege is a matter exclusively within the jurisdiction of the Legislature;

(4) Art. 212 forecloses any scrutiny by the court into the procedure adopted by the House. The validity of the proceedings inside the Legislature cannot be called in question on the ground that the procedure laid down by the law has not been strictly followed. "The decision of the Assembly cannot be challenged on the ground that there was any irregularity in the procedure. Art. 212 creates an express bar against a challenge to any proceedings of the Legislature on the ground of alleged irregularity of procedure".

(5) When a person is punished with imprisonment under Art. 194(3) in accordance with the rules made by the Legislature under Art. 208(1), it is in accordance with Art. 21.[19]

The contention of the petitioner in the instant case was that he was not heard by the Assembly before passing the resolution to punish him for contempt. Treating this as a matter of mere procedure, the Court ruled that it was covered by Art. 212. The rules made under Art. 208 do not provide for any such hearing.

The criticism expressed by the author in the earlier edition of this book was two fold:

One, fair hearing is a part of natural justice and failure to provide natural justice is now regarded not as a matter of procedural irregularity but as going to the jurisdiction of the authority making the decision.[20] If this view is applied then the failure to giving a hearing to the concerned person can be regarded as affecting its jurisdiction to punish, and this is certainly not protected by Art. 212.

Two, after the *Maneka Gandhi* case, Art. 21 does not now envisage *any* procedure, but such procedure as is reasonable.[21] Imprisoning a person without giving him a hearing cannot certainly be regarded as a reasonable procedure. Therefore, the rules of a Legislature which fail to provide for an opportunity of being heard to the affected person before sentencing him to a term of imprisonment for contempt of the Legislature do not measure up to the requirements of Art. 21. Art. 212 protects irregularity in procedure of a Legislature but certainly not a breach of his Fundamental Right under Art. 21.

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19. On Art. 21, see, Ch. XXVI, *infra.*

20. JAIN, A *TREATISE ON ADMINISTRATIVE LAW*, I, 450. *et. seq*; JAIN, *CASES AND MATERIALS ON INDIAN ADM. LAW*, I, Ch. XI.

21. See, *infra*, Ch. XXVI, Sec. D, for discussion on this case.

That the criticism was justified is borne out by the decision of the Supreme Court in *Raja Ram Pal*.[22]

Again, two cases of tri-partite conflict between the Press, Court and the Legislature arose in Tamil Nadu in 1992. The privileges committee of the Tamil Nadu Assembly found the editor of a newspaper guilty of breach of privilege of the House for publishing an alleged incident and certain proceedings in the House on February 5, 1992. The Speaker directed the editor to appear before the bar of the House on April 27 for being reprimanded. The editor approached the Supreme Court with a writ petition and the Court issued a notice on May 1 to the Secretary, Legislative Assembly, to appear before the Court on May 5, with some information. On May 4, 1992, the Assembly adopted a resolution directing the Secretary not to respond to the Court summons to appear before it, but offered to provide the Court information through the government counsel.

Proceedings for contempt of the House were initiated against Sunil, the Madras correspondent of the Illustrated Weekly published from New Delhi, following publication of an article written by him on Tamil Nadu Assembly in a September issue. The House took the view that the article sought to present the proceedings of the House in a "pejorative and prejudicial slant." Sunil expressed regret to the House, but still on April 10, 1992, the House directed Sunil to be present before the bar of the House on April 20 for being reprimanded. As Sunil did not appear before the House, a warrant for his arrest was issued by the Speaker.

Sunil approached the Supreme Court and on April 24, 1992, the Court in an interim order, stayed the execution of the arrest warrant and also stayed the notice dated April 10, issued by the Speaker directing Sunil to appear before the bar of the House. On April 27, an announcement was made in the T.N. Assembly that the warrant of arrest against Sunil would be executed despite the Supreme Court's stay order. On May 7, the Court clarified that its interim order of April 24 staying the warrant of arrest of Sunil, by necessary implication, interdicted, any assertion of powers to arrest Sunil by any police or other official. The Court also directed the Police Commissioner, Delhi, to give protection to Sunil and prevent infraction of the Court's order. The Court also expressed its confidence and hope that the authorities in consonance with their duty would act in "aid, authority and dignity" of the apex Court as envisaged by Art. 144 of the Constitution.[23] On the other hand, the Speaker pleaded in the House that under Art. 212, the validity of the proceedings could not be questioned.

A significant case pertaining to the legislative privileges arose in Tamil Nadu in 1987. On March 25, 1987, a weekly published a cartoon which, it was alleged, denigrated the MLAs. On March 28, the Speaker made a statement in the House holding the editor guilty of the breach of privilege and demanding the editor to publish an apology in the weekly failing which summary sentence would be passed by the House itself. On April 4, 1987, the House passed a resolution sentencing the editor to undergo three months' rigorous imprisonment. He was arrested the same day but was released after two days. In the meantime, the editor filed a writ petition in the Madras High Court and challenged the resolution as unconstitutional and also demanded compensation for the flagrant violation of his

22. See Chapter II Sec. L for discussion of the case.
23. *Supra*, Ch. IV, Sec. I.

Fundamental Rights in imposing the three months' rigorous imprisonment on him.

After considering the matter in the light of the past judicial decisions in the area of legislative privileges, a full bench of the High Court laid down the following propositions: in *S. Balasubramanian v. State of Tamil Nadu*:[24]

(1) The Constitution is the basic and fundamental law of the land; it reigns supreme and the "rights, powers and privileges" of the various limbs of the state are subject to its provisions.

(2) The final authority to interpret the Constitution and to settle constitutional controversies belongs to the Supreme Court and the High Courts. These courts have been constituted as the sentinels of both the Constitution and the democracy as well as the fundamental rights of the citizens.

(3) The legislatures have to function within the limits of constitutional provisions; adjudication of any controversy as to whether legislative authority has been exceeded or fundamental rights have been contravened is "solely and exclusively" left to the Judicature. Therefore, inevitably, the decision about the construction of Art. 194(3), the privileges, powers and immunities claimed or action taken in vindication thereof "cannot be said to be in the exclusive domain or of the sole arbitral or absolute discretion of the House of legislature".

(4) Of course, the courts having regard to their own self-imposed limits would honour the sentiments particularly keeping in view the plenary powers of the Legislature within the constitutionally permitted limits so long as such action of the Legislature does not result in the negation of the fundamental rights guaranteed to the people. The court observed in this connection:[25]

> "The all powerful postures or claims of sky-high powers or suzerain claims of sovereignty or over-lordism are to be brushed aside as nothing but fossil of the tyrannical and anarchical past and not in keeping tune with the basic and fundamental principle of rule of law, the bedrock of the Constitution or the democratic ideals which are the avowed object of the Republic ushered in by the Constitution of India. The contentions to the contrary have no basis or recognition of law and do not have the merit of acceptance by the courts in this country."

(5) No person can be deprived of his life or personal liberty except according to procedure established by law (Art. 21) and the state shall not deny to any person equality before law and the protection of law (Art. 14). Consequently, no law or procedure laid down by law or the action taken thereunder can be arbitrary or irrational or oppressive and the requirements of compliance with the principles of natural justice are implicit in Art. 21 and every action of the state has to be tested on the anvil of Arts. 14, 19 and 21 read together. No immunity can be claimed from the scrutiny of this Court to see whether any Act or ac-

24. AIR 1995 Mad 329.
25. *Ibid*, at 343.

tion of the legislature as in the case of the other limb of the State, violates the above stated cardinal principles.

(6) In the instant case, the alleged guilt of the editor had been decided and pronounced upon by the Speaker himself and declaration made by him to that effect even before any opportunity to show cause or hearing was given to him. "*Suo motu* the Speaker of the House has power only to refer the question to the privileges committee and not to record a verdict on the very question. The High Court observed in this connection:[26]

> "There had been, in our view, gross violation of law as also the principles of natural justice in dealing with the case of the petitioner and punishing him with imprisonment and the entire procedure adopted in this case smacks of arbitrariness and oppressiveness besides the same being most unreasonable. While denying the personal liberty of the petitioner, a citizen of this country, even the elementary procedure established by law does not appear to have been adhered to."

Thus, the Court concluded that, in the instant case, Fundamental Rights of the petitioner under Arts. 14, 19 and 21[27] were grossly violated in imposing three months' imprisonment and, accordingly, "the condemnation of the petitioner as also the punishment imposed are declared to be unconstitutional and null and void." The court also awarded the petitioner a token compensation of Rs. 1000 for infringement of his right under Art. 21.

On March 22, 1999, a member of the Opposition in the Tamil Nadu Legislative Assembly assaulted a Minister. In the evening, the member was imprisoned for a week on a warrant issued by the Speaker. On March 23, a *habeas corpus* petition was moved on behalf of the concerned member in the Madras High Court under Art. 226. The High Court granted interim bail to the member and ordered his release from the prison. The Judges who heard the petition felt that no one could be sentenced to jail without being given a hearing. They also felt that since the arrest followed a criminal action, the matter should have been referred to an appropriate court. The bench made it clear that it was not interfering with the decision of the House suspending the member from the House for the rest of the ongoing session.

At first, the Speaker reacted strongly to the High court order and said that he would not take cognisance of it. On March 23, while the member's case was being argued in the Court, the Assembly passed a resolution holding the member guilty of contempt of the House and sentenced him to 15 days imprisonment. On March 24, the Speaker relented. The member was released from the prison in pursuance of the court order for his bail but he was rearrested a few minutes later under the Assembly resolution. A fresh *habeas corpus* petition was filed in the High Court seeking the release of the member and challenging the resolution passed by the Assembly.

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26. *Ibid*, 345.

27. For discussion on Art. 14, see, Ch. XXI, *infra;* on Art. 19, see, Ch. XXIV, *infra;* for Art. 21, see, *infra*, Ch. XXVI, Secs. B, C, D, E and F.

In the meantime, the Speaker accepted that his order issued by him *suo motu* on March 22, ordering member's imprisonment was flawed because he had issued it in his individual capacity as the Speaker. He also made it clear that neither he nor any of the Assembly staff members would accept any notice or summons from the High Court on the matter. He also observed that challenging the Assembly resolution in the court "would definitely affect the sovereignty of the House and I will challenge it."[28]

The Madras High Court again ordered the release of the member on bail after suspending the Assembly's resolution. The Speaker who had earlier declared that he would not brook any interference from the court in implementing the Assembly resolution again relented, chose not to challenge the court order and, accordingly, the member was released from the prison. Thus, a confrontation between the High Court and the Assembly was averted for the time being as the Speaker chose to accept the court order releasing the member on bail.[29] The Speaker told the House that he did not wish a confrontation with the judiciary and that the court order granting bail to the member was only an interim order. The Speaker went on to observe that the legislature and the judiciary are two limbs of the democracy and, therefore, one should not demolish the sovereignty of the other.

Questions regarding the permissible limits of legislative privileges, the role of the courts in this area, the relation between legislative privileges and Fundamental Rights have been arising from time to time creating unnecessary tensions between the courts and the legislatures. This problem needs to be solved so that the court-legislature tensions which result in ugly incidents from time to time may be avoided.[30]

The only viable course to protect the press and the people is to have a central legislation defining legislative privileges. This matter has been hanging fire since the famous *Keshav Singh* case,[31] in 1964. It may be still better to add an appendix to the Constitution defining legislative privileges as a central law on the subject may not be constitutionally viable. The alternative suggested in the earlier edition of amending Arts 105 and 194 making legislative privileges subject to Fundamental Rights and judicial review, may no longer be necessary given the decision of the Supreme Court in *Raja Ram Pal*.

It needs to be appreciated that a legislature exercises its privileges against the same people who have elected it. This can be regarded as an anti-democratic action on the part of a democratic legislature. It needs to be remembered that the function of privileges in early days in Britain was to make the House of Commons immune from royal interference. But to-day legislatures use their privileges not for protection against the executive but to stifle criticism by the people. To a great extent, the claim of privilege by a democratically elected legislature borders on being undemocratic and anti-people. At times, the majority party in a House uses the issue of privileges as a political weapon to beat the minority.

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28. *The Hindustan Times*, dated, March 25, 99, p. 1.
29. *The Times of India*, dated March 26, 99, p. 10.
30. Reference may be made in this connection to a study by the author entitled *Parliamentary Privileges and the Press* (1984) published by the Indian Law Institute, New Delhi.
31. *Supra*, Ch. II, Sec. I.

CHAPTER VII

STATE EXECUTIVE

SYNOPSIS

The State Executive consists of the Governor, who is the head of the State, and the Council of Ministers with the Chief Minister at its head.

The pattern of the State Executive is very similar to that of the Central Executive which is based on the fundamental principle of accountability of the Executive to the Legislature. Like the Centre, the States also have parliamentary form of government. Therefore, what has been said in Chapter III as regards the Central Executive is applicable to the area of the State Executive as well.

The constitutional provisions dealing with the State Executive are more or less word to word similar to the constitutional provisions dealing with the Central Executive except for some differences arising out of the fact while the Constitution confers some discretion on the State Governor, it confers none on the President.

Arts. 153 to 167 and 213 deal with the composition and powers of the State Executive.

A. ADMISSION TO THE EXECUTIVE ORGANS

(i) GOVERNOR

(a) SIGNIFICANCE OF THE GOVERNOR'S OFFICE

The Governor of a State plays a multifaceted role. He is a vital link between the Centre and the State. It is his duty to keep the Centre informed of the affairs of the State. This helps the Centre to discharge its constitutional functions and responsibilities towards the State.

The Governor is the constitutional head of the State. He appoints the Chief Minister and other Ministers and discharges several important functions in relation to the State Legislature. The Governor assures continuity in the State Administration, as having a fixed tenure, he stays in office while the Chief Minister may come and go from time to time.

The Governor acts as the agent of the Centre when a proclamation of breakdown of constitutional machinery in the State is issued under Art. 356.[1] The State Governor is thus a key functionary in the system envisaged by the Constitution.

(b) APPOINTMENT OF GOVERNOR

Each State has a Governor, but two or more States may have a common Governor [Art. 153]. The Governor is formally appointed by the President [Art. 155]. The President appoints the State Governor on the advice of the Prime Minister with whom, therefore, the effective power lies in this regard.[2]

The Constituent Assembly fully debated the merits and demerits of an elected *v.* nominated Governor and finally opted for the system of presidential nomination, rather than direct election, of the Governor because of several reasons:[3] For example—

(1) A nominated Governor would encourage centripetal tendencies and, thus, promote all-India unity. On the other hand, it was apprehended

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1. For discussion on Art. 356, see, *infra*, Ch. XIII, Sec. B.
2. IV *CAD*, 588-607.
3. VIII *CAD*, 455.

that "an elected Governor would to some extent encourage that separatist provincial tendency more than otherwise. There will be far fewer links with the Centre."[4]

(2) In a parliamentary system the head should be impartial, but a Governor elected by the direct vote of the people would have to be a partyman. On this point, it was stated in the Constituent Assembly:

> "He should be a more detached figure acceptable to the province, otherwise he could not function, and yet may not be a part of the party machine of the province. On the whole, it would probably be desirable to have people from outside, eminent in something, education or other fields of life who would naturally cooperate fully with the Government in carrying out the policy of the Government and yet represent before the public something above politics."

(3) Conflicts might arise between the Governor and the Chief Minister if both were to be elected by the people, for the former might claim to arrogate power to himself on the plea of his having been elected by the whole State as against the latter who would be elected only in a constituency which would be a small part of the State. It was stated in the Constituent Assembly:[5]

> "When the whole of the executive power is vested in the Council of Ministers, if` there is another person who believes that he has got the backing of the province behind him and, therefore, at his discretion he can come forward and intervene in the governance of the province, it would really amount to a surrender of democracy".

(4) The Governor being only a symbol, a figurehead, there would be no point in spending money in having him elected.[6]

The Constitution gives a *carte blanche* to the Centre in the matter of appointment of a State Governor. Under Art. 155, the ultimate responsibility to appoint the Governor rests with the Central Government. The Governor has a dual capacity—he is the Head of the State as well as the representative of the Centre in the State and he works as a channel of communication and contact between the State and the Centre. It is felt that with a view to ensuring the smooth functioning of the constitutional machinery in the State, it would be best to consult the State Chief Minister while appointing the Governor, and a convention has thus grown accordingly.

So long as there was one party rule at the Centre as well as in the States, the consultation was merely a formality and no difficulty ever arose in the matter of appointment of the Governor. During this period, the institution of the Governor remained largely dormant. But after the fourth general election held in February 1967, the political scene underwent a sea change as different political parties came in power in the States and the Centre. The appointment of Governors became a somewhat controversial matter, particularly in those States where the political complexion of the government differed from that at the Centre. These

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4. *Ibid.*
5. VII *CAD*, 455.
6. VIII *CAD*, 12, 424-556.

States apprehended that the Governor appointed by the Central Government, and holding office during the pleasure of the President (which means the Central Government), would function not objectively and impartially, but at the bidding of the Central Government to destabilize State Governments. These States claimed not only consultation, but rather their concurrence, in the matter of appointment of the Governor. The Centre has not accepted any such proposition. While the Centre consults the Chief Minister, it is not ready to concede a veto to him in the matter of appointment of the Governor. The Centre is not prepared to consult the State Cabinet as such and regards consultation with the Chief Minister as adequate.

For a smooth functioning of the Indian federal structure, it is necessary that the person to be appointed as the Governor should be such as to inspire confidence from both the Centre and the State concerned. The office of the Governor has now become a balance wheel of the Centre-State relationship. As the Governor has to discharge certain functions in the State as the Centre's representative independently of the State Government because of the Centre's ultimate responsibility to see that each State functions according to the Constitution,[7] it is not possible for a State to claim a final say in the matter of the Governor's appointment. But, at the same time, the Centre should not seek to force a person as Governor upon a State against its wishes otherwise relations between him and the State Government will always be strained.

A Study Team of the Administrative Reforms Commission has suggested that though the Chief Minister of the State should be consulted before a Governor is appointed, yet this should not dilute the primary responsibility of the Centre to appoint a competent and suitable person as Governor.[8]

Although one of the reasons to have a nominated Governor was to have an impartial head of the State, in practice, however, persons from political parties have been appointed Governors leading to stresses and strains between the Governor and the State Government as the Governor may belong to a party different from that of the State Government. For smooth sailing of the State Government, it may be advisable to have a non-political, non-party, man eminent in some walk of life as the State Governor. The Sarkaria Commission has suggested that Art. 155 should be amended so as to ensure effective consultation with the State Chief Minister in the Matter of appointment of the Governor.[9]

A citizen of India who has completed the age of 35 years is eligible to be appointed as the Governor [Art. 157]. Before entering upon his office, a Governor has to make and subscribe, in the presence of the Chief Justice of the State High Court, an oath or affirmation in the prescribed form. In the absence of the Chief Justice, the oath may be taken before the senior-most Judge of the High Court available at the time [Art. 159].

The Governor cannot be a member of a House of Parliament, or of the State Legislature, and if a member of a House, at the time of his appointment as the Governor, he has to vacate his seat in that House on the date on which he enters upon his office as Governor [Art. 158(1)].

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7. Arts. 355 and 356, *infra*, Ch. XIII.
8. *Report, Centre-State Relationship*, I. 285, Also see, *Lok Sabha Debates*, Nov. 16, 1967 and *Rajya Sabha Debates*, Nov. 20, 1967; *Report of the Administrative Reforms Commission*, 24.
9. *Report*, 124.

The Governor cannot hold any other office of profit [Art. 158(2)]. He is entitled to the free use of his official residence and also to such emoluments, allowances and privileges as Parliament may determine by law [Art. 158(3)]. The emoluments and allowances of a Governor cannot be reduced during his term of office [Art. 158(4)]. Where one person is appointed Governor of more than one State, his emoluments are allocated amongst the States in such proportion as the President may determine [Art. 158(3-A)].

(c) GOVERNOR'S PRIVILEGES

The Governor enjoys the same privileges as the President does under Art. 361 and he stands, in this respect, on the same footing as the President.[10]

Even where Governor's *bona fides* are questioned in the matter of exercise of his discretionary powers of appointment and dismissal of the Chief Minister, he cannot be called upon to enter his defence.[11] According to the Bombay High Court, "the Governor while taking decisions in his sole discretion, enjoys immunity under Article 361…"[12]

The Governor holds his office during the pleasure of the President under Art. 156. "Any *mala fide* actions of the Governor may, therefore, conceivably be gone into by the President."[13]

In *G. Vasantha Pai v. C.K. Ramaswamy,*[14] the Madras High Court has laid down that a combined reading of Arts. 154, 163 and 361(1) would show that the immunity against answerability to any Court is regarding functions exercised by the Governor qua-Governor and those functions in respect of which he acts on the advice of the Council of Ministers or in his discretion.

If the Governor appoints a person to a constitutional office who is not qualified for the purpose, the discretion of the Governor may not be challengeable because of Art. 361. But the authority of the appointee to hold the office can be challenged through *quo warranto.*[15] The fact that the Governor has made the appointment, does not give the appointee any higher right to hold the appointment. If the appointment is contrary to any constitutional provision, it will be struck down.[16]

(d) TENURE OF GOVERNOR

The basic rule is that a Governor holds his office during the pleasure of the President [Art. 156(1)], *i.e.*, as long as the Central Executive wants him in that office. Accordingly, the Central Executive can remove the Governor on any ground, as for example, bribery, corruption, violation of the Constitution, etc.

Subject to this overall condition, a Governor holds office for five years. He, however, continues to hold office even after the lapse of his term till his successor enters upon his office [Art. 156(2)]. Thus, a person once appointed a Governor continues to hold that office till his successor enters upon his office.[17]

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10. *Supra*, Ch. III, Sec. A(i)
11. For discussion on "Governor's Discretionary Powers", see, *infra.*
12. *Pratap Singh Raojirao Rane v. State of Goa,* AIR 1999 Bom 53.
13. *Ibid,* 66.
14. AIR 1978 Mad 342.
15. For discussion on *quo warranto,* see, *infra*, Ch. VIII, Sec. E.
16. *B.R. Kapur v. State of Tamil Nadu,* JT 2001(8) SC 40, at 66 : (2001) 7 SCC 231.
17. *K. Ballabh v. Commission of Inquiry,* AIR 1969 SC at 261.

The Governor may resign at any time by writing to the President [Art. 156(3)]. In a contingency for which the Constitution makes no provision, such as death of the Governor, the President may make such provision as he thinks fit for discharge of the functions of the Governor of a State [Art. 160]. Thus, the Chief Justice of the High Court can be appointed temporarily to discharge the functions of the Governor of the State.[18]

While there exist provisions in the Constitution for impeachment of the President, no such provisions exist concerning the Governor. The reason being that as he holds his office during the pleasure of the President, the Central Government can always recall him if the circumstances so require. A Governor is a political appointee, and when an appointment is made by the government on political considerations, it can also be terminated on political considerations.[19]

A glaring example of the Centre's absolute power to recall Governors was furnished in December, 1989, when the President, on the advice of the National Front Prime Minister V.P. Singh, asked all the Governors to tender their resignations, simply because they were appointed by the previous government belonging to another political party.

In *Surya Narain v. Union of India*,[20] the Rajasthan High Court upheld the dismissal of the Governor of Rajasthan (Raghukul Tilak) by the President.[21]

The Court pointed out that the Governor while discharging his functions works as a channel of communication and contact between the State and the Centre; the Governor is an appointee of the President and expressly holds office during his pleasure. The Governor thus has no security of tenure and no fixed term of office. Art. 156(3) is controlled by Art. 156(1). The President in exercise of his pleasure may cut short the five years term of the Governor. Consequently, the President can ask the Governor to resign or may terminate his term of office. The Governor may be removed by an expression of presidential displeasure before the normal term of five years and the presidential pleasure under Art. 156(1) is 'unjusticiable'.

It seems that sacking a State Governor is much easier than dismissing a Central Government employee. While both hold office during the pleasure of the President, a Government servant enjoys protection of Art. 311,[22] while a Governor enjoys no such protection.

The question of the status of a State Governor was again brought into focus by the summary dismissal of the Governor of Nagaland, Shri M.M. Thomas, on April 11, 1992. Earlier, the Governor had dissolved the State Legislative Assembly on the advice of the then Chief Minister retaining him as the care-taker Chief Minister till fresh elections could be held. The Governor had done so in exercise

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18. *Arun Kumar v. Union of India,* AIR 1982 Raj 67.

19. It has been held judicially that the appointment of a political appointee can be terminated without much formality as it is done purely on political considerations. See, *Om Narain Agarwal v. Nagar Palika, Shahjahanpur,* AIR 1993 SC 1440 : (1993) 2 SCC 242; *Dattaji Chirandas v. State of Gujarat,* AIR 1999 Guj 48.

20. AIR 1982 Raj. 1.

21. Raghukul Tilak assumed office as Governor on May 12, 1977, during the Janata regime. He was removed from office on Aug. 8, 1981, by the Indira Gandhi Government.

22. See, *infra,* Ch. XXXVI, for discussion on this topic.

of his power under Art. 174(2)(b)[23] without consulting the Centre before taking such an action. The Central Government did not approve of this action of the Governor. Accordingly, the Centre imposed the President's rule in the State under Art. 356 on April 2, and dismissed the Governor soon thereafter.[24] The Centre's justification for taking the action was that the Chief Minister had already lost his majority in the Legislature when he advised the Governor to dissolve the House.[25] The Opposition parties in Parliament described Centre's action as an attack on the federal character of the Constitution.[26]

The episode did bring to the forefront two issues of crucial importance to the Indian federalism:[27] (1) Is the Governor a constitutional authority in his own right or is he bound to seek the consent of the Centre before exercising the powers vested in him by the Constitution? (2) Use of Art. 356 in a State.

On the first question, theoretically speaking, as per the constitutional provisions, the Governor should be entitled to decide in his own judgment whether the powers vested in him by the Constitution should be exercised or not at a particular moment. Theoretically speaking, it should not be necessary for him to seek the Centre's consent to his proposed exercise of any such power. Therefore, in theory, in the instant case, the Governor may not have done anything wrong or improper in exercising his power under Art. 174 and dissolving the House. But, then, hitherto, the practice has developed in a different manner. Governors rarely act in their own judgment independently of the Centre's view. They usually act either at the behest, or with the consent, express or implied, of the Centre.[28]

This practice cannot be regarded as being in conformity with constitutional rectitude. Even politically this practice is not sound because the Central and State Governments may belong to different political parties and the decision of the Central Government in such a situation may have political overtones. Therefore, it will be best to leave the Governor who is the man on the spot free to decide as to how to exercise his constitutional powers as and when the situation arises.

On the other hand, in *Hargovind Pant v. Raghukul Tilak*,[29] the Supreme Court has ruled that the office of the Governor is not an employment under the Government of India, and so it does not fall within the prohibition of Art. 319(d).[30] Therefore, a member of the State Public Service Commission can be appointed as the Governor. The Court adduced the following reasons for this view : an employment

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23. *Infra,* Sec. C(b).
24. For discussion on Art. 356, See, *infra,* Ch. XIII.
25. On dissolution of a House, see, *supra*; Ch. II, Sec. I(c).
26. In October, 1980, the Centre dismissed the Tamil Nadu Governor, Prabhudas Patwari. This shows that the Prime Minister can use the President's pleasure under Art. 156(1) to dismiss a Governor from his office for political reasons without assigning any cause. See ***The Statesman,*** dated 31-10-1980.
27. For discussion on Federalism, see, *infra*, Chs. X-XVI.
28. In 1971, the Committee of Governors appointed by President Giri stated in its report that "the Governor as Head of State, has his functions laid down in the Constitution itself, and is in no sense an agent of the President… In the framework of the Constitution as it is conceived there is no power vested in any authority to issue any directions to the Governor".
This may be the formal position but, in practice, this assertion does not accord with the facts mentioned above.
29. AIR 1979 SC 1109.
30. *Infra*, Ch. XXXVI, Sec. K.
This provision prohibits appointment of a member of a Public Service Commission to any post under the Central or State Government.

can be said to be under the Central Government if the holder or the incumbent is under the control of the Central Government *vis-a-vis* such employment. The office of the Governor does not fall under this description. The office of the Governor is not an employment under the Government of India; the Governor occupies a high constitutional office with important constitutional functions and duties; he is not an employee of the Government of India; he is not subordinate or subservient or under the control of the Government of India, nor is he amenable to its directions, nor is he accountable to it for the manner in which he carries his functions and duties. According to the Court, Governor's "is an independent constitutional office which is not subject to the control of the Government of India".

The Supreme Court has observed further in this connection:

> "He is constitutionally the head of the State in whom is vested the executive power of the State and without whose assent there can be no legislation in exercise of the legislative power of the State."

What the Supreme Court has stated above is only the theoretical or the formal position of the Governor. In practice, things appear to be different because the Governor is appointed by the Centre, holds his office subject to its pleasure and can be dismissed by it at any time. This, in effect, is bound to compromise the Governor's independence of action. A Governor can adopt a stance not in accord with the wishes of the Centre only at his own risk.

Recently, the Patna High Court has explained the position of the Governor.[31] Reading Arts. 156 and 159(1) together, the Court has ruled that the five year term of a Governor is not a fixed term but it is subject to the "pleasure of the President". Therefore, a Governor can be shifted from one State to another even during the term of five years. The Court has observed in this regard: [32]

> "Thus, under Clause (3) of Art. 156 of the Constitution, it is apparent that five years term is subject to the exercise of pleasure by the President and the President of India is the best Judge for exercise of his pleasure to decide as to when and in what circumstances the term of a sitting Governor of a State should be reduced, or, instead of reducing the term, he may be transferred from one State to another or he may be asked to vacate the office."

The Court has also ruled that the President is not bound to give reasons for exercising his pleasure one way or other. The office of the Governor is not an employment under the Government of India. A Government servant cannot be dismissed without being given a right of being heard, the Governor can be removed from office under Art. 156(1) without being given a hearing for the President is the best Judge of when to withdraw his pleasure from the office of the Governor. The maxim of *audi alteram partem* does not apply to a Governor.[33] This means that the Governor need not be given a hearing, unlike a government servant, before being removed from his office. It remains, however, a moot point whether the State Legislature or Parliament can pass a resolution requesting the President to recall the Governor and what will be the operative force, if any, of such a resolution.

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31. *Indian Union Muslim League v. Union of India,* AIR 1998 Pat. 156.
32. *Ibid,* 160.
33. For discussion on this maxim, see, M.P. JAIN, *A TREATISE OF ADMINISTRATIVE LAW, I,* Chs. IX and X. Also see, M.P. JAIN, *CASES & MATERIALS ON INDIAN ADMINISTRATIVE LAW,* Ch. VIII and IX.

Recently, the Central Government recalled the Governor of Tamil Nadu [Fathima Beevi, an ex-Judge of the Supreme Court], for having appointed Jayalalitha as the Chief Minister of the State under Art. 164(4) even though she was not qualified at the time to contest an election for the State Legislative Assembly. Later, the Supreme Court ruled that the appointment was unconstitutional.[34]

(ii) COUNCIL OF MINISTERS

On lines similar to the Centre, each State has a Council of Ministers, with the Chief Minister at its head.[35] The provision regarding the Council of Ministers is mandatory and the Governor cannot dispense with this body at any time [Art. 163(1)]. This proposition has now been reiterated by the Supreme Court which has held that the Council of Ministers continues to stay in office even when the Legislature is dissolved by the Governor.[36]

The function of the Council of Ministers is "to aid and advise the Governor in the exercise of his functions except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion [Art. 163(1)].[37] The phrase "by or under" the Constitution means that the need to exercise discretionary power may arise from any express provision of the Constitution or by necessary implication.[38]

It has been judicially held that the Council of Ministers comes into existence to aid and advise the Governor as envisaged by Art. 163(1) as soon as the Chief Minister is appointed and sworn in by the Governor. More Ministers can be appointed in course of time. But, till then, the Chief Minister alone acts as the Council of Ministers to aid and advise the Governor. The Constitution does not prescribe any minimum or maximum number of Ministers as members of the Council of Ministers. Accordingly, there is nothing in the Constitution to prevent the Chief Minister from aiding and advising the Governor all by himself pending appointment of other Ministers and allocation of business among them. "The formation of the Council of Ministers is complete with the swearing in of the Chief Minister."[39]

(a) APPOINTMENT OF CHIEF MINISTER AND OTHER MINISTERS

Ordinarily, a Minister should be a member of the State Legislature. A basic feature of the parliamentary system of government is that all Ministers ought to be members of a House of State Legislature. This ensures accountability of the Council of Ministers to the Legislature.[40] However, a non-member may also be appointed as a Minister, but he would cease to be a Minister if he does not become a member of the State Legislature within six months [Art. 164(4)].

Under Art. 177, a Minister has the right to speak in, and participate in the proceedings of, a House of the State Legislature. This means that a Minister, even

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34. For discussion on this case, see, below.
35. See, *supra*, Ch. III, Sec. A(ii), under "Council of Ministers".
36. *K.N. Rajgopal v. M. Karunanidhi*, AIR 1971 SC 1551 : (1972) 4 SCC 733.
37. For a full discussion on this provision, see, *infra*, Sec. C, under "Governor's Discretionary Power".
38. *Samsher Singh v. State of Punjab*, AIR 1974 SC 2192 : (1974) 2 SCC 831.
39. *Dattaji Chirandas v. State of Gujarat*, AIR 1999 Guj 48, 57.
40. On this question, see, below.

though not a member of a House can participate in its proceedings but cannot vote.

Under this provision, a person who is not a member of any House may even be appointed as the Chief Minister[41] as the term 'Minister' in Art. 164(4) covers the "Chief Minister" as well. Therefore, there have been cases when non-members have been appointed as Chief Ministers. For example, Kamraj Nadar was appointed as the Chief Minister of Madras in 1954 although he was not a member of the State Legislature.

A few judicial pronouncements on the scope of Art. 164(4) may be taken note of here.

Shri T.N. Singh who was not a member of either House of the State Legislature was appointed the Chief Minister of Uttar Pradesh. The High Court rejected the challenge to his appointment in view of Art. 164(4) of the Constitution and the Supreme Court upheld the High Court. A non-member can be appointed as Chief Minister for a period of six months.[42]

A question of crucial significance has been considered by the Supreme Court in *S.R. Chaudhari v. State of Punjab.*[43] Shri Tej Prakash Singh was appointed as a Minister in the State of Punjab on the advice of Chief Minister, Sardar Harcharan Singh Barar, on 9-9-1995. At the time of his appointment as a Minister, he was not a member of the State Legislature. As he failed to get elected to the State Legislature, he resigned from the Council of Ministers after 6 months on 8-3-1996. This was in accordance with Art. 164(4). During the term of the same Legislature, there was a change in the office of the Chief Minister. The new Chief Minister, again appointed Tej Prakash Singh as a Minister on 23-11-96. He was a not a member of the Legislature at the time. A petition was filed for a writ of *quo warranto* against the Minister. The High Court dismissed the petition *in limine*, but, on appeal, the Supreme Court quashed the Minister's appointment. The Supreme Court stated that Arts. 164(1) and 164(4) should be so construed as to "further the principles of a representative and responsible Government." The Court refused to interpret Art. 164 in a literal manner on the "plain language of the Article". Instead the Court argued for a "purposive interpretation of the provision[44].

Referring to Art. 164, the Court observed that its scheme clearly suggests that ideally, every Minister must be a member of the Legislature at the time of his appointment. In an exceptional case, a non-member may remain a Minister for six months. Such a person must get elected to the House during the period of six months. If he fails to do so, he must cease to be a Minister. He cannot be re-appointed thereafter during the life time of the same Legislature by the same or even a different Chief Minister. The Court has observed:

> "The "privilege" of continuing as a Minister for six months without being an elected member is only a one time slot for the individual concerned during the

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41. For criticism of this practice, see, 13 *JILI* 376 (1971).

42. *Harsharan Verma v. Tribhuvan Narain Singh*, AIR 1971 SC 1331 : (1971) 1 SCC 616.
The Court reiterated this ruling in *Harsharan Verma v. State of Uttar Pradesh*, AIR 1985 SC 282 : (1985) 2 SCC 48.

43. AIR 2001 SC 2707 : (2001) 7 SCC 126.

44. *Ibid* at 2717.
Also see, *infra*, Ch. XL.

> term of the concerned Legislative Assembly. It exhausts itself if the individual is unable to get himself elected within the period of grace of six consecutive months... It is not permissible for different Chief Ministers, to appoint the same individual as a Minister, without him getting elected, during the term of the same Assembly... The change of a Chief Minister, during the term of the same Assembly would, therefore, be of no consequence so far as the individual concerned."[45]

To appoint a person repeatedly as a Minister while he is not a member of the Legislature would amount to subversion of the constitutional and democratic process. The Court further observed criticising the appointment of a non-member repeatedly as a Minister:[46]

> "By permitting a non-legislator Minister to be re-appointed without getting elected within the period prescribed by Art. 164(4), would amount to ignoring the electorate in having its say as to who should represent it—a position which is wholly unacceptable. The seductive temptation to cling to office regardless of constitutional restraint must be totally eschewed. Will of the people cannot be permitted to be subordinated to political expediency of the Prime Minister or the Chief Minister as the case may be, to have in his cabinet a non-legislator as a Minister for an indefinite period by repeated reappointments without the individual seeking popular mandate of the electorate."

Accordingly, the Supreme Court has expressed its "considered opinion" that—

> "It would be subverting the Constitution to permit an individual, who is not a member of the Legislature, to be appointed a Minister repeatedly for a term of "six consecutive months", without him getting elected in the meanwhile. The practice would be clearly derogatory to the constitutional scheme, improper, undemocratic and invalid."[47]

The Supreme Court has made another momentous pronouncement in *B.R. Kapur v. State of Tamil Nadu*[48] in relation to Art. 164(4). The matter arose in the following factual context. The nomination paper of Jayalalitha for election to the State Legislative Assembly was rejected. She had been convicted for certain offences under the Prevention of Corruption Act and the Indian Penal Code and sentenced to three years'rigorous imprisonment. She had appealed to the High Court against her conviction; the High Court suspended her sentence but not her conviction pending decision on her appeal. Accordingly, she was disqualified to contest an election to the House. As a result of the election, her party [AIDMK] won by a big majority and elected her as the leader. The Governor of Tamil Nadu appointed her as the Chief Minister under Art. 164(4) as she was not a member of the State Legislature at this time. Her appointment as the CM was challenged and the Supreme Court declared the same as null and void.

The crucial question was whether a person who is disqualified to be a member of the State Legislature could be appointed as a Minister or the Chief Minister under Art. 164(4). The Supreme Court argued in the negative. The Court has argued that it is implicit in Art. 164(4) [read along with Arts. 164(1) and (2)] that a Minister who is not a member of the Legislature must seek election to the Legislature and secure a seat therein, within six months of his appointment. If he fails

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45. *Ibid*, at 2718.
46. *Ibid*, at 2719.
47. *Ibid*, at 2720.
48. JT 2001 (8) SC 40 : (2001) 7 SCC 231.

to do so, he ceases to be a Minister. It, therefore, follows from this that a person appointed as a Minister should be one who can stand for election to the Legislature and satisfy the requirement of Art. 164(4). This means that he should be one who satisfies the qualification for membership of the State Legislature [Art. 173] and is not disqualified from seeking that membership by reason of any provision in Art. 191 on the date of his appointment as a Minister.

The idea underlying Art. 164(4) is that due to political exigencies, or to avail the services of an expert in some field, a person may have to be appointed as a Minister without his being a member of the State Legislature at the time of his appointment. He has 6 months for this purpose. This means that he should be a person who, when he is appointed, is not debarred from being a member of the Legislature. This means that he should be qualified to stand for the election to the Legislature and is not disqualified to do so. Art. 164(4) is not intended for the induction into the Council of Ministers of someone who is ineligible to stand for election to the State Legislature.

The Court has stated that it would be "unreasonable and anomalous to conclude that a minister who is a member of the Legislature is required to meet the constitutional standards of qualification and disqualification but that a Minister who is not a member of the Legislature need not." "Logically, the standards expected of a Minister who is not a member should be the same as, if not greater than, those required of a member".

If the Governor appoints a disqualified person to a constitutional office, the discretion of the Governor may not be challengeable because of Art. 361[49], but that does not confer any immunity on the appointee himself. The qualification of the appointee to hold the office can be challenged in proceedings for *quo warranto*.[50] If the appointment is contrary to any constitutional provision, it can be quashed by the Court.

The Supreme Court rejected the argument that Jayalalitha had people's mandate to become the Chief Minister of the State as is evidenced by her party having won at the election. The Court's reply to this argument is—

> "The Constitution prevails over the will of the people as expressed through the majority party. The will of the people as expressed through the majority party prevails only if it is in accord with the Constitution."[51]

The Chief Minister is formally appointed by the Governor [Art. 164(1)].[52]

Although under Art. 164(1), the Governor appoints the Chief Minister, the Constitution is completely silent as to the person who should be appointed as such. The basic rule followed for the purpose is that the leader of the majority party in the State Legislative Assembly should be invited by the Governor to form the Government. When no party has a clear-cut majority in the legislature, the appointment of the Chief Minister becomes problematic. A question has also been raised from time to time whether the appointment of the Chief Minister by the Governor is judicially reviewable. These questions have been discussed in

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49. *Supra*, Ch. III, Sec. A(i); Sec. A(i)(c).
50. *Infra*, Ch. VIII; see, *Kumar Padma Prasad v. Union of India*, *supra*, Ch. IV.
51. JT 2001 (8) SC at 66.
52. See, *supra*, Ch. III, Sec. A(iii)(b), on the appointment of the Prime Minister.

some detail later in this Chapter under the heading "Governor's Discretionary Powers".[53]

There is no convention to the effect that only a member of the Legislative Assembly should be appointed as the Chief Minister. Many a time, members of Lgislative Councils have been appointed as Chief Ministers, for example, C. Rajagopalachari in Madras and Morarji Desai in Bombay in 1952; C.B. Gupta in U.P. in 1960 and Mandal in Bihar in 1968. It is, however, realised that the Chief Minister should properly belong to the Lower House and so a Chief Minister from the Upper House seeks the earliest opportunity to get elected to the Lower House.

At times, while appointing the Chief Minister, the Governor imposes the condition that he should seek a vote of confidence from the State Assembly within a stipulated period. There is no specific provision in the Constitution enabling the Governor to require the Chief Minister to prove his majority on the floor of the House. The question has been raised whether in the absence of any such constitutional provision, can the Governor impose such a condition on the C.M.? The Patna High Court has ruled that the Governor can impose such a condition in his discretion. The underlying idea is to ensure that there is in office a Chief Minister who enjoys the confidence of the majority in the House. The principle of collective responsibility envisages that the Council of Ministers enjoys majority support in the House. When it is doubtful whether the Chief Minister enjoys majority support in the House or not, the Governor can call on him to seek a vote of confidence from the House. The Constitution specifically provides neither for a vote of confidence nor for a vote of no-confidence for or against the government in the House. But it would be preposterous to suggest that there can be no such vote because the Constitution is silent on the point. The entire constitutional scheme would collapse if Art. 164 is interpreted in such a manner.[54]

While the Chief Minister is appointed by the Governor in his discretion, other Ministers are appointed by the Governor on the advice of the Chief Minister. Therefore, in effect, the Ministers are the appointees of the Chief Minister [Art. 164(1)], though he does not have an absolute discretion in the matter as he has to keep party consideration in view.

The Congress Chief Ministers function subject to the supervision of the High Command of the Party which, to some extent, does compromise their independence of action. Similarly, the B.J.P. Chief Ministers function under the control of the Party's central leadership. This, of course, is an extra-constitutional practice.

In the States of Bihar, Madhya Pradesh and Orissa, there has to be a Minister in charge of tribal welfare, who may also be put in charge of the welfare of the Scheduled Castes and Backward Classes or any other work [Proviso to Art. 164(1)].[55]

The salaries and allowances of the Ministers are determined by the State Legislature by law [Art. 164(5)].[56]

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53. *Infra*, Sec. C.
54. *Sapru, Jayakar Motilal CR Dass v. Union of India,* AIR 1999 Pat. 221.
55. See, *infra,* Ch. XXXV.
56. Until so determined, they are to be as specified in the Second Schedule to the Constitution.

The provisions defining the tenure of the Council of Ministers in the States are parallel to those at the Centre. Thus, (i) the Council of Ministers in a State is collectively responsible to the Legislative Assembly [Art. 164(2)],[57] and not to the Legislative Council and (ii) the Ministers hold office during the pleasure of the Governor [Art. 164(1)].[58] The concept of the Governor's pleasure is discussed below. The Chief Minister can invoke the Governor's pleasure to dismiss an unwanted Minister.[59]

Article 177, noted above, which enables a Minister to participate in the proceedings of a House even if he is not a member thereof is designed to strengthen the principle of ministerial accountability to the Legislative Assembly. Ministerial responsibility means that the minister is able to answer in the House for every act of administration. The concept of ministerial responsibility ensures that the government is in line with the popular opinion.

Besides collective responsibility of the Cabinet, a Minister also has his individual responsibility. This matter has already been discussed earlier.[60]

(b) OATH OF OFFICE AND MINISTERS

Before a Minister enters upon his office, the Governor administers to him the prescribed oaths of office and secrecy [Art. 164(3)]. What happens if a Minister breaks the oath taken by him at the time of his induction into the office of the Minister?

A Minister (Mr. Balakrishna Pillai) in the Kerala Government was reported to have said at a public meeting that people should resort to terrorism and wage a war against the Central Government on the Punjab model to achieve their objectives. A citizen of India filed a petition in the High Court for issue of *quo warranto*[61] preventing the Minister from exercising the authority of his office on the ground that his speech amounted to a breach of the oath taken by him at the time of assuming office as a Minister and he thus forfeited his right to continue as a Minister. The Minister resigned his office. The Court however dismissed the petition.

In *K.C. Chandy v. R. Balakrishna*,[62] the Kerala High Court emphasized that when a Minister commits breach of his oath of office, it is for the Governor or the Chief Minister to decide whether he should remain in office. The Court said that it would be wrong to assume that no sanctity is attached to the oath taken before assumption of office. No Minister could enter upon his office without taking oaths of office and secrecy. The constitutional requirement of taking such an oath is not to be treated merely as another moral obligation. The oath of office is the prescription of fundamental code of conduct in the discharge of the

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57. For discussion on the concept of 'Collective Responsibility', see, *supra*, Ch. III, Sec. B(d).
58. *Supra*, Ch. III, Sec. A(iii)(d).
59. There have been a number of cases of dismissal of the Ministers in the States. For example, in 1964, the Punjab Governor dismissed a Minister on the Chief Minister's advice because he had misused his official influence.
On Nov. 18, 1973, the Governor of Himachal Pradesh dismissed a Minister on the advice of the Chief Minister : *The Times of India*, Nov. 19, 1973, p. 1.
60. *Supra*, Ch. III, Sec. B(e).
61. For discusison on *quo warranto*, see, *infra*, Ch. VIII, Sec. E.
62. AIR 1986 Ker 116.
Also, *K.Sukumaran v. Union of India*, AIR 1986 Ker. 122.

duties of the high office. Breach of this fundamental conduct of good behaviour may result in the deprivation of the office he holds. It is for the Governor or the Chief Minister to inquire whether there has been any breach of oath by a Minister. This is a matter to be decided under Art. 164(1) because the Minister holds his office subject to the pleasure of the Governor or the Chief Minister. It is not for a Court to embark on such an inquiry. The High Court also pointed out that breach of oath of office taken by a Minister is not a disqualification constitutionally listed under Art. 191 of the Constitution or specified under any law made by Parliament.[63]

After sometime, Pillai was reinducted as a Minister and again a writ petition was filed challenging his appointment. The writ petition was again dismissed by the High Court. The Court maintained that the question whether the Minister committed breach of oath could not be examined by it as "these are not matters which are open to judicial review. The intention of the founding fathers of the Constitution was to leave such matters to the good sense of the Chief Minister and the legislature with the general public holding a watching brief." Since the office of the Minister is held at the pleasure of the Governor or the Chief Minister "termination at their will may be the possible outcome of a breach of oath". Matters which are entirely within the realm of the "pleasure and unfettered discretion of the appointing authority" are not amenable to the jurisdiction of the High Court under Art. 226.[64]

To the same effect is the ruling of the Punjab and Haryana High Court in *Hardwari Lal v. Ch. Bhajan Lal*.[65] The Court has ruled that breach of oath by a Chief Minister does not give rise to any disqualification under Arts. 191 and 192. Similarly, breach of oath by him does not disqualify him from holding that office. The Constitution makes no provision as regards the consequences arising from breach of oath by a Minister. The Chief Minister is appointed by the Governor and he holds office during his pleasure. Arts. 191 and 192 exhaustively deal with and furnish a composite machinery regarding disqualification of a member of the Legislature. Therefore, a Court cannot issue any writ to remove a Chief Minister from office on the ground of breach of oath by him. It is for the Governor as the appointing authority to take cognisance of any such matter and not for the Court to terminate the tenure of a Minister on any such ground.

The Andhra Pradesh High Court has refused to issue *quo warranto*[66] to remove the Chief Minister from office because various allegations had been made against him. Power to terminate the tenure of office vests solely in the Governor.[67]

A code of conduct for Ministers (both Central and State) has been issued by the Government of India, Ministry of Home Affairs. The Government of Andhra Pradesh has also issued a code of conduct for Ministers. The High Court has ruled that these codes are not statutory in nature. Though they lay down rules of

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63. For disqualifications under Art. 191, see, *supra*, Chs. II and VI.

64. *Sukumaran v. Union of India*, AIR 1987 Ker. 212.
For discussion on Art. 226, see, *infra*, Ch. VIII, Sec. D.

65. AIR 1993 P & H 3.

66. See, *infra*, Ch. VIII, Sec. E.

67. *D. Satyanarayana v. N.T. Rama Rao*, AIR 1988 AP 62. Also see, *Ramachandran v. M.G. Ramachandran*, AIR 1987 Mad 207.
On this point see, *infra*, under "Governor's Discretionary Powers".

conduct which the Ministers have to observe, they are in the nature of guidelines and, therefore, the courts cannot enforce these codes against any Minister by issuing any writ.[68]

(c) INTERACTION BETWEEN THE EXECUTIVE AND THE LEGISLATURE

The pattern of interaction between the Executive and the Legislature in a State is similar to that existing at the Centre.[69] A few broad features of this may be recapitulated here.

The Ministers are members of the Legislature and responsible to the Legislative Assembly.[70] They stay in office so long as they are able to command the confidence of the majority in that House.

The Legislature has ample opportunities of criticising and shaping the policies of the Executive. It is a recurring process and opportunity is taken in this respect *inter alia* at the time of legislation, discussion of the Governor's speech and his messages and consideration of demands.[71]

Further, the Legislature is entitled to fix the emoluments of the Ministers.[72] The ordinance-making power of the Executive is also subject to legislative control.[73]

As at the Centre so in the States, the Executive also has ample opportunities to control the Legislature. It summons and prorogues the Houses and may dissolve the Assembly.[74] It initiates practically all legislation and enjoys a veto power over legislation.[75] It plays a leading part in discussion on financial matters in the Legislature and initiates all demands.[76]

B. WORKING OF THE EXECUTIVE

(a) CONDUCT OF GOVERNMENT BUSINESS

Arts. 154 and 166 regulate the working of the State Executive. Art. 166 relates to the conduct of business of the State Government and is couched in terms similar to those in Art. 77 and the same principles govern the interpretation of Art. 166.[77] The State being the author of a decision, cannot resile or go back on that decision merely because it was the order of the previous government. If the order of that government was not acceptable to the newly elected Government, it was open to it to withdraw or rescind the same formally. It is not open to the State to contend that the said decision did not bind it.[78]

The executive power of the State is vested in the Governor who exercises it either directly or through officers subordinate to him in accordance with the Con-

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68. *Vidadala Harinadhababu v. N.T. Rama Rao,* AIR 1990 AP 898.
69. See, *Supra,* Ch. III, Sec. C.
70. See, *supra,*
71. *Supra,* Ch. VI.
72. *Supra,* footnote 40.
73. Art. 213; *infra.*
74. *Supra,* Ch. VI, Sec. C.
75. *Supra,* Ch. VI, Sec. F(i), under "Legislation"
76. *Supra,* Ch. VI, Sec. F(ii), under "Financial Procedure".
77. *Supra,* Ch. III, Sec. B.
78. *State of Bihar v. Bihar Rajya MSESKK Mahasangh,* (2005) 9 SCC 129 : AIR 2005 SC 1605.

stitution [Art. 154(1)]. Parliament or the State Legislature may confer by law functions on any authority subordinate to the Governor [Art. 154(2)(b)].

The Governor is empowered to make rules for the more convenient transaction of the business of the State Government [Art. 166(3)]. Under these Rules, known as the Rules of Business, the government business is divided amongst the Ministers and specific functions are allotted to different Ministries.[79] Each Ministry can, therefore, issue orders or notifications in respect of functions which have been allocated to it under the Rules of Business.

All executive action of the State Government is expressed to be taken in the name of the Governor [Art. 166(1)]. This clause applies to cases where the executive action has to be expressed in the shape of a formal order or notification. It prescribes the mode in which an executive action has to be expressed. Orders and instruments made and executed in the Governor's name are to be authenticated in such manner as may be specified in the rules made by him. The validity of an instrument so authenticated cannot be called into question on the ground that it is not an order or instrument made or executed by the Governor [Art. 166(2)].

These provisions are synonymous with Arts. 53 and 77, discussed earlier, in relation to the working of the Central Executive.[80] Consequently, the earlier discussion can be adopted here. Common principles apply to the Central and State Executive in this regard.[81] The discussion here will apply *mutatis mutandis* to the Central Executive as well.

The Supreme Court has observed in *Barsay*[82] that Art. 77(1) is only directory. Similarly, Art. 166(1) is also directory in nature. Any non-compliance therewith, does not make the order invalid. Even if an order is not issued in strict compliance with the provisions of Art. 166(1), i.e. the words "by order", or "in the name of the Governor" are absent therein, it can be established by evidence aliunde that the impugned order was made by the appropriate authority. If an order is issued in the name of the Governor, and is duly authenticated in the manner prescribed in Art. 166(2), there is an irrebuttable presumption that the order or instrument is made or executed by the Governor. Any non-compliance with Art. 166(2) does not invalidate the order, but it precludes the drawing of any such irrebuttable presumption. This does not prevent any one from proving by other evidence that as a matter of fact the order has been made by the appropriate authority.[83]

No particular formula of words are required for compliance. Clause (1) does not prescribe how an executive action of the Government is to be performed; it only prescribes the mode in which such act is to be expressed. While clause (1) is in relation to the mode of expression, clause (2) lays down the ways in which the

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79. A typical Rule of Business runs as follows:
"The Governor shall, on the advice of the Chief Minister, allocate amongst the Ministers and Ministers of State the business of Government by assigning one or more departments to the charge of a Minister or a Minister of State".

80. *Supra*, Ch. III, Sec. E.

81. *Supra*, Ch. III, Sec. B.

82. *Major E.G. Barsay v. State of Bombay*, AIR 1961 SC 1762 at 1776 : 1962 (2) SCR 195.
Also, *Dattatraya Moreshwar v. State of Bombay*, AIR 1952 SC 181 : 1952 SCR 612, *L.G. Chaudhari v. Secy. L.S.G. Dept., Govt. of Bihar*, AIR 1980 SC 383 : 1980 Supp SCC 374. Cf an order in exercise of quasi-judicial power. *State of Maharashtra v. Basantilal*, (2003) 10 SCC 620 : AIR 2003 SC 4688.

83. *M/s. Laxmi Udyog Rock Cement Pvt. Ltd. v. State of Orissa*, AIR 2001 Ori. 51.

order is to be authenticated.[84] When there was no government order to pay compensation to terminated employee in terms of Art. 166, no action can be regarded as that of the State since Council of Ministers are advisers and, as Head of State, Governor is to act with aid or advice of Council of Ministers. Therefore, till advice is accepted by Governor, views of Council of Ministers do not get crystallized into action of State.[85]

An order initiating departmental proceedings under the M.P. Civil Services Pension Rules was executed in the name of the Governor and was duly authenticated by the signatures of the Under Secretary to the Government of Madhya Pradesh. The Supreme Court ruled in *State of Madhya Pradesh v. Yashwant Trimbak*,[86] that the order could not be questioned in any Court on the ground that it was not made or executed by the Governor. The bar to judicial enquiry with regard to the validity of such order engrafted in Art. 166(2) would be attracted. "The signature of the concerned Secretary or Under Secretary who is authorised under the authentication rules to sign the document signifies the consent of the Governor as well as the acceptance of the advice rendered by the concerned Minister".

In an earlier case, *State of Bihar v. Rani Sonabati Kumari*,[87] considering the question with reference to a notification issued under s. 3(1) of the Bihar Land Reform Act, 1950, the Supreme Court held:

> "The order of Government in the present case is expressed to be made "in the name of the Governor" and is authenticated as prescribed by Art. 166(2), and consequently the validity of "the order or instrument cannot be called in question on the ground that it is not an order or instrument made or executed by the Governor".

Even when an order is issued by the Secretary to the Government without indicating that it is by order of the Governor, the immunity in Art. 166(2) would be available if it appears from other material that in fact the decision was taken by the Government.[88]

In *Yashwant Trimbak*,[89] there was another point also involved. According to the Pension Rules, departmental proceedings against a retired employee could not be instituted without the "sanction of the Governor". It was argued that the rule envisaged sanction of the Governor himself but the Court rejected the argument. The Court argued that the order of sanction for prosecution of a retired government servant is an executive act of the government. Under Art. 166(3), the Governor may frame rules of business and allocate all his functions to different Ministers except those functions which the Governor discharges in his own discretion. The expression 'business of the Government of the State" in Art. 166(3) comprises functions which the Governor is to exercise with the aid and advice of the Council of Ministers including the functions which the Governor has to exer-

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84. *J. P. Bansal v. State of Rajasthan* (2003) 5 SCC 134 : AIR 2003 SC 1405.
85. *Ibid.*
86. AIR 1996 SC 765 : 1996 (2) SCC 305.
Also, *Gulabrao Keshavrao Patil v. State of Gujarat*, (1996) 2 SCC 26; *Mohansingh Tanwani v. State of Maharashtra*, AIR 2002 Bom. 39.
87. AIR 1961 SC 221 : 1961 (1) SCR 728.
88. Also see, *Municipal Corp. of Delhi v. Birla Cotton Spinning & Weaving Mills*, AIR 1968 SC 1232 : 1968 (3) SCR 251.
89. *Supra*, footnote 86.

cise in his own subjective satisfaction as well as statutory functions of the State Government. Therefore, excepting the matters to be discharged by the Governor in his discretion, "the personal satisfaction of the Governor is not required and any function may be allocated to Ministers". Therefore, the decision taken by the Council of Ministers (to whom the function has been allocated under the Rules of Business) to sanction prosecution of the retired government servant is valid and does not suffer from any legal infirmity.[90]

The Supreme Court has observed in *Trimbak*:[91]

> "Therefore, excepting the matters with respect to which the Governor is required by or under the Constitution to act in his discretion, the personal satisfaction of the Governor is not required and any function may be allocated to Ministers."

In *Shamrao v. State of Maharashtra*,[92] the Supreme Court has ruled that the statutory functions and duties vested in the State Government may be allocated to Ministers by the Rules of Business framed under Art. 166(3) of the Constitution.

Rules of authentication prescribe the persons who can sign the orders of the government. When an order is expressed in the name of the Governor and is authenticated by an officer authorised to do so under the Rules, it becomes an order of the government and cannot then be called in question on the ground that it was not an order made or executed by the Governor.

The Courts have held that the provisions regarding the form [Art. 166(1)] are directory and not mandatory; even a substantial, and not necessarily a strict, compliance with these requirements would suffice to confer the immunity on the order.[93] Every executive decision need not be expressed in the form laid down in Art. 166(1). An order not conforming with the required form would not be *prima facie* invalid. Though it might not claim immunity from being challenged on the ground that it was not made by the Governor, yet it is possible to uphold its validity if extraneous evidence shows that the decision was taken by a competent authorityunder the Rules of Business.[94] Thus, an order confirming preventive detention made in the name of the Government, but signed on behalf of the Secretary to the Government of Bombay, has been held valid.[95] The Court concluded that there was ample evidence to show that the decision had in fact been taken by the appropriate authority, and that the infirmity in the form of authentication did not vitiate the order. It only meant that the presumption could not be availed of by the State.

In *State of Bombay v. Purushottam Jog Naik*,[96] in the body of the order in question, the 'satisfaction' was shown to be that of the Government of Bombay; at the bottom of the order the 'Secretary to the Government of Bombay, Home Department' signed it under the words "By order of the Governor of Bombay". It

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90. Also see, *Samsher Singh v. State of Punjab,* AIR 1974 SC 2192 : (1974) 2 SCC 831; *supra,* Ch. III, Sec. B.
91. AIR 1996 SC 765, at 769.
92. AIR 1964 SC 1128 : 1964 (6) SCR 446.
93. *Anand Kumar v. State of U.P.,* AIR 1966 All 545.
94. *Chitralekha v. State of Mysore,* AIR 1964 SC 1823 : 1964 (6) SCR 368*; Relly Susan Mathew v. Controller of Entrance Exams., Trivandrum,* AIR 1997 Ker 218, 223.
95. *Dattatraya v. State of Bombay,* AIR 1952 SC 181 : 1952 SCR 612.
Also see, *State of Rajasthan v. Spripal Jain,* AIR 1963 SC 1323 : 1964 (1) SCR 475.
96. AIR 1952 SC 317 : 1952 SCR 674.

was argued that the order was defective as it was not expressed to be in the name of the Governor within the meaning of Art. 166(1) of the Constitution and so was not protected by Art. 166(2). Rejecting the contention, the Supreme Court said:

> "In our opinion, the Constitution does not require a magic incantation which can only be expressed in a set formula of words. What we have to see is whether the substance of the requirements is there".

In *P. Joseph John v. Travancore-Cochin*,[1] a show-cause notice issued under Art. 311 was impugned on the ground that it was not in accordance with Art. 166. The notice was issued on behalf of the Government and was signed by the Chief Secretary to the Government. Under the Rules of Business, the Chief Secretary was in charge of the portfolio of "Service and Appointments" at the Secretariat level in the State. The Court ruled that the said notice was issued in substantial compliance with the directory provisions of Art. 166.

Mere notings in the file by the officers and the Minister which were not communicated to the person concerned, cannot be held to be an order of the government. For an order to be effective it must be expressed in the name of the Governor [Art. 166(1)], authenticated in the manner provided in Art. 166(2), and communicated to the person concerned.[2] Inter-departmental communications also cannot be regarded as orders of the government.[3]

In *Chitralekha v. State of Mysore*,[4] an order of the Mysore Government expressed through a letter from the Under Secretary, Mysore Government, though not conforming with Art. 166, was not quashed by the Supreme Court as it was not denied by any one that it was an order made by the Government. An order of the Government withdrawing certain amenities from the employees issued in the form of a letter signed by the Under Secretary to the Government was held to be a valid order under Art. 166 as the decision in question was taken by the Minister of the Department concerned who was empowered under the Rules of Business to take such decision.[5]

Merely because the Chief Minister informed the press conference about a decision taken by the Council of Ministers the previous day, it cannot be said that there was an order of the government in terms of Art. 166(1). Before a decision of the Council of Ministers amounts to an order of the government, it should fulfil two conditions *viz.*: (1) it has to be expressed in the name of the Governor [Art. 166(1)]; and (2) it has to be communicated to the persons concerned. Until these conditions are fulfilled, it only remains a tentative order and the government is competent to reconsider the matter and take a fresh decision.[6]

As a matter of form, legislation usually confers powers on the 'Governor' [or the 'President'], or the 'State Government', [or the 'Central Government']. The government being an impersonal entity has necessarily to function through a hu-

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1. AIR 1955 SC 160 : 1955 (1) SCR 1011.
2. *Bachhittar Singh v. State of Punjab*, AIR 1963 SC 395 : 1962 Supp (3) SCR 713.
For a comment on the case see, 5 *JILI* 418 (1963).
Also see, *State of Bihar v. Kripalu Shankar*, AIR 1987 SC 1554 : (1987) 3 SCC 34.
3. *Ghaio Mal v. Delhi*, AIR 1959 SC 65 : 1959 SCR 1424.
4. AIR 1964 SC 1823 : 1964 (6) SCR 368.
5. *M.V. Srinivasa v. State of Andhra Pradesh*, (1997) 6 SCC 589 : AIR 1997 SC 3008.
6. *State of Kerala v. A Lakshmikutty*, AIR 1987 SC 331 : (1986) 4 SCC 632.
For a fuller discussion on this question, See, M.P. JAIN, *INDIAN ADM. LAW, CASES AND MATERIALS*, II, Ch. XIV, Sec. F, 1550-1564.

man agency. According to S. 3(60) of the General Clauses Act, the term 'State Government' means a Governor, and the 'Central Government' means 'President'. However, no one expects that the 'Governor' or 'President' should discharge all the functions personally.

The Rules of Business lay down who has to take what decision. Usually, these Rules enable the Minister-in-charge of a department to dispose of cases coming before him; and the Minister is also authorised to make standing orders, and to give such directions as he thinks fit, for disposal of cases in his department. In practice, therefore, the Governor rarely passes any executive order himself, except where a matter falls within his discretion.[7]

At times, a statute may itself provide for delegation of power by the government. Generally speaking, such a statutory provision is supplementary, and does not exclude making of decisions according, to the Rules of Business, and both co-exist.

Even when the statute formally requires the 'satisfaction' of the 'Government', 'Governor' or the 'President', for taking an action, action can be taken in the usual manner, without the personal satisfaction of the Head of the State[8], by the officers authorised to take decisions under the Rules of Business.[9]

Under a statutory regulation, an appeal from an order of the State Public Service Commission passed by it in disciplinary proceedings against an employee lay to the Governor. Rejecting the argument that the appeal ought to be heard by the Governor himself, and not by the State Government, the Supreme Court observed in the following case[10] that hearing of such an appeal is "not one of those functions which the Governor is required to exercise in his discretion under any of the provisions of the Constitution. The Governor has therefore to act on the advice of the State Government." Accordingly, the appellate power in the instant case could be exercised in accordance with Art. 166 of the Constitution.

Under S. 68(c) of the Motor Vehicles Act, a draft scheme to nationalize certain bus routes was prepared and published. The scheme was challenged on the ground that the 'opinion' requisite under the Act, was formed not by the State Government but by the Secretary of Labour to the Government. The argument was that the functions under the Motor Vehicles Act relate to the Transport Department, and the requisite satisfaction under the Act could be formed either by the Council of Ministers, or the Minister to whom the business under the Act had been allocated under the Business Rules, but not by the Secretary, and that, too, by one who was not the Head of the Transport Department to which the functions in question had been assigned.

In the above case, the Supreme Court rejecting the argument held that under Art. 166(3), the Governor can allocate any function, barring those which fall within his discretion, to any Minister or official. Therefore, Business Rule 23A

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7. *Infra,* Sec. C.

8. *Godavari v. State of Maharashtra,* AIR 1964 SC 1128 : 1964 (6) SCR 446; *C.M.P. Co-operative Societies v. State of Madhya Pradesh,* AIR 1967 SC 1815 : 1967 (3) SCR 329.

9. *Ishwarlal v. State of Gujarat,* AIR 1968 SC 870. Also, *Mohan v. State of West Bengal,* AIR 1974 Cal 25; *Bijaya Lakshmi Cotton Mills v. State of West Bengal,* AIR 1967 SC 1145 : 1967 (2) SCR 406.

10. *U.P.P.S. Commission at Allahabad v. Suresh Chandra,* AIR 1987 SC 1953 : (1987) 4 SCC 176.

under which the Secretary in question had been empowered to take the decision was valid. The Court emphasized that in a well-planned administration, most of the decisions are taken by civil servants, and the primary function of the Minister is to lay down policies and supervise administration and not to burden himself with day to day administration.

The Governor is essentially the constitutional head; the administration of the State is run by the Council of Ministers. But, in the very nature of things, it is impossible for the Council of Ministers to decide each and every matter which comes before the government. So, Rules of Business are made under Art. 166(2) for the convenient transaction of government business. Even a Minister is not expected to burden himself with the day to day administration. His main function is to lay down policies and programmes of his Ministry. Decisions in specific cases are thus taken by officials under the Rule of Business.

A civil servant takes a decision not as a delegate of his Minister but on behalf of the government. He takes decisions under the Business Rules as a 'limb' of the government and not as a person to whom the power of the government has been delegated. When functions entrusted to a Minister are discharged by an official, there is, in law, no delegation because constitutionally the official's decision is that of the Minister.[11] Any type of power—administrative, *quasi*-judical or legislative—conferred on the Head of the State or the Government can be discharged by civil servants according to the Business Rules.[12]

Under Art. 311(2)(*c*), a civil servant can be dismissed without an enquiry if the President or the Governor, as the case may be, is satisfied that in the interest of the State, it is not expedient to hold such an inquiry. It has been held by the Supreme Court that under Art. 311(2)(*c*), the personal satisfaction of the President or the Governor is not necessary. The satisfaction of the Governor for the exercise of powers or functions [other than his discretionary functions] required by the Constitution is not the personal satisfaction of the Governor but is the satisfaction in the constitutional sense under the Cabinet System of government. The President/Governor acts in this matter, as in any other matter, on ministerial advice. The matter can be disposed of according to the Rules of Business.[13]

The Supreme Court has recently sounded a note of warning to the bureaucrats exercising powers of the government. The Court has observed that "senior officers occupying key positions" who take decisions on behalf of the government "are not supposed to mortgage their own discretion, volition and decision making authority and be prepared to give way or being pushed back or pressed ahead at the behest of politicians for carrying out commands having no sanctity in law."[14]

The Collector issued a notification under section 4(1) of the Land Acquisition Act for acquiring certain land. After hearing objections under section 5A, he forwarded his report to the government for appropriate decision. The Revenue De-

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11. *A Sanjeevi v. State of Madras,* AIR 1970 SC 1102 : (1970) 1 SCC 443.

12. *Gullapalli N. Rao v. State of Andhra Pradesh S.R.T. Corp. (The Gullapalli* case), AIR 1959 SC 308 : 1959 Supp (1) SCR 319.

13. *Samsher Singh v. State of Punjab,* AIR 1974 SC 2192 : (1974) 2 SCC 831; *supra.*
Also see, *Bhuri Nath v. State of J&K,* AIR 1997 SC 1711, 1721 : (1997) 2 SCC 745.
For discussion on Art. 311(2)(c), see, *infra,* Ch. XXXVI.

14. *Tarlochan Dev Sharma v. State of Punjab,* AIR 2001 SC 2524, 2531 : (2001) 6 SCC 260.
Also see, *Anirudh Sinhji Jadeya v. State of Gujarat,* AIR 1995 SC 2390 : (1995) 5 SCC 302.

partment decided not to proceed with the acquisition, and, accordingly, in a letter requested the land acquisition officer to take necessary proceedings accordingly. The Ministry of Urban Development disagreeing with the view of the Ministry of Revenue moved the Chief Minister to have the issue re-examined. Before any decision was taken, the Revenue Department again requested the land acquisition officer to take further action as requested above. As no action was taken by the land acquisition officer, the appellants approached the High Court and the matter ultimately came before the Supreme Court. Referring to Arts. 166(1) and (2), the Supreme Court ruled in the instant case,[15] that there was no final decision taken by the Minister of Revenue.

It appeared from the Business Rules that both the departments were entitled to deal with the subject of land acquisition and valuation thereof. According to the Instructions issued under the Rules of Business where the subject of a case concerns more than one department, no order is to be issued unless all departments concerned have examined the case. If the departments disagree, the case may be submitted to the Chief Minister for orders for laying the case before the Cabinet. So the decision of the Revenue Minister was not final because the other department did not agree with it. According to the Instructions, when the matter was brought to the Chief Minister, who holds the ultimate responsibility and is accountable to the people, he should place the decision before the Cabinet and then the Chief Minister could take the decision. Therefore, in the instant case, no final decision had been taken by the Chief Minister whether to drop or proceed with the acquisition.

Articles 77 and 166 do not in reality amount to any delegation of power. The decision of a Minister or an officer under the Rules of Business is regarded as the decision of the President or the Governor.

A properly expressed and authenticated order, though not challengeable on the ground that it has not been made or executed by the Governor, may, nevertheless, be challenged on other grounds,[16] as for example, *inter alia*: the condition precedent to the making of the order has not been fulfilled, or that the principles of natural justice have not been observed where it was necessary to do so,[17] or that it has not been made in accordance with law, or that it has not been made by the person authorised to do so under the Rules of Business, or that it does not correctly reflect the actual decision taken by the government,[18] or that the discretion has not been exercised properly.[19] This aspect of the matter falls legitimately under the scope of Administrative Law.[20]

There are, however, certain powers conferred by the Constitution on the Governor or the President which cannot be entrusted to anybody and the Governor or the President, as the case may be, has to sign the order himself. A few examples of such powers are: ordinance-making power;[21] power to give assent to Bills;[22]

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15. *Gulabrao Keshavrao v. State of Gujarat,* (1996) 2 SCC 26.
16. *Benoy Krishna v. State of West Bengal,* AIR 1966 Cal. 429; *Parkash Chand v. Union of India,* AIR 1965 Punj. 270.
17. The *Gullapalli* case, *supra.*
18. *E.P.Royappa v. State of Tamil Nadu,* AIR 1974 SC 555 : (1974) 4 SCC 3.
19. *King Emperor v. Sibnath,* AIR 1945 PC 156.
20. JAIN, *A TREATISE ON ADMINISTRATIVE LAW,* I, Ch. XIX.
Also see, JAIN, *CASES & MATERIALS ON INDIAN ADMINISTRATIVE LAW,* III, Ch XVI.
21. *Supra,* Ch. III, Sec. D(ii)(d); *infra,* Sec. D(ii)(c).
22. *Supra,* Ch. II, Sec. J(i)(c); Ch. VI, Sec. F(i).

President's proclamation of emergency under Art. 352;[23] President's proclamation of taking over a State Government under Art. 356,[24] or to declare a financial emergency under Art. 360.[25]

As has already been noted earlier, the President acts on the aid and advice of the Council of Ministers and the same is true of the functions of the Governor except those which he has to exercise in his discretion. Wherever the Constitution requires satisfaction of Governor for exercise of any power or function such satisfaction is not the personal satisfaction of the Governor but the satisfaction in the constitutional sense under the cabinet system of government. The Governor exercises all his powers and functions by or under the Constitution on the aid and advice of the Council of Ministers, save in limited spheres where Governor is required to exercise his functions in his own discretion.[26]Thus, apart from a few of the President's functions, mentioned here, and the Governor's discretionary functions discussed below, all other functions can be discharged under Arts. 77 and 166.

C. GOVERNOR'S DISCRETIONARY POWERS

The concept of the Governor acting in his discretion or exercising independent judgment is not alien to the Constitution. The normal rule is that the Governor acts on the aid and advice of the Council of Ministers and not independently or contrary to it. But there are exceptions under which the Governor can act in his own discretion. Although some of the exceptions were pointed out, they are not exhaustive.[27]

(1) The Governor is required to discharge certain functions in his "discretion" "by or under the Constitution".

This envisages that the Governor's discretionary powers need not be express but may be necessarily implied.

(2) In the discharge of these functions, he is not required to seek the "aid and advice" of his Council of Ministers.

(3) Whether a function falls within his "discretion" or not, it is the Governor who decides the matter in his "discretion".

(4) The Governor's decision under (3) above is final. He is the sole and final judge whether any function is to be exercised in his discretion or on the advice of his Council of Ministers.

(5) The validity of any thing done by the Governor is not to be called in question on the ground that "he ought or ought not to have acted in his discretion".

It was felt necessary by the makers of the Constitution to confer discretionary power on the Governor for two main reasons: (*i*) the Governor has to serve as an

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23. *Infra,* Ch. XIII.
24. *Ibid.*
25. *Ibid.*
26. *Pu Myllai Hychho v. State of Monogram,* (2005) 2 SCC 92 : AIR 2005 SC 1537.
27. *M.P. Special Police Establishment v. State of M.P.,* (2004) 8 SCC 788.

agent of the Central Government in the State; and (*ii*) he is an important link between the Centre and the State to maintain the unity and integrity of the country.[28]

Under the Constitution, there are several categories of action which the Governor may take in his discretion, *viz.* :

(1) Art. 200 requires him to reserve for the President's consideration any Bill which in his opinion derogates from the powers of the High Court;

(2) To reserve any other Bill [Art. 200];

(3) To appoint the Chief Minister of the State;[29]

(4) Governor's report under Art. 356;[30]

(5) Governor's responsibility for certain regions such as the Tribal Areas in Assam and responsiblities placed on the Governor's shoulders under Arts. 371A, 371C, 371E, 371H.[31]

In all other matters, the Governor, like the President, acts on the advice of his Council of Ministers.

In the matter of grant of sanction to prosecute a Chief Minister or a Minister the Governor is normally required to act on the aid and advice of the Council of Ministers and not in his own discretion. It is also presumed that a high authority like the Council of Ministers will normally act in a bona fide manner, fairly, honestly and in accordance with law. Where as a matter of propriety the Governor may have to act in his own discretion, or where bias is inherent or manifest in the advice of the Council of Ministers or, on those rare occasions where on facts the bias becomes apparent or the decision of the Council of Ministers is shown to be irrational and based on non consideration of relevant factors, the Governor would be right to act in his own discretion and grant sanction. Similar would be the situation if the Council of Ministers disables itself or disentitles itself from giving such advice. In appropriate facts and circumstances, the Governor may exercise in his own discretion otherwise it would lead to a situation where people in power may break the law with impunity safe in the knowledge that they will not be prosecuted as the requisite sanction will not be granted.[32]

It is well settled that the exercise of administrative power will stand vitiated if there is a manifest error on record or the exercise of power is arbitrary. In the M.P. Special Police etc.[33] The office of the Lokayukta was held by a former Judge of the Supreme Court. It is difficult to assume that such a high authority would give a report without any material whatsoever. No law is intended to be laid down in this behalf however. Each case may be judged on its own merits. When the Council of Ministers takes a decision in exercise of its jurisdiction, it

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28. VIII *CAD*, 489, 495.
29. *Supra*, Sec. A(ii)(a).
30. *Infra*, Ch. XIII.
31. See, Ch. IX, *infra.*
32. *M.P. Special Police Establishment v. State of M.P.*, (2004) 8 SCC 788.
33. *M.P. Special Police Establishment v. State of M.P.*, (2004) 8 SCC 788.

must act fairly and reasonably. It must not only act within the four corners of the statute but also for effectuating the purpose and object for which the statute has been enacted where the decision of the Council of Ministers was ex facie irrational and based on non consideration of relevant matters the Governor can decide on his own discretion and grant sanction. whereas the decision of the Governor was not.

So long as one party (*i.e.*, the Congress) with very stable majorities was in office in all the States as well as the Centre, the office of the Governor was not regarded as very significant. Liaison between the States and the Centre was conducted to a large extent at the party level. In fact, doubts were raised whether the Governor's office served any useful purpose, so that Prime Minister Nehru had to explain the role of the Governors to dispel the sense of their futility.[34] He said that they played a useful role which might become very important on occasions. A Governor was a factor in bringing various groups and parties together. He could do a great deal to lessen tensions. He could not obviously overrule the government but his advice was always available. If in some vital matters, the Governor thought that there was a breach of the Constitution, he could refer it to the President. Normally speaking, decisions were of the government but the government should keep an intimate touch with the Governor and consult him formally or informally. The importance of the Governor's office was partly constitutional but largely conventional. Much depended on the personality of the Governor.

But, with the emergence of the multi-party system in the wake of the fourth general elections, the office of the Governor has become more directly involved in the constitutional process and has assumed significance both as a link between the Centre and the States as well as for maintaining an effective constitutional machinery within the States. In this process, the Governor's office has also become controversial, as whatever decision a Governor takes, whether as the representative of the Centre, or the constitutional Head of the State, he becomes a centre of controversy, for one or the other political party feels dissatisfied and thus criticises him and attributes to him partisan motives. This also brings the Central Government into controversy, for the Governor being an appointee of the Centre, and holding his office during its pleasure, is regarded as the Centre's creature, and the disgruntled political group criticises the Central Government as well for exercise of his discretion by the Governor.

The repercussions and reverberations of decisions taken by the Governors are often heard in Parliament.[35] A Governor's decision may at times lead to a sort of confrontation between the Centre and the States which affects the federal balance to some extent. The Central Government usually takes the formal position that the Governor is free to take a decision in the discharge of his function, that it does not dictate to him one way or the other, and though he may seek advice from the Centre, the final decision rests with him.

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34. Press Conf., Nov. 7, 1958, reported in *The Hindustan Times*, Nov. 8, 1958, p. 6.

35. On Nov. 15, 1967, a motion disapproving the Central Government's action "in using the institution of Governors of States not as instruments of proper functioning of the Constitution but as agents of the party in power at the Centre.....", was discussed in the Lok Sabha.

Also see, *Lok Sabha Debates*, July 20, July 28 and Dec. 4, 1967; (1968) *JI, Const. & Parl. Studies, II*, 98.

Much of the controversy arises around the use of discretionary powers by the Governors, especially the power to appoint the Chief Minister, to dismiss the ministry and to dissolve the House. These powers are exerciseable by the Governor as Head of the State. Controversy also arises with respect to the use by the Governor of his power to recommend to the President the imposition of his rule under Art. 356. The Governor exercises this power as the Centre's representative in the State—a matter discussed later in the book.[36]

As regards the constitutional text, Governor's powers with regard to the State Legislature and the Ministry are couched practically in the same terms as those of the President. Like the President, the Governor is also enabled to keep himself informed of the administrative developments in the State; and like Art. 78,[37] Art. 167 makes corresponding provisions. Thus, the Chief Minister is obligated to communicate to the Governor all decisions of the Council of Ministers relating to the State administration and proposals for legislation [Art. 167(a)], and to furnish such other information to him as the Governor may call for regarding administration of the affairs of the State and proposals for legislation [Art. 167(b)].[38] Further, if the Governor so requires, the Chief Minister will submit for the consideration of the Council of Ministers any matter on which a decision has been taken by a Minister without reference to the Council of Ministers [Art. 167(c)].[39]

This provision, as has already been explained, does not vest the Governor with a power to overrule a ministerial decision, but is designed to strengthen the principle of collective responsibility. It is merely a matter of caution that a decision which in the opinion of the Governor is such as requires the *imprimatur* of the whole Cabinet, and not of a single Minister alone, should so receive it. No individual Minister should take an important decision behind the back of his colleagues and thus bind them without their knowing anything about it. If this happens very often, the principle of collective responsibility will be sapped of its vitality.

To a great extent, the Chief Minister himself should be able to manage his colleagues and enforce the important constitutional principle of collective responsibility.

The Governor's power is the last safety valve to preserve and promote that principle. Commenting on Art. 167, the Sarkaria Commission has observed:[40]

> "The options available to the Governor under Art. 167 give him persuasive and not dictatorial powers to override or veto the decisions or proposals of his Council of Ministers relating to the administration of the affairs of the State. At best they are powers of giving advice or counselling delay or the need for caution and they are powers which may be used to build bridges between the Government and opposition."

The function of the Council of Ministers is to 'aid and advise' the Governor in the exercise of his functions, even when functions are conferred on the Governor

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36. *Infra.* Ch. XIII.
37. *Supra*, Ch. III, Sec. B.
38. *Supra*, Ch. III, Sec. B.
39. *Supra*, Ch. III, Sec. B.
40. *Report*, 116.

by legislation,[41] except in so far as he is required to exercise his functions *in his discretion* by or under the Constitution [Art. 163(1)]. The implication of Art. 163(1) is that in the exercise of his discretionary powers, the Governor does not have to seek ministerial advice. Governor's discretionary functions thus lie outside the area of ministerial responsibility.

The expression "by or under" the Constitution used in Art. 163(1) has a wide import. The Constitution may not expressly provide that a particular function is to be exercised by the Governor in his discretion. Still, the tenor or the context of the provision may show that the function is one which the Governor is to exercise in his discretion. If any question arises whether a matter falls within the Governor's discretion or not, the decision of the Governor in his discretion is final, and the validity of anything done by the Governor in his discretion cannot be called in question on the ground that he ought or ought not to have acted in his discretion [Art. 163(2)].[42]

No Court is entitled to inquire whether any, and if so what, advice was tendered by the Ministers to the Governor [Art. 163(3)]. This constitutional provision, which is paralled to Art. 74(2),[43] prohibits an inquiry in respect of two matters: (1) whether any advice was given to the Governor by the Council of Ministers; and (2) if an advice was given what was that advice? The clause applies when no advice has been given as well as when an advice has been given.

Vesting the Governor with discretionary powers was justified in the Constituent Assembly on the ground that "the provincial governments are required to work in subordination to the Central Government," "the Governor will reserve certain things in order to give the President opportunity to see that the rules under which the provincial governments are supposed to act according to the Constitution or in subordination to the Central Government are observed."[44]

While the Governor, like the President, usually acts on ministerial advice, the Governor is not bound to seek such advice in his discretionary area, and he discharges such functions to the best of his judgment.[45] The question of the scope of the Governor's discretionary powers has been raised over and over again during the last several years. It is also a matter of vital importance for the proper functioning of the Indian federal polity.

Comparing Art. 74(1) with Art. 163(1) several significant points of difference become noticeable between the Governor and the President.

(1) Under Art. 74(1), no discretion is left with the President. He is bound by ministerial advice in all his functions. On the other hand, under Art. 163(1), Governor receives "aid and advice" from his Council of Ministers only in those functions which lie outside his 'discretion'.

Prima facie, the use of the word 'discretion' for the Governor, but not for the President, indicates that while the Constitution envisages the possibility of the Governor acting at times in his discretion, *i.e.*, independently of the Ministers, no such possibility has been envisaged for the President. Therefore, it can be said

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41. *Ram Nagina Singh v. S.V. Sahni*, AIR 1976 Pat 36.
42. *Supru Jayakar Motilal C.R. Das v. Union of India*, AIR 1999 Pat 221.
43. For discussion on Art. 74(2), see, *supra*, Ch. III, Sec. B.
44. DR. AMBEDKAR, VIII *CAD*, 502.
45. *Samsher Singh v. State of Punjab, supra.*

that the Governor is expected to play a somewhat more activist role than the President, and, to this extent, the Governor differs from the President.

(2) After the 42nd Constitutional Amendment enacted in 1976,[46] ministerial advice has been made binding on the President [Art. 74(1)], but no such provision has been made with respect to the Governor.

Article 163(1) only says that there shall be a Council of Ministers "to aid and advise" the Governor except in so far as he acts in his discretion. Unlike Art. 74(1), Art. 163 does not bind the Governor in accordance with the advice of the Ministers even in the exercise of his non-discretionary functions. But that would hardly make a difference. The position is similar to what existed at the Centre before the amendment of Art. 74(1) in 1976 by the 42nd Constitutional Amendment. Ordinarily, therefore, the Governor acts on the advice of his Ministers except when the function is within his discretionary area.

(3) While the President can require the Council of Ministers to reconsider the advice given by it, and he is bound to act in accordance with the advice given after reconsideration, there is no such provision in the case of the Governor. This also indicates that a Governor may have certain functions to discharge independently of ministerial advice.

The Governors' Committee has clarified the position thus: "..... even though in normal conditions the exercise of the Governor's powers should be on the advice of the Council of Ministers, occasions may arise when the Governor may find that, in order to be faithful to the Constitution and the law and his oath of office, he has to take a particular decision independently."

The Constitution expressly mentions only a few functions which a Governor exercises in his discretion.[47] As to what other functions fall within this category has been left vague and flexible; the Constitution provides no guidelines for deciding this and, in effect, the final judge of the matter is the Governor himself.[48]

Article 163 making reference to Governor's discretion has been phrased in rather wide and general terms. It means that in exercising his powers, the Governor may find that action under a particular article in the Constitution by necessary implication requires him not necessarily to act on the advice of his Council

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46. For a summary of the provisions of this Amendment, see, *infra*, Ch. XLII.

47. Under Schedule VI, certain discretionary functions are conferred on the Governors of Assam, Meghalaya, Tripura and Mizoram for the purpose of administration of Tribal Areas in these States. Para 9(2) refers to a limited matter of a possible dispute with regard to the share of royalties to be handed over to a District Council of an autonomous District.

Under Art. 239, a State Governor can be appointed as the Administrator of an adjoining Union Territory and in the administration of the Union Territory, the Governor does not have to act on the advice of his Council of Ministers in the State.

Under Art. 371, the President may by order provide for any special responsibility of the Governors of Maharashtra and Gujarat in respect of Vidarbha, Marathwada, Maharashtra, Saurashtra, Kutch and the rest of Gujarat.

Under Art. 371A, a special responsibility has been placed on the Governor of Nagaland for certain purposes and, in the discharge of these functions, he shall, after consulting his Council of Ministers, exercise his individual judgment as to the action to be taken.

Also see, Art. 371D. See, *infra*, Ch. IX.

48. On Governor's Discretionary Power, see, M.P. SINGH, Governor's Power to Dismiss Ministers or Council of Ministers—An Empirical Study, 13 *JILI* 612 (1971); SETALVAD, *UNION-STATE RELATIONS* (1974).

of Ministers but in his own judgment. On this point, the Governors' Committee has observed: [49]

> "Thus, even though in normal conditions the exercise of the Governor's powers should be on the advice of the Council of Ministers, occasions may arise when the Governor may find that, in order to be faithful to the Constitution and the law and his oath of office, he has to take a particular decision independently. It is however realised that, in the scheme of our Constitution, such occasions will be extremely rare."

The constitutional provisions regarding the Governor's appointment, tenure, functions, etc., show that the Governor holds a dual capacity. On the one hand, he is the constitutional Head of the State and is, thus, a part of the State apparatus. On the other hand, he is the representative of the Central Government in the State and, thus, provides a link with the Centre. From this angle, the Governor's position differs from that of the President who functions merely as the constitutional Head at the Centre.

As the representative of the Centre, the Governor has to serve as the eyes and ears of the Centre and so has to act in his discretion in certain matters. One such matter is reservation of Bills passed by the State Legislature for the assent of the President [Art. 200]. In doing so, the Governor may not always be in agreement with his Council of Ministers. The Governor may be justified to reserve a Bill for Presidential sanction, even if his Council of Ministers advises otherwise, if, in his opinion, the Bill in question would affect the powers of the Union or contravene any provision of the Constitution. Obviously, the State Ministry is not expected to tender any advice to the Governor to reserve a Bill for the Presidential assent (except when the Constitution specifically makes it obligatory to do so). The Governor will, therefore, have to exercise his discretion in the matter whether he should assent to a Bill or reserve it for President's assent.[50] He must reserve the Bill where the Constitution stipulates President's assent.

Under the second proviso to Art. 200, it is obligatory for the Governor to reserve a Bill for President's consideration if, in his 'opinion', if it becomes law, it will so derogate from the powers of the High Court as to endanger the position which that Court is designed to fill by the Constitution.[51] The words 'in his opinion' are very suggestive. It suggests that the Governor has to decide the matter in his discretion. In other cases, the Governor may reserve the Bill if he thinks it to be against the larger interests of the concerned State or India as a whole.

In 1982, the Governor of Jammu and Kashmir refused to give assent to the controversial Resettlement Bill earlier passed by the Legislature and returned the Bill to the House for reconsideration. In his statement, the Governor detailed several constitutional, legal and other reasons for his not giving his assent to the Bill. He said that if he had given his assent to the Bill, it would have paved the way for a severe and grave threat to the security, integrity, solidarity and sovereignty

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49. *Report*, 20.
On November 26, 1970, the President appointed a Committee of Governors to study certain aspects pertaining to the 'Role of Governors'. The Committee submitted its report in 1971.

50. *Supra*; also, *infra*, Part IV, Ch. X.

51. *Supra*, Ch. II.

of the country.[52] Obviously, the Governor took this action in his discretion for the State Government was in favour of the Bill becoming the law.[53]

An important matter in which the Governor acts in his discretion is making a report to the President under Art. 356 invoking President's rule in the State because of the breakdown of the constitutional machinery therein.[54] Nor can the Ministry be consulted by the Governor while making a report to the Centre under Art. 356 for the failure of the constitutional machinery in the State may be because of the conduct of the Council of Ministers itself and, therefore, the Governor must, of necessity, and in the very nature of things, exercise his own judgment in this matter.

Then there are a large number of matters with regard to which the Centre can give directions to the States under the Constitution and presumably the Governor may be required to perform some functions under these directions.[55]

In a situation when there arises a conflict between the Governor's roles as the Centre's representative and as the constitutional head in the State then, undoubtedly, the former obligation should take precedence over the latter. This is the direct result of his being the nominee, and holding his office during the pleasure, of the Central Government. One of the reasons for the Constituent Assembly to adopt the system of centrally-nominated, rather than elected, Governor was that he would keep the Centre in touch with the State and would remove a source of possible 'separatist tendencies'.[56] Therefore, exercise of discretionary powers by the Governor as the Centre's representative is constitutionally justifiable.

The more difficult problem, however, is regarding the functioning of the Governor in his discretion as the Head of the State. The position here is somewhat vague. According to the Supreme Court, the Governor is essentially a constitutional head and the administration of the State is run by the Council of Ministers.[57] But this observation does not conclusively repudiate the view that there may be some area where the Governor may take a decision which may not have been suggested to him by the Council of Ministers, or he may not be bound automatically to follow ministerial advice.[58]

It is now fairly well-established that the Governor nominates members to the Legislative Council[59] on ministerial advice. Though the formal power to convene and prorogue the House vests in the Governor, he does so only when advised by the Chief Minister and not himself *suo motu*. The reason for this convention is that it is the Chief Minister alone who can provide the Assembly with business to transact.

(a) APPOINTING CHIEF MINISTER

Again, in the matter of appointing the Chief Minister, the constitutional provision [Art. 164(1)] confers discretionary power on the Governor[60] which is non-

52. The Hindu, Int'l ed., Oct. 2, 1982, p. 4.
53. For Governor's Assent to Bills, see, *supra*, Ch. VI.
54. See, *infra*, Ch. XIII, Sec. B, under 'Emergency'
55. *Infra*, Ch. XII.
56. VII *CAD*, 12, 454-6; also see, *supra*.
57. *A. Sanjeevi v. State of Madras*, AIR 1970 SC 1102 : (1970) 1 SCC 443.
58. See *Samsher's* case, *supra*.
59. *Supra*, Ch. VI, Sec. B(i).
60. *Supra*, Ch. VII, Sec. A(ii)(a).

justiciable. Because of the immunity granted to the Governor under Art. 361, he is not answerable to the Court even on the ground of *mala fides*.[61] As the Governor holds his office during the pleasure of the President, the question of *mala fide* action of the Governor can be gone into by the President, *i.e.*, the Central Executive. This position has been clarified by the courts in a number of cases.

According to the Calcutta High Court,[62] the Governor in making the appointment of the Chief Minister under Art. 164(1) "acts in his sole discretion", and that the "exercise of his discretion by the Governor cannot be called in question in writ proceedings in High Court". Thus, in the matter of appointment of the Chief Minister, the Governor does not act on the advice of the Council of Ministers. It is for the Governor himself to make such inquiries as he thinks proper to ascertain who among the members of the Legislature ought to be appointed as the Chief Minister and who would be in the position to enjoy confidence of the majority in the State Assembly.

In *S. Dharmalingam v. His Excellency Governor of Tamil Nadu*,[63] the appointment of the Chief Minister was challenged. The Madras High Court ruled that in appointing the Chief Minister, the power exercised by the Governor was wholly within his discretion and the Court could not interfere in the matter relating to his discretion. The Court observed in this connection:

> "Certain powers are available to the Governor under Art. 163, which he could exercise in his sole discretion. With regard to the action pertaining to his sole discretion, the immunity of the Governor is absolute and beyond even the writ jurisdiction of the High Court. The power of the Governor with regard to the appointment of the Chief Minister is a power which falls in his sole discretion and therefore the Court cannot call in question the same."

The Gauhati High Court has also ruled that the Governor is the "sole and exclusive authority" to appoint a Chief Minister. The Governor as the Head of the State, "is the sole judge to ascertain as to who commanded the support of the majority in the Assembly".[64] The Court has observed:

> "The repository of power to appoint Chief Minister and the Council of Ministers or to withdraw the pleasure contemplated under Art. 164(1) and/or dismissal of the Ministry are exclusive pleasure-cum-discretion of the Governor.... It follows, therefore, that the right of the Governor to withdraw pleasure, during which the Ministry holds office, is absolute, unrestricted and unfettered."

Where the Chief Minister of a coalition ministry resigned, but the Governor asked the Ministry to continue in office until alternative arrangements could be made, and the United Front then elected another leader who was then asked to form the government, the Gauhati High Court in *R.K. Nokulsana Singh v. Rishang Keising*[65] refused to issue *quo warranto*[66] to remove the Ministry from office, because the Assembly was not in session and no one could say whether they did not command support of the majority in the Assembly. The Chief Minister is

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61. *Supra*, Sec. A(i)(c).
62. *Mahabir Prasad Sharma v. Prafulla Chandra Ghose*, AIR 1969 Cal. 198.
63. AIR 1989 Mad 48.
Also see, *G. Vasantha Pai v. C.K. Ramaswamy*, AIR 1978 Mad 342; *Madan Murari Verma v. Choudhuari Charan Singh*, AIR 1980 Cal 95; *supra*, Ch. III.
64. *Jogendra Nath v. State of Assam*, AIR 1982 Gau. 25.
65. AIR 1981 Gau 47.
66. For *Quo warranto*, see, Chapter VIII, Sec. E.

appointed by the Governor (Art. 164) and there is no constitutional bar of any kind on his choice as to whom to appoint as the Chief Minister. The only effective check is that the Ministry shall fall if it fails to command a majority in the Assembly. So long as the Chief Minister and other Ministers enjoy the pleasure of the Governor, no writ of *quo warranto* can be issued by the High Court.

In the matter of appointment of the Chief Minister, the Governor is not required to act on the advice of the Council of Ministers. However, the over-all affective limitation on his discretion is that he is to appoint a person as Chief Minister who will be able to enjoy a majority support in the Assembly. If the Ministry is not able to command a majority support in the House, it will fall. If a party enjoys a clear majority in the Assembly, the Governor's task is more or less mechanical and non-discretionary, as he has to call upon the leader of the majority party to form the government.

His task, however, becomes difficult, and even controversial, when no party has clear majority in the Assembly, and when loyalties of the legislators undergo frequent changes making the political picture in the State fluid and confused. In such a situation, the Governor's role may become crucial as it often becomes a matter of importance as to who is invited first to form the government, for the party in power could hope to gain accretion to its strength by winning over the loyalties of some legislators with a flexible conscience. In such a fluid situation, the Governor has to take a decision, after making such enquiries as he thinks proper, as to the person who will be in a position to command a majority in the Assembly and invite him to form the Government.[67] For example, the role of the Haryana Governor in appointing the leader of the Congress (I) as Chief Minister came in for a lot of criticism. Congress (I) was not the largest group in the Assembly but its leader was appointed as the Chief Minister; he was later able to attract a few members from other parties and thus managed a majority for himself.

At times, while appointing the Chief Minister, the Governor imposes the restriction that he should seek a vote of confidence from the House concerned. A question has been raised whether the Governor can do so because the Constitution does not specifically refer to anything like a vote of confidence. Does the Governor act beyond his powers while imposing any such condition? The Patna High Court in *Sapru*[68] has answered the question in the negative. The Court has invoked two constitutional features to support such a condition, *viz*., (1) collective responsibility of the Council of Ministers to the House;[69] and (2) discretionary nature of the Governor's power to appoint the Chief Minister.

The principle of collective responsibility includes within its ambit the rule that the Council of Ministers must enjoy majority support in the Legislative Assembly and it includes both a vote of confidence and a vote of no confidence for or against the Ministry. Where there is doubt about the Chief Minister enjoying the majority support in the House, the Governor is entitled to call upon him to prove his majority in the House. This serves two purposes, viz.,: (1) it assures the Governor that his choice of the Chief Minister was right; and (2) it satisfies the elec-

67. See, *Report of the Governors' Committee*, 14, 28 (1971).
68. *Sapru Jayakar Motilal C.R. Das v. Union of India*, AIR 1999 Pat 221.
69. For discussion on the principle of collective responsibility, see, Ch. III, Sec. B(d), *supra.*

torate that the Chief Minister enjoys majority in the Assembly. The High Court has observed:[70]

> "… the Constitution does not make any reference either to a vote of confidence or to a vote of no-confidence, and it would indeed be preposterous to suggest that since the Constitution does not refer to these, in a parliamentary form of Government there can be no vote of confidence or vote of no-confidence for or against the Government. The entire constitutional scheme envisaged a parliamentary form of government with a cabinet system would be defeated if such a construction is put on the provision of Article 164 of the Constitution…"

On the whole, however, it is advisable to evolve suitable conventions in this regard to make the Governor's role in the matter of appointing the Chief Minister less activist, non-political and non-controversial. In 1971, an effort was made in this respect when the Committee of Governors[71] suggested the following guidelines for guidance of the Governors in the matter of appointing the Chief Minister:

(1) Where a single party commands a majority in the Assembly, the Governor is to call upon its leader to form the government.

(2) It is not incumbent on the Governor to invite the leader of the largest party (not in majority) to form the government. The ultimate test for the purpose is not the size of a party but its ability to command a majority in the House.

(3) If before the election, some parties combine and produce an agreed programme and the combination gets a majority after the election, the commonly chosen leader of the combination should be invited to form the government.

(4) If no party is returned in a majority at the election and, thereafter, two or more parties come together to form the government, the leader of the combination may be invited to form the government.

(5) The leader of a minority party may be invited to form the government if the Governor is satisfied that the leader will be able to muster majority support in the House.

(6) Ordinarily, an elected member of the Legislature should be chosen as the Chief Minister. A non-member or a nominated member of the Legislature ought not to be appointed as the Chief Minister except in exceptional circumstances. In any case, he should become an elected member of the Legislature as soon as possible.

(b) DISSOLVING THE HOUSE

Another bone of contention has been the question of dissolving the House. As has already been discussed,[72] some discretion has now come to be conceded to the Governor in this area. He is to take a decision to dissolve or not to dissolve the House on a consideration of the totality of circumstances. He may refuse to accept the advice of the Ministry which has lost the majority support if in his view an al-

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70. AIR 1999 Pat., at 228.
71. *Supra.*, footnote, 49.
72. *Supra*, Ch. VI, Sec. E.

ternative stable government can be formed. The Governor may, however, be bound to accept the advice for dissolution by a Ministry having a majority support.[73]

The discretionary element in the matter of dissolution can be reduced if, as suggested earlier,[74] a convention is adopted to grant dissolution to a defeated Chief Minister if he had a majority earlier. There is however great reluctance in the public to hold frequent elections as holding of an election in India is a very costly proposition. Therefore, dissolution of the Assembly ought to be resorted to only as a last resort. This enhances the discretion of the Governor instead of reducing it. This also encourages the cult of defection of members from one party to another.[75]

(c) DISMISSAL OF MINISTRY

A very controversial question regarding the Governor's discretion is his power to dismiss the Ministry. As at the Centre, so in a State, the Council of Ministers is collectively responsible to the Legislative Assembly and holds office during the Governor's pleasure.[76]

A non-controversial use of the Governor's power is the dismissal of a Minister who has lost the confidence of the Chief Minister, or the dismissal of a Ministry which has demonstrably lost majority support in the Legislative Assembly, but, instead of respecting the verdict, refuses to vacate the office. Such a step vindicates the normal working of the parliamentary form of government as well as promotes constitutionalism as it is against democratic norms that a cabinet which has lost confidence of the majority in the House should continue to remain in power.

This also amounts to a breach of Art. 164(2) which insists that the Council of Ministers is collectively responsible to the Legislative Assembly. How can a Ministry which has lost confidence of the House be said to be collectively responsible to the House. Here the Governor is not really exercising any personal discretion for the decision has already been taken by the House and he is merely implementing the same.[77] Such a use of the Governor's power will be very rare in practice for a Ministry losing majority support usually resigns except when the Ministry is defeated in the House on a snap vote.

The Calcutta High Court has ruled that if the Council of Ministers refuses to vacate the office of Ministers, even after a vote of no confidence has been passed against it in the Legislative Assembly of the State, it will then be for the Governor to withdraw the pleasure during which the Council of Ministers holds office.[78]

When a Ministry enjoying the majority support, however, acts to thwart the Constitution, or makes a mockery of the democratic and parliamentary institutions, or infringes a specific constitutional obligation, *e.g.*, it fails to convene the

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73. *Governors' Comm. Rep*. 60.
74. *Supra*, Ch. II, Sec. I(c).
Also see, ARC, *Report on Centre-State Relationship*, 30 (1969).
75. On Anti-Defection Law, see, Ch. II, *supra*, Sec. F.
76. For a detailed discussion on the concept of 'Collective Responsibility, see, *supra*, Ch. III, Sec. B(d).
77. *Supra*, Sec. A(ii)(c) AIR 1969 Cal 198.
78. *Mahabir Prasad Sharma v. Prafulla Chandra Ghose*, *supra*, footnote 62.

Legislature within six months of the last session, recourse may be had to the Presidential power under Art. 356.[79] It may not be possible for the Governor to use his own power to dismiss the Ministry in such a situation, for then he will have to install another Council of Ministers and it may not be possible for him to do so when the dismissed Ministry had majority in the House.

There is also the knotty problem of options open to a Governor when the government in office, enjoyed majority support once, but loses that in between the two sessions of the Legislature. Should the Governor take action to dismiss the Ministry, or wait till the Assembly meets and votes the Ministry out?

The most dramatic exhibition so far of the Governor's discretionary power to dismiss the Ministry has been in West Bengal. A United Front Ministry, a conglomeration of 14 parties having no common policy or programme, took office in March 1967 with Ajoy Mukherjee as the Chief Minister. The parties had fought elections separately, but combined together after the elections with the dominant purpose of keeping the Congress (which had been in office since 1947) out of power.

On November 2, 1967, a few members defected from the UF, formed a new party under the leadership of Dr. P.C. Ghosh, and informed the Governor that they had withdrawn support from the Ministry. The Congress Party informed the Governor that it would extend support to a new Ministry if formed by the leader of the new party. Doubts about the majority support to the UF Ministry were now raised. The Governor impressed on the Chief Minister the imperative need of calling an early session of the Assembly, but the Ministry wanted to delay convening the House by six weeks. Consequently, the Governor dismissed the Ministry and installed another Ministry on November 21, 1967, under Ghosh as the Chief Minister. The Governor based his action on the Ministry losing majority support in the Assembly. He emphasized that it was constitutionally improper for a Ministry to continue in office after losing confidence of the majority in the Assembly. In case of doubt on this point, the proper course for the Ministry would have been to seek a vote of confidence on the floor of the House without delay. The Governor could not appreciate the reasons advanced by the Chief Minister to delay calling the Assembly to test the standing of the Ministry. He felt that to deal effectively with the multifarious problems faced by the State, it was imperative that a Ministry clearly enjoying majority support should be in office.

The constitutional crisis did not, however, come to an end with this step. To test whether the new Ministry enjoyed majority support in the House, the Governor convened the House on the advice of the Chief Minister, but the Speaker adjourned the House when it met.[80] Ultimately, President's rule had to be imposed in West Bengal.

The Governor's action in dismissing the UF Ministry naturally raised a hue and cry in the country. Opinions about its constitutional propriety were divided. The Central Home Minister asserted in both Houses of Parliament, on November 30, 1967, that it was within the constitutional competence of the Governor to dissolve the Council of Ministers when in his judgment the previous government had lost majority support in the Assembly. He also maintained that the Governor

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79. *Infra*, Ch. XIII.
80. *Supra*, Ch. VI, Sec. D(a).

had acted in his discretion and not under any directive from the Centre. This statement was approved by both Houses of Parliament on December 4, 1967.

From a purely legalistic angle, on February 6, 1968, the Calcutta High Court dismissed a petition for a writ of *quo warranto*[81] against the new Chief Minister Ghosh on the ground that under Art. 164(1), the Ministers hold office during the Governor's pleasure and no restriction or condition has been imposed upon the exercise of the Governor's pleasure. The Governor has "an absolute, exclusive, unrestricted and unquestionable discretionary power to dismiss a minister and appoint a new Council of Ministers". The Court asserted that the "withdrawal of the pleasure by the Governor is a matter entirely in the discretion of the Governor" and that "the exercise of the discretion by the Governor in withdrawing the pleasure cannot be called in question in this (writ) proceeding".[82]

The High Court clarified that the provision in Art. 164(2) that the Ministers shall be collectively responsible to the Legislature does not fetter the Governor's pleasure during which the Ministers hold office. It only means that the Council of Ministers is answerable to the Assembly and a majority in the Assembly can at any time express its want of confidence in the Council of Ministers. But this is as far as the Assembly can go, it has no power to remove or dismiss a Ministry. If a Ministry does not vacate office, after the passage of a vote of no-confidence against it by the Assembly, it is then for the Governor to withdraw his pleasure during which the Ministry holds office and the discretion of the Governor is "absolute and unrestricted".

This legalistic position has been confirmed by other High Courts that the Governor has discretionary power to dismiss the Chief Minister. Thus, the Gauhati High Court has held that under Art. 164(1), Ministers hold office during the pleasure of the Governor. "The exercise of the pleasure has not been fettered by any condition or construction or restriction". The Governor as the appointing authority can withdraw his pleasure and dismiss a Chief Minister. The power to appoint or dismiss the Chief Minister or the Ministry are exclusive pleasure-*cum*-discretion of the Governor. The Constitution lays down no procedure or imposes no fetter as regards the dismissal of a Chief Minister by the Governor whose right to withdraw his pleasure, during which the Ministers hold office, is "absolute, unrestricted and unfettered".[83] "Withdrawal of pleasure is entirely in the discretion of the Governor and the Governor alone. The Assembly can only express its want of confidence in the ministry; the Assembly cannot go further than that; it has no power to remove or dismiss the Ministry. "The power of removal or withdrawal of pleasure is entirely and exclusively that of the Governor." This is an area which is prohibited to the Court because of Art. 163(2).

In *Karpoori Thakur v. Abdul Ghafoor*, the Patna High Court refused to issue a writ against the Chief Minister asking him to resign because he had lost the confidence of the House. The petition was filed by a few members of the House. The High Court said that the Council of Ministers was responsible to the whole

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81. For discussion on *Quo Warranto*, see, *infra*, Ch. VIII, Sec. E.

82. *Mahabir Prasad Sharma v. P.C. Ghosh. supra*, note 68.
For a comment on the case see, 12 *JILI* 127 (1970).
Also, M.P., SINGH, Governor's Power to Dismiss Ministers or Council of Ministers—An Empirical Study, 13 *JILI*, 612 (1971).
Also see, *supra*, Ch. VI under "Speaker" of the Assembly.

83. *Jogendra Nath Hazarika v. State of Assam*, AIR 1982 Gau 25.

House and not to a few members only. Also, there is no rule of law that a Ministry must resign on being defeated in the House. That is a political matter and the Governor has power to dismiss the Ministry.[84]

The Bombay High Court has come to a similar conclusion.[85] The Governor of Goa dismissed the incumbent Chief Minister [P] and appointed [W] as the new Chief Minister. The ex-Chief Minister P challenged the Governor's order through a writ petition alleging *mala fides* on the part of the Governor. The High Court refused to interfere. Dismissing the writ petition as not maintainable, the High Court said that the matter of dismissing and appointing the Chief Minister is one which the Governor discharges in his own sole discretion and without the aid and advice of the Council of Ministers and is, therefore, not open to judicial review. Governor's discretion is restricted only by the paramount consideration of command of majority in the House. With regard to the action pertaining to the Governor's sole discretion, his immunity under Art. 361 is absolute and beyond the writ jurisdiction of the Court.[86] The Governor is not answerable to the Court even in respect of a charge of *mala fides* in connection with his official acts. The Court pointed out that as the Governor holds office during the pleasure of the President (Art. 156), the President may conceivably go into any allegation of *mala fides* against the Governor. An effective check is that the Ministry will fall if it fails to command a majority in the State Legislative Assembly.

This, however, is the legalistic position. In practice, the Governor must keep certain matters in view while exercising the power, the basic consideration being that the Governor is to use his powers to promote, not to thwart, responsible government in the State.

The Bengal episode can hardly be regarded as healthy in a parliamentary system as it creates an unfortunate precedent that the Governor may dismiss a Ministry in his discretion. Such episodes ought to be avoided in the interest of smooth working of the Constitution. It is thus necessary to evolve certain conventions in this respect. The crisis would have been averted had the Ministry resigned, or called an early session of the House to test its strength as was suggested by the Governor. Had the Ministry followed any of these courses, the democratic traditions and values would have been strengthened in the country. Undoubtedly, it is unconstitutional for a Ministry to remain in office after losing majority support, and it is under an obligation to remove the cloud of doubt on its support in the House by seeking its verdict at the earliest. But the important question still remains whether the Governor should invoke his discretion in such a situation or bide his time till the Assembly meets and decides the issue one way or other.

One plausible view may be that it is unconstitutional for the Governor to keep a Ministry in office about which he feels sure that it no longer enjoys majority support, and he is under an obligation to dismiss it and put another Ministry in office instead. The Governors' Committee has asserted that "where the Governor is satisfied, by whatever process or means, that the Ministry no longer enjoys majority support, he should ask the Chief Minister to face the Assembly and prove his majority within the shortest possible time. If the Chief Minister shirks

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84. AIR 1975 Pat 1.
85. *Pratapsingh Raojirao Rane v. Governor of Goa,* AIR 1999 Bom 53.
86. For discussion on Art. 361, see, *supra*, Ch. III, Sec. A(i).

this primary responsibility and fails to comply, the Governor would be in duty bound to initiate steps to form an alternative Ministry. A Chief Minister's refusal to test his strength on the floor of the Assembly can well be interpreted as *prima facie* proof of his no longer enjoying the confidence of the Legislature. If then, an alternative Ministry can be formed which, in the Governor's view, is able to command a majority in the Assembly, he must dismiss the Ministry in power and install the alternative Ministry in office."[87]

But this course of action is full of many hazards and pitfalls and places a heavy responsibility on the Governor. Whenever a Governor takes any such action, he is bound to become the centre of a big political controversy. His action may be characterised as politically motivated. He may make an error of judgment. Not only the Governor, but the Central Government also is drawn into the vortex of political controversy. If the newly installed Ministry fails to secure majority support in the House, the Governor's action would be politically indefensible, and he may have no other choice but to resign his office. Such an action on the Governor's part may also encourage defections from one party to another as the defectors may hope to become ministers in the new Ministry. In the final analysis, it is the House which is the ultimate arbiter on the question of confidence of majority support of a Ministry and it is there that the Governor's action has to be vindicated.

In the Bengal case, when fresh elections were held, the U.F. won a majority and again formed the Ministry and this led to the Governor's resignation from office. A Governor should, therefore, act with extreme care and circumspection in such a crucial matter. All said and done, the soundest democratic convention in this regard would appear to be that, but for the extreme and exceptional situations, the Governor may not use his discretion and wait till the Assembly gives its verdict. At times, even minority Ministry may remain in office with the support or sufferance, of some groups in the House. Lastly, there cannot be a gap of more than six months between the two sessions of the Legislature and, therefore, the fate of the Ministry in the House cannot remain in suspense for longer than six months in any case.

The Administrative Reforms Commission has suggested that when a question arises as to whether the Council of Ministers enjoys majority support in the Assembly, the Governor may *suo motu* summon the Assembly to obtain the verdict if the Chief Minister does not advise him to convene the Assembly. The Central Government has refused to endorse this suggestion.[88]

On February 21, 1998, the U.P. Governor dismissed the Kalyan Singh Government and installed in office another person (Jagdambika Pal) as the Chief Minister. The Governor's plea was that the Kalyan Singh Ministry had lost its majority in the Legislative Assembly because of defection of some of its supporters. There was no vote of no-confidence passed against the Kalyan Singh Government nor was the Government asked to go to the Assembly to seek a vote of confidence. The action of the Governor was widely criticised as amounting to trampling upon democratic conventions and the Governor misusing his position for partisan ends.[89]

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87. *Report,* p. 45.
88. *Report on Centre-State Relationship,* 28.
89. *The Hindu Int'l Ed.,* Feb. 28, 1998, p. 8.

A writ petition was filed in the Allahabad High Court on February 23, 98, challenging the action of the Governor. Following *Bommai*,[90] the Allahabad High Court overturned the Governor's action, restored the Kalyan Singh Government and left it open to the Governor to convene a session of the State Legislative Assembly to prove its majority.[91] Then, the newly installed Chief Minister approached the Supreme Court. The Court directed that a special session of the Assembly be summoned which would have the only agenda to have a composite floor test between the two contending parties in order to ascertain who out of the two contesting claimants of Chief Ministership enjoys a majority in the House.[92] The floor test was held as directed by the Supreme Court and Kalyan Singh won the day.

It becomes clear from the above-mentioned decisions of the High Courts and the Supreme Court that the Governor's discretion to dismiss the Chief Minister is exercisable only if the Chief Minister loses his majority in the Assembly and this has to be ascertained only on the floor of the House and not in the chambers of the Governor. It is very clear now that the Governor's pleasure is to be exercised for promotion, and not for supplanting, the democratic parliamentary system. The Governor ought not to exercise his pleasure at his own whim and fancy but only after a floor-test in the Assembly. Thus, the Governor's discretion to dismiss the Ministry has been effectively restricted by judicial pronouncements.

(d) NEED FOR GOVERNOR'S DISCRETIONARY POWERS

In an *obiter*, the Madras High Court in *Mathialagan v. Governor of Tamil Nadu*,[93] has propounded the view that the Governor has no discretionary power, except the Governor of Assam under Rule 9(i) in Schedule VI, and that the exception in Art. 163(1) does not apply or govern the interpretation of any other Article pertaining to Governor's function. This is too restrictive a view and cannot be accepted because of many considerations. It goes counter to what the other High Courts have said in many cases.[94] It makes the exception to Art. 163(1)otiose and redundant. Due importance has not been attached by the Madras High Court to Art. 163(2) which empowers a Governor to decide in his discretion whether in any matter he is required to act in his discretion or not.

The Articles pertaining to the Governor have to be interpreted in the light of Arts. 163(1) and (2) and, hence, they cannot be interpreted, in every situation, *pari passu* with the Articles applying to the President, as in his case the Constitution does not in express terms confer any discretion. This distinction cannot be ignored between the President and the Governor.

There is also a practical reason as to why a Governor should have a greater latitude than the President. The governments in the States have been somewhat unstable, and have often suffered from the curse of defection. The Governor acts also as the Centre's representative in the State, and while the President's rule can be imposed in a State under Art. 356, it cannot be done at the Centre where a Ministry must always remain in office. Because of these factors, it is possible to treat a Governor on a somewhat different footing than the President. The Gover-

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90. For full discussion on this case, see, *infra*, Ch. XIII, Sec. B.
91. *The Hindu Int'l Ed.*, dated February, 28, 98, p. 1.
92. *Jagdambika Pal v. Union of India*, AIR 1998 SC 998 : (1999) 9 SCC 95.
93. AIR 1973 Mad 198, 217.
94. *Supra.*

nors' Committee has observed in this connection, "Thus even though in normal conditions the exercise of the Governor's powers should be on the advice of the Council of Ministers, occasions may arise when the Governor may find that, in order to be faithful to the Constitution and the law and his oath of office, he has to take a particular decision independently".[1]

The Court cannot take cognizance of an offence committed by a public servant under Ss. 161, 164 and 165, I.P.C., and under the Prevention of Corruption Act, without the previous sanction of the State Government. A question has been raised whether or not to accord sanction to the prosecution of the Chief Minister, the Governor should, as a matter of propriety, necessarily act in his own discretion and not on the advice of the Council of Ministers? The better opinion seems to be that in this matter, the Governor ought to act in his discretion, for, how can the Chief Minister advise the Governor whether he should be prosecuted or not on a charge of corruption. [2] It is the Governor who appoints the Chief Minister and he can dismiss the C.M. in his discretion. It is, therefore, justifiable that the state Governor should accord sanction to prosecute the Chief Minister on a charge of corruption.

What about a Minister? Who should be the authority to accord sanction to prosecute a Minister? Theoretically, the Governor appoints and can dismiss a Minister but he does so on the advice of the Chief Minister and, thus, the Governor's role in this matter is only formal or passive. Therefore, the question is whether the Governor can sanction prosecution of a Minister in his own discretion, or he should act in this matter on the advice of the Chief Minister. If it is the latter, then it will be extremely difficult to prosecute a Minister for it is difficult to envisage the C.M. to advise prosecution of a Minister appointed by him. Partisan and political considerations are bound to crop up for it will be politically inexpedient for a C.M. to admit that there has been a corrupt Minister in the Cabinet. Therefore, it seems to be necessary that in this matter also, the Governor acts in his discretion. In any case, if the Governor decides to act in such a matter in his discretion, then under Arts. 163(1) and (2), his decision cannot be challenged in any forum.

The only way to reduce the occasions for the Governors to exercise their discretion is to evolve acceptable conventions to take care of various situations which arise.[3] A danger in a Governor deciding matters according to his wisdom is that there may thus arise in the country uncertainty and lack of uniformity in constitutional practices as different Governors may respond differently to identical or near identical situations. The Governor's activist and discretionary role can be minimised if all political parties accept some healthy conventions, follow sound democratic behaviour, and play the game in an even-handed manner without trying to bend the Constitution to serve their own immediate political interests. Also, it goes without saying that the Governor has to use, if at all, his discretionary power to promote, and not to thwart, sound democratic parliamentary government, the principle of responsibility of the Executive to the Legislature and government according to the Constitution.

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1. *Report*, 20.
2. *State of Maharashtra v. Ramdas Shrinivas Nayak*, AIR 1982 SC 1249 : (1982) 2 SCC 463.
3. On 'Conventions' see, *supra*, Ch. I. Also see, Ch. XL, *infra.*

The Administrative Reforms Commission suggested in 1969 that some guidelines should be evolved to enable exercise of these discretionary powers by the Governor for the purpose of preserving and protecting democratic values. The Commission felt that the guidelines are necessary to secure uniformity of action and eliminate all suspicions of partisanship or arbitrariness.[4] However, the Central Government considered this recommendation of the A.R.C. and decided against framing any guidelines. The Government felt that the best course would be to allow conventions to grow up.[5]

Presently it seems that a convention has come into existence that in case of doubt whether the Ministry enjoys the confidence of the House or not, the Governor requires the Chief Minister to seek a vote of confidence from the House. For example, there was in office a coalition Government in the State of U.P. consisting of B.J.P. and B.S.P. under the Chief Minister belonging to B.J.P. When in October, 97, the B.S.P. withdrew its support from the Government, the Governor required the Chief Minister to seek a vote of confidence from the House and Chief Minister Kalyan Singh was able to win such a vote.[6] Again, in Gujarat, when the Congress withdrew its support from the Waghela Government in October 97, the Governor refused to dissolve the Assembly as advised by the Chief Minister but asked the Chief Minister to seek a vote of confidence from the House.

The J&K Legislature passed an Act constituting a board of management for the Vaishno Devi Shrine with the Governor as the *ex-officio* chairman. Interpreting the Act, the Supreme Court ruled in *Bhuri Nath v. State of Jammu & Kashmir*[7] that the Legislature entrusted the powers to the Governor in his official capacity but he was not to act on the advice of the Council of Ministers as the executive head of the State. The State Governor "is required to exercise his *ex officio* power as Governor to oversee personally the administration, management and government" of the shrine, its properties and funds.

Under an Act passed by the Haryana Legislature, the State Governor was appointed as the Chancellor of a University. In *Hardwari Lal*,[8] the High Court ruled that the Act intended that the State Government, as such, ought not to interfere in the affairs of the University, and that the State Government could not give advice to the Governor in the discharge of the functions as the Chancellor. In this capacity, the Governor acts in his discretion and not on the aid and advice of his Council of Ministers.

Ultimately, one point about the governor's discretionary power needs to be emphasized, viz. that the discretionary power has been vested in the governor to deal with any unforeseen situation which may arise in the state. In exercising his power the governor must always act to promote and protect the institution of the parliamentary form of government and not to take arbitrary decisions. While seeking to exercise his discretionary power, the governor is to keep in his view the sole criterion whether his decision will promote or thwart parliamentary system in the State.

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4. *Report on Centre-State Relationship,* 25.
5. *The Times of India,* March 14, 1975.
6. Also see, *supra,* footnote 92.
7. AIR 1997 SC 1711, 1722 : (1997) 2 SCC 745.
8. *Hardwari Lal v. G.D. Tapase, Chandigarh,* AIR 1982 P&H 439. Also, *Kiran Babu v. State of Andhra Pradesh,* AIR 1986 AP 275.

(e) GOVERNOR'S POSITION IN NON-DISCRETIONARY AREA

Besides the specific matters mentioned above, what is the position in matters where the Governor receives advice from his Council of Ministers. Art. 163 does not clarify the position between the Governor and his Council of Ministers in the non-discretionary area.[9] Is the Governor bound to act on the advice of the Council of Ministers? In the opinion of the Governors' Committee, the position is as follows: [10]

> "Even in the sphere where the Governor is bound to act on the advice of his Council of Ministers, it does not necessarily mean the immediate and automatic acceptance by him of such advice. In any relationship between the Governor and his Council of Ministers, the process of mutual discussion is implicit, and the Governor will not be committing any impropriety if he states all his objections to any proposed course of action and asks the Ministry to reconsider the matter. In the last resort he is bound to accept its final advice, but he has the duty, whenever necessary, to advise the Ministry as to what he considers to be the right course of action, to warn the Ministry if he thinks that the Ministry is taking an erroneous step and to suggest to it to reconsider the proposed course of action. In the process of advice and consent, there is ample room for exchange of views between the Governor and the Council of Ministers even though he is bound to accept its advice."

The above statement assimilates the position of the Governor *vis-a-vis* his Council of Ministers (in the non discretionary area) to that existing between the President and his Council of Ministers under Art. 74.[11]

D. FUNCTIONS AND POWERS OF THE EXECUTIVE

(i) JUDICIAL POWER

The Constitution confers certain powers on the State Government which may be characterised as 'judicial' in nature.

The State Executive has power to appoint judges to the subordinate Courts in the State [Art. 233-237].[12] Besides, the question whether a member of the State Legislature has become subject to a disqualification or not is formally decided by the Governor [Art. 192].[13]

POWER TO GRANT PARDON

The Governor is empowered to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends [Art. 161]. This power of the Governor is very much similar to the power of the President under Art. 72, discussed earlier.[14] Article 161 of the Constitution confers upon the Governor of a State similar powers in respect of any offence against any law relating to a matter to which the executive power of the State extends. The power under Arts. 72 and 161 of the Constitution

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9. *Supra*, Sec. A(i); Sec. B.
10. *Report*, 20.
11. On this point, see, *supra*, Ch. III, Sec. B.
12. For a detailed discussion on these provisions, see, *infra*, Ch. VIII, Sec. G.
13. *Supra*, Ch.VI, Sec. B(iii).
14. *Supra*, Ch. III, Sec. D(i).

is absolute and cannot be fettered by any statutory provision. But the president or the Governor, as the case may be, must act on the advice of the Council of Ministers.[15] The State Government has full freedom in exercising the power of clemency, which is a matter of policy, and even excluding a category of persons which it thinks expedient to exclude as long as there is no insidious discrimination involved.[16]

As discussed earlier,[17] the Governor's powers, under any law in force, to suspend, remit or commute a death sentence have been saved by Art. 72(3). A power to suspend the execution of a sentence or remit the whole or any part thereof has been conferred by S. 432(1), Cr.P.C., 1974 on the State Government. Under S. 433(1), Cr.P.C., the State Government is authorised to commute a sentence, including that of death, into a less rigorous sentence. Art. 161 is of much wider amplitude than S. 401, Cr.P.C., for while under the former the State Government can give an absolute and unconditional pardon, the latter does not empower it to do any such thing. In any case, the power given under Art. 161 cannot be fettered by any statutory provision. Because of Arts. 72 and 161, the power of the Governor to grant pardon, etc., overlaps, to some extent, with the similar power of the President, particularly in case of a death sentence.[18]

The appellant was sentenced to three years' imprisonment. After about 16 months, the government remitted his sentence. Under the Representation of the Peoples Act, a person sentenced to imprisonment for not less than two years is disqualified from being a candidate at an election. The question was whether the appellant was qualified to be a candidate. In *Sarat Chandra Rabha v. Khagendra Nath*,[19] the Supreme Court answered in the negative. The effect of remission is to wipe out the remaining part of the sentence which has not been served and, thus, in practice, the sentence is reduced to that already undergone. In law the remission does not touch the order of conviction by the Court and the sentence passed by it. Thus, in the instant case, the sentence of three years' imprisonment is not affected and the appellant remains disqualified although he may not have to undergo the full sentence.

In *Nanavati v. State of Bombay*,[20] the Supreme Court discussed some aspects of this power. Nanavati, a high naval officer, was found guilty of the offence of murder and was sentenced to life imprisonment by the Bombay High Court. The Governor of Bombay suspended the sentence till the disposal of his appeal by the Supreme Court and directed that he be detained in the naval jail.

The action of the Governor raised a storm of public protest as it was characterised as an interference with the course of justice. However, the High Court upheld the Governor's order. It ruled that the power of pardon, reprieve, suspension of sentence, etc., under Arts. 72 and 161, could be exercised before, during or after trial, as the words of these provisions were wide. These contained no limitation as to the time at, the occasion on, and the circumstances in which, the powers conferred by these provisions might be exercised.

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15. *State (Government of NCT of Delhi) v. Prem Raj*, (2003) 7 SCC 121 : (2003) 8 JT 17.
16. *Govt. of A.P. v. M.T. Khan*, (2004) 1 SCC 616 : AIR 2004 SC 428.
17. *Ibid.*
18. *Dy. I.G. of Police v. Raja Ram*, AIR 1960 AP 259; *Parkasho v. State of Uttar Pradesh*, AIR 1962 All. 151.
19. AIR 1961 SC 334 : 1961 (2) SCR 133.
20. AIR 1961 SC 112 : 1961 (1) SCR 497.

Thereafter, Nanavati sought special leave of the Supreme Court to appeal from the High Court's sentence of life imprisonment. The Court has made a rule under Art. 145, requiring a petitioner, sentenced to a term of imprisonment, to surrender to his sentence before his petition is heard unless the Court otherwise orders.[21] Nanavati claimed an exemption from the rule in view of the Governor's order suspending his sentence. The Court pointed out that while exercising its powers under Art. 136, it could either pass an order of suspension of sentence or grant of bail pending the disposal of the application for special leave to appeal.[22] This power of the Court overlaps with that of the Executive to suspend the sentence during pendency of the special leave.

Applying the rule of harmonious construction of the power of the two organs so as to avoid the conflict between them, and the ambit of the power of the Executive being wider and that of the Court being narrower, it must be held that the Executive could not suspend the sentence during the time the matter is *sub judice* in the Court. The Governor may grant a full pardon at any time, even when the case is pending in the Court, but the suspension of the sentence for the period when the Supreme Court is seized of the case could be granted only by the Court itself and not by the Governor. The Supreme Court held in effect that the Governor's order suspending the sentence could operate only till the matter became *sub judice* in the Court on filing the petition for special leave to appeal, and no further. Thereafter, it is for the Court to pass such order as it thinks fit. The Court refused to grant to Nanavati the exemption he prayed for.[23]

Several cases have come to light showing that, at times, the power to grant pardon is misused by the State Governments. In *Swaran Singh*,[24] D, an MLA of the U.P. Assembly, was found guilty of murdering one J. He was convicted and sentenced to imprisonment for life. Within a period of two years, the Governor of U.P. granted remission of the remaining long period of his life sentence. The family members of the deceased challenged the action of the Governor in the High Court and the matter ultimately reached the Supreme Court which quashed the Governor's action. The Supreme Court found that when the Governor passed the remission order, certain vital facts concerning D were not placed before the Governor. For example, the same Governor had earlier dismissed a petition from D for remission of his sentence and this fact was not disclosed when the second petition was moved after only few months. It was not disclosed to the Governor that D was involved in five other criminal cases of serious offences; his conduct in the prison was far from satisfactory and that out of two years and five months he was supposed to have been in jail, he was in fact on parole during the substantial part thereof.

Referring to *Kehar Singh*,[25] and *Maru Ram*,[26] the Court stated that judicial review of the Governor's decision under Art. 161 is not exercisable on the merits except within strict limits defined in *Maru Ram*, *viz.*: "all public power, including constitutional power, shall never be exercisable arbitrarily or *mala fide*, and ordinarily guidelines for fair and equal execution are guarantors of valid play of power". The Court stated in *Swaran Singh*:

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21. For Art. 145, see, Ch. IV, Sec. I(f), *supra.*
22. For discussion on Art. 136, see, *supra*, Ch. IV, Sec. D.
23. Also see, *State v. Nanavati,* AIR 1960 Bom 502.
24. *Swaran Singh v. State of U.P.,* AIR 1998 SC 2026 : (1998) 4 SCC 75.
25. *Supra,* Ch. III, Sec. D(i).
26. *Maru Ram v. Union of India,* AIR 1980 SC 2147 : (1981) 1 SCC 107; *supra,* Ch. III.

> "The bench stressed (in *Maru Ram*) the point that the power being of the greatest moment, cannot be a law unto itself but it must be informed by the finer canons of constitutionalism.... If such power [under Art. 161] was exercised arbitrarily, *mala fide* or in absolute disregard of the finer canons of constitutionalism,[27] the by-product order cannot get the approval of law and in such cases, the judicial hand must be stretched to it."[28]

In the instant case, when the Governor was not posted with material facts, "the Governor was apparently deprived of the opportunity to exercise the powers in a fair and just manner. Conversely the order now impugned fringes on arbitrariness".

The Court therefore quashed the Governor's order and remitted the case back to the Governor for reconsideration and pass a fresh order in "the light of those materials which he had no occasion to know earlier".

Again, in *Satpal v. State of Haryana*,[29] a BJP leader sentenced to life imprisonment in a murder case was pardoned by the Governor of Haryana. The Supreme Court ruled that the Governor was not properly advised and had exercised his power "without applying his mind" and, accordingly, quashed the clemency order. The Court observed:

> "… the conclusion is irresistible that the Governor had not applied his mind to the material on record and has mechanically passed the order just to allow the prisoner to overcome his conviction and sentence passed by the Court".

Rejecting the plea of the Government that the power of pardon and remission of sentence is executive in nature, the Court stated:

> "There cannot be any dispute with the proposition of law that the power of granting pardon under Art. 161 is very wide and does not contain any limitation as to the time on which and the occasion on which and the circumstances in which the said power could be exercised. But the said power being a constitutional power conferred on the Governor by the Constitution is amenable to judicial review on certain limited grounds".

The Court pointed out the following grounds on which the Court could interfere with an order passed under Art. 161, *viz.*, if the Governor exercises the power himself without being advised by the Government; if the Governor transgresses the jurisdiction in exercise of the power under Art. 161; if the Governor has passed the order without application of mind; if the order is *mala fide*; if the Governor has passed the order on some extraneous consideration. Whatever applies to the President under Art. 72 equally applies to the power of the Governor under Art. 161. The power under Art. 72 or 161 is to be exercised by the government concerned and not by the President or the Governor on his own.[30] The advice of the appropriate government binds the President/Governor.

The Apex Court has also stated that "considerations for exercise of power under Arts. 72 or 161 may be myriad and their occasions protean, and are left to the appropriate government, but no consideration nor occasion can be wholly irrelevant, irrational, discriminatory or *mala fide*."

In the instant case, the Supreme Court observed further:

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27. For discussion on the concept of 'constitutionalism', see, *supra*, Ch. I.
28. *Swaran Singh v. State of U.P.*, AIR 1998 SC 2026, at 2028 : (1988) 4 SCC 75.
29. AIR 2000 SC 1702 : (2000) 5 SCC 170.
30. Reference was made to the *Kehar Singh* and *Maru Ram* cases discussed earlier, see, *supra*, Ch. III, Sec. D(i).

> "The entire file has been produced before us and we notice the uncanny haste with which the file has been processed and the unusual interest and zeal shown by the authorities in the matter of exercise of power to grant pardon."

In the instant case, the Court ruled that the Governor was not properly advised. He was not made aware of several crucial features of the case going against the accused.

It has now been settled that the Governor does not exercise the clemency power in his own discretion but on the advice of his Council of Ministers. The Governor of Madras rejected a mercy petition on his own without seeking the advice of Council of Ministers. The Madras High Court quashed the Governor's decision on the ground that the Governor had not followed the constitutional practice of seeking the advice of his Cabinet before passing orders on the mercy petition. The High Court directed the Governor to seek the advice of the Council of Ministers before taking a fresh decision on the mercy petition.[31]

These cases are telling examples of criminalisation of politics and show how powers vested in high functionaries by the Constitution can be manipulated to favour criminal politicians. The clemency power is exercised at times not on merits but on political and other extraneous considerations. So long as the clemency power is exercisable on the advice of the government of the day, political considerations are bound to creep in while exercising power under Art. 72 or 161. It is, therefore, necessary to develop a non-political mechanism for the exercise of this power so that it is exercised purely on the merits of each case without any political connotations.

These cases show that there exists a close *nexus* between crime and politics, and that the Supreme Court has through these sought to break this *nexus*. It also shows how necessary it is that the courts do exercise the power of judicial review over exercise of power under Art. 72 or 161 so as to ensure that this power is not misused or used arbitrarily in favour of influential politicians who commit crimes with impunity.

(ii) LEGISLATIVE POWER

(a) PARTICIPATION IN THE LEGISLATIVE PROCESS

Like the Central Executive, the State Executive also participates intimately in the legislative process.[32] Each Minister is necessarily a member of the State Legislature. The powers of prorogation and dissolution of the Legislature vest in the Executive. The Governor has to signify his assent to a Bill passed by the State Legislature before it can assume legal sanctity or reserve it for Presidential assent.

Most of the bills are drafted by government departments and are presented to, and piloted through, the Legislature by the Ministers. No bill can ever be passed by the Legislature without government sponsorship and support because the government has majority in the Legislative Assembly.

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31. *The Hindustan Times*, dated 26-11-1999; *The Hindustan Times*, dated 27-11-1999, p. 11.
32. *Supra*, Ch. VI, Sec. F(i).

(b) RULE MAKING

Several provisions of the Constitution confer rule-making powers on the Governor. He can make rules regarding:—

(1) authentication of orders and other instruments;[33]

(2) conditions of service of the members of the State Public Service Commission[34] as well as civil servants;[35]

(3) convenient transaction of Government business;[36]

(4) procedure in respect of communications between the Houses of State Legislature;[37]

(5) recruitment of officers, *etc.*, for a High Court,[38]

(6) recruitment of secretarial staff of the Legislature.[39]

(c) ORDINANCE-MAKING POWER

The State Executive has ordinance-making power similar to that enjoyed by the Central Executive.[40]

According to Art. 213(1), which is in *pari materia* to Art. 123, which has already been discussed earlier, the State Governor may promulgate such ordinances as the circumstances appear to him to require when—(1) the State Legislative Assembly is not in session; or if the State has two Houses, when one of the Houses is not in session; and (2) the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action.

According to the proviso to Art. 213(1), the Governor cannot, without instructions from the President, promulgate any ordinance if:—(*a*) a Bill to that effect would, under the Constitution, have required the previous sanction of the President for its introduction into the State Legislature;[41] or, (*b*) if the Governor would have deemed it necessary to reserve a Bill to that effect for the President's consideration;[42] or, (*c*), an Act of the State Legislature to that effect would have been invalid under the Constitution without receiving the President's assent.[43]

The purport of (c), mentioned above, is as follows: when a State makes a law containing a provision inconsistent with a Central Law with respect to a matter in the Concurrent List, the State Law has to receive the assent of the President to be valid. Thus, the assent of the President is secured *subsequent* to the passage of the Bill.[44] If, however, an ordinance is being made in the similar circumstances, then the instructions from the President are a condition *precedent* to the promulgation of the ordinance.

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33. Art. 166(2); *supra*, Sec. B.
34. Art. 318; *infra*, Ch. XXXVI, Sec. K.
35. Art. 309; Ch. XXXVI, Sec. B, *infra*.
36. Art. 166(3); *supra*, Sec. VIII, Sec. B.
37. Art. 208; *supra*, Ch. VI, Sec. G.
38. Art. 229, Proviso; *infra*, Ch. VIII, Sec. G.
39. Art. 187(3); *supra*, Ch. VI, Sec. D(c).
40. *Supra*, Ch. III, Sec. D(ii)(d).
41. For discussion of these points, see, *infra*, Ch. X, Sec. K.
42. *Supra*, Ch. VI, Sec. F(i).
43. *Infra*, Ch. X, Sec. K.
44. See, *infra*, Ch. X, Secs. F, H and K.

An ordinance is to be laid before the State Assembly, and before the Council as well if there is one in the state. [Art. 213(2)(a)]. An ordinance ceases to operate at the expiration of six weeks from the reassembly of the Legislature. If the State has a bicameral legislature, and the two Houses assemble on different dates, the period of six weeks is to be counted from the later of the two dates. If the Government so desires it can in the mean time bring forth a Bill incorporating the provisions contained in the ordinance and have it enacted. An ordinance ceases to operate earlier than six weeks if a resolution disapproving it is passed by the Assembly, and is agreed to by the Council, if any [Art. 213(2)(a)]. An ordinance may be withdrawn by the Governor at any time [Art. 213(2)(b)].

An ordinance has the same force and effect as an Act passed by the State Legislature. [Art. 213(2)]. The ordinance-making power is co-extensive with the legislative power of the State.[45] Just as the Legislature can make a law under Art. 209 to expedite financial business in the Houses, so can an ordinance.[46] An ordinance cannot make a provision which cannot be validity enacted by an Act of the State Legislature [Art. 213(3)]. In the Concurrent List, an Act of the State Legislature repugnant to an Act of Parliament with respect to a matter in that list may become effective if the President has assented to it. So an ordinance, in a similar situation, will be valid if enacted with the President's prior consent [Art. 213(1)(c)].[47]

The power to make ordinances though formally vested in the Governor is, in effect, exercised by the Council of Ministers on whose advice the Governor acts, except when the matter is one in which the Governor has to seek instructions from the President.[48] The position as regards justiciability of the Governor's satisfaction to issue an ordinance is similar to that of the President's satisfaction discussed earlier.[49]

EFFECT OF AN ORDINANCE

Article 123(2) or 213(2) says that an ordinance has the same force and effect as an Act of the Legislature. What happens when an ordinance lapses without being replaced by an Act of the Legislature? Is the ordinance to be regarded as void *ab initio*?

Under the Orissa Municipal Act, election took place to certain offices in the Cuttack Municipality. The High Court set aside the municipal election. To overcome the difficulty thus created, an ordinance was issued validating the election. This ordinance was also declared to be invalid by the High Court. The councilors filed an appeal in the Supreme Court. The argument was that the Ordinance lapsed as the Legislature failed to enact the necessary legislation and so the councilors lost their offices.

The Supreme Court observed on the effect of the ordinance:[50]

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45. See, Ch. XII, *infra*.
46. *State of Punjab v. Satpal Dang, supra,* Chs. II and VI.
47. *Infra,* Ch. X, Sec. K.
Also, *Bhupendra Bose v. State of Orissa,* AIR 1960 Ori 46.
48. *Infra,* Ch. X, Sec. K.
49. *Supra,* Ch. III, Sec. D(ii)(d).
50. *State of Orissa v. Bhupendra Kumar Bose,* AIR 1962 SC 945, 955 : 1962 Supp (2) SCR 380.

> "Having regard to the object of the ordinance and to the rights created by the validating provisions, it would be difficult to accept the contention that as soon as the ordinance expired, the validity of the elections came to an end and their invalidity was revived. The rights created by this ordinance, in our opinion,.. must be held to endure and last even after the expiry of the ordinance."

Here the Court in the factual context ruled that the effect of the ordinance did not cease when it lapsed. Similarly, in *Venkata Reddy*,[51] an ordinance issued by the State Government abolished the posts of part time village officers. After sometime, the ordinance lapsed without being replaced by an Act of the Legislature. The question was whether the offices revived after the lapse of the Ordinance. The Supreme Court answered in the negative. The Court refuted the argument that when an ordinance is not replaced by an Act, as required by Art. 123(2) or 213(2), the ordinance is to be deemed to be void *ab inilio* and it should be assumed that it never because effective.

The Court argued, after reading Arts. 123(2) and 213(2), that the wordings of both of these provisions being similar, neither of these provisions says that the ordinance shall be void from its commencement if it is not approved, or is disapproved by the Legislature. The constitutional provision merely says that the ordinance shall cease to operate. This means that the ordinance remains effective till it ceases to operate. Accordingly, a mere disapproval of an ordinance by the concerned legislature cannot revive closed or completed transaction. If the Legislature wants to revive the pre-ordinance position, it can do so by passing a law having retrospective effect. Therefore, abolition of the posts by the ordinance having become a completed event, no question arises of revival of those posts after the lapse of the ordinance. The effect of the ordinance was irreversible except by express legislation as stated above.

But, on the other hand, the Gauhati High Court in the following case[52] took a different view. The Central Government issued an ordinance declaring certain sections of people in Assam as Scheduled Tribes. By successive ordinances the benefit was continued till the last ordinance lapsed without Parliament passing the necessary Act continuing the provisions of the ordinance. The Court ruled that with the lapse of the ordinance, the people concerned also lost the benefit conferred on them by the lapsed ordinance. The ordinance in question was made only for a short period. When Parliament failed to pass the necessary law, the ordinance lapsed. "Until and unless the competent authority enacts such a law with a view to confer such benefits afresh on those sections of the people, it is not possible to hold that as a right has already accrued that right has to be saved".

It is thus clear that an ordinance is effective so long as it lasts. If it lapses because of non-action of the Legislature, its validity is not affected. Depending on the factual context and other factors, the Court may hold that the effect of the ordinance has not come to an end even if the ordinance may have ceased to exist.

JUSTICIABILITY OF ORDINANCE-MAKING POWER

The position as regards justiciability of the Governor's satisfaction to issue an ordinance is similar to that of the President's satisfaction discussed earlier.[53]

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51. *T. Venkata Reddy v. State of Andhra Pradesh*, AIR 1985 SC 724 : (1985) 3 SCC 198.
52. *Maitreyee Mahanta v. State of Assam*, AIR 1999 Gau 32.
53. See, Ch. III, Sec. D(ii)(d), *supra.*

The question has been raised from time to time whether the 'satisfaction' of the Governor (i.e. of the Government) to issue an ordinance is justiciable or not.

The Governor of Andhra Pradesh issued an ordinance reducing the age of retirement of civil servants from 58 to 55. The ordinance was challenged *inter alia* on the ground of non-application of mind. Rejecting the argument, the Supreme Court asserted in *Nagaraj*[54] that issuing an ordinance is a legislative act of the executive. The Court stated in this connection. "The power to issue an ordinance is not an executive power but is the power of the executive to legislate". [55] This power is plenary within its field like the power of the State Legislature to pass laws and "there are no limitations upon that power except those to which the legislative power of the State Legislature is subject". Therefore, an ordinance cannot be declared invalid for the reason of non-application of mind "any more than any other can be. An executive act is liable to be struck down on the ground of non-application of mind not the act of the Legislature."[56]

The Court also rejected the ground of *mala fides*[57] with the remark that the ordinance making power being a legislative power, the argument of *mala fides* was misconceived. The Court also observed, "The Legislature, as a body, cannot be accused of having a law for an extraneous purpose."[58] The Court cannot examine the motives of the Legislature in passing an Act.

In *T. Venkata Reddy v. State of Andhra Pradesh*,[59] the Supreme Court has again reiterated the proposition that an ordinance cannot be struck down on such grounds as non-application of mind, or *mala fides*, or that the prevailing circumstances did not warrant the issue of the ordinance. An ordinance passed under Art. 123, or under Art. 213, stands on the same footing as an Act. Therefore, "an ordinance should be clothed with all the attributes of an Act of legislature carrying with it its incidents, immunities and limitations under the Constitution. It cannot be treated as an executive action or an administrative decision".[60] The Courts can declare a statute unconstitutional when it transgresses constitutional limits, but they cannot inquire into the propriety of the exercise of the legislative power. It has to be assumed that the legislative discretion is properly exercised.[61]

The U.P. Government promulgated an ordinance acquiring 49% share of the Dalmia Industry in the U.P. State Cement Corporation, a government undertaking. The validity of the ordinance was challenged but the Supreme Court rejected all contentions and ruled that the ordinance was made in public interest. The acquisition of shares of Dalmia in the government company was in public interest. The ordinance was not only in public interest and for public purpose but also was just and fair.[62]

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54. *K. Nagaraj v. State of Andhra Pradesh*, AIR 1985 SC 551 : (1985) 1 SCC 523.
55. *Ibid*., at 565.
56. For discussion on the concept of 'non-application of mind', see JAIN, *A TREATISE ON ADM. LAW, I*, 959-63; *CASES & MATERIALS*, III, 2306-16.
57. See, *A TREATISE op. cit*, 890-928; *CASES & MATERIALS, op. cit.*, 2068-2135.
58. AIR 1985 SC 551 at 566 : (1985) 1 SCC 523.
59. AIR 1985 SC 724 : (1985) 3 SCC 198.
60. *Ibid*, at 731.
61. See, *supra*, Ch. II.
Also see, *R.K. Garg, supra; A.K. Roy v. Union of India, supra*, Ch. III, Sec. D(ii)(d).
62. *Dalmia Industries Ltd. v. State of Uttar Pradesh*, AIR 1994 SC 2117 : (1994) 2 SCC 583.

Again, in the case noted below,[63] the Supreme Court has reiterated what it has said earlier in *Nagaraj* and *Venkata Reddy,* viz., the Court cannot take cognizance of "legislative malice" in passing a statute. Accordingly, motive for promulgation of an ordinance cannot be examined by the Court. The Court again reiterated the proposition that the ordinance cannot be invalidated on the ground of non-application of mind.

The judicial view expressed in the above cases that an ordinance cannot be questioned on the ground of *mala fides* is open to question as discussed earlier. It needs to be emphasized that the doctrine of Separation of Powers envisages not only separation of powers, as such, but also separation of the three organs who wield these powers.[64] When the Executive promulgates an ordinance, it exercises legislative power which in itself amounts to the negation of the doctrine of Separation of Powers, as it combines legislative power with executive power. Although an ordinance may have the same effect as an Act of the Legislature, and the function of making an ordinance may be regarded as legislative, yet there is a vital difference between the two: an ordinance is made by the Executive while an Act is made by a democratically elected Legislature after due deliberation and discussion. Therefore, the making of an ordinance can never be equated with the enactment of an Act through the Legislature. An ordinance and an Act may have the same effect after enactment, but this cannot mean that their origin is also on the same footing. One is the legislative act of the Executive, the other is the legislative act of the democritically elected Legislature. The executive can never be equated with the legislature.

The proposition, mentioned above, seems to have become untenable after the Supreme Court decision in *Bommai,* where the Supreme Court has ruled that a proclamation issued by the President under Art. 356 on the advice of the Council of Ministers is amenable to judicial review at least to the extent of examining whether the conditions precedent to the issuance of the Proclamation have been satisfied or not.[65] Thus, while an Act passed by a Legislature may not be challengeable on the ground of *mala fides,* the same ought not to be said of the Executive.

The Constitution itself differentiates between an Act and an ordinance as is very clear from the phraseology of Art. 123 or 213. An ordinance has a temporary life; it is not a permanent law like an Act. The very fact that an ordinance lapses automatically after a while, and has to be replaced by an Act of the Legislature shows that the Constitution does not confer the same status on an ordinance as that of an Act. The following discussion itself brings out clearly the fact that the Supreme Court does not treat an ordinance as being on *all fours with* an Act. In the eyes of the Court itself, an ordinance is a merely temporary expedient—an inferior kind of law. Accordingly to treat 'legislation' by the executive as *pari passu* with legislation by a legislature, as has been done in the above cases, does not appear to be sound.

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63. *Gurudevdatta VKSSS Maryadit v. State of Maharashtra,* AIR 2001 SC 1980 : (2001) 4 SCC 534.
64. See, *supra,* Ch. III, Sec. F.
65. For discussion on *Bommai,* see, *infra,* Ch. XIII, Sec. B.

MISUSE OF THE POWER TO MAKE ORDINANCES

The power to promulgate ordinances is meant to be used sparingly and only in an emergency and when the State Legislature is in recess. An ordinance has only a limited life. Art. 213 is so structured that no ordinance made by the State Government can remain in force for more than 7½ months without being approved by State Legislature and enacted into an Act. Under Art. 213, the Governor can promulgate an ordinance if the State Assembly is not in session. An ordinance lapses if not passed by the Legislature within six weeks from the re-assembly of the Legislature. The Assembly has to meet within six months of its last session; in effect, the maximum life of an ordinance can thus be seven and half months.

However, in Bihar, an objectionable practice arose of not placing the ordinances before the Legislature for approval. These ordinances were re-promulgated word to word after the prorogation of the Legislature. This practice was helped by the fact that the Assembly always met for less than six weeks. The re-promulgation of the ordinances was done on a massive scale in a routine manner without ever being replaced by Acts of Legislature as envisaged by the constitutional provision. The State Government proceeded on the basis that it was not necessary to introduce any legislation in the Legislature but that the law could be continued to be made by the Government by having ordinances repromulgated by the Governor from time to time. In this way, an ordinance raj in the real sense of the term was ushered in the State. This amounted to law-making by an executive fiat instead of by the Legislature. This practice of mass repromulgation of ordinances on the prorogation of the session of the State Legislature continued unabated for long and was resorted to methodologically and with a sense of deliberateness.

Just to take one example of how the whole thing operated: the Bihar Sugarcane (Regulation of Supply and Purchase) Ordinance was kept in force for more than 13 years through the process of re-promulgation instead of seven and a half months as envisaged by the constitutional provision. Many other ordinances were continued for years without ever being brought before the Legislature for approval.[66]

An idea of the extent of this objectionable practice can be had from the following figures: during the period 1967-81, the State Governor promulgated 256 ordinances; all these ordinances were kept alive for periods ranging between 1 to 14 years by repromulgation from time to time. This reprehensible practice posed a threat to the system of parliamentary democracy. It could also be characterised as a fraud on the constitution as Art. 213 was never designed to be used in such a manner.

A writ petition was filed in the Supreme Court as a matter of public interest litigation on January 16, 1984, challenging such a practice as unconstitutional. The Supreme Court delivered its opinion in the matter in December, 1986.[67] The Court emphasized that under the Constitution, the primary law-making authority is the legislature and not the executive and the ordinance making power is "in the nature of an emergency power". The Court took note of the practice prevailing in Bihar. The Court described the practice as follows:

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66. See, WADHWA, *Re-promulgation of Ordinances; A Fraud on the Constitution of India.*

67. *D.C. Wadhwa v. State of Bihar,* AIR 1987 SC 579 : (1989) 1 SCC 378. On "Public Interest Litigation', see, *infra,* Ch. VIII; *infra,* Ch. XXXIII, Sec. B.

> "It is clear that the power to promulgate ordinance was used by the Governor of Bihar on a large scale and that after the session of the Legislature was prorogued, the same ordinances which ceased to operate were re-promulgated, containing the same provisions almost in a routine manner".

The Court emphasized that every ordinance promulgated by the State Governor under Art. 213, must be placed before the State legislature, and "the executive cannot by taking resort to emergency provision of Art. 213 usurp the law-making function of the legislature."

The Court ruled unequivocally that the executive cannot by taking resort to an emergency power exercisable by it only when the legislature is not in session, take- over the law-making function of the Legislature, as this would subvert the democratic process which lies at the core of our constitutional scheme. The Court emphasized: "The power to promulgate an ordinance is essentially a power to be used to meet an extraordinary situation and it cannot be allowed to be perverted to serve political ends". It is the function of the Legislature which is a representative body to make law; the Executive cannot continue the provisions of an ordinance in force without going to the Legislature. "If the Executive were permitted to continue the provisions of an ordinance in force by adopting the methodology of re-promulgation without submitting to the voice of the Legislature, it would be nothing short of usurpation by the Executive of the law-making function of the Legislature".[68]

Criticizing the practice in trenchant terms, the Court observed:

> "The executive cannot by taking resort to an emergency power exercisable by it only when the legislature is not in session, take over the law-making function of the legislature. That would be clearly subverting the democratic process which lies at the core of our constitutional scheme, for then the people would be governed not by the laws made by the legislature as provided in the Constitution but by laws made by the executive".

The Court set its face against the Ordinance-Raj in the Country.

The Court did concede, however, that "there may be a situation where it may not be possible for the Government to introduce and push through in the Legislature a Bill containing the same provisions as in the ordinance, because the Legislature may have too much legislative business in a particular session, or the time at the disposal of the Legislature in a particular session may be short, and in that event, the Governor may legitimately find that it is necessary to repromulgate the ordinance. Where such is the case, repromultation of the ordinance may not be open to attack. But, otherwise, it would be a colourable exercise of power on the part of the Executive to continue an ordinance with substantially the same provisions beyond the period limited by the Constitution, by adopting the methodology of repromulgation". In this context, the Court further observed:

> "It is settled law that a constitutional authority cannot do indirectly what it is not permitted to do directly. If there is a constitutional provision inhibiting the constitutional authority from doing an act, such provision cannot be allowed to be defeated by adoption of any subterfuge. That would be clearly a fraud on the constitutional provision."[69]

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68. *Ibid.*, 589.

69. For comments on this case, see, DR. T.V. SUBBA RAO, Doctrine of Colourable Re-Promulgation of Ordinances : Wadhwa's case, AIR 1988 JL 49.

The Court held that the Executive in Bihar "has almost taken over the role of the Legislature in making laws, not for a limited period, but for years together in disregard of the constitutional limitations. This is clearly contrary to the Constitutional Scheme and it must be held to be improper and invalid." The Court ruled that the systematic practice of the Bihar Government in promulgating ordinances successively without enacting them through the Legislature was "clearly unconstitutional" and amounted to "a fraud on the Constitution".

The Court went on to say that "the Government (of Bihar), it seems, made it a settled practice to go on re-promulgating ordinances from time to time and this was done methodically and with a sense of deliberateness". The Court called this a "reprehensible practice of the highest constitutional importance".

The Court declared unconstitutional the Bihar Intermediate Education Council Ordinance, 1985, which was re-promulgated.

On 16-12-1989, the Bihar Government promulgated an ordinance to take over private recognised Sanskrit schools which were receiving government grants. The ordinance of 89 was successively replaced several times during 90 to 92. These ordinances were substantially in similar terms. Each ordinance contained a "repeal and savings' clause repealing the previous ordinance. As a result thereof, all actions taken under the previous ordinance were deemed to be taken under the fresh ordinance. It is thus clear that the facts of this case repeated what had been decried by the Supreme Court in *Wadhwa*. In *Krishna Kumar Singh v. State of Bihar*,[70] the Apex Court declared all these ordinances except the original one of 1989, as unconstitutional and invalid.

The Court ruled that in the absence of any explanation by the Government for promulgating these ordinances and in the absence of any compensation for taking over properties of the schools, all the ordinances which took colour from one another and formed a chain, were held to be fraud on Art. 213, arbitrary and invalid violating Art. 14 of the Constitution.[71]

There arose a very substantial question from the facts of the above case. An ordinance is a temporary or a stop-gap law. The first ordinance changed the status of the school employees from private to public or government servants. The ordinance lapsed without being replaced by a statute as is envisaged by the Constitution. The question was : Whether these employees lost the governmental status once the ordinance came to an end or was the status once conferred on them irreversible? The Bench deciding the case consisted of two judges who differed between themselves on this point. One judge took the view that the status conferred by the ordinance came to an end with the lapse of the ordinance as the status was not irreversible. The other judge took the view, that the status once conferred was irreversible. In view of this difference of opinion between the two judges, the matter has been referred to a larger bench.

The difficulty in accepting the doctrine of irreversibility of status is that if such a significant and permanent result can be achieved through the medium of an ordinance which is a stop gap law and which is enacted only to meet an unforeseen situation, then there remains no need to enact a law, as envisaged by the Constitution, to replace an ordinance and this will undermine the constitutional position

70. (1998) 5 SCC 643.
71. For discussion on Art. 14, see, *infra*, Ch. XXI.

of the Legislature. The executive can freely resort to an ordinance instead of undertaking the arduous process of legislation through the legislature and subjecting itself to legislative scrutiny.

In *Venkata Reddy*,[72] as stated above, an ordinance was given a high status by the Supreme Court, and was equated to an Act of the Legislature. But the later case (*Wadhwa*) shows that an ordinance cannot be placed on the same pedestal as an Act for all purposes, the reason being that an ordinance is made by the Executive and not by the Legislature, and that ordinance-making power is subject to some limitations to which legislative power is not subject.

Wadhwa exposes in a very telling manner the dangers of an unrestricted power to the Executive to issue ordinances, as this power, like any other power, is prone to be abused or misused.[73] Promulgation of an ordinance by the Executive is inherently undemocratic. But when the government by-passes the Legislature and resorts to the ordinance-making power in a routine manner, the situation becomes much worse.

(iii) EXECUTIVE POWER

As regards the content of the executive power in a State, whatever has been said under the Central Government is fully relevant.[74] The extent and the scope of the State executive power has been discussed under Federalism.[75]

The usual rule is that the executive power of the State Government is co-extensive with the legislative power of the State Legislature.[76] To avoid conflict of State executive power and the Central executive power in the concurrent area, the proviso to Art. 162 provides that the executive power of the State in this area is subject to any law made by Parliament, or restricted by the executive power of the Centre expressly conferred on it by the Constitution or any law made by Parliament.[77]

A State Government thus has the undoubted right to organise fair price shops for distribution of foodstuffs under its executive power derived from entry 33(b) of List III, and no statutory power need be vested in the Government for this purpose.[78] The State Government can make appointments under its executive power without there being any law or rule for the purpose.[79]

In the absence of a law, on a particular subject matter, the State Government can pass executive orders in that behalf.[80]

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72. *Supra*.
73. The Supreme Court has reiterated the *Wadhwa* ruling in *Gurudevdatta VKSSS Maryadit v. State of Maharashtra*, AIR 2001 SC 1980, at 1988.
74. *Supra*, Ch. III, Sec. D(iii).
75. *Infra.*, Ch. XII, Sec. A.
76. *Ambesh Kumar v. Principal, LL.R.M. Medical College*, AIR 1987 SC 400 : 1986 Supp SCC 543; *Bharat Coking Coal Co. Ltd. v. State of Bihar*, (1990) 4 SCC 557.
77. *Bharat Coking Coal Ltd. v. State of Bihar, op. cit.* For fuller discussion on this topic, see, *infra*, Ch. XII.
78. *Sarkari Sasta Anaj Vikreta Sangh v. State of Madhya Pradesh*, AIR 1981 SC 2030 : (1981) 4 SCC 471. For entry 33(b), List III, see, *infra*, Ch. X, Sec. F.
79. *Sikkim v. Dorjee Tshering Bhutia*, AIR 1991 SC 1933 : (1991) 4 SCC 243. Also see, Ch. XXXVI, Sec. B.
80. *State of Madhya Pradesh v. Nivedita Jain*, AIR 1981 SC 2045 : (1981) 4 SCC 296; *Dayaram A. Gursahani v. State of Maharashtra*, AIR 1984 SC 850 : (1984) 3 SCC 36. See, *Ram Jawaya v. State of Punjab, supra*, Ch. III, Sec. D(iii).

The matter has been further elucidated by the Supreme Court in *Bishambar Dayal*.[81] The State in the exercise of its executive power is responsible for carrying on general administration of the State. So long as the Government does not go against a constitutional or a statutory provision, the width and amplitude of the executive power cannot be curtailed. If there is no law covering a particular aspect, the government can carry on the administration by issuing administrative directions or instructions until the Legislature makes a law in that behalf. The State Government can act within its competence and take executive action even if there is no legislation to support such executive action.

The Courts have propounded the doctrine of "occupied field" in relation to the exercise of the executive power under Art. 162. When a subject is covered by a statute passed by the State Legislature, then the Government cannot meddle with that subject through its executive power under Art. 162. The executive power under Art. 162 is not available in respect of the subject which is already covered by legislation.[82] In such a case, the executive has to exercise its statutory powers according to the provisions of the relevant statute.

The Government can issue general instructions in exercise of its executive power. These instructions may look very much like rules which the government makes in exercise of its statutory rule-making power which constitute delegated legislation. The instructions issued by the government under its executive power can supplement, but cannot supplant, the statutory rules made by the government. The executive instructions stand on a lower footing than statutory rules as they do not have the force of law.[83]

In the exercise of its executive power under Art. 162, the State Government has power and authority to prescribe conditions for admission to undergraduate and post-graduate medical courses, when there are no legal provisions for the purpose.[84] Government can create posts through administrative orders so long as they are not inconsistent with any statutory rules.[85]

The State Government issued a notification under its executive power prescribing an entrance examination for selection of candidates for admission to the medical colleges run by the State. The administrative notification was held valid as it did not come in conflict with any statutory provision. The notification only

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81. *Bishambar Dayal Chandra Mohan v. State of Uttar Pradesh,* AIR 1982 SC 33 : (1982) 1 SCC 39.

82. *S. Arunachalam v. State of Tamil Nadu,* ILR (1996) 3 Mad 1508; *V. Chandra v. State of Tamil Nadu,* ILR (1996) 1 Mad 1007; *Association of Management of Pvt. Colleges v. State of Tamil Nadu,* AIR 1998 Mad 34.

83. *Union of India v. Tulsiram Patel,* AIR 1985 SC 1416 : (1985) 3 SCC 398; *State of Maharashtra v. Jagannath,* AIR 1989 SC 1133; *Chairman, L.I.C. of India, Bombay v. Kalangi Samuel Prabhakar,* AIR 1997 AP 304*; Maharashtra State Electricity Board v. State of Maharashtra,* AIR 1997 Bom 267; *Ratan Kumar Tandon v. State of Uttar Pradesh,* AIR 1996 SC 2710 : (1997) 2 SCC 161; *National Mineral Development Corpn. Ltd. v. State of Kant.,* AIR 1997 Kant 331.

See, M.P. JAIN, *A TREATISE ON ADM. LAW,* I, Ch. VIII; *CASES & MATERIALS ON INDIAN ADM. LAW,* I, Ch. VII.

84. *Dr. Ambesh Kumar v. Principal, L.L.R.M. Medical College, Meerut,* AIR 1987 SC 400 : 1986 Supp SCC 543; *Aditya Shrikant Kelkar v. State of Maharashtra,* AIR 1998 Bom 260.

85. *C. Rangaswamaiah v. Karnataka Lokayukta,* AIR 1998 SC 2496 : (1988) 6 SCC 66.

supplemented, did not supplant, the qualifications for admission laid down by statutory rules.[86]

However, in the absence of any law, the State Government or its officers in exercise of its executive authority cannot infringe rights of citizens merely because the State Legislature has power to make laws with regard to that subject.[87] Similarly, a notification issued in exercise of executive power cannot override a rule statutorily made.[88] The executive cannot go, in exercising its executive power, against a constitutional or a statutory provision.

Defining 'executive power', the Supreme Court has stated that the executive power vested in the State Government under Art. 154(1) connotes the residual of government functions which remain after the legislative and judicial functions are taken away. The executive power includes acts necessary for the carrying on or supervision of the general administration of the State including both a decision as to action and the carrying out of the decision.[89]

In addition to the executive power conferred generally on the State Executive, a few specific executive functions have been conferred under the Constitution, *e.g.*, appointing the Advocate-General; appointing members of the State Public Service Commission,[90] etc.

E. ADVOCATE-GENERAL

Parallel to the Attorney-General at the Centre,[91] there is an Advocate-General in each State. He is formally appointed by the Governor. Needless to say that the Governor exercises this power with the aid and advice of the Council of Ministers.

The Advocate-general is a person who is qualified to be appointed as a Judge of the High Court [Art. 165(1)].

The Advocate-General holds his office during the Governor's pleasure and receives such remuneration as the Governor may determine [Art. 165(3)]. The fact that the Advocate-General holds office during the Governor's pleasure means that, unlike a High Court Judge who retires at the age of 62, the Advocate-General can hold office even after he attains the age of 62 years.[92]

He gives advice to the State Government upon such legal matters as may be referred to him. He performs such other duties of a legal character as may be assigned to him by the Governor from time to time, or are conferred on him by the Constitution or any other law [Art. 165(2).]

He also has the right to speak and otherwise participate in the proceedings of the Houses of the State Legislature, or of any committee of the Legislature of which he may be named as a member, but he does not have a right of vote under this provision [Art. 177]. He enjoys all legislative privileges which are available to a member of the Legislature.[93]

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86. *Andhra Pradesh v. Lavu Narendra Nath*, AIR 1971 SC 2560 : (1971) 1 SCC 607.
87. *Bharat Coking Coal Ltd. v. State of Bihar, op. cit.; Bishambar Dayal, op. cit.*
88. *Union of India v. Arun Kumar Roy*, AIR 1986 SC 737 : (1986) 1 SCC 675.
89. *Chandrika Jha v. State of Bihar*, AIR 1984 SC 322 : (1984) 2 SCC 41.
90. *Infra.* Ch. XXXVI, Sec. K.
91. *Supra*, Ch. III, Sec. G.
92. See, *Om Prakash Joshi v. State of Rajasthan*, AIR 2002 Raj. 33.
93. *Supra*, Ch. VI, Sec. H.

CHAPTER VIII

STATE JUDICIARY

SYNOPSIS

A. INTRODUCTORY

The primary duty of the Judiciary is to uphold the Constitution and the Laws without fear or favour, without being biased by political ideology or economic theory.[1]

The State Judiciary consists of a High Court and a system of subordinate courts. The High Court is at the apex of the State judicial system. The High Courts come below the Supreme Court in India's judicial hierarchy.[2] The institution of the High Courts is fairly old as it dates back to 1862 when under the Indian High Courts Act, 1861, High Courts were established at Calcutta, Bombay and Madras.[3] In course of time, other High Courts also came to be established.[4] The Constitution builds the structure of the High Courts, on the pre-existing foundations.[5]

At present, each State in India has a High Court [Art. 214]. Parliament may, however, establish by law a common High Court for two or more States [Art 231(1)]. The Gauhati High Court is the common High Court of seven States of North East India, namely-Assam, Nagaland, Meghalaya, Manipur, Tripura, Mizoram[6] and Arunachal Pradesh[7]. Bombay High Court has jurisdiction over the State of Goa and the Union Territory of Daman, Diu, Dadra & Nagar Haveli[8]. Similarly Calcutta High Court is the High Court for the Union Territory of the Andaman & Nicobar Islands[9]. The States of Punjab & Haryana have a common High Court which is also the High Court for the Union Territory of Chandigarh[10]. Besides these four, there are at present 17 other High Courts.

The High Courts play a very significant role in the scheme of administration of justice. The enormity of the task assigned to the High Courts can be appreciated by having a look at the wide and varied jurisdiction assigned to these courts.

The High Courts enjoy civil as well as criminal, ordinary as well as extraordinary, and general as well as special jurisdiction. The High Courts enjoy an original jurisdiction in respect of testamentary, matrimonial, company and guardianship matters. Original jurisdiction is conferred on the High Courts under several statutes. The High Courts enjoy extraordinary jurisdiction under Arts. 226 to issue various writs. Several statutes confer an advisory jurisdiction on the High Courts. Each High Court has supervisory powers over the subordinate courts under it. Each High Court, being a Court of record enjoys the power to punish for its contempt as well as of its Subordinate Courts.

Considering the question whether a High Court should sit as a whole at one place or in Benches at different places, the Law Commission expressed its firm opinion as early as 1957 that "in order to maintain the highest standards of ad-

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1. *People's Union for Civil Liberties (PUCL) v. Union of India*, (2003) 4 SCC 399 : AIR 2003 SC 2363.
2. For Supreme Court, see, *supra*, Ch. IV.
3. JAIN, OUTLINES OF INDIAN LEGAL HISTORY, 262-289.
4. *Ibid*.
5. *Ibid*.
6. State of Mizoram Act, 1986.
7. State of Arunachal Pradesh Act, 1986.
8. Goa, Daman & Re-organization Act, 1987.
9. Calcutta High Court (Extension of Jurisdiction) Act, 1953.
10. See Art. 230 (*infra*).

ministration of justice and to preserve the character and quality of the work at present being done by the High Courts, it is essential that the High Court should function as a whole and only at one place in the State."[11]

However, several High Courts have Benches apart from the principal one, with separate territorial jurisdictions.[12]

The Chief Justice is the administrative authority of the High Court. He plays or ought to play a very important role in the consultative process relating to appointment of Judges of the High Court. He has absolute prerogative to constitute a Bench is of the Chief Justice of the High Court and a request to the Chief Justice of the High Court to constitute a Bench to dispose of certain matters did not amount to a direction did not in any way express any lack of confidence in the Chief Justice nor take away his prerogative to constitute the Bench.[13]

B. COMPOSITION OF THE HIGH COURT

(a) STRENGTH OF A HIGH COURT

A High Court consists of the Chief Justice and such other Judges as the President may appoint from time to time [Art. 216]. In this way, the number of Judges in a High Court is flexible and it can be settled by the Central Executive from time to time keeping in view the amount of work before a High Court.

Representation of People Act cannot be taken away by the Rules framed by the High Court in exercise of the power conferred by Article 225 such power relates to procedural matters and cannot make nor curtail any substantive law.[14]

The question of justiciability of the adequacy of the Judge-strength in a High Court has been considered by the Supreme Court in *Supreme Court Advocates-on-Record Association v. Union of India*[15]. The Court has emphasized that it is necessary to make a periodical review of the Judge strength of every High Court with reference to the felt need for disposal of cases, taking into account the backlog of cases and the expected future filing. This is essential to ensure speedy justice. Art. 216 casts a duty on the Central Executive to periodically assess the Judge strength of each High Court. Art. 216 is to be interpreted not in isolation, but as a part of the entire constitutional scheme, conforming to the constitutional purpose and its ethos.

Accordingly, the Court has ruled that fixation of Judge strength in a High Court is a justiciable matter. If it is shown that the existing strength is inadequate to provide speedy justice to the people, in spite of the optimum efficiency of the existing strength, "a direction can be issued to assess the felt need and fix the strength of Judges commensurate with the need to fulfil the State obligation of providing speedy justice." In making the review of the Judge strength in a High Court, the President must attach great weight to the opinion of the Chief Justice

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11. Law Commission of India, *Fourth Report*, (1956).
12. Allahabad High Court-1; Bombay High Court-3; Calcutta High Court-1; Gauhati High Court-6; Madras High Court-1; Madhya Pradesh High Court-2; Rajasthan High Court-2.
13. *Rajiv Ranjan Singh v. Union of India* (2005) 11 SCC 312 : (2005) 5 Scale 297.
14. *Raj Kumar Yadav v. Samir Kumar Mahaseth* (2005) 3 SCC 601 : (2005) 11 JT 177.
15. AIR 1994 SC 268 : (1993) 4 SCC 441, see, *infra*, (d).

of the High Court and the Chief Justice of India, and "if the Chief Justice of India so recommends, the exercise must be performed with due despatch".[16]

To reach this conclusion, the Court invoked Art. 21, according to which speedy justice is now a constitutional requirement.[17] On this point, the Court overruled the view expressed by it earlier in *S.P. Gupta v. Union of India*,[18] that the question of the strength of Judges in a High Court was not justiciable. It is not for the Court to fix the number of judges itself; it can ask for a review to be undertaken of the judge strength. Thereafter, on the question of fixation of the strength of the Judges of a High Court, the Supreme Court had observed in *Subhesh Sharma v. Union of India*[19]: "For the availability of an appropriate atmosphere where a Judge would be free to act according to his conscience it is necessary, therefore, that he should not be overburdened with pressure of work which he finds it physically impossible to undertake. This necessarily suggests that the Judge strength should be adequate to the current requirement and must remain under constant review in order that commensurate Judge strength may be provided."

The significance of the Supreme Court ruling in the *Advocates-on-Record* case can be appreciated in the context of the embarrassing situation that every High Court is faced with the load of pending cases. In its report in 1988, the Law Commission estimated that nearly 14 lac cases were pending in the various High Courts.[20] As on 31st March, 2007 there were 3678043 cases pending in the High Courts.[21] One of reasons for this situation is inadequate judicial strength in the High Courts.

(b) APPOINTMENT OF JUDGES

The High Court Judges are appointed by the President after consulting the Chief Justice of India, the Governor of the State concerned[22] and, in case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court to which the appointment is to be made [Art. 217(1)].

As mentioned above, the constitutional provision [Art. 217(1)] says that the President appoints these Judges after consulting the Chief Justice of India, the State Governor and the Chief Justice of the High Court concerned. The Central Executive and the State Executive provide the political input in the process of selection of the Judges.

Since the inauguration of the Constitution, the question has been considered by some authorities: how to ensure that the Judges are selected on non-political considerations? It is thought that it is necessary for securing the independence and objectivity of the Judiciary that Judges be selected on merit and not on political considerations. Such an objective can be achieved only if the role of the po-

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16. *Ibid*, at 441.
17. See, *infra*, Ch. XXVI, for discussion on Art. 21.
18. AIR 1982 SC 149 : 1981 Supp SCC 87; see, *infra*, (c).
19. AIR 1991 SC 631, 636 : 1981 Supp (1) SCC 574.
20. *Law Comm. of India, One Hundred Twenty Fourth Report on The High Court Arrears—A Fresh Look*, 2 (1988).
21. Court News : published by Supreme Court of India: [April-June 2007]: Vol. II; Issue No: 2; p. 7.
22. In case of a common High Court for two or more States, the Governors of all the States concerned are consulted; Art. 231(2).

litical elements is reduced in the process of selection of the Judges of the High Courts.

The matter was considered by the Law Commission as early as 1958. In its XIV Report,[23] the Commission opined that the High Court Judges were not always appointed on merit because of the influence of the State Executive. Accordingly, the Commission suggested that the Chief Justice of the High Court should have a bigger role to play in the matter of appointment of the Judges; that it should be only on his recommendation that a Judge be appointed, and also that concurrence, and not only consultation, of the Chief Justice of India be needed for this purpose.[24]

The Government of India did not accept this recommendation. On the other hand, it stated that, as a matter of course, the High Court Judges had been appointed with the concurrence of the Chief Justice of India.[25]

Again, the Study Team of the Administrative Reforms Commission on Centre-State Relationship endorsed the Law Commission's view that influence of the State Executive be reduced in appointing the High Court Judges. The Team suggested that the State Executive should have the right only of making comments on the names proposed by the High Court's Chief Justice but not to propose a nominee of its own. The Team hoped that this would reduce political influence exerted at the State level in appointing High Court Judges and improve professional competence.[26]

However, the A.R. Commission did not endorse the suggestion made by its Study Team. The Commission took the view that the proposal would drastically reduce the role of the State Governments in the selection of the High Court Judges. In its view, the existing procedure balanced the right of the Centre and of the States. It harmonized "the initiative and autonomy of the State, on the one hand, and safeguards against the question of undue influence by the State, on the other".[27]

(c) *S.P. GUPTA V. INDIA*

In 1982, the matter regarding appointment of the High Court Judges as well as of the Supreme Court Judges came before the Supreme Court by way of public interest litigation[28] in the famous case of *S.P. Gupta v. Union of India.*[29]

Several writ petitions were filed in the various High Courts under Art. 226 by several lawyers practising in the various High Courts.[30] All these petitions were transferred to the Supreme Court for disposal. The main question considered by the Court was: of the several functionaries participating in the process of appointment of a High Court Judge whose opinion amongst the various participants should have primacy in the process of selection?

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23. *Supra.*
24. *XIV Report*, 71-75.
25. *Rajya Sabha*, Nov. 24, 1959.
26. *Report*, I, 181-88 (1967).
27. *Report on Centre-State Relationship*, 40.
28. For Public Interest Litigation, see, *infra*, this Chapter Sec. D(k) and Ch. XXXIII, Sec. B.
29. AIR 1982 SC 149.
30. For discussion on Art. 226, see, *infra*, Sec. D.

The majority[31] took the view, in substance, that the opinions of the Chief Justice of India and the Chief Justice of the High Court were merely consultative and that "the power of appointment resides solely and exclusively in the Central Government" and that the Central Government could override the opinions given by the constitutional functionaries (*viz.*, the Chief Justice of India and the Chief Justice of the concerned High Court). This meant that the view of the Chief Justice of India did not have primacy in the matter of appointment of the High Court Judges; that the primacy lay with the Central Government which could decide after consulting the various constitutional functionaries and that the Central Government was not bound to act in accordance with the opinions of all the constitutional functionaries consulted, even if their opinions be identical.

The majority in *Gupta* thus gave a literal meaning to the word 'consultation' in Arts. 124(2)[32] and 217(1) in relation to all consultees and final decision in the matter was left in the hands of the Central Executive.[33] The majority thus took an extremely literal and positivistic view of Art 217(1). In reality, this view made consultation with the Chief Justices inconsequential in the matter of appointment of High Court Judges.

However, even after *Gupta,* the Central Government always maintained that it had, as a matter of policy, not appointed any Judge without the name being cleared by the Chief Justice of India.

The majority ruling in *Gupta* to the effect that in the consultative process leading to the appointment of a High Court Judge, the view expressed by the Chief Justice of India would have as much significance as the opinion of the State Governor, or the Chief Justice of the High Court concerned, came to be criticised in course of time by a Bench of the Supreme Court in *Subhesh Sharma*.[34] The Bench emphasized that an independent, non-political judiciary was crucial to sustain the democratic political system adopted in India. The Bench now expressed the view that consistent with the constitutional purpose and process, "it became imperative that the role of the institution of the Chief Justice of India be recognised as of crucial importance in the matter of appointments to the Supreme Court and the High Courts of the States".[35]

The Bench in *Subhash* also criticised the developing practice of a State sending up names for appointment to the High Court direct to the Central Govern-

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31. BHAGWATI, FAZAL ALI, DESAI AND VENKATARAMIAH, JJ. The Bench consisted of five Judges.

32. See, Ch. IV, Sec. B(b), *supra,* for this Article of the Constitution.

33. After referring to Arts. 124(2) and 217(1), BHAGWATI, J., observed as follows (AIR 1982 SC at 200):
"... It is clear on a plain reading of these two Articles that the Chief Justice of India, the Chief Justice of the High Court and such other Judges of the High Courts and of the Supreme Court as the Central Government may deem it necessary to consult are merely constitutional functionaries having a consultative role and the power of appointment resides solely and exclusively in the Central Government... It would therefore be open to the Central Government to override the opinion given by constitutional functionaries required to be consulted and to arrive at its own decision in regard to the appointment of a Judge in the High Court or the Supreme Court ... Even if the opinion given by all the Constitutional functionaries consulted by it is identical, the Central Government is not bound to act in accordance with such opinion". For 'consultation' and 'consult' and cases relating thereto see also *N. Kannadasan v. Ajoy Khose,* (2009) 7 SCC 1, 42, exhaustively considered.

34. *Subhesh Sharma v. Union of India,* AIR 1991 SC 631 : 1991 Supp (1) SCC 574.

35. AIR 1991 SC, at 641.

ment instead of sending the same to the Chief Justice of the High Court concerned. According to the Bench of the Court: "This is a distortion of the constitutional scheme which is wholly impermissible".[36] The Bench opined that primacy be given to the views of the Chief Justice of India in the matter of selection of the High Court Judges. This would improve the quality of selection. In India, judicial review is "a part of the basic constitutional structure"[37] and "one of the basic features of the essential Indian Constitutional policy". Therefore, "to contemplate a power for the Executive to appoint a person despite of his being disapproved or not recommended by the Chief Justice of the State and the Chief Justice of India would be wholly inappropriate and would constitute an arbitrary exercise of the power". The Bench observed:

> "In India, however, the judicial institutions, by tradition, have an avowed apolitical commitment and the assurance of a non-political complexion of the judiciary cannot be divorced from the process of appointments. Constitutional phraseology of "consultation" has to be understood and explained consistent with and to promote this constitutional spirit... The appointment is rather the result of collective constitutional process. It is a participatory constitutional function. It is, perhaps, inappropriate to refer to any 'power' or 'right' to appoint Judges. It is essentially a discharge of a constitutional trust of which certain constitutional functionaries are collectively repositories..."[38]

The Bench, therefore, suggested reconsideration by a larger Bench of this aspect of the process of appointment of Judges.

(d) *SUPREME COURT ADVOCATES-ON-RECORD ASSOCIATION V. INDIA*

As a consequence of the observations of the Bench in *Subhesh,* a Bench of 9 Judges was constituted to reconsider the matter.

In *Supreme Court Advocates-on-Record Association v. Union of India,*[39] in a majority opinion delivered by VERMA, J., the Court has sought to interpret the constitutional provisions concerning the High Courts so as to strengthen the "foundational features and the basic structure of the Constitution."

The majority now gave up literal interpretation and adopted a wider meaning of the constitutional provisions concerning the judiciary. The word 'consultation' in Art. 217(1) was given a broad meaning. The majority now insisted that the main concern of the constitution is the selection of the most suitable person for the superior judiciary. Thus, the majority view expressed in *S.P. Gupta*—(i) that the last word in appointment of High Court Judges rests with the government; and (ii) that the Chief Justice of India has no place of primacy in selection of High Court Judges were now overruled.

Accordingly, the Court has ruled that "in the choice of a candidate suitable for appointment, the opinion of the Chief Justice of India should have the greatest weight as he is best suited to know the worth of the appointee; the selection should be made as a result of a participatory consultative process in which the Executive has the power to act as a mere check on the exercise of power by the Chief Justice of India, to achieve the constitutional purpose. Thus, the executive

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36. *Ibid,* at 642.
37. See, *infra,* Ch. XLI, for discussion on the Doctrine of Basic Features of the Constitution.
38. AIR 1991 SC, at 645.
39. AIR 1994 SC, 268 : 1993 (4) SCC 441.

element in the appointment process is reduced to the minimum and any political influence is eliminated."[40]

The Court has emphasized that the primary aim must be to reach an agreed decision taking into account the views of all the consultees, giving the greatest weight to the opinion of the Chief Justice of India. "No question of primacy would arise when the decision is reached in this manner, by consensus, without any difference of opinion". However, if conflicting opinions do emerge at the end of the process, then the primacy must lie in the final opinion of the Chief Justice of India, "unless for very good reasons known to the Executive and disclosed to the Chief Justice of India, that appointment is not considered to be suitable".

The Court has further emphasized that the primacy of the opinion of the Chief Justice of India in this context means, in effect, "primacy of the opinion of Chief Justice of India formed collectively, that is to say, after taking into account the views of his senior colleagues who are required to be consulted by him for the formation of his opinion".[41] The Chief Justice of India is expected "to take into account the views of his colleagues in the Supreme Court who are likely to be conversant with the affairs of the concerned High Court. The Chief Justice of India may also ascertain the views of one or more senior Judges of that High Court". The majority of the Judges has emphasized that this process would achieve the constitutional purpose of selecting the best available for composition of the Supreme Court and the High Courts which is so essential to ensure the independence of the judiciary, and, thereby, to preserve democracy.[42]

The majority judgment has laid down detailed procedural norms to be followed while appointing the Supreme Court and High Court Judges.

The law laid down by the Supreme Court in the *Supreme Court Advocates-on-Record* case has one great advantage, *viz.*, to minimise political influence in the appointment of High Court Judges as the Central Government could no longer appoint a Judge bypassing the Chief Justice of India. The majority has also expressed the opinion that initiation of the proposal for appointment of a High Court Judge must be by the Chief Justice of the concerned High Court.

The ruling of the Supreme Court in the *Supreme Court Advocates* case regarding appointment of the High Court Judges has been elaborated and articulated further by another 9 Judge Bench in *In Re : Presidential Reference.*[43]

The Court has now clarified that although the opinion of the Chief Justice of India has "primacy" in the matter of appointment of a High Court Judge, it is not solely the opinion of the Chief Justice of India alone but it is "reflective of the opinion of the judiciary which means that it must necessarily have the element of plurality in its formation". Therefore, the Chief Justice of India should form his opinion in regard to a person to be recommended for appointment as a High Court Judge in consultation with his two senior-most puisne Judges. They would in making their decision take into account the opinion of the Chief Justice of the High Court, which "would be entitled to greatest weight", the views of other High Court judges who may have been consulted and the views of the Supreme

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40. AIR 1994 SC, at 430.
41. *Ibid.*, at 431.
42. *Ibid.*, at 425.
43. AIR 1999 SC 1, 19-22; see, *supra*, Ch. IV, Sec. F(j).

Court Judges "who are conversant with the affairs of the concerned High Court." All these views should be expressed in writing and conveyed to the Government of India along with the recommendation.

The Court has emphasized that the plurality of Judges in the formation of the opinion of the Chief Justice of India is an in-built check against the likelihood of arbitrariness or bias. In view of this safeguard, Judicial review of the appointment of a High Court Judge is available only on the following grounds:

(i) if, in making the decision as regards the appointment of a High Court Judge, the views of the Chief Justice and the senior Judges of the High Court concerned, and of the Supreme Court Judges having knowledge of that High Court, have not been sought or considered by the Chief Justice of India and his two senior-most colleagues;

(ii) if the appointee lacks eligibility for appointment as a High Court Judge.

But the opinion of the Chief Justice touching the *merit* of the decision is not justiciable—only the decision making process is subject to review.[44]

(e) QUALIFICATIONS FOR A HIGH COURT JUDGE

A person to be appointed as a High Court Judge should be a citizen of India; he must have held a judicial office in India, or been an advocate of a High Court, for at least ten years [Art. 217(2)].[45] Unlike the Supreme Court, the Constitution makes no provision for appointment of a jurist as a High Court Judge.

Legal History was made in India when in *Kumar Padma Prasad v. Union of India*,[46] for the first time, the Supreme Court quashed the appointment of Shri K.N. Srivastava, Secretary (Law and Justice), Mizoram Government, as a High Court Judge on the ground that he was not qualified to be appointed as such.

The appointment of Shri Srivastava as a High Court Judge was challenged through a writ petition moved in the Gauhati High Court by a practising advocate and the High Court granted a stay on the warrant of appointment. Shri Srivastava then moved the Supreme Court against the High Court order and moved a transfer petition of the writ petition from the High Court to the Supreme Court.

Referring to Art. 217(2)(a), the Court pointed out that the question was whether Shri Srivastava had held a judicial office for 10 years. The term 'judicial office' has not been defined in the Constitution but, according to the Court, holder of 'judicial office' under Art. 217(2)(a) means a person who exercises only judicial functions, determines causes *inter partes* and renders decisions in a judicial capacity. He must belong to the judicial service which as a class is free from executive control and is disciplined to hold the dignity, integrity and independence of judiciary.

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44. *N. Kannadasan v. Ajoy Khose*, (2009) 7 SCC 1, 51.

45. To compute the period of ten years, the periods for which a person has held a judicial office, been an advocate of a High Court, been a member of a tribunal or held any post under the Centre or State requiring special knowledge of law have to be counted: Expl. (a) and (aa) to Art. 217(2).

46. AIR 1992 SC 1213 : (1992) 2 SCC 428.

In view of the Court, the expression 'judicial office' "means an office which is a part of judicial service as defined under Art 236(b) of the Constitution".[47] The Supreme Court ruled that Shri Srivastava was not qualified to be appointed as a High Court Judge as he had held no judicial office in a judicial service. The Court ruled that the office of Legal Remembrancer-*cum*-Secretary (Law and Judicial) of the State Government held by him was a non-judicial office under the control of the Executive. All the other offices held by him were neither judicial nor part of any judicial service. He also did not complete a period of ten years as a member of the State Judicial Service.

The Court made it clear that ordinarily the domain in such matters lay wholly with the constitutional authorities but in exceptional circumstances like the present, where the incumbent did not fulfil the qualification prescribed for the office, it became the Court's duty to see that no ineligible or unqualified person was appointed to a high constitutional and august office of a High Court Judge.

(f) THE CHIEF JUSTICE

The administration of the High Court including the power to constitute Benches and the allocation of cases to puisne judges is with the Chief Justice[48]. The requirement under a statute of consultation with the Chief Justice before appointment of either a sitting or retired judge as a member of a Tribunal under that statute, cannot be equated with Art. 217 of the Constitution and does not require the Chief Justice to consult senior colleagues before making a recommendation.[49]

(g) ACTING CHIEF JUSTICE

The President may appoint one of the Judges of the High Court as its acting Chief Justice in case the office falls vacant, or the Chief Justice is unable to perform his duties by reason of absence or otherwise [Art. 223].

The Acting Chief Justice has all the powers of the Chief Justice "without any limitation or rider", although it is a rule of prudence not to take any major decisions which could await the decision of the would Chief Justice.[50]

(h) ADDITIONAL JUDGES

The President may appoint duly qualified persons as additional Judges of a High Court, for a period not exceeding two years, when it appears to him that because of temporary increase in business or arrears of work therein, the number of Judges of that Court should be increased [Art. 224(1)].[51]

(i) ACTING JUDGE

A duly qualified person may also be appointed as an acting Judge of a High Court when any of its Judges, other than the Chief Justice, is unable to perform his duties due to absence or otherwise, or when a permanent Judge of the High

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47. See, *infra*, Sec. G.
48. *Rajiv Ranjan Singh 'Lalan' (V) v. Union of India*, (2005) 11 SCC 312 : (2005) 5 SCALE 297.
49. *Ashok Tanwar v. State of Himachal Pradesh*, (2005) 2 SCC 104 : (2005) 4 JT 528 : AIR 2005 SC 614.
50. *Ashok Tanwar v. State of Himachal Pradesh*, (2005) 2 SCC 104 : AIR 2005 SC 614.
51. See, *infra*, this Chapter, Sec. B(o), for further discussion on this point.

Court is appointed as its acting Chief Justice. An acting Judge holds office until the permanent Judge resumes his duties [Art. 224(2)].

(j) APPOINTMENT OF RETIRED JUDGES

The Chief Justice of a High Court may, with the previous consent of the President, request a retired High Court Judge to sit and act as a Judge of the High Court. While so sitting and acting, he is entitled to such allowance as the President may by order determine. He has all jurisdiction, powers and privileges of a High Court Judge, but is not regarded as a Judge of the High Court for any other purpose [Art. 224A]. He is, thus, a Judge of the High Court for purposes of jurisdiction, powers and privileges but not for any other purpose. He can, therefore, hear an election petition.[52] Since an *ad hoc* judge is not otherwise deemed to be a judge of the High Court, the period of service as an *ad-hoc* judge cannot be included for the purposes of determining pensionary benefits.[53]

(k) OATH BY JUDGES

Before entering upon his office, a person appointed as a High Court Judge is to make and subscribe an oath or affirmation in the prescribed form before the Governor of the State, or his nominee for the purpose [Art. 219].

(l) SALARIES OF JUDGES

The salaries payable to a High Court Judge are determined by Parliament by law and, unil provision is made for the purpose, such salaries as are specified in the Second Schedule to the Constitution [Art. 221(1)]. Further, Parliament is empowered to determine by law such matters as allowances payable to a High Court Judge and his rights in respect of leave of absence and pension.

Parliament may regulate these matters from time to time [Art. 221(2)][54] but never to the disadvantage of a Judge after his appointment.[55] Thus, it has been held that the rights of a Chief Justice of a High Court to receive pension and other benefits, can not be altered to his disadvantage, after his appointment.[56]

(m) PRACTICE AFTER RETIREMENT

A person who has held office as a permanent Judge of a High Court is debarred from acting and pleading in any Court or before any authority in India except the Supreme Court and other High Courts [Art. 220].

The Law Commission adversely commented on the practice of the High Court Judges setting up practice after their retirement, as it greatly detracted from the dignity of the High Courts and the administration of Justice generally. The Commission, therefore, suggested that the retirement age of the High Court Judges be extended from 60 to 65 years and a total ban imposed on a retired High

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52. *Krishan Gopal v. Prakash Chandra,* AIR 1974 SC 209 : 1974 (1) SCC 128.
53. *Justice P. Venugopal v. Union of India,* (2003) 7 SCC 726, at pp. 734-735 : AIR 2003 SC 3887, the Bench doubted the correctness of the Court's earlier decision in *Union of India v. Pratibha Bonnerjea,* (1995) 6 SCC 765 : AIR 1996 SC 693.
54. Proviso to Art. 221(2).
55. Necessary provisions in this regard have been made by the High Court Judges (Salaries and Conditions of Service) Act, 1954. The Act has been recently amended by the High Court and Supreme Court Judges (Salaries and Conditions of Service) Amendment Act, 1998.
56. *Justice S.S. Sandhawalia v. Union of India,* AIR 1990 P&H 198.

Court Judge resuming practice in any Court.[57] The Commission's recommendation was partially accepted; the age of retirement of a High Court Judge was raised from 60 to 62, but ban on his practice after retirement was not imposed.

(n) FILLING UP VACANCIES

Usually, there is long delay in filling the posts of High Court Judges. This causes delay in the administration of justice. The High Court Judges are overworked and vacancies among them make matters worse.

In *Subhesh Sharma v. Union of India*,[58] the Supreme Court has taken into consideration a matter of great public significance, *viz*., the question of delay in filling up the vacancies in the sanctioned posts of the Judges in the Supreme Court and the High Courts, and fixing the strength of the Judges in each High Court.

The strength of the Judges in the Supreme Court is fixed by law by Parliament.[59] In case of the High Courts, the power lies in the President to fix the judicial strength for each High Court. It is common experience, that a number of these posts remain vacant for long. The Supreme Court has now emphasized that for Rule of Law to prevail, judicial independence is of "prime necessity". To make available to a Judge a proper atmosphere in which he may be free to act according to his conscience, it is necessary to ensure that the Judge is not overburdened with pressure of work. "This necessity suggests that the Judge strength should be adequate to the current requirement and must remain under constant review in order that commensurate judicial strength may be provided.[60] This point has been emphasized upon from time to time by various bodies.[61]

The Supreme Court has pointed out that keeping the load of work in view which comes before the High Courts, the judicial strength in no High Court is adequate. The Court has, therefore, suggested to the Government of India, that the matter should be reviewed from time to time and steps be taken for determining the sanctioned strength in a pragmatic manner on the basis of the existing need. The Court has observed in this connection:

> "If there be no correlation between the need and the sanctioned strength and the provisions of Judge-manpower is totally inadequate, the necessary consequence has to be backlog and sluggish enforcement of the Rule of Law."[62]

Another matter raised by the Court is the delay in filling vacancies of Judges. The Court has emphasized upon quick action to fill up the posts. The Court has observed in this connection:[63]

> "Backlog in the courts, has become a national problem. The adjudicatory process is being blamed for not equalling itself to the challenge of the times. There is a general complaint that the judicial system is on the verge of collapse. It is, therefore, the obligation of the constitutional process to keep the system appropriately manned. We have found no justification for the sluggish move in such an important matter".

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57. XIV *Report*, 88.
58. AIR 1991 SC 631 : 1991 Supp (1) SCC 574; *supra*, footnote 34.
59. See, Ch. IV, *supra*, Sec. B(a).
60. AIR 1991 SC, at 636.
61. Law Commission, *XIV Report*.
62. Also see, in this connection, *Supreme Court Advocates-on-Record Association v. Union of India*, *supra*, Sec. B(d).
63. AIR 1991 SC, at 641.

(o) TRANSFER OF JUDGES

The question of transfer of a Judge from one High Court to another has raised controversies from time to time. During the emergency of 1975,[64] 16 High Court Judges were transferred from one High Court to another. It was widely believed that the Government did so as a punitive measure to punish those Judges who had dared to give judgments against it.[65]

Article 222(1) empowers the President to transfer a Judge from one High Court to another after consulting the Chief Justice of India. Under Art. 222(2), the transferred Judge is entitled to receive, in addition to his salary, such compensatory allowance as may be determined by Parliament by law, and until so determined, as the President may fix by order.

As the phraseology of Art. 222(1) stands, neither the consent of the Judge is necessary to his transfer nor is the opinion of the Chief Justice binding on the Government.

A Judge of the Gujarat High Court was transferred to the Andhra Pradesh High Court without his consent. He challenged his transfer through a writ petition in the High Court and the matter came ultimately before the Supreme Court in *India v. Sankalchand Himatlal Sheth*.[66]

The Supreme Court realised that while the Constitution promoted the democratic value of independence of the Judiciary, the Executive could use the power of transfer of High Court Judges to undermine judicial independence. But, as regards the interpretation of Art. 222, the Court divided 3:2. The minority took the view that to preserve judicial integrity and independence, the word 'transfer' in Art. 222 should be interpreted to mean only 'consensual transfer', *i.e.*, transfer of the Judge with his consent and not otherwise because transfer constitutes a stigma on the Judge and is very inconvenient to him. On the other hand, the majority took a more literal view of Art. 222 and held that Art. 222 does not require consent of a Judge to his transfer from one to another High Court.

As a safeguard against misuse of power by the Executive, the majority ruled that 'consultation' with the Chief Justice as envisaged by Art. 222 has to be 'full and effective consultation' and not a mere formality. The opinion given by the Chief Justice would be entitled to the greatest weight and any departure from it would have to be justified by the Government on strong and cogent grounds.

The majority also emphasized that the proposal to transfer a judge/Chief Justice should be initiated only by the Chief Justice of India and that transfer could be resorted to only as an exceptional measure and only in public interest. Transfer made thus ought not to be considered as punitive. Transfer of a Judge from

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64. For discussion on the emergency provisions in the Constitution, see, *infra*, Ch. XIII.

65. The Government sought to justify these transfers on the plea of national integration and removal of narrow parochial tendencies, but this defence was found by the Supreme Court as not true. CHANDRACHUD, J., observed in *Sankalchand*, "..... the record of this case does not bear out the claim that any one of the 16 High Court Judges was transferred in order to further the cause of national integration. Far from it".

In the words of BHAGWATI, J., in *S.P. Gupta v. Union of India*, [AIR 1982 SC, at 218], "What was held by the Court was that the transfers of the High Court Judges during the emergency were made not for the purpose of furthering the cause of national integration but by way of punishment."

66. AIR 1977 SC 2279 : (1977) 4 SCC 98.

one High Court to another is a non-justiable matter. Transfer of a Judge ought not to be made as a punishment. A High Court Judge can be punished only according to Art. 217(1) read with Art. 124(4),[67] and not otherwise.

Again, the question of transfer of High Court Judges was raised in *S.P. Gupta v. Union of India*.[68] BHAGWATI, J., reiterated the minority view in *Sankalchand* that a Judge could not be transferred without his consent. In any case, he said that the transfer of a Judge could be exercised only in public interest and that transfer of a judge by way of punishment could never be in public interest. He emphasized that "whenever transfer of a Judge is effected for a reason bearing upon the conduct or behaviour of the Judge, it would be by way of punishment." Transfer being a serious matter, the burden of sustaining the validity of the transfer order must rest on the Government.[69] In the instant case, BHAGWATI, J., ruled that the transfer of the Chief Justice of the Patna High Court to the Madras High Court was bad because: (1) there was no full and effective consultation between the Central Government and the Chief Justice of India before the decision was taken to transfer him; (2) transfer was made by way of punishment and not in public interest.

FAZL ALI AND DESAI, JJ., joined BHAGWATI, J., in holding the said transfer to be bad. These Judges, however, did not agree with BHAGWATI, J., in his view that under Art. 222, for transfer, the consent of the Judge would be necessary. On the other hand, the majority view was that the transfer of the Chief Justice was valid. The consent of the Judge was not necessary for purposes of his transfer. Still the power of transfer vested in the Central Government was not absolute, but was subject to two conditions: (i) public interest; (ii) effective consultation with the Chief Justice of India. An order of transfer would become a justiciable issue and be liable to be quashed if—(a) it was not in public interest, or (b) it was passed without full and effective consultation; and (c) if the opinion of the Chief Justice was brushed aside or ignored without cogent reasons.

It was emphasized by the majority that transfer of a Judge could not be made for the purpose of punishing him. Therefore, a Judge can never be transferred on the grounds of misbehaviour or incapacity. It was also suggested by some of the majority Judges[70] that the concerned Judge should be consulted by the Chief Justice as regards his proposed transfer though his consent is not necessary. It was also emphasized by some Judges that any transfer with an oblique motive or for an oblique purpose, *e.g.*, not toeing the line of the Executive would be outside the purview of Art. 222.

In the instant case of the transfer of the Chief Justice, the reason was that people in his proximity had created an atmosphere injurious to the administration of Justice. This ground fell within the expression 'public interest'. There was no reflection on the conduct of the Chief Justice as there was no suggestion of any complicity or connivance on his part. There was thus no element of punishment involved in this transfer.

The position as regards transfer of a High Court judge as it emerged after the majority view in *Gupta* was unsatisfactory. There existed no real safeguard

67. See *infra*, Sec. B(t), for this procedure.
68. AIR 1982 SC 149 : 1981 Supp SCC 87, *supra*, (c).
69. *Ibid*, 270.
70. TULZAPURKAR, PATHAK, GUPTA AND VENKATARAMIAH, JJ.

against an unwarranted transfer of a Judge. After all, during the emergency, 16 Judges were transferred after following the procedure laid down in Art. 222. As Justice BHAGWATI so aptly put it: "..... the so-called safeguard of consultation with the Chief Justice of India has proved to be of no avail." The one positive aspect of the *Gupta* case was that an order of transfer was held justiciable on some grounds and that some curbs were imposed on the power of the Executive.

On January 28, 1983, the Government of India formally announced its policy of having the Chief Justices of all the High Courts from outside the concerned State. For this purpose, the Government intended to use the provisions of Art. 217 or 222 relating to appointments or transfers. Another idea was to have one-third of the Judges in each High Court from outside the State.

This policy had been advocated by the Law Commission.[71] The Commission wanted this objective to be achieved through initial appointments. In the view of the Commission, this would not only help the process of national integration but also improve the functioning of various High Courts "as it would secure in the bench of each High Court the presence of a number of Judges who would not be swayed by local considerations or be affected by issues which may arouse local passions and emotions." Though it is a commendable policy, care needs to be taken that such a policy is implemented without doing anything to compromise the independence of the Judiciary. It is possible that transfer of a Judge (or Chief Justice) in implementation of this policy may be regarded as a matter of public interest but each case of transfer has to be considered on its own merits.

The question of transfer of High Court Judges has been considered again by the Supreme Court in the *Supreme Court Advocates-on-Record* case.[72] The proposition has been reiterated that there is no requirement of prior consent of the Judge before his transfer under Art. 222, but the opinion of the Chief Justice of India has been given 'not mere primacy' but a 'determinative' character in the transfer process. According to the majority opinion, the proposal for the transfer of a Judge/Chief Justice should be initiated by the Chief Justice of India alone. The power can be exercised only in "public interest." The transfer ought not to be "punitive" in nature. "Any transfer in accordance with the recommendation of the Chief Justice of India cannot be treated as punitive or an erosion in the independence of judiciary."[73]

Before giving his opinion, the Chief Justice of India has to consult the Chief Justice of the High Court from where the Judge is to be transferred and any Supreme Court Judge whose opinion may be significant for the purpose, as well as the views of at least one other senior High Court Chief Justice, or any other person whose views are considered relevant by the Chief Justice of India. The question of transfer of a Judge is justiciable but only on a limited basis, *i.e.*, transfer is being made without the recommendation of the Chief Justice of India and only the transferred judge has *locus standi* to question his transfer and no one else.

In *Dalpatray Bhandari v. Union of India*,[74] the Supreme Court has reiterated the proposition that a writ petition challenging the transfer of a Judge, filed by a

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71. *14th* and *80th* REPORTS.
72. *Supra*, Sec. B(d).
73. AIR 1994 SC, at 435.
74. (1995) Supp (1) SCC 682.

person other than the Judge himself, was not maintainable. "No one other than the transferred judge himself can question the validity of a transfer".

In Re Presidential Reference,[75] the Supreme Court has further elucidated its ruling in *Supreme Court Advocates* on the transfer of a High Court Judge. The Court has now stated that before recommending the transfer of a Judge of one High Court to another as a judge, the Chief Justice of India must consult a plurality of Judges. He must take into account the views of: (i) the Chief Justice of the High Court from which the Judge is to be transferred; (ii) any Judge of the Supreme Court whose opinion may have significance in the case; (iii) the Chief Justice of the High Court to which the transfer is to be effected.

All these views are to be expressed in writing and should be considered by a collegium consisting of the Chief Justice and the four senior-most puisne Judges of the Supreme Court. The collegium should consider the response of the Judge to be transferred. These views and those of the four senior-most judges should be conveyed to the Government of India along with the proposal for transfer. "Unless the decision to transfer has been taken in the manner aforesaid, it is not decisive and does not bind the Government of India."[76]

Because of all the safeguards mentioned above, the judicial review in case of transfer of a High Court Judge, according to the Court, would be limited to a case where transfer of a Judge has been made or recommended without obtaining the views and reaching the decision in the manner aforesaid.

The matter of transfer of a High Court Judge was raised again before the Supreme Court in *Reddy*.[77] It was argued that judicial review being a basic feature of the Constitution,[78] exclusion of judicial review in the matter of transfer could not be regarded as good law. There could be arbitrariness in transferring a High Court Judge. The Supreme Court rejected the contention. The Court observed :[79]

> "Every power vested in a public authority is to subserve a public purpose, and must invariably be exercised to promote public interest. This guideline is inherent in every such provision, and so also in Art. 222. The provision requiring exercise of this power by the President only after consultation with the Chief Justice of India, and the absence of the requirement of consultation with any other functionary, is clearly indicative of the determinative nature, not mere primacy, of the Chief Justice of India's opinion in this matter."

The consent of the Judge is not required for his transfer. The Chief Justice of India will recommend transfer of a Judge only in public interest, for promoting better administration of justice throughout the country, or at the request of the concerned Judge.

In the formation of his opinion for transfer of a High Court Judge, the Chief Justice of India would take into consideration the opinion of the Chief Justice of the High Court from which the Judge is to be transferred, any Judge of the Supreme Court whose opinion may be of significance in that case, as well as the views of at least one other senior Chief Justice of a High Court, or any other person whose views are considered relevant by the Chief Justice of India. The pri-

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75. AIR 1999 SC 1; see, *supra*, footnote 43.
76. AIR 1999 SC, at 21.
77. *K. Ashok Reddy v. Government of India*, AIR 1994 SC 1207 : (1984) 2 SCC 303.
78. See, Ch. XLI, *infra*, for discussion on this Doctrine.
79. AIR 1994 SC 1207 at 1210 : (1994) 2 SCC 303.

macy of the judiciary in the matter of appointments and its determinative nature in transfers introduces the judicial element in the process, and is in itself a sufficient justification for the absence of the need for further judicial review of those decisions.

Judicial review is ordinarily needed as a check against possible executive excess or arbitrariness. Plurality of Judges in the formation of the opinion of the Chief Justice of India is another in built check against the likelihood of arbitrariness or bias. Further, the guideline of "public interest" is sufficient guideline for the proper exercise of the power and to ensure exclusion of the possibility of any arbitrariness in the exercise of power under Art. 222. Judicial review of transfer of a Judge is not excluded but only limited. The area of justiciability is restricted to the constitutional requirement of recommendation of the Chief Justice of India for exercise of the power under Art. 222 by the President of India. "The power under Art. 222 of the Constitution is to be exercised by the highest constitutional functionaries in the country in the manner indicated which provides several inbuilt checks against the likelihood of arbitrariness or bias." The judicial review of transfer can be invoked only at the instance of the transferred Judge and not at the instance of any one else.

(p) PROPRIETY OF APPOINTING ADDITIONAL JUDGES

It has already been mentioned above that under Art. 224(1), provision has been made for appointment of additional Judges for a term not exceeding two years at a time.

Questions have been raised from time to time as regards the advisability and propriety of appointing additional Judges. For example, it has been emphasized that it is the duty of the President to provide for adequate strength of permanent Judges in each High Court commensurate with the load of work before it. Then, it has been said that an additional Judge ought not to be appointed when there is a vacancy of a permanent Judge. It would not be proper to appoint an additional judge while keeping a permanent post vacant or unfilled. Further, it has been emphasized that the permanent strength of each High Court should be periodically reviewed. If the increase in work in a Court is permanent, then resort ought to be had to Art. 216 and not to Art. 224.[80] The purpose of appointment of additional judges is to meet temporary increase in work or arrears.

In India, the present position is that nearly one-third of the High Court Judges are additional Judges. A practice has developed over time that a person is appointed first as an additional judge and, then, when a permanent vacancy arises, he is promoted to be a permanent Judge. Since an additional Judge can be appointed for a maximum period of two years, at one time, his tenure is extended from time to time for a period of not more than two years at a time, and so his position remains vulnerable until he becomes a permanent Judge.

The various Judges participating in the *Gupta* decision,[81] sought to strengthen the position of the additional Judges to some extent so as to ensure their independence. The highest point was reached in this connection in the opinion of Gupta, J., who practically assimilated the position of an additional judge to that of a permanent Judge. According to him, the only consideration in extending his

80. See TULZAPURKAR, DESAI, VENKATARAMIAH, JJ. in *Gupta*, *supra*, Sec. B(c).
81. *Ibid.*

tenure is whether the volume of work pending in the Court requires his re-appointment. His tenure must be two years. Shorter tenure in the discretion of the executive without reference to the volume of work in a High Court militates against the concept of judicial independence.

An additional Judge like a permanent Judge could be removed by following the procedure laid down in Arts. 124(4) and (5) read with Art. 218.[82] Dropping an additional Judge at the end of his initial appointment on the ground that there are allegations against him without properly ascertaining the truth of the allegations may be expedient but it is destructive of judicial independence. Also, in the matter of re-appointment of an additional Judge, the opinion of the Chief Justice of India should have primacy over the opinion of the Chief Justice of the concerned High Court. PATHAK AND TULZAPURKAR, JJ., substantially agreed with GUPTA, J.

But the majority was not prepared to go to such a length to safeguard the position of additional Judges. The majority view may be summed up as follows :

(1) No additional Judge is to be appointed without complying with the requirement of Art. 217(1).[83]

(2) An Additional Judge has a right of being considered for appointment as a permanent Judge. The Government cannot drop him at its sweet will after the expiry of the original term.

(3) For re-appointment of an additional Judge after the expiry of his original term, the procedure laid down in Art. 217(1) must be followed.

(4) He has a right to be considered for re-appointment.

(5) A decision is to be taken in regard to him for re-appointment after consultation amongst the three constitutional authorities, *viz*., the Government of India, Chief Justice of India and Chief Justice of the concerned High Court.

(6) If it is found that there was no consultation with any of these authorities before decision is taken by the Government not to re-appoint an additional Judge, then the decision is bad.

(7) The outside limit of the term of appointment of an additional Judge is two years. When arrears of pending cases in a High Court is so large that it is not possible to dispose of them in the foreseeable future, there is no justification for appointing an additional judge for less than 2 years.

(8) If the Government decides not to re-appoint an additional Judge on irrelevant grounds or *mala fide* (other than fitness or suitability), then the decision will be bad and is challengeable.

(9) The Chief Justice of India's opinion stands *pari passu* with, and has no primacy over, the opinion of the Chief Justice of the High Court concerned in the matter of appointment or re-appointment of an additional Judge.

(10) An additional Judge is not a judge on probation.

By majority, the non-continuance of an additional Judge of the Delhi High Court was sustained as there was doubt about his honesty or integrity. The Chief

82. See, *infra*, (t), this section.
83. *Supra*, (b), this section.

Justice of the High Court was against his continuance although the Chief Justice of India was for his extension on the ground that there was not sufficient material to doubt his integrity. The Central Government went by the opinion of the Chief Justice of the High Court in preference to that of the Chief Justice of India. The majority view was that in deciding whether to continue an additional Judge, his reputation as to honesty and integrity could be taken into account. There was no need to hold any judicial or *quasi*-judicial inquiry or give natural justice to the Judge concerned. Some of the Judges of the Supreme Court were, however, in favour of giving a fair play to the Judge.

The upshot of the majority decision in the *Gupta* case was to place a large reservoir of power in the hands of the Central Executive as regards appointment of High Court Judges. By refusing primacy of the opinion of the Chief Justice of India, the Central Executive was conceded power to decide finally as to whom to appoint when there was no unanimity of opinion among the three constitutional authorities concerned, *viz.*, the State Executive, the Chief Justice of the concerned High Court and the Chief Justice of India. However, the situation as regards appointment of High Court Judges (including additional Judges) has now undergone a change after the *S.C. Advocates- on-Record* case.[84] The opinion of the Chief Justice of India has now been given a primacy in the consultative process prior to the appointment of the Judges.

In relation to the recommendation made by the Chief Justice of a High Court for appointment of a person to an office created by a statute, the powers of judicial review is 'very restricted' e.g. when a relevant aspect is not considered.[85]

(q) TENURE

A High Court Judge (whether permanent, additional or acting) retires at the age of sixty-two years [Arts. 217(1) and 224(3)].

Any question as to the age of a High Court Judge is to be decided by the President after consulting the Chief Justice of India, and his decision is final [Art. 217(3)]. Thus, the jurisdiction to determine the Judge's age is vested exclusively in the President. Consultation with the Chief Justice of India is, however, mandatory, but his advice is not binding on the President.

No Court can claim jurisdiction to decide the question of age of a High Court Judge. No question of propriety, correctness or validity of the decision by the President can be raised before a Court.

It has been held by the Supreme Court that the President should follow natural justice, and before reaching his decision on the question, he ought to give to the Judge concerned a reasonable opportunity to give his version, and produce evidence in support of the age stated by him at the time of his appointment. "How this should be done, is, of course, for the President to decide; but the requirement of natural justice that the Judge must have a reasonable opportunity to put before the President his contention, his version and his evidence, is obviously implicit in the provision itself".[86]

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84. *Supra*, (d), this section.
85. *N. Kannadasan v. Ajoy Khose*, (2009) 7 SCC 1, 50.
86. *J.P. Mitter v. Chief Justice, Calcutta High Court*, AIR 1965 SC 961, at 966 : 1965 (2) SCR 53.

In the instant case,[87] the decision reached by the President as regards the age of a Calcutta High Court was quashed by the Supreme Court because of two infirmities therein:

(1) The evidence of the concerned Judge was not available to the President when he reached his decision. As the decision regarding his age affected the Judge in a very serious manner "considerations of natural justice and fair play require that before the question is determined by the President, the appellant should be given a chance to adduce his evidence."[88]

(2) The decision was made by the Home Minister and approved by the President. This was, therefore, the decision of the Government of India, "but that plainly is not the decision of the President" as envisaged by Art. 217(3). Accordingly, the matter was referred, to the President to decide it again after receiving the evidence from the concerned Judge.

After the President had made his decision in the above case, again the concerned Judge questioned the decision on several grounds. The Supreme Court in its decision[89] ruled against the Judge, upheld the decision of the President and laid down several important propositions as regards Art. 217(3).

The Court has stated that the President is not obligated to give a personal hearing to the Judge concerned. The Judge was entitled to make a representation but he cannot claim an oral hearing. It is for the President to decide whether in a particular case he should give a personal hearing.

The Supreme Court has emphasized that in deciding the age of the Judge, the President is to consult only the Chief Justice of India and none else. As the President performs a 'judicial function of grave importance', he cannot act in this matter on ministerial advice. The President has to reach his own decision. Although the President's decision is 'final', the Court has jurisdiction, in appropriate cases, to set aside the order "if it appears that it was passed on collateral considerations, or the rules of natural justice were not observed, or that the President's judgment was coloured by the advice or representation made by the Executive, or it was founded on no evidence".

The Court would not, however, go into the merits of the President's decision. The Court has emphasized that under Art. 217(3), the President is invested with judicial power of great consequence having a bearing on the independence of the Judges of the higher courts. Accordingly, "there must be no interposition of any other body or authority, in the consultation between the President and the Chief Justice of India."[90]

In *Samsher v. State of Punjab*,[91] IYER AND BHAGWATI, JJ., have cast doubts on the correctness of the proposition regarding the 'personal satisfaction' of the President while acting under Art. 217(3) as stated above. They insist that the President's satisfaction is constitutionally secured when his Ministers arrive at such satisfaction. The independence of the judiciary, they think, is ensured by the

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87. *Ibid.*
88. On Natural Justice, see, M.P. JAIN, *A TREATISE ON ADM. LAW*, I, Chs. IX, X, XI & XII; JAIN, *CASES & MATERIALS ON ADM. LAW, I*, Chs. VIII, IX, X and XI.
89. *Union of India v. Jyoti Prakash*, AIR 1971 SC 1093 : (1971) 1 SCC 396.
90. *Ibid*, at 1106.
91. AIR 1974 SC 2192 : (1974) 2 SCC 831, See, Ch. III, Sec. B, *supra*.

mandatory requirement of consulting the Chief Justice with whom should rest the last word in the matter. Rejection of his advice may ordinarily be regarded "as prompted by oblique considerations vitiating the order". The ruling of these Judes in *Samsher* would deprive the President of any discretion in the matter and obligate him to act in accordance with the advice of the Chief Justice of India. But this has not yet become a binding norm as other Judes in *Samsher* expressed no opinion on this point."[92]

The *Samsher* ruling has the defect that it introduces the Council of Ministers in the decision–making process as regards the age of a High Court Judge which is objectionable. In *Samsher*, the Court was not considering the specific question in issue, but a different question altogether. As regards the specific question in issue, *Mitters'* ruling is to be preferred.[93]

Supporting *Mitter's* ruling, DESAI, J., has said in the *Additional Judges* case (*Gupta* case):[94]

> "Once the function of the President while exercising power under Art. 217(2) is held to be judicial it follows as a necessary corollary that the President has to act on his own after consultation with the Chief Justice of India but he cannot act on the advice of the Council of Ministers because a person discharging a judicial or *quasi*-judicial function cannot act at the behest or dictate of some other authority."

There are, however, two difficulties in the present provision:

(1) The advice of the Chief Justice has not been made binding on the President. Therefore, the President, in theory, can take a view different from that of the Chief Justice.

The view of IYER and BHAGWATI, J.J., expressed in *Samsher* on this point are only *obiter dicta*.

(2) Art. 361 bars any Court action against the President as such.[95] If he is to decide the matter himself (without the inter-position of the Central Government), how can President's decision be challenged in a Court on any ground?

As regards determination of the age of a Supreme Court Judge under Art. 124(2A), Parliament is to set up an authority for the purpose.[96] No such authority has been set up as yet. Therefore, for the present, the only method appears to be is to ask for *quo warranto* against the Judge concerned from the High Court and, finally, the matter can go on appeal to the Supreme Court.[97]

(r) RESIGNATION

A High Court Judge may resign from his office by writing to the President. [Proviso (a) to Art. 217(1)]. Resignation takes effect from the date on which the Judge of his own volition chooses to sever his connection with his office.

There is nothing in the Constitution which expressly or impliedly forbids the withdrawal of a communication by the Judge to resign his office before the arri-

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92. *Ibid*.
93. *Supra*, footnote 86.
94. *Supra*, this Ch. Sec. B(q).
95. See, Ch. III, Sec. A(i), *supra*.
96. *Supra*, Ch. IV, Sec. B(l).
97. For *quo warranto*, see, *infra*.

val of the date on which it was intended to take effect. A prospective resignation does not, before the intended future date is reached, become a complete, and operative act of 'resigning his office' by the Judge within the contemplation of proviso (a) to Art. 217(1).[1]

(s) VACANCY BY TRANSFER

The office of a High Court Judge falls vacant when he is appointed as a Supreme Court Judge, or is transferred to any other High Court [Proviso (c) to Art. 217(1)].

An additional Judge of the Kerala High Court was transferred to the Gujarat High Court and he was given time till 22/7/96 to join the transferee High Court. In the meantime, he continued to act as the Judge of the Kerala High Court. A petitioner filed a petition for *quo warranto* on the ground that because of the order of transfer under Art. 222, he ceased to be a Judge of the Kerala High Court under proviso (c) to Art. 217(1). Rejecting the petition, the High Court ruled that the transferred Judge continues to be a Judge of the transferor High Court and till he assumes charge in the transferee High Court, he does not cease to be a judge immediately the transfer order is issued.[2]

(t) REMOVAL OF A JUDGE

A High Court Judge may be removed from office in the same manner as a Supreme Court Judge, *i.e.*, on the two Houses of Parliament passing a resolution for his removal, by a special majority, for proved misbehaviour or incapacity.[3]

Parliament has enacted the Judges (Inquiry) Act, 1968, to regulate the procedure for investigation and proof of misbehaviour or incapacity of a Supreme Court or a High Court Judge for presenting an address by Parliament to the President for his removal. A notice of a motion for presenting such an address may be given by 100 members of the Lok Sabha, or 50 members of the Rajya Sabha.

The Speaker or the Chairman may either admit or refuse to admit the motion. If it is admitted, then the Speaker/Chairman is to constitute a committee consisting of a Supreme Court Judge, a Chief Justice of a High Court and a distinguished jurist. If notices of the motion are given on the same day in both the Houses, the Committee of Inquiry is to be constituted jointly by the Speaker and the Chairman. The Committee is to frame definite charges against the Judge on the basis of which the investigation is proposed to be held and give him a reasonable opportunity of being heard including cross-examination of witnesses. If the charge is that of physical or mental incapacity, the Committee may arrange for the medical examination of the judge by a medical board appointed by the Speaker/Chairman or both as the case may be.

The report of the Committee is to be laid before the House or Houses concerned. If the Committee exonerates the Judge of the charges, then no further action is to be taken on the motion for his removal. If the Committee finds the Judge to be guilty of misbehaviour or suffering from an incapacity, the House can take up consideration of the motion. On the motion being adopted by both

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1. *Union of India v. Gopalchandra Misra*, AIR 1978 SC 694 : (1978) 2 SCC 301.
2. *M.K. Sasidharan v. Hon'ble Chief Justice of India*, AIR 1997 Ker. 35.
3. Arts. 217(1)(*b*) and 124(4) and (5); *supra*, Ch. IV, Sec. B(l).

Houses according to the relevant constitutional provision [Art. 124(4) or 218(4)], an address may be presented to the President for removal of the Judge. Rules under the Act are to be made by a committee consisting of 10 members from the Lok Sabha and 5 members from the Rajya Sabha.

A question of some consequence has been considered by the Supreme Court in the following case.[4] What procedure should be followed when there are allegations of bad conduct against a High Court Judge but which falls short of the impeachable conduct, *viz.*, "proved misbehaviour or incapacity" [Art. 217(1)(*b*)]. The Court has emphasized that bad conduct or bad behaviour of a Judge, even though not impeachable, may yet be improper conduct not befitting the standard of a Judge. The bad conduct of a Judge has a rippling effect on the reputation of the judiciary as a whole. But the Bar Association ought not to criticise the Judge in such a manner as to amount to contempt of Court. The proper course for it would be to collect specific, authentic and acceptable material concerning the conduct of the Judge and the office-bearers of the Bar Association should see the Judge concerned, or the Chief Justice of the High Court who would make an inquiry and place the matter before the Chief Justice of India. If the conduct of the Chief Justice of the High Court is in question, the office bearers ought to approach the Chief Justice of India who will take necessary action in the matter. On the decision being taken by the Chief Justice of India, the matter should rest there.

In another case, the allotment of a plot of land to a High Court Judge by the State Government while the judge was hearing a challenge to the allotment process, was set aside by the Supreme Court and the plot directed to be vested in the State Government and sold, to "instill public confidence in the judiciary".[5]

To ensure that the highest standards of conduct are maintained, in 1999, a Code of Conduct was framed at the Chief Justices' Conference. An in-house procedure was evolved to deal with complaints against any sitting judge, which envisaged the taking of administrative steps, for example not posting cases for disposal before the judge concerned, after an enquiry by the Committee of Judges constituted for the purpose. However in the absence of any legislative sanction to the Code of Conduct, it is not enforceable nor can the proceedings of the Committee be made public.[6]

(u) OFFICERS AND EXPENSES

The officers and servants of a High Court are appointed by its Chief Justice, or such other judge or officer of the Court, as the Chief Justice may direct [Art. 229(1)]. This power of the Chief Justice is subject to three exceptions:

(1) The Governor may by rules require that, in cases mentioned in the rules, no person, not already attached to the Court, is to be appointed to any office connected therewith except after consultation with the State Public Service Commission [Proviso to Art 229(1)].

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4. *C. Ravichandran Iyer v. Justice A. M. Bhattacharjee*, (1995) 5 SCC 457 : 1995 SCC (Cri) 953.
5. *Tarak Singh v. Jyoti Basu*, (2005) 1 SCC 201 : AIR 2005 SC 338.
6. *Indira Jaisingh v. Registrar General, Supreme Court of India*, (2003) 5 SCC 494 : (2005) 11 JT 552. The Judges (Enquiry) Bill, 2006 substantially incorporates the in-house procedure evolved in the Code of Conduct.

(2) Subject to any law of the State Legislature, the conditions of service of officers and servants of the High Court may be prescribed by rules made by the Chief Justice, or any other Judge or officer of the Court as he may authorize for the purpose [Art. 229(2)].

(3) Such of the rules as relate to salaries, allowances, leave or pensions require the approval of the State Governor [Proviso to Art. 229(2)].

The article assumes that unless the Chief Justice has not only applied his mind or acted on the basis of the recommendations of a committee constituted for the purpose, but also framed Rules fixing the scales of pay of its employees, the State Government cannot be asked to fix the pay scales of the employees of the High Court.[7]

It is for the Governor (*i.e.*, the State Executive) to consider and give its approval to the proposed rules: The Court cannot issue *a mandamus* to the Governor directing him to give his approval.[8]

The Court has however expressed the hope that "one should accept in the fitness of things and in view of the spirit of Art. 229 that the approval, ordinarily and generally, would be accorded.[9] unless there were "justifiable reason" for not doing so.[10]

When the State Government refused to recommend Draft Rules forwarded by the Chief Justice inter alia relating to the pay-scales of the employees of the High Court on the ground of financial constraints, the Supreme Court directed the Chief Justice in consultation with the Government to constitute a Special Pay Commission consisting of judges and administrators, to submit a report to the Supreme Court on the basis of which "the Chief Justice and the Government shall thrash out the problem and work out an appropriate formula in regard to pay scales to be fixed for the High Court employees".[11] Pursuant to the direction a Special Pay Commission was set up and Draft Rules framed which, after some modification, was agreed by the Government before the Supreme Court, to be sent to the Governor for his approval.[12]

The Supreme Court has emphasized in *M. Gurumoorthy v. Accountant General, Assam & Nagaland*,[13] that in the matter of appointment of officers, *etc.*, of the High Court, it is the Chief Justice or his nominee who is to be the supreme authority, and the State Government cannot interfere except to the limited extent provided in Art. 229. Thus, the post of the Registrar of the High Court can be

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7. *State of UP v. Section Officer Brotherhood*, (2004) 8 SCC 286 : AIR 2004 SC 4769.

8. *State of Andhra Pradesh v. T. Gopalakrishna Murthi*, AIR 1976 SC 123 : (1976) 2 SCC 883.
Also, *State of Assam v. Bhuban Chandra Dutta*, AIR 1975 SC 889 : (1975) 4 SCC 1.
For discussion on *mandamus*, see, *infra*, Sec. E.

9. Also see, *Supreme Court Employees Welfare Association v. Union of India*, AIR 1990 SC 334 : (1989) 4 SCC 187; *High Court of Judicature, Rajasthan v. Ramesh Chand Paliwal*, AIR 1998 SC 1079, 1084-1085 : (1998) 3 SCC 72; *State of Maharashtra v. Association of Court Stenos*, (2002) 2 SCC 141 : AIR 2002 SC 555; *Union of India v. S.B. Vohra*, (2004)2 SCC 150 : AIR 2004 SC 1402.
On this point, also see, under the Supreme Court, *supra*, Ch. IV, Sec. I(g).

10. *State of Maharashtra v. Assn. of Court Stenos*, (2002)2 SCC 141 : AIR 2002 SC 555.

11. *High Court Welfare Assn.,Calcutta v. State of W.B*, (2004) 1 SCC 334 : AIR 2004 SC 354.

12. *High Court Welfare Assn.,Calcutta v. State of W.B*, (2007) 3 SCC 63 : AIR 2007 SC 1218.

13. AIR 1971 SC 1850 : (1971) 2 SCC 137.

filled only by the Chief Justice and not by the Government.[14] The power to appoint includes the power "to suspend, dismiss, remove or compulsorily retire from service". No outside executive authority can interfere with the exercise of the power by the Chief Justice. The object underlying Art. 229(1) is to ensure the independence of the High Court.[15]

The administrative expenses of a High Court, including all salaries, allowances and pensions payable to or in respect of the officers and servants of the Court, are charged upon the Consolidated Fund of the State, and any fees or other moneys taken by the Court, form part of that Fund [Art. 229(3)].[16]

The Supreme Court has also held in the case noted below,[17] that under Art. 229, power to make appointments of High Court officers and servants is conferred on the Chief Justice, as such, and not on the High Court. The Chief Justice is the "sole authority" in the matter of appointment of the High Court staff and officers and no other Judge can usurp those powers. "The Chief Justice has been vested with wide powers to run the High Court administration independently so as not to brook any interference from any quarter, not even from his Brother Judges who, however, can scrutinize his administrative action or order on the judicial side like the action of any other authority".[18]

Commenting on Art. 229, the Supreme Court has observed: "the objects of this Article was to secure the independence of the High Court which cannot be regarded as fully secured unless the authority to appoint supporting staff with complete control over them is vested in the Chief Justice... There is imperative need for total and absolute administrative independence of the High Court."[19] But the Supreme Court has emphasized that the Chief Justice of the High Court ought not to exercise his power under Art. 229 in an arbitrary manner.

C. JURISDICTION AND POWERS

(i) COURT OF RECORD

A High Court is a Court of record and has all the powers of such a Court including the powers to punish for its contempt [Art. 215]. The power is similar in content, scope and nature to the corresponding power of the Supreme Court.[20]

As a Court of record, the High Court is entitled to preserve its original record in perpetuity. Besides, as a Court of record the High Court has twofold powers:

(i) it has power to determine the question about its own jurisdiction; and

(ii) it has inherent power to punish for its contempt summarily.[21]

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14. *State of Orissa v. Sudhansu Sekhar*, AIR 1968 SC 647 : (1968) 2 SCR 154; *S.C. Malik v. P.P. Sharma*, AIR 1982 Del, 83.

15. *Chief Justice, Andhra Pradesh v. L.V.A. Dikshitulu*, AIR 1979 SC 193 : (1979) 2 SCC 34.

16. *Supra*, Ch. VI, Sec. F(iii).

17. *High Court of Judicature, Rajasthan v. Ramesh Chand Paliwal*, AIR 1998 SC 1079 : (1998) 3 SCC 72.

18. *Ibid*, at 1086.

19. *H.C. Puttuswamy v. Hon'ble Chief Justice of Karnataka*, AIR 1991 SC 295, 298 : 1991 Supp (2) SCC 421.

20. *Supra*, Ch. IV, Sec. C(i).

21. *Naresh Shridhar Mirajkar v. State of Maharashtra*, AIR 1967 SC 1; *High Court of Judicature at Allahabad v. Raj Kishore*, AIR 1997 SC 1186 : (1997) 3 SCC 11 : (1966) 3 SCR 744.

In *Sukhdev v. Teja Singh*,[22] the Supreme Court refused to transfer contempt proceedings filed against the petitioner in the Pepsu High Court to some other High Court. The Constitution vests in the High Court itself the powers to deal with its contempt and, therefore, transfer of contempt proceedings from the Pepsu to another High Court would deprive the High Court of the jurisdiction vested in it by the Constitution.

The power to take proceedings for the contempt of Court is an inherent power of a Court of record and, therefore, the Criminal Procedure Code does not apply to such proceedings. The contemner is not in the position of an accused as "contempt proceeding is *sui generis*; it has peculiar features which are not found in criminal proceedings".[23]It has also been held that theContempt of Courts Act, 1971, reaffirms and reiterates the jurisdiction and power of a High Court in respect of its own contempt and of subordinate courts. "The Act does not confer any new jurisdiction instead it affirms the High Court's power and jurisdiction for taking action for the contempt of itself as well as of the subordinate courts".[24] The High Court's *suo motu* power to take cognizance of its contempt is not affected thereby.

In *Kapur*,[25] the Supreme Court has emphasized that as a Court of record under Art. 215, the High Court possesses inherent power and jurisdiction, not derived from the Contempt of Courts Act which does not affect that power or confer a new power or jurisdiction. In view of Art. 215, no law made by a legislature could take away the jurisdiction conferred on the High Court nor it could confer it afresh by virtue of its own authority.

The Supreme Court has further ruled in *Sukhdev*[26] that the High Court can deal with a contempt matter summarily and adopt its own procedure consistent with fair play and natural justice. "All that is necessary is that the procedure is fair and that the contemner is made aware of the charge against him and given a fair and reasonable opportunity to defend himself."

A wilful violation or disobedience of an order of the High Court amounts to its contempt.[27] In 1965, the State of West Bengal issued an order prohibiting preparation of sweets from milk. A writ petition was moved in the High Court to challenge the order, the notice for which was duly served on the State. Thereafter, the Chief Minister in a broadcast made several comments on controversial matters pending before the Court. The Supreme Court held that the Chief Minister's speech was calculated to obstruct the course of justice and amounted to contempt of Court and his conduct merited disapproval.[28]

The Supreme Court has ruled in *Mohd. Ikram Hussain v. State of Uttar Pradesh*,[29] that the Constitution preserves the power of a High Court to punish

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22. AIR 1954 SC 186 : 1954 SCR 454.
23. *Delhi Judicial Service Association v. State of Gujarat*, AIR 1991 SC, at 2191 : (1991) 4 SCC 406.
24. *Ibid*, at 2198.
25. *R.L. Kapur v. State of Tamil Nadu*, AIR 1972 SC 858 : (1972) 1 SCC 651.
26. *Supra*, footnote 22.
27. *B.K. Kar v. Chief Justice*, AIR 1961 SC 1367 : (1962) 1 SCR 319; *Hoshiar Singh v. Gurbachan Singh*, AIR 1962 SC 1089 : (1962) Supp 3 SCR 127; *Aswini Kumar v. P.C. Mukherjee*, AIR 1965 Cal 484.
28. *In re, P.C. Sen*, AIR 1970 SC 1821 : (1969) 2 SCR 649.
29. AIR 1964 SC 1625 : (1964) 5 SCR 86.

for its contempt and such power is also inherent in a Court of record. The only curbs on such a power are those imposed by the Contempt of Courts Act which limits the term for which a person can be imprisoned for 6 months' simple imprisonment.[30] In the instant case, it has been ruled that disobedience of an order of the High Court amounts to contempt of the Court. A direction given by the High Court in a proceeding for writ of *habeas corpus* for the production of the body of a person has to be carried out and if disobeyed the contemner is punishable by attachment and imprisonment.[31]

The Supreme Court can also take cognisance *suo motu* of the contempt of a High Court under Art. 129.[32] The Supreme Court is the highest Court of record. It is charged with the duties and responsibilities of correcting the lower courts and tribunals and of protecting them from those whose misconduct tends to prevent the due performance of their duties. Art. 129 vests powers in the Supreme Court to punish for contempt of itself in its capacity as the highest Court of record and also as a Court charged with the appellate and superintending powers over the lower courts and tribunals as detailed in the Constitution. The Supreme Court has observed in this connection:

> "To discharge its obligations as the custodian of the administration of justice in the country and as the highest Court imbued with supervisory and appellate jurisdiction over all the lower courts and tribunals, it is inherently deemed to have been entrusted with the power to see that the stream of justice in the country remains pure, that its course is not hindered or obstructed in any manner, that justice is delivered without fear or favour and for that purpose all the courts and tribunals are protected while discharging their legislative duties."[33]

The Supreme Court has emphasizned that fair comments, even if outspoken, but made without any malice or attempting to impair the administration of justice and made in good faith and in proper language, do not constitute contempt of Court.

A lawyer or a litigant who seeks to browbeat the Court and maligns the judge because he could not get a favourable order from the Court commits contempt of Court. If such activity is permitted, Judges would not be able to perform their duties freely and fairly with the result that administration of justice would become a casualty and Rule of Law would receive a set back.

The Supreme Court has cautioned the High Courts that the contempt jurisdiction ought to be exercised with scrupulous care and caution, restraint and circumspection. Recourse to this jurisdiction should be had whenever something is done which tends to affect the administration of justice, or which tends to impede its course or tends to shake public confidence in the majesty of law and to preserve and maintain the dignity of the Court.[34]

Reference may be made here to *State of Bihar v. Subhash Singh*,[35] a case of non-compliance of an order of the High Court by an executive officer. While dis-

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30. Entry 14, List III, runs as : "Contempt of Court, but not including contempt of the Supreme Court".

31. There have been quite a few cases of the High Courts punishing persons for their contempt. See, for example, *Pritam Pal v. High Court of M.P.*, (1993) Supp. (1) SCC 529 : AIR 1992 SC 904.

32. For discussion on Art. 129, See, *supra*, Ch. IV, Sec. (c).

33. *In re : Vinay Chandra Mishra*, AIR 1995 SC 2348, 2358 : (1995) 1 KLJ 504.

34. *Chetak Construction Ltd. v. Om Prakash*, AIR 1998 SC 1855 : (1998) 4 SCC 577.

35. AIR 1997 SC 1390 : (1997) 4 SCC 430.

posing of a writ petition, the High Court directed the concerned officer to consider the case of the writ petitioner and dispose it of with a reasoned order within two months. When this did not happen, the Court imposed the costs on the officer personally for non-compliance of its order. On appeal to the Supreme Court, the Court refused to interfere as the delay in complying with the High Court order was of 17 months and the concerned officer had not explained the reasons for the delay.

The Supreme Court has emphasized that the Head of the Department/designated officer is ultimately accountable to the Court for the result of the action or decision taken. The Executive is enjoined to comply with the orders passed by the Court in exercise of judicial review. The Court exercises its power of judicial review to ensure that the Executive discharges its power "truly, objectively expeditiously for the purpose for which substantive, acts/results are intended." All actions of the state or its officials must be carried out subject to the Constitution and within the limits set by the law. "Judicial review of administrative action is, therefore, an essential part of rule of law".

When the Court directs an officer to discharge its duties expeditiously and if it is not done, the official concerned is required to explain to the Court as to the circumstances in which he could not comply with the direction issued by the Court. If there was any unavoidable delay, he should have sought further time for compliance. In the instant case, the concerned official took no such step. The Supreme Court also impressed on the High Courts to be circumspect in imposing costs personally against the official and keep at the back of its mind the facts and the circumstances in each case.

The High Court ought not to pass an order holding a person guilty of its contempt and imposing on him punishment therefor without issuing him a show cause notice, or giving him an opportunity to explain the alleged contemptuous conduct.[36]

Can a statute passed by Parliament adversely affect the jurisdiction of the Supreme Court [Art. 129] and the High Courts [Art. 215] to punish for their contempt?

The Supreme Court has answered this question in *Pallav Sheth v. Custodian.*[37] The question was whether the contempt of courts Act, 1971, in any way affected the power of the High Court under Art. 215. The Supreme Court has stated that Constitution has conferred on the Supreme Court and the High Courts as courts of record the power to punish for their contempt. "This power cannot be abrogated or stultified." Any law which "stultifies or abrogates" this power under Art. 129/215 will not be regarded as having been validly enacted. But a law which provides "for the quantum of punishment, or what may or may not be regarded as acts of contempt, or even providing for a period of limitation for initiating proceedings for contempt cannot be taken to be a provision which abrogates or stultifies the contempt jurisdiction under Art. 129/215 of the Constitution."[38]

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36. *L.P. Misra v. State of Uttar Pradesh*, AIR 1998 SC 3337 : (1998) 7 SCC 379.
37. AIR 2001 SC 2763 : (2001) 7 SCC 549.
38. *Ibid.*, at 2773. For Art. 129, see, Ch. IV, Sec. C(i), *supra.*

(ii) GENERAL JURISDICTION

The Constitution does not contain detailed provisions to define the jurisdiction of the High Courts. It merely declares that their jurisdiction, the law administered by them, the respective powers of their Judges in relation to the administration of justice by the courts, and their rule-making power, all are to be the same as were enjoyed by them immediately before the commencement of the Constitution [Art. 225].

The Constitution thus maintains the *status quo* existing on January 25, 1950, in respect of the jurisdiction and powers of the High Courts. The reason for this is that the High Courts are institutions of respectable antiquity, that these courts had been in existence much before the advent of the present Constitution and they are not new bodies created for the first time by the Constitution.[39] The *status quo* in respect of the High Courts is subject to the provisions of the Constitution and any law made by the appropriate Legislature in pursuance of its powers under the Constitution [Art. 225].[40]

Accordingly, the three High Courts at Bombay, Calcutta and Madras (Chennai) possessed admiralty jurisdiction and they continue to possess this jurisdiction even after the Constitution has come into force. The Andhra Pradesh High Court being the successor of the High Court of Madras also enjoys the admiralty jurisdiction.[41]

In two important respects, however, the Constitution itself affects the *status quo* regarding the High Courts. First, any restriction on their original jurisdiction regarding a revenue matter, or an act ordered or done in revenue collection, existing in the pre-Constitution era is no longer to operate.[42] This affects the High Courts of Calcutta, Madras and Bombay from whose original jurisdiction, due to some historical circumstances, revenue matters were excluded.[43] The original jurisdiction of these Courts is now freed from a very ancient restriction dating back to the year 1781.

Secondly, a major change in the jurisdiction of the High Courts has been effectuated by Art. 226 which empowers them to issue writs and, thus, confers a significant power on them to enforce rights of the people, to administer justice and to review administrative action. This provision is discussed in detail below.[44]

Prior to the Constitution, only the three High Courts at Calcutta, Bombay and Madras could issue writs within the boundaries of their original jurisdiction. Now, Art. 226 treats all High Courts equally and confers the power on them all to issue writs within their territorial jurisdiction.

(iii) CONSTITUTIONAL QUESTION

Article 228 provides that if the High Court is satisfied that a case pending in a subordinate Court involves a substantial question of law regarding the interpreta-

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39. JAIN, *INDIAN LEGAL HISTORY*, Ch. XIX.
40. See, *infra*, See H., for legislative powers *vis-a-vis* the High Courts.
41. *M.V.AL. Quamar v. Tsavliris Salvage (Intl.) Ltd.*, AIR 2000 SC 2826 : (2000) 8 SCC 278.
42. Proviso to Art. 225.
43. Only these three High Courts had original jurisdiction in the pre-constitution days. For a detailed discussion on the genesis of this restriction, see, footnote 39, *supra*.
44. *Infra*, Secs. D and E.

tion of the Constitution, which it is necessary to determine to dispose of the case, the High Court shall withdraw the case to itself. It may then dispose of the whole case itself, or may determine only the constitutional law point and return the case to the subordinate Court for disposal in conformity with the High Court's judgment on the constitutional point.

The High Court will take action under Art. 228 only if the case cannot be disposed of without determining the constitutional question involved. This provision enables the High Court to determine the constitutional question at the earliest opportunity. The language of Art. 228 is such that once the conditions mentioned therein are satisfied, the High Court has no option but to withdraw the case to itself for disposal.[45]

(iv) POWER OF SUPERINTENDENCE

SALIENT FEATURES OF ART. 227

According to Art. 227(1), every High Court has the power of superintendence over all courts and tribunals within its territorial jurisdiction except those which are constituted by or under a law relating to the armed forces [Art. 227(4)].

This power of superintendence and control over all Subordinate Courts and tribunals is both of administrative and judicial nature, and, such power could be exercised *suo motu*. However the power of superintendence does not imply that the High Court can influence the subordinate judiciary to pass any order or judgment in a particular manner.[46] In *Waryam Singh v. Amarnath*,[47] a Constitution Bench of the Supreme Court traced the High Court's history of the power of Superintendence now elevated in the Constitution as Art. 227. The court pointed out that the material part of Art. 227 substantially reproduces the provisions of S.107 of the Government of India Act, 1917. The power of the High Court was not merely 'administrative superintendence' apart from and independently of the provisions of other laws conferring revisional jurisdiction on the High Court. It was noticed that S. 107 was reproduced as S. 244 in the Government of India Act, 1935 which, in turn, was reproduced with some modification as Art. 227 of the Constitution.

The power of superintendence includes the power to call returns from the courts, to make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts, and prescribe forms in which books, entries and accounts are to be kept by the officers of such courts [Art. 227(2)].

Article 227 of the Constitution of India gives the High Court the power of superintendence over all Courts and tribunals throughout the territories in relation to which it exercise jurisdiction. This jurisdiction cannot be limited or fettered by any act of the State Legislature. The supervisory jurisdiction extends to keeping the subordinate tribunals within the limits of their authority and to seeing that they obey the law. The powers under Article 227 are wide and can be used, to meet the ends of justice. They can be used to interfere even with an interlocutory order. However the power under Article 227 is a discretionary power [and it is difficult to attribute to an order of the High Court, such a source of power, when

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45. *Ranadeb Chaudhary v. Land Acquisition Judge*, AIR 1971 Cal 368.
46. *Jasbir Singh v. State of Punjab*, (2006) 8 SCC 294 : (2006) 9 JT 35.
47. AIR 1954 SC 215.

the High Court itself does not in terms purport to exercise any discretionary power]. It is settled law that this power of judicial superintendence must be exercised sparingly and only to keep subordinate courts and tribunals within the bounds of their authority and not to correct mere errors. Further, where the statute bars the exercise of revisional powers it would require very exceptional circumstances to warrant interference under Article 227 since the power of superintendence was not meant to circumvent statutory law. It is settled law that the jurisdiction under Article 227 could not be exercised in the "cloak of an appeal in disguise".[48]

The High Court may also settle tables of fees to be allowed to the officers of such courts and to attorneys, advocates and pleaders practising therein [Art. 227(3)]. However, the rules made, forms prescribed, or tables settled cannot be inconsistent with any law in force and require the previous approval of the Governor of the State concerned in which the subordinate courts are situated.[49]

The power of superintendence thus conferred on the High Court over the courts and tribunals within its territorial jurisdiction is very broad. It extends to administrative as much as judicial superintendence. It may even be exercised *suo motu* in the interest of justice.[50] The power and duty of the High Court under Art. 227 is essentially to ensure that the courts and tribunals, inferior to High Court, have done what they were required to do.

A notable point about Art. 227 is that it enables the High Court to superintend not only 'courts' but tribunals as well. This aspect of Art. 227 is very significant in the present era of proliferation of tribunals.[51]

SCOPE OF ART. 227

Where a statutory right to file an appeal has been provided for, it is not open to High Court to entertain a petition under Article 227 of the Constitution. Even if a remedy by way of an appeal has not been provided for against the order and judgment of a District Judge, the remedy available to the aggrieved person is to file a revision before the High Court under Section 115 CPC. Where remedy for filing a revision before the High Court under Section 115 CPC has been expressly barred by a State enactment, only in such case a petition under Article 227 of the Constitution would lie and not under Article 226 of the Constitution.

It is also not permissible to a High Court on a petition filed under Article 227 of the Constitution to review or reweigh the evidence upon which the inferior Court or tribunal purports to have passed the order or to correct errors of law in the decision.[52]

The power under Art. 227 is broader than that conferred on the High Court by Art. 226.[53] For example, through its power to issue *certiorari* under Art. 226, a High Court can annul the decision of a tribunal while under Art. 227 it can do

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48. *State v. Navjot Sandhu,* (2003) 6 SCC 641 : (2003) 4 JT 605. See also *Sneh Gupta v. Devi Sarup,* (2009) 6 SCC 194 : (2009) 2 JT 641, general principles of interference reiterated.
49. Proviso to Art. 227(3) read with Art. 231(2)(*b*).
50. *Pramod Saraswat v. Ashok Kumar,* AIR 1981 All 441; *Ratan Muni Jain Intermediate College v. Director of Education,* AIR 1997 All 163.
51. See, *infra,* Sec. I.
52. *Sadhana Lodh v. National Insurance Co. Ltd.,* (2003) 3 SCC 524 : AIR 2003 SC 1561.
53. See, Sec. D., *infra*.

that and do something more—it can issue further directions in the matter. But under Art. 227, the High Court does not sit as a Court of appeal.

In *Umaji v. Radhikabai*,[54] the Supreme Court has explained the difference between Arts. 226 and 227. The power to issue writs is not the same as the power of superintendence. A writ in the nature of *habeas corpus* or *mandamus* or *quo warranto* or prohibition or *certiorari* cannot be equated with the power of superintendence.[55] These writs are directed against persons, authorities and the state.

The power of superintendence conferred by Art. 227 is supervisory and not appellate jurisdiction. This jurisdiction is intended to ensure that subordinate courts and tribunals act within the limits of their authority and according to law. The power of superintendence is in addition to the power conferred on the High Courts under Art. 226. The powers conferred by Arts. 226 and 227 are separate and distinct and operate in different fields. Though, *prima facie*, it may appear that the writ of *certiorari* or prohibition partakes of the nature of superintendence inasmuch as at times the end result in both cases may be the same, in reality the nature of the power to issue these writs is different from the supervisory or superintending powers under Art. 227. The fact that the same result can at times be achieved by two different processes does not mean that both the processes are the same.

The power of superintendence is to be exercised to keep the courts and tribunals within the bounds of their authority and jurisdiction and not for correcting mere errors of law or facts. Art. 227 does not confer on the High Court power similar to that of an ordinary Court of appeal. The power under Art. 227 is to be used sparingly and only in appropriate cases, for the purpose of keeping the subordinate courts and Tribunals within the bounds of their authority, and not for correcting mere errors.[56]

The High Court will usually interfere under Art. 227, if a Court or tribunal acts arbitrarily, or declines to do what is legally incumbent on it to do and thereby refuses to exercise jurisdiction vested in it by law, or exceeds its jurisdiction, or assumes erroneous jurisdiction, or a tribunal acts against natural justice, or its findings are based on no evidence, or are otherwise perverse, or there is an error of law apparent on the face of the record.[57]

When a tribunal has acted within its jurisdiction, the High Court does not interfere unless there is any grave miscarriage of justice or flagrant violation of law.[58] The Court would interfere only when the exercise of discretion by a tribunal is capricious, perverse or *ultra vires* and not when it is exercised judicially. The Court would not interfere merely because it might take a different view of the facts and exercise the discretion differently from what the tribunal has done.[59]

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54. AIR 1986 SC 1272, 1317 : 1986 Supp SCC 401.
55. For these writs, see, *infra*, Sec. E.
56. *Waryam Singh v. Amarnath*, AIR 1954 SC 215 : 1954 SCR 565; *Jijabai v. Pathankhan*, AIR 1971 SC 315 : (1970) 2 SCC 711; *Ahmedabad Mfg. & Calico Ptg. Co. Ltd. v. Ramtahel Ramnand*, AIR 1972 SC 1598 : (1972) 1 SCC 898.
57. *Dahya Lala v. Rasul Mohd. Abdul Rahim*, AIR 1964 SC 1320 : (1963) 3 SCR 1; *Ahmedabad Mfg, & Calico Ptg. Co. v. Ramtahel*, AIR 1972 SC 1568 : (1972) 1 SCC 898; *India v. Adhoc Claims Commissioner*, AIR 1977 Cal 393; *S. Mahalakshmi v. M. Syamala*, AIR 1997 Mad 34; *State of Maharashtra v. Milind*, AIR 2001 SC 393 : AIR 2001 SC 393.
58. *D.N. Banerjee v. P.R. Mukherjee*, AIR 1953 SC 58.
59. *Sarpanch v. Ramgiri Gosavi*, AIR 1968 SC 222 : (1967) 3 SCR 774.

The High Court would not re-appreciate, review or reweigh the evidence after the tribunal has appreciated the same and decided questions of fact.[60] Normally the High Court does not enter the arena of facts under Art. 227, but the High Court may interfere if a substantial portion of the evidence relied upon by the lower courts is found to be inadmissible, or of no evidentiary value,[61] or a finding of fact is not supported by any evidence, or is based on manifest misreading of evidence, or if its conclusions are perverse.[62] In this connection, the Supreme Court has observed.[63]

> "In the exercise of this jurisdiction [under Art. 227] the High Court can set aside or ignore the findings of fact of an inferior Court or tribunal if there was no evidence to justify such a conclusion and if no reasonable person could possibly have come to the conclusion which the Court or tribunal has come to, or in other words it is a finding which was perverse in law. Except to the limited extent indicated above the High Court has no jurisdiction to interfere with the findings of fact".[64]

In the instant case, the Supreme Court ruled that the findings recorded by the lower Court did not suffer from such an infirmity so as to justify interference with the said finding under Art. 227. The High Court in exercise of its jurisdiction under Art. 227 was not justified in setting aside the finding of fact recorded by the lower Court. Where the appellate authority under the W.B. Restoration of Alienated Land Act, 1973, gave a finding without considering the evidence on record, the High Court would be justified in interfering with such finding of fact and setting it aside.[65]

Similarly, the Supreme Court has asserted in another case[66] that under Art. 227, the High Court can set aside a finding of fact by a tribunal if it is arrived at by non-consideration of the relevant and material documents, the consideration of which could have led to an opposite conclusion.

It has been held by the Supreme Court that the High Court does not exercise its jurisdiction under Art. 227 if an alternative remedy is available.[67] But this is not an inflexible rule and there may be circumstances when, despite the existence of an alternative remedy, the High Court may deem it fit to intervene under Art. 227.[68]

When a High Court refuses to exercise its power of superintendence, the Supreme Court may itself, on an appeal from the High Court's order, exercise

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60. *Shaik Mohammed v. K.H. Karimsab,* AIR 1970 SC 61 : (1978) 2 SCC 47; *Maruti Lala Raut v. Dashrath Babu Wathare,* AIR 1974 SC 2051 : (1974) 2 SCC 615; *India Pipe Fitting Co. v. Fakruddin,* AIR 1978 SC 45 : (1977) 4 SCC 587; *Ganpat v. Sashikant,* AIR 1978 SC 955 : (1978) 2 SCC 573.

61. *Zenna Soralaji v. Virabell Hotel Co. (P) Ltd.,* AIR 1981 Bom 446.

62. *Gopala Genu v. N.P.A.A. Trust,* AIR 1978 SC 347 : (1978) 2 SCC 47; *Satyanarayan M. Sakaria v. Vithaldas Shyamlal Jhaveri,* 1994 Supp (1) SCC 614; *Achutananda Baidya v. Prafullya Kumar Gayen,* AIR 1997 SC 2077 : (1997) 5 SCC 76.

63. *Mani Nariman Daruwala v. Phiroz N. Bhatena,* AIR 1991 SC 1494 : (1991) 3 SCC 141.

64. Also see, *Chandravarkar Sita Ratna Rao v. Ashalata S. Guram,* AIR 1987 SC 117 : (1986) 4 SCC 447.

65. *Achutananda Baidya v. Prafullya Kumar Gayen,* AIR 1997 SC 2077, 2079 : (1997) 5 SCC 76.

66. *Baby v. Travancore Devaswom Board,* AIR 1999 SC 519 : (1998) 8 SCC 310.

67. *Mohd. Yunus v. Mohd. Mustaqim,* AIR 1984 SC 38 : (1983) 4 SCC 566.

68. *Union of India v. Ad-hoc Claims Commissioner,* AIR 1977 Cal 393.

the same powers in a suitable case.[69] The High Court's jurisdiction under Art. 227 cannot be controlled by a statute and it can be exercised even when a tribunal's decision is declared to be final and conclusive.[70]

The Supreme Court has held that the Commissioner of Hindu Religious Endowments who acts in a *quasi*-judicial capacity under the Orissa Hindu Religious Endowments Act is subject to High Court's superintendence under Art. 227. He is, therefore, bound to follow the decisions of the High Courts and it will amount to contempt of Court on his part if he deliberately avoids to follow the High Court's decision, *mala fide*, by giving wrong and illegitimate reasons.[71] The Court has emphasized that if the Commissioner does not follow the previous decisions of the High Court, it will create confusion in the administration of law, will undermine respect laid down by the High Court, and will impair the constitutional authority of the High Court.

When the statutory power of revision given to the High Court is inadequate, the High Court can fall back upon its supervisory power under Art. 227.[72]

Recently, the Supreme Court has emphasized [73]that the power of superintendence vested in the High Courts under Art. 227 is "part of the basic structure of the Constitution"[74]

Article 235 also vests in the High Courts some control over the subordinate courts. While Art. 227 deals with the official acts of the persons occupying those courts, Art. 235 deals with such persons themselves in relation to the discipline. Further, while the power of superintendence of the High Courts under Art. 227 extends to the courts and tribunals, the controlling power under Art. 235 extends only to courts and not to tribunals.[75]

(v) POWER OF REVIEW

There is no provision in the Constitution to confer on High Court power to review its own decisions. But the Supreme Court has ruled that a High Court being a superior Court has inherent power to review its own decisions.

The High Court can exercise the power of review to prevent miscarriage of justice, or correct grave and palpable errors committed by it. The High Court can review its decision on such ground as "error apparent on the face of the record."[76]

The Supreme Court has observed in *Thomas*[77] that a High Court being a Court of record [Art. 215][78] has inherent powers to correct its record by way of review. A Court of record envelopes all such powers whose acts and proceedings are to be

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69. *Hari Vishnu Kamath v. Ahmad Ishaq*, AIR 1955 SC 233 : (1955) 1 SCR 233.
70. *State of Gujarat v. Vakhat Singhji*, AIR 1968 SC 1481 : (1968) 3 SCR 692.
71. *B. Mishra v. B. Dixit*, AIR 1972 SC 2466 : (1973) 1 SCC 446.
72. *Baby v. Travancore Devaswom Board*, AIR 1999 SC 519 : (1987) 8 SCC 310.
73. *L. Chandra Kumar v. Union of India*, AIR 1997 SC 1125, 1150 : (1997) 3 SCC 261, also see, *infra*, Ch. XLI.
74. For explanation of this concept, see, *infra*, Ch. XLI.
75. *Infra*, Sec. G.
76. *Shivdeo Singh v. State of Punjab*, AIR 1963 SC 1909; *Ariban Tuleshwar Sharma v. Ariban Pishak Sharma*, AIR 1979 SC 1041 : (1979) 4 SCC 389; *Khaitan (India) Ltd. v. Union of India*, AIR 2000 Cal 1; *Ramakrishna Hela v. Official Liquidator*, AIR 2000 Cal 68.
77. *M.M. Thomas v. State of Kerala*, AIR 2000 SC 540 : (2000) 1 SCC 666.
78. *Supra*, Sec. C (a).

enrolled in a perpetual memorial and testimony. The High Court, as a Court of record, has a duty to itself to keep all its records correctly and in accordance with law. Hence if any apparent error is noticed by the High Court in respect of any order favoured, by it, the High Court has not only the power, but a duty, to correct it. The High Court's power in that regard is plenary. And where an order is obtained by fraud and misrepresentation the High Court can, inexercise of its inherent power, recall its order.[79]

D. WRIT JURISDICTION: ART. 226

(a) NATURE OF THE WRIT JURISDICTION

A very significant aspect of the Indian Constitution is the jurisdiction it confers on the High Courts to issue writs. The writs have been among the great safeguards provided by the British Judicial System for upholding the rights and liberties of the people. It was an act of great wisdom and foresight on the part of the Constitution-makers to introduce the writ system in India, and, thus, constitute the High Courts into guardians of the people's legal rights.

In the modern era of welfare state, when there is governmental action on a vast scale, a procedure to obtain speedy and effective redress against an illegal exercise of power by the Executive is extremely desirable. Through writs, the High Courts are able to control, to some extent, the administrative authorities in the modern administrative age. The writ system provides an expeditious and less expensive remedy than any other remedy available through the normal Court-process.

In the pre-Constitution era, only the High Courts of Calcutta, Madras and Bombay enjoyed the jurisdiction to issue writs. The jurisdiction was, however, limited territorially as each High Court could issue a writ not throughout the whole of its territorial jurisdiction but only within the area of the Presidency Town within which it enjoyed an original jurisdiction.[80] No other High Court had such a jurisdiction. Art. 226 thus affects all the High Courts in a fundamental manner and adds greatly to their power. Each High Court now has a writ jurisdiction, and even the Calcutta, Madras and Bombay High Courts have benefited for they can now issue writs even outside the limits of their original jurisdiction.

It is a public law remedy. The High Court while exercising its power of judicial review does not act as an appellant body. It is concerned with illegality, irrationality and procedural impropriety of an order passed by the State or a statutory authority.[81] Under Art. 226(1), a High Court is empowered to issue directions, orders or writs, including writs in the nature of *habeas corpus, mandamus, prohibition, quo warranto* and *certiorari*, for the enforcement of a Fundamental Right and for any other purpose. High Courts exercise discretionary and equitable jurisdiction under Art. 226.[82]

The power of the High Court to entertain a petition under Art. 226 is an original power whereas the power of the Supreme Court while entertaining an appeal under Art. 136 is an appellate power[83].

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79. *Deepa Gourang Murdeshwar Katre v. Principal V.A.V. College of Arts,* (2007) 14 SCC 108 : (2007) 3 JT 403.
80. JAIN, *OUTLINES OF INDIAN LEGAL HISTORY*, 303-308 (1990).
81. *Dwarka Prasad Agarwal v. B. D. Agarwal,* (2003) 6 SCC 230 : AIR 2003 SC 2686.
82. *U.P. State Sugar Corpn. Ltd. v. Kamal Swaroop Tondon,* (2008) 2 SCC 41, see also *Secretary, ONGC Ltd. v. V.U. Warrier,* (2005) 5 SCC 245 : AIR 2005 SC 3039; *Indian Overseas Bank, Annasalai v. P. Ganesan,* (2008) 1 SCC 650.
83. *State of Orissa v. Gokulananda Jena,* (2003) 6 SCC 465 : AIR 2003 SC 4207.

The significant point to note is that under Art. 226, the power of a High Court is not confined only to issue of writs; it is broader than that for a High Court can also issue any directions to enforce any of the Fundamental Rights or "for any other purpose". In a number of cases, courts have issued directions rather than writs.[84]

High Court can pass appropriate orders while exercising jurisdiction under Art. 226. Such power can neither be controlled nor affected by Or. 23 R. 3 CPC. Proceedings in exercise of writ jurisdiction are different from proceedings in a civil suit.[85]

Power under Article 226 can be exercised by the High Court to reach injustice wherever it is found.[86] But the Court has also set its own limits saying that even a wrong decision is not open to challenge unless it be mala fide. The doctrine of fairness does not convert the writ courts into appellate authorities over administrative authorities. Unless the action of the authority is mala fide, even a wrong decision taken by it is not open to challenge. Hence, whatever the wisdom (or the lack of it) of the conduct of such an authority, it will not be judicially reviewed and particularly so in commercial matters, the Courts should not risk their judgments for the judgments of the bodies to which that task is assigned.[87]

Further, it cannot supplant substantive statutory provisions. Hence, since the Land Acquisition Act, 1894 is a self-contained Code, the common law principles of justice, equity and good conscience cannot be extended in awarding interest, contrary to or beyond the provisions of the Statute and the Court has no power to award interest in a manner other than one prescribed by Statute while exercising jurisdiction under Article 226.[88]

The jurisdiction thus conferred on a High Court is to protect not only the Fundamental Rights but even any other legal right as is clear from the words 'any other purpose'. This Constitutional Right to access the High Court cannot be fettered and more so by the Court itself e.g. by directing the petitioner to deposit money as a condition precedent to such access.[89] Fundamental Rights of a citizen, whenever infringed, the High Court having regard to its extraordinary power under Article 226 of the Constitution, as also keeping in view that access to justice is a human right, would not turn him away only because a red corner notice has been issued by Interpol. The superior courts in criminal cases are entitled to go into the manner in which such red corner notice is sought to be enforced and/or whether local police is threatening an Indian citizen with arrest although they are not entitled to do so, except in terms of the Extradition Act, 1962.[90]

Any authority or body of persons having legal authority to adjudicate upon questions affecting the rights of a subject and enjoined with a duty to act judicially or quasi-judicially is amenable to the certiorari jurisdiction of the High Court. The proceedings of judicial courts subordinate to the High Court can be

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84. See, *Swayambar Prasad v. State of Rajasthan,* AIR 1972 Raj. 69; *Gujarat State Financial Corporation v. Lotus Hotel*, AIR 1983 SC 848 : (1983) 3 SCC 379; *Air India Statutory Corpn. v. United Labour Union*, AIR 1997 SC 645, 680 : (1997) 9 SCC 377.

85. *Commr. of Endowments v. Vittal Rao,* (2005) 4 SCC 120 : AIR 2005 SC 454.

86. *Secy. ONGC Ltd. v. V.U. Warrier,* (2005) 5 SCC 245 : AIR 2005 SC 3039, the Court referred to jurisdiction as 'equitable'.

87. *Karnataka State Industrial Investment & Development (Corpn.) Ltd. v. Cavalet India Ltd.,* (2005) 4 SCC 456 : (2005) 3 JT 570.

88. *Delhi Development Authority v. Mahender Singh,* (2009) 5 SCC 339 : (2009) 4 JT 208.

89. *Grand Vasant Residents Welfare Assn. v. DDA,* (2005) 12 SCC 281.

90. *Bhavesh Jayanti Lakhani v. State of Maharashtra,* (2009) 9 SCC 551.

subjected to certiorari. It is well settled principle that : (i) technicalities associated with the prerogative writs in English law have no role to play under the constitutional scheme; (ii) a writ of certiorari to call for records and examine the same for passing appropriate orders, is issued by a superior Court to an inferior Court which certifies its records for examination; and (iii) a High Court cannot issue a writ to another High Court, nor can one Bench of a High Court issue a writ to a different Bench of the High Court much less can the writ jurisdiction of a High Court be invoked to seek issuance of a writ of certiorari to the Supreme Court. The High Courts are not constituted as inferior courts in the constitutional scheme. Courts subordinate to the High Court are amenable to writ jurisdiction of the High Court under Article 226 of the Constitution.[91]

Article 226 provides an important mechanism for judicial review of administrative action in the country. India is a democratic country governed by Rule of Law. Public authorities exercise various types of powers—executive, adjudicatory, legislative. It is necessary that public authorities act according to law and so they are subjected to judicial review. Judicial review of the action of the public authorities, is an essential part of Rule of Law and the courts have been expressly entrusted with the power of judicial review as sentinel in *qui vive*. In *L. Chandra Kumar*[92] a Seven Judge Bench of the Supreme Court held that the power of judicial review under Art. 226 of the Constitution was one of the basic features of the Constitution. Hairing held so, the court at the same time held a litigant cannot straight away invoke the High Court's constitutional jurisdiction at the first instance but must approach the Administrative Tribunal first. But even after considering the Seven Judge Bench decision in *L. Chandra Kumar* a two Judge Bench of the Supreme Court in relation to dismissal of two lakh employees by State Govt. for going on strike, held that the High Court was empowered to exercise its extra ordinary jurisdiction under Art. 226 to meet unprecedented extraordinary situations with no parallel and the availability of alternative remedy before Administrative Tribunal would not be a bar.[93]

The legal parameters of judicial review has undergone a change. WEDNESBURY principle of unreasonableness has been displaced by the doctrine of proportionality.[94] Although the Court referred to the observations of the House of Lords in Tweed Pardes Commission[95], it is doubtful whether the true implication of the observations of House of Lords results in the replacement of Wednesbury as conceived by the Supreme Court. After all, disproportionate exercise of power is also unreasonable exercise of power.

The Supreme Court has often said that judicial review is not concerned with policy making functions of the State and particularly those involving financial implications. Yet the Court appears to have made an uncharacteristic leap in *Mohd. Abdul Kadir,*[96] saying that where an issue involving public interest has

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91. *Surya Dev Rai v. Ram Chander Rai,* (2003) 6 SCC 675 : AIR 2003 SC 3044. See *Kannadasan,* (2009) 7 SCC 1, 50, where the Supreme Court has reiterated that judicial review itself is a part of the basic structure of the Constitution.

92. (1997) 3 SCC 261.

93. *T.K. Rangarajan v. Govt. of T.N.,* (2003) 6 SCC 581 : AIR 2003 SC 3032. The Court found that at the particular time there was only one member manning the Administrative Tribunal.

94. *State of Madhya Pradesh v. Hazarilal,* (2008) 3 SCC 273 : AIR 2008 SC 1300.

95. *Tweed v. Parades Commission,* (2007) 4 All ER 177.

96. (2009) 6 SCC 611 : (2009) 6 SCALE 615.

not engaged the attention of those concerned with policy, or where the failure to take a prompt decision on a pending issue is likely to be detrimental to public interest, Courts will be failing in their duty if they did not draw the attention of the authorities concerned to the issue involved in appropriate cases on the logic that the Courts are not framers but they can act as catalysts when there is a need for a policy or a change in policy.

The great advantage of Art. 226 is that its scope cannot be curtailed or whittled down by legislation. The jurisdiction of the High Court under Art. 226 cannot be taken away by any legislation. Even when the Legislature declares the action or decision of an authority final, and ordinary jurisdiction of the courts is barred, a High Court is still entitled to exercise its writ jurisdiction which remains unaffected by legislation.[1] A finality clause in a statute is no bar to the exercise of the High Court's jurisdiction under Art. 226.[2] The judicial review in India thus stands on a much firmer ground than in Britian because while the jurisdiction of the British courts to issue writs may be regulated by legislation, the same cannot be done in India.

A mere wrong decision without anything more is not enough to attract jurisdiction of the High Court under Art. 226.[3] The High Court acts as a supervisory authority and hence it cannot reappreciate the entire evidence adduced in the disciplinary proceeding to alter the findings of the enquiring authority.[4] Where a decision in an earlier writ petition adversely affected the interest of the appellants, a second writ petition at their instance was maintainable.[5]

Since exercise of power under Art. 226 is discretionary relief may be denied because of suppression of facts. But the suppressed fact must be material one, i.e. one which would have had an effect on the merits of the case. Hence where a suit is withdrawn and was not pending by the time the writ petition was heard and the writ petition was otherwise maintainable, it could not be rejected on the ground of suppression of the fact of filing of the suit.[6]

But in the judicial review jurisdiction the Court cannot change the policy by requiring the government to select the best from among "films made" instead of "films made and certified" for public exhibition.[7] The Court also found fault with the reasoning of the High Court which proceeded on the wrong assumption that the objects of the film festival and the national films awards were the same and, therefore, when permission was granted for entering the film in film festivals without certification by the Board, a similar treatment should be extended to entries for the national film award.[8]

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1. *Sajjan Singh v. State of Rajasthan*, AIR 1965 SC 845 : (1965) 1 SCR 933; *Custodian, Evacuee Property v. Jafran Begum*, AIR 1968 SC 169 : (1967) 3 SCR 736; *Kartar Singh v. State of Punjab*, (1994) 3 SCC 569.
2. *Srikant K. Jituri v. Corp. of Belgaum*, see, *infra*, footnote 10.
3. *Sadhana Lodh v. National Insurance Co. Ltd.*, (2003) 3 SCC 524.
4. *Sub-Divisional Officer, Konch v. Maharaj Singh*, (2003) 9 SCC 191 : (2000) 8 SLJ 705.
5. *Pohla Singh v. State of Punjab*, (2004) 6 SCC 126 : AIR 2004 SC 3329.
6. *SJS Business Enterprises (P) Ltd. v. State of Bihar*, (2004) 7 SCC 166.
7. *Ibid*.
8. *Directorate of Film Festivals v. Gaurav Ashwin Jain*, (2007) 4 SCC 737 : AIR 2007 SC 1640.

Article 226 cannot be invoked for resolution of a private law dispute and recording a compromise as contradistinguished from a dispute involving public law character. It is also well settled that a writ remedy is not available for resolution of a property or a title dispute.[9]

Under Art. 226, the High Court may even grant a declaratory relief when writ is not a proper remedy.[10] A High Court can make an interim order pending final disposal of the writ petition.[11] A High Court cannot, however, give interim relief to the petitioner if it does not propose to determine the rights of the parties involved in the matter, but desires a regular suit to be filed for the purpose.[12]

Further, the words in the Article 'in the nature' of writs imply that a High Court is not obligated to follow all the procedural technicalities of the English law relating to writs, or changes of judicial opinions from case to case there, but should keep to the broad and fundamental features of these writs as followed in the English law. A petition is not thrown out merely because the proper writ has not been prayed for.[13]

It is impermissible for the High Court to adopt an adjudicatory role and decide upon the very existence or otherwise of the agreement as well as the tenability and legality or otherwise of making a reference to an arbitrator.[14]

The Court will not permit abuse of process by way of suppression of facts and the petition is liable to be dismissed at the threshold.[15] A writ petition cannot be filed under Art. 226 merely to enforce a purely contractual obligation. For this purpose, the proper remedy is a suit for damages or specific performance.[16] It has been held that the Courts have no jurisdiction to give directions for amending statutory rules framed by the executive.[17]

It is impermissible for the High Court to widen the scope of hearing of writ petitions without giving notice to parties concerned and without pleadings in respect of the wider questions taken up by it.[18]

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9. *Dwarka Prasad Agarwal v. B. D. Agarwal,* (2003) 6 SCC 230 : AIR 2003 SC 2686.
10. *Srikant K. Jituri v. Corpn. of the City of Belgaum,* (1994) 6 SCC 572 : AIR 1995 SC 288.
11. *Kanoria Chemicals & Industries Ltd. v. Uttar Pradesh State Electricity Board,* **(**1997) 5 SCC 772; *State of Madhya Pradesh v. M.V. Vyavsaya & Co.,* AIR 1997 SC 993 : (1997) 1 SCC 156.
12. *State of Orissa v. Madan Gopal,* AIR 1952 SC 12 : 1952 SCR 28.
13. *Basappa v. Nagappa,* AIR 1954 SC 440; *Kanu Sanyal v. Dist. Mag.,* AIR 1973 SC 2684 : (1973) 2 SCC 674.
14. *Food Corpn. of India v. Indian Council of Arbitration,* (2003) 6 SCC 564 : AIR 2003 SC 3011.
15. *B. Srinivasa Reddy v. Karnataka Urban Water Supply & Drainage Board Employees' Assn.,* (2006) 11 SCC 731
16. *Har Shankar v. Dy. Excise and Taxation Commr.,* AIR 1975 SC 1121 : (1975) 1 SCC 737; *Divisional Forest Office v. Biswanath Tea Co. Ltd.,* AIR 1981 SC 1368 : (1981) 3 SCC 238; *Food Corporation of India v. Jagannath Dutta,* AIR 1993 SC 1494 : 1993 Supp (3) SCC 635; *State of Madhya Pradesh v. M.V. Vyavsaya & Co.,* AIR 1997 SC 993 : (1997) 1 SCC 156.
For further discussion on this point, see, Ch. XXXIX.
17. *State of Manipur v. Ksh. Moirangninthou Singh,* (2007) 10 SCC 544 : (2007) 3 SCALE 50.
18. *State of U.P. v. Satya Narain Kapoor,* (2004) 8 SCC 630 : (2004) 9 JT 410.

The Supreme Court has given an expansive interpretation to Art. 226 over time. Under Art. 226, instead of merely quashing an administrative order as invalid when it is found to be flawed, the judicial tendency is to mould the relief according to the needs of the situation. In this way, judicial review has assumed a very positive and creative complexion.[19]

Requirements of Or. 23 R. 3 CPC can be pressed into service in writ proceedings also even though in terms of explanation to S. 141 CPC the code is not applicable to proceedings under Art. 226.[20] Disposal of the case on a point not raised by the parties and omission to decide the question raised is improper.[21]

Although High Court lacked jurisdiction to entertain appeal against order of Tribunal passed in 1994 but when subsequently writ petition was filed against the Tribunal's order, it got jurisdiction in view of Supreme Court's decision in *L. Chandra Kumar* case.[22] The Court explained that the fact the jurisdiction of High Court came to be recognized only later, cannot change the situation, since when the High Court entertained the writ petition, it had jurisdiction to do so and also to consider what was the effect of the earlier order or proceeding before it and whether the earlier order was legal and justified.[23]

(b) TERRITORIAL JURISDICTION TO ISSUE WRITS

A High Court exercises its writ jurisdiction throughout the territories in relation to which it exercises its jurisdiction.

The High Court can issue a writ—

(1) to a person or authority having its location or residence within the Court's territorial jurisdiction; or,

(2) if the cause of action either wholly or partly arises within the High Court's territorial jurisdiction.

Although in view of Section 141 CPC the provisions thereof would not apply to writ proceedings, the phraseology used in Section 20(c) CPC and Article 226(2) being in *pari materia*, the decisions of the Supreme Court rendered on interpretation of Section 20(c) CPC shall apply to the writ proceedings also.[24]

The High Court can issue a writ even when the person resides, or the authority is located, outside its territorial jurisdiction if the cause of action wholly or partially arises within the Court's territorial jurisdiction. This is a very useful constitutional provision [Art. 226(2)] as a High Court within whose jurisdiction a

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19. *State of Gujarat Steel Tubes v. Its Mazdoor Sabha*, AIR 1980 SC 1896 : (1980) 2 SCC 593; *Shiv Shankar Dal Mills v. State of Haryana*, AIR 1980 SC 1037 : (1980) 2 SCC 437; *Nawabganj Sugar Mills Co. v. Union of India*, AIR 1976 SC 1152.
See, M.P. JAIN, *THE EVOLVING INDIAN ADMINISTRATIVE LAW*, 215-18 (1983).

20. *K. Venkatachala Bhat v. Krishna Nayak*, (2005) 4 SCC 117 : (2005) 3 JT 161.

21. *V. K. Majotra v. Union of India*, (2003) 8 SCC 40 : AIR 2003 SC 3909.

22. (1997) 3 SCC 261,

23. *Rama Rao v. M.G. Maheshwara Rao*, (2007) 14 SCC 54 : (2007) 10 JT 504.

24. *Kusum Ingots & Alloys Ltd. v. Union of India*, (2004) 6 SCC 254 : AIR 2004 SC 2321.

cause of action arises is competent to issue writs to the Central Government located at New Delhi.

Cause of action implies a right to sue. The material facts which are imperative for the suitor to allege and prove constitute the cause of action. Cause of action is not defined in any statute. It has, however, been judicially interpreted, *inter alia*, to mean every fact which would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. Negatively put, it would mean that everything which, if not proved, gives the defendant an immediate right to judgment, would be part of cause of action. Its importance is beyond any doubt. The question as to whether the Court has territorial jurisdiction to entertain a writ petition, must be arrived at on the basis of averments made in the petition, the truth or otherwise thereof being immaterial. In order to confer jurisdiction on a High Court to entertain a writ petition it must disclose that the integral facts pleaded in support of the cause of action do constitute a cause so as to empower the Court to decide the dispute and that the entire or a part of it arose within its jurisdiction. The facts pleaded in the writ petition must have a nexus on the basis whereof a prayer can be granted. Those facts which have nothing to do with the prayer made therein cannot be said to give rise to a cause of action which would confer jurisdiction on the Court.[25] Even if a small fraction of the cause of action accrues within the jurisdiction of the Court, the Court will have jurisdiction in the matter. However, the same by itself may not be considered to be a determinative factor compelling the High Court to decide the matter on merits. In appropriate cases, the Court may refuse to exercise its discretionary jurisdiction by invoking the doctrine of forum convenience.

When a part of the cause of action arises within one or the other High Court, it will be for the petitioner to choose his forum.[26]

Although the original order was given at a place outside the area where the appellate/revisional order was passed, it may give rise to a cause of action at the place where the original order was passed.

Even in a given case, when the original authority is constituted at one place and the appellate/revisional authority is constituted at another, a writ petition would be maintainable at both the places as order of the appellate authority constitutes a part of cause of action. A writ petition would be maintainable in the High Court within whose jurisdiction the appellate authority is situate having regard to the fact that the order of the appellate authority is also required to be set aside and as the order of the original authority merges with that of the appellate authority.[27]

In *Alchemist*[28] the Supreme Court has reiterated that for the purpose of deciding whether facts averred in a writ petition would or would not constitute a part of cause of action, one has to consider whether such facts constitute a material, essential or integral part of the cause of action and that in determining this ques-

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25. *Kusum Ingots & Alloys Ltd. v. Union of India,* (2004) 6 SCC 254 : AIR 2004 SC 2321.
26. *Kusum Ingots & Alloys Ltd. v. Union of India,* (2004) 6 SCC 254 : AIR 2004 SC 2321.
27. *Kusum Ingots & Alloys Ltd. v. Union of India,* (2004) 6 SCC 254 : AIR 2004 SC 2321.
28. *Alchemist Ltd. v. State Bank of Sikkim,* (2007) 11 SCC 335 : AIR 2007 SC 1812.

tion, the substance of the matter and not form has to be considered. Even if a small faction of the cause of action arises within the jurisdiction of the Court, the Court would have territorial jurisdiction to entertain the petition. The petitioner had filed a writ petition before the Punjab & Haryana High Court under Article 226 and invoked the Court's jurisdiction stating at its registered office was in Chandigarh; it carried on business at Chandigarh; It offer was accepted and such acceptance was communicated at Chandigarh; part performance of the contract took place at Chandigarh by reason of depositing of Rs. 4.50 crores as per the request of the State of Sikkim; negotiations were held between the parties at Chandigarh and, finally the letter of revocation was received by the petitioner at Chandigarh and the consequences of such revocation ensued at Chandigarh. These events had to be proved in order that the petitioner could establish that his rights had been affected by the revocation which was the reason for his filing the writ petition.[29]

Where the services of an employees of Eastern Coalfields Ltd., was terminated at Mugma (Jharkhand) where he was serving in the office of the General Manager and the entire cause of action arose in Mugma, the Supreme Court held that the mere fact that the head office of the Eastern Coalfields was in West Bengal by itself could not confer jurisdiction on the Calcutta High Court.[30] This is a patently erroneous decision. Art. 226(1) provides from the inception of the Constitution that the High Court within whose territorial jurisdiction the 'seat' of the authority was situate would have the power or jurisdiction to issue writs.[31] New India Assurance is wholly wrong and needs to be overruled as early as possible as otherwise it is productive of harm and mischief to citizens who seek relief from the High Courts of their respective states.

Where an obligation is cast on a party and he commits a breach of such obligation, he cannot be permitted to take advantage of such situation. Hence the authorities cannot be allowed to take undue advantage of their own fault in failing to act in accordance with law.[32] Hence when under a ceiling law a return was filed and the statute required the final statement to be issued within a particular time or within a reasonable time after issuance of the order of a designated officer made in 1976 and the final statement attained finality, initiation of fresh proceedings against the landholder after the insertion of a new provision in the act to that effect could not be permitted.

It is the duty of the High Court before which the writ petition is filed to ascertain whether any part of the cause of action has arisen within the territorial limits of its jurisdiction. It depends on the facts of each case. When an order is challenged, cause of action arises.—

(i) at the place where the order was made, as well as;

(ii) at the place where its consequences fall on the person concerned.[33]

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29. The Court ought to have pointed out why these facts were not material or essential or integral part of the cause of action. As such this case begs the question of as to what such essential integral or material factors would be in a given situation.

30. *New India Assurance Co. Ltd. v. Vipin Behari Lal Srivastava,* (2008) 3 SCC 446 : AIR 2008 SC 1525.

31. *Ibid*

32. *Kusheshwar Prasad Singh v. State of Bihar,* (2007) 11 SCC 447 : (2007) 5 JT 237.

33. *SEBI v. Alka,* AIR 1999 Guj. 221; *Birla Institute of Technology v. Yamini Shukla,* AIR 1996 All 244.

Reference may be made here to *ONGC v. Utpal Kumar Basu*.[34] The petitioner company, having its registered office in Calcutta, read in a Calcutta newspaper the ONGC advertisement inviting tenders at Delhi for works to be executed in Gujarat. In response to this advertisement, the petitioner company sent its tender from Calcutta to the Delhi address. All the bids were analysed at Delhi and the petitioner company's bid was rejected on the ground that it did not fulfil the requisite experience *criteria* stipulated in the tender.

The company made representations from Calcutta against non-consideration of its offer but the same were rejected by ONGC at Delhi. The company then filed a writ petition against ONGC in the Calcutta High Court which issued direction to ONGC to consider the petitioner's tender.

On appeal by ONGC, the Supreme Court quashed the High Court order on the ground of lack of jurisdiction in the High Court as no part of the cause of action arose within the territorial jurisdiction of the Calcutta High Court. Under Art 226, a High Court can exercise its jurisdiction if a part of the cause of action arises within its territorial jurisdiction but, in the instant case, no part of the cause of action arose within the territorial jurisdiction of the Calcutta High Court.

Merely because the petitioner company read the advertisement at Calcutta, submitted the offer from Calcutta, made representations from Calcutta and received a reply thereto at Calcutta, cannot constitute facts forming an integral part of the cause of action. The advertisement itself mentioned that the tenders should be submitted at New Delhi, that they would be scrutinised there and the final decision arrived at New Delhi.

It was wrong for the Calcutta High Court to assume jurisdiction merely because the petitioner before it resided or carried on business at Calcutta. It is for the High Court to decide whether any part of the cause of action has arisen within its territorial limits of jurisdiction. The High Court ought not to claim jurisdiction merely because some insignificant event connected with the cause of action happened within its territorial limits.

Ordinarily, a High Court will not issue a writ of certiorari for quashing its own order.[35]

A FIR was filed in Shillong (Meghalaya) against the petitioner carrying on business in Bombay. The petitioner filed a writ petition in the Bombay High Court to transfer the FIR to Bombay on the ground that most of the facts on which the FIR was filed occurred in Bombay and most of the investigation in the complaint had to take place in Bombay. The Bombay High Court rejected the writ petition.

However, on appeal, the Supreme Court reversed the High Court and ordered transfer of the FIR from Shillong to Bombay.[36] The place of residence of the writ petitioner is not the criterion to determine the contours of the cause of action in a particular writ petition. Filing of a FIR in a particular State is not the sole criterion to decide that no cause of action has arisen even partly in the territorial limits of the jurisdiction of another State.

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34. (1994) 4 SCC 711.
35. *Dwarka Prasad Agarwal v. B. D. Agarwal*, (2003) 6 SCC 230 : AIR 2003 SC 2686.
36. *Navinchandra N. Majitha v. State of Maharashtra*, AIR 2000 SC 2966 : (2000) 7 SCC 640.

The passing of legislation by itself does not give rise to a cause of action to file a writ petition challenging its validity, and the situs of the office of Parliament, the State Legislature or authorities making the legislation or subordinate legislation, would not therefore be a place at which the cause of action arises wholly or in part. However, when an order is passed by a Court or tribunal or an executive authority, whether under provisions of a statute or otherwise, part of the cause of action arises at that place. So also where appellate/revisional authority is situated elsewhere a part of cause of action would arise there. Therefore a writ petition questioning the constitutionality of a parliamentary Act shall not be maintainable in the High Court of Delhi only because the seat of the Union of India is in Delhi.[37] Question of territorial jurisdiction to entertain a writ petition must be arrived at solely on the basis of averments made in the petition, the truth or otherwise thereof being immaterial.[38]

But the Court has been continually taking a restrictive approach and depriving persons to access the High Court in their own states for which the 15th amendment was made[39]

(c) WRIT JURISDICTION NOT APPELLATE BUT SUPERVISORY IN NATURE

The Supreme Court has emphasized time and again that the power of the High Court under Art. 226 is supervisory in nature and is not akin to appellate power. The main purpose of this power is to enable the High Court to keep the various authorities within the bounds of their powers, but not to sit as an appellate body over these authorities.

While exercising power under Art. 226, the High Court cannot go into the correctness or merits of the decision taken by the concerned authority but a review of the manner in which the decision is made[40]; it only ensures that the authority arrives at its decision according to law[41] and in accordance with the principles of natural justice wherever applicable.[42]

The Court can also intervene if the authority acts unfairly or unreasonably.[43] It is often said that judicial review is not directed against the decision, as such, but is confined to the decision-making process.

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37. *Kusum Ingots & Alloys Ltd. v. Union of India*, (2004) 6 SCC 254 : AIR 2004 SC 2321.
38. *Kusum Ingots & Alloys Ltd. v. Union of India*, (2004) 6 SCC 254 : AIR 2004 SC 2321.
39. *Alchemist Ltd. v. State Bank of Sikkim*, (2007) 11 SCC 335 : AIR 2007 SC 1812.
40. *H.B. Gandhi, Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons*, (1992) Supp (2) SCC 312.
41. The Court quashed an illegal action in *Gurdeep Singh v. State of Jammu & Kashmir*, AIR 1993 SC 2638 : 1995 Supp (1) SCC 188.
42. *State of Madhya Pradesh v. M/s. M.V. Vyavasaya & Co.*, AIR 1997 SC 993, 997; *Indian Oil Corp. Ltd. v. Ashok Kumar Arora*, AIR 1997 SC 1030 : (1997) 3 SCC 72; *H.B. Gandhi, Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons*, (1992) Supp. (2) SCC 312; *Rattan Lal Sharma v. Managing Committee, Dr. Hari Ram H.S. School*, AIR 1993 SC 2155 : (1993) 4 SCC 10.
Also see, *infra*, under *Certiorari*, Sec. E.
43. *U.P. Financial Corporation v. M/s. Gem Cap (India) Pvt. Ltd.*, AIR 1993 SC 1435, at 1439 : (1993) 2 SCC 299; *Al-Karim Educational Trust v. State of Bihar*, AIR 1996 SC 1469 : (1996) 8 SCC 330.
For discussion on the concept of unreasonableness in Administrative Law, see, M.P. JAIN, *A TREATISE ON ADM. LAW*, I, 945-953; *CASES & MATERIALS ON INDIAN ADM. LAW*, III, 2229-2236.
Also see, *infra*, under *Mandamus*, Sec. E.

The Supreme Court has described the nature of the High Court's jurisdiction under Art. 226 as follows: [44]

> ".... in a proceeding under Articles 226 and 227 of the Constitution the High Court cannot sit in appeal over the findings recorded by a competent Tribunal. The Jurisdiction of the High Court, therefore, is supervisory and not appellate. Consequently Art. 226 is not intended to enable the High Court to convert itself into a Court of appeal and examine for itself the correctness of the decision impugned and decide what is the proper view to be taken or order to be made."

But here also flexibility is recognized. In Rajendra Singh the Supreme Court, after setting aside the Speaker's decision declaring that certain MPs had not incurred disqualification as it was based on no evidence, did not remit the matter back to the Speaker but itself decided the issue and declared that the members were disqualified.[45]

The Supreme Court has often referred to the following extract from an English case[46] to define the nature of the jurisdiction conferred by Art. 226 :

> "The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorised or enjoined by law to decide for itself a conclusion which is correct in the eyes of the Court."

This means that, generally speaking, the writ Court can quash a flawed decision but it cannot substitute its own decision for that of the concerned authority.

In exercise of its jurisdiction the High Court is not justified in going into merits and expressing its views and thereafter remitting the matter.[47]

Directing that final report of police under S. 173(2) Cr. P.C. was not to be accepted, and if accepted to be treated as rejected, the impugned order clearly indicated that the High Court wanted the rejection of the final report though it was not specifically spelt out, hence, impugned order set aside.[48]

The principle stated above represents the nature of the High Court's supervisory power under Art. 226.

(d) INTER-RELATIONSHIP OF ARTS. 32 AND 226

Article 226 operates "notwithstanding anything in article 32" [Art. 226(1)]. Thus, Art. 32 and Art. 226 exist independently of each other.

Article 226 is wider in scope than Art. 32. Under Art. 32, the Supreme Court may issue writs for the enforcement of Fundamental Rights only;[49] under Art. 226, on the other hand, a High Court may enforce not only a Fundamental Right but also any other legal right. For example, under Art. 265, no tax can be levied

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44. *Shama Prashant v. Ganpatrao,* AIR 2000 SC 3090, 3097 : (2000) 7 SCC 522.
45. *Rajendra Singh Rana v. Swami Prasad Maurya,* (2007) 4 SCC 270 : AIR 2007 SC 1305.
46. *Chief Constable of the North Wales Police v. Evans,* (1982) 3 All ER 141 (HL).
47. *Union of India v. Adani Exports Ltd.,* (2007) 13 SCC 207 : (2007) 13 JT 144.
48. *Sanjay Bansal v. Jawaharlal Vats,* (2007) 13 SCC 71 : AIR 2008 SC 207.
49. *Infra,* Chs. XX-XXXIII.

without the authority of law.[50] When, therefore, a tax imposed without the authority of law infringes a Fundamental Right, relief can be had either under Art. 32, or Art. 226. But when a Fundamental Right is not infringed, only Art. 226, and not Art. 32, can be invoked.[51]

For enforcement of Fundamental Rights, a parallel writ jurisdiction has been conferred on the High Courts as well as on the Supreme Court. The High Court's jurisdiction is not in derogation of the Supreme Court's jurisdiction.[52]

Although under the Constitution, Arts. 32 and 226 exist independently of each other, the courts have by their process of interpretation introduced the doctrine of *res judicata* to discourage multiple and overlapping writ petitions in the High Court and the Supreme Court to get the same relief in the same factual situation.[53]

(e) ARTS. 226 AND 136 COMPARED

The scope of Art. 136 has already been discussed earlier.[54] Art. 226 differs from Art. 136 in several respects.

While under Art. 136, the Supreme Court hears appeals from courts or tribunals, and not from any administrative body, under Art. 226, a High Court can issue a writ to any authority, *quasi*-judicial or administrative or legislative. That way, Art. 226, is broader in scope than Art. 136. But, from another point of view, Art. 226 is narrower in compass than Art. 136. Whereas Art. 136 confers appellate jurisdiction on the Supreme Court, Art. 226 confers only a writ jurisdiction on a High Court, and the scope allowed to a Court in its appellate jurisdiction is much wider than what is available to a Court in its writ jurisdiction.

Under Art. 136, the Supreme Court can go into questions of fact as well as of law and can give any remedy which appears to it to be suitable in the circumstances of the case. A High Court's powers under Art. 226 are not so broad. The High Court does not act as a Court of appeal under Art. 226.[55] The scope of writs is not as wide as that of an appeal as many more matters can be taken cognisance of in an appeal than under the writs, *e.g.*, in *certiorari*, a High Court goes into errors of law manifest on the face of the record while in an appeal under Art. 136 there is no such restriction on the Supreme Court.

In *Workmen, Cochin Port Trust v. Board of Trustees*,[56] an interesting question was raised : whether dismissal of the special leave appeal petition by the Supreme Court would necessarily bar a writ petition before the High Court under Art. 226 on the same grounds?

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50. *Supra*, Ch. II.
51. *Bengal Immunity Co. v. State of Bihar*, AIR 1955 SC 661 : (1955) 2 SCR 603.
52. Also see, *infra*, Ch. XXXIII, for application of the doctrine of *res judicata* to petitions under Art. 32.
53. See, *infra*, under *Res Judicata.*
54. See, *supra*, Ch. IV, Sec. D.
55. *Sangram Singh v. Election Tribunal*, AIR 1955 SC 425 : (1955) 2 SCR 1.
56. AIR 1978 SC 1283 : (1978) 3 SCC 119.

The facts in the case were as follows: an industrial tribunal gave an award in favour of the workmen. A special leave petition under Art. 136 against the award was dismissed by the Supreme Court. The employees thereafter filed a writ petition in the High Court under Art. 226 substantially on the same grounds on which the special leave petition was based earlier. Objection against the maintainability of the petition was rejected by the Supreme Court. The Court emphasized that the question was whether the order dismissing the special leave petition had considered all the matters raised in the petition. When the Supreme Court rejected the special leave petition earlier, it decided nothing specifically except that it was not a fit case for appeal.[57]

When a person files a special leave petition in the Supreme Court under Art. 136, but withdraws the same, he cannot be barred from filing a writ petition in the High Court under Art. 226.[58] The situation would however be different if the appeal was dismissed on merits by the Supreme Court. In such a situation, the same matter cannot be re-agitated through a writ petition in the High Court under Art. 226.[59]

(f) INTER-RELATION BETWEEN ARTS. 226 AND 227

In practice parameters of exercising jurisdiction under either Articles 226 or 227 are almost similar and width of jurisdiction exercised by High Courts, unlike English courts, has almost obliterated distinction between the two jurisdictions. However, in *Radhey Shyam v. Chhabi Nath*,[60] another two judge Bench of the Supreme Court doubted the correctness of the decision in Surya Dev Rai and after pointing out the erroneous reading of a 9-judge Constitution Bench Judgement in *Naresh Shridhar Mirajkar*,[61] expressed its difference of opinion with the views expressed in Surya Dev Rai, directed the matter to be placed before the Chief Justice of India for constituting a larger Bench to consider the correctness or otherwise of the law laid down in Surya Dev Rai. Three differences that nevertheless exist, are: (i) Issuing writ of certiorari is an exercise of its original jurisdiction by High Court while exercise of supervisory jurisdiction under Art. 227 is not original, in this sense the latter is akin to appellate revisional or corrective jurisdiction; (ii) If the High Court issues writ of certiorari it may only annul or quash proceedings but cannot substitute its own decision in place thereof, while in exercise of supervisory jurisdiction High Court may not only quash or set aside the impugned proceedings, judgment or order but may also give suitable directions so as to guide the subordinate Court as to the manner in which it should proceed thereafter or afresh. In appropriate cases High Court may make an order in supersession or substitution of order of subordinate Court as the Court should have made in the facts and circumstances of the case; and (iii) Jurisdiction under Art. 226 has to be invoked by an aggrieved party, but supervisory jurisdiction under Art. 227 can be exercised *suo motu* as well.[62] Remedies under Articles 226 and 227 are not available for correcting mere errors of fact or law. They are

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57. On this point, see, also, Ch. IV, Sec. D(a), *supra*.
58. *Ahmedabad Mfg. & Calico Printing Co. v. Workmen*, AIR 1981 SC 960 : (1981) 2 SCC 663.
59. Also see, *infra*, under *Res Judicata.*
60. (2009) 5 SCC 616 : (2009) 6 JT 511.
61. AIR 1967 SC 1.
62. *Surya Dev Rai v. Ram Chandra Rai*, (2003) 6 SCC 675 : AIR 2003 SC 3044. See also *State of Madhya Pradesh v. Visan Kumar Shiv Charan Lal*, (2008) 15 SCC 233 and cases cited therein.

available only when (i) error is manifest and apparent on face of record, and (ii) grave injustice or gross failure of justice has been occasioned thereby. Further, ordinarily neither is available when an alternative efficacious remedy by way of appeal or revision is available to the person aggrieved but in a given situation. High Court has to choose between causing delay by its intervention and meet the need for imminent action.[63] The power of the High Court under Articles 226 and 227 of the Constitution is always in addition to the revisional jurisdiction conferred on it. The curtailment of revisional jurisdiction of the High Court under Section 115 CPC by Amendment Act 46 of 1999 does not take away and could not have taken away the constitutional jurisdiction of the High Court.[64]

In *MMTC*,[65] a 3 Judge Bench of the Supreme Court undertook an exhaustive study of the interrelation between Article 226 and 227 quoting a number of earlier observations of the Court converging to the view that the distinction between the two jurisdictions stands almost obliterated in practice and viewed the broad general difference between them as follows:

(a) A writ petition under Art. 226 was an exercise of the High Court's original jurisdiction whereas that under Art. 227 was of supervisory and in that sense it was akin to appellate, revisional or 'corrective' jurisdiction.

(b) In the case of a writ of certiorari, the records of the proceedings are certified and then sent up by the inferior court or tribunal is brought up before the High Court and it may 'simply annul or quash the proceedings and do no more' whereas in its supervisory jurisdiction the Court can go further in that after quashing the proceedings it may also 'give such direction as the facts and circumstances of the case may warrant and even substitute such a decision of its own in place of the impugned decision'.

The first decision of the High Court on a petition under Art. 226 or Art. 227 is by a single judge. Writ proceedings under Art. 226 fall on the original side of the High Court and therefore, an intra-Court appeal is possible from a single Judge to a Division Bench. Not so in case of Art. 227 for proceedings thereunder do not fall on the original side.

There are many situations where a petition can be filed under both the Articles. The Supreme Court has ruled that where the fact justifies a party filing a petition either under Art. 226 or Art. 227, and a party chooses to file the petition under both the Articles, in fairness to the petitioner concerned, the Court should treat the petition as having been filed under Art. 226 as this will protect petitioner's right to file an intra-Court appeal from the single Judge to the Division Bench.[66]

(g) ALTERNATIVE LEGAL REMEDY

A High Court does not ordinarily issue a writ when an alternative efficacious remedy is available. Under Art. 226, the High Court does not decide disputes for

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63. *Surya Dev Ra v. Ram Chandra Rai*, (2003) 6 SCC 675 : AIR 2003 SC 3044.
64. *Surya Dev Rai v. Ram Chandra Rai*, (2003) 6 SCC 675 : AIR 2003 SC 3044.
65. *MMTC Limited v. Commissioner of Income Tax*, (2009) 1 SCC 8 : AIR 2009 SC 1349.
66. *Umaji Keshao Meshran v. Radhikabai*, AIR 1986 SC 1272 : 1986 Supp SCC 401; *Lokmat Newspapers Pvt. Ltd. v. Shankar Pd.*, AIR 1999 SC 2423 : (1999) 6 SCC 275.

which remedies under the general law are available. Ordinary remedies are not sought to be replaced by Art. 226.

The principle has been stated by the Supreme Court as follows:[67]

> "It is well settled that when an alternative and equally efficacious remedy is open to a litigant, he should be required to pursue that remedy and not invoke the special jurisdiction of the High Court to issue a prerogative writ. It is true that the existence of another remedy does not affect the jurisdiction of the Court to issue a writ; but the existence of an adequate legal remedy is a thing to be taken into consideration in the matter of granting writs...."

Article 226 is not meant to short-circuit or circumvent statutory procedures.[68] In *State of West Bengal v. North Adjai Coal Co.*,[69] the Supreme Court has held that normally before a writ petition under Art. 226 is entertained, the High Court would insist that the party aggrieved by the order of a *quasi*-judicial tribunal should have recourse to the statutory authorities which have power to give relief.[70]

Thus, to question the election to an office or a body, the statutory procedure by way of election petition, and not Art. 226, ought to be resorted to.[71] The Supreme Court has stated recently that once an election is over the aggrieved candidate ought to pursue his remedy in accordance with the relevant statutory provisions and the Court will not ordinarily interfere with the elections under Art. 226. The Court will not ordinarily interfere where there is an appropriate or equally efficacious remedy available, particularly in relation to election disputes.[72]

When a right or liability is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy and not the discretionary remedy under Article 226 of the Constitution.[73]

The Motor Vehicles Act contains a complete code for regulating issue of permits, and a person aggrieved by the refusal of a permit should take recourse to the remedies provided under the Act and not to a writ petition.[74]

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67. *Union of India v. T.R. Varma,* AIR 1957 SC 882 : 1958 SCR 499.

68. *Titaghur Paper Mills Co. Ltd. v. State of Orissa,* AIR 1983 SC 603 : (1983) 2 SCC 33; *Asstt. Collector of Central Excise, Chandan Nagar, West Bengal v. Dunlop India Ltd.,* AIR 1985 SC 330 : (1985) 1 SCC 260; *Swetambar Stahanakwasi Jain Samiti v. The Alleged Committee of Management Sri R.J.I. College, Agra,* (1996) 3 JT (SC) 21 : (1996) 3 SCC 11; *APDDC Staff & Workers Union v. Govt. of AP,* AIR 2000 AP 70.

69. (1971) 1 SCC 309, 310 : (1971) 27 SCC 268.
Also see, *Sri Ramdas Motor Transport Ltd. v. Tadi Adhinarayana Reddy,* AIR 1997 SC 2189 : (1997) 5 SCC 446.

70. Also see, *U.P. Jal Nigam v. Nareshwar Sahai Mathur,* (1995) I SCC 21 : 1995 SCC (194) 209; See also *Radha Raman Samanta v. Bank of India,* (2004) 1 SCC 605 : (2003) 10 SCALE 1094, for the stage when the issue to be raised and decided.

71. *Prafulla Chandra v. Oil India Ltd.,* AIR 1971 Ass. 9; *Bar Council of Delhi v. Surjeet Singh,* AIR 1980 SC 1612 : (1980) 4 SCC 211; *Ravjibhai Bhikabhai v. Chief Officer, Bilimora Nagar Palika,* AIR 1982 Guj 163.
But see, *D.L. Suresh v. Institute of Chartered Accountants,* AIR 1983 Knt. 43, where the High Court interfered because the nomination paper was unduly rejected and the election petition could be filed only after the election. When an election petition is not available to cover a specific question arising out of a municipal election, a writ petition would be maintainable: *Navuba Gokalji v. Returning Officer,* AIR 1982 Guj 281.

72. *Umesh Shivappa Ambi v. Angadi Shekara Basappa,* AIR 1999 SC 1566 : (1998) 4 SCC 529.

73. *Seth Chand Ratan v. Pandit Durga Prasad,* (2003) 5 SCC 399 : AIR 2003 SC 2736.

74. *G. Veerappa Pillai v. Raman and Raman Ltd.,* AIR 1952 SC 192 : 1952 SCR 583.

For adjudication of labour disputes, recourse should be had to the machinery provided under the Industrial Disputes Act.[75] An income-tax assessee should take recourse to the machinery provided by the Income-tax Act in case he feels aggrieved by an action of the income-tax authorities.[76]

In relation to appointment of non-hereditary trustees from the Vysya community of Marwadies of Adilabad, appropriate remedy lies under S. 92. CPC or under provisions of the Hindu Religious Institutions and Endowments Act, 1987 and not under Art. 226.[77]

The petitioner was assessed to property tax by the Delhi Municipal Corporation. The petitioner challenged it as totally arbitrary and unwarranted through a writ petition under Art. 226. The High Court rejected the writ petition on the ground that the Delhi Municipal Corporation Act is "a complete code in itself. It provides for an appeal against the assessment and levy of house tax to the district judge. The Act, thus, provides for a machinery for redressal of grievances of a person who feels aggrieved on account of levy or assessment of any tax under this Act."[78]

When there is an arbitration clause in a contract the courts will not permit recourse to any other remedy without invoking the remedy by way of arbitration, unless both the parties agree to another mode of dispute resolution.[79]

When no action is taken by the police on the information given to it, the complainant can have recourse to S. 190 r/w S. 200 Cr. P.C. to lay the complaint before the Magistrate concerned. Without availing that remedy, the complainant could not have approached the High Court by filing a writ application.[80] Where prosecution proceedings under S. 276 of the Income Tax Act were challenged on the ground that (i) there was no concealment of income and the allegation of tax evasion was based on no evidence, and (ii) the delay in filing returns happened in unavoidable circumstances and without any guilty mind it was held that the absence of culpable mental state could be pleaded in defence at the criminal trial and the High Court rightly did not deal with those aspects.[81]

Where a large number of employees of PSU transferred to a private organization in a terms of a bipartite agreement between the PSU and the private organization, writ petition challenging such transfer on the ground that in the absence of specific consent of the employees, such transfer was arbitrary and unreasonable, it was held that since the claim of the writ petitioner employees related to interpretation of the agreement and appointment letters and no disputed facts were involved and the issue related to employment of hundreds of employees and also because alternative remedy is a rule of discretion and not a rule of law,

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75. *Basant Kumar v. Eagle Rolling Mills*, AIR 1964 SC 1260 : (1964) 6 SCR 913; *Prafulla Chandra v. Oil India*, AIR 1971 Ass 9; See also *U.P. State Bridge Corpn. Ltd. v. U.P. Rajya Setu Nigam S. Karamchari Sangh*, (2004) 4 SCC 268, industrial dispute normally before the Tribunal.

76. *Champalal Binani v. CIT*, AIR 1970 SC 645 : (1971) 3 SCC 20.

77. *Rajasthani Pragathi Samaj v. Ramesh Kumar Sharma*, (2003) 11 SCC 680 : AIR 2004 SC 105.

78. *India Trade Promotion Organisation v. Deputy Assessor & Collector, MCD*, AIR 1997 Del. 74.

79. *ABL International Ltd. v. Export Credit Guarantee Corpn. of India Ltd.*, (2004) 3 SCC 553 : (2003) 10 JT 300.

80. *Gangadhar Janardan Mhatre v. State of Maharashtra*, (2004) 7 SCC 768 : AIR 2004 SC 4753.

81. *Prakash Nath Khanna v. CIT*, (2004) 9 SCC 686 : AIR 2004 SC 4552.

remedy under industrial law was not a bar to maintainability of such writ petition[1]

The Supreme Court has observed in *Thansingh*[2] that though Art. 226 is couched in wide terms, the exercise of the jurisdiction is discretionary and is subject to several self-imposed restrictions, one of these being that ordinarily the writ jurisdiction is not to be resorted to if the petitioner can obtain an alternative remedy under the statute. "Ordinarily the Court will not entertain a petition for a writ under Art. 226, where the petitioner has an alternative remedy, which without being unduly onerous, provides an equally efficacious remedy."

Proceedings under Art. 226 are not a substitute for statutory appeal.[3] But an appeal to the Central Government from an order passed by the Reserve Bank of India would be an appeal from Caesar to Caesar since the Reserve Bank would hardly act without the concurrence of the Central Government.[4]

In the instant case, the petitioner challenged through a writ petition the decision made by the Commissioner of Sales Tax. Under the relevant law, a reference of questions of law could be made by the Commissioner to the High Court. The petitioner did not resort to this remedy but moved the writ jurisdiction of the High Court. The Supreme Court rejected the writ petition saying "the High Court normally will not permit by entertaining a petition under Art. 226 of the Constitution the machinery created under the statute to be bypassed, and will leave the party applying to it to seek resort to the machinery so set up".[5]

The Government passed an order compulsorily retiring the writ petitioner. He filed a writ petition to challenge the order, but the writ petition was dismissed by the High Court on the ground that there was an alternative remedy available to him before the U.P. Service Tribunal which was the highest forum created by law to give full, complete and expeditious relief to public servants in service matters. The petitioner could not invoke the extraordinary jurisdiction under Art. 226 for redressal of his grievances, by-passing the special forum created specifically by law for redressal of such grievances efficaciously and adequately.[6]

The Supreme Court has laid down the proposition that when a statutory forum or tribunal is specially created by a statute for redressal of specified grievances of persons on certain matters, the High Court should not normally permit such persons to ventilate their specified grievances before it by entertaining petitions under Art. 226 of the Constitution.[7]

Although the High Courts do apply the rule of "exhaustion of the statutory remedy" before issuing a writ under Art. 226, the rule is not rigid but somewhat flexible and it is primarily a matter of the discretion of the writ Court.[8] The Su-

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1. *Balco Captive Power Plant Mazdoor Sangh v. NTPC,* (2007) 14 SCC 234 : AIR 2008 SC 336.
2. *Thansingh v. Supdt. of Taxes,* AIR 1964 SC 1419 : (1964) 6 SCR 654.
3. *Transmission Corpn. of A.P. v. Ch. Prabhakar,* (2004) 5 SCC 551 : AIR 2004 SC 3368.
4. *Reserve Bank of India v. M. Hanumaiah,* (2008) 1 SCC 770, 778 : AIR 2008 SC 994.
5. *All India Lawyers Forum for Civil Liberties v. Union of India,* AIR 2001 Del. 380.
6. *State of Uttar Pradesh v. Labh Chand,* AIR 1994 SC 754, 759 : (1993) 2 SCC 495.
Also see, *Thansingh, supra,* footnote 2.
7. *Secretary, Minor Irrigation and Rural Engineering Services v. Sahngoo Ram Arya,* (2002) 5 SCC 521.
8. *A.V. Venkateswaran, Collector of Customs, Bombay v. Ramchand Sobhraj Wadhwani,* AIR 1961 SC 1506 : (1962) 1 SCR 753.

preme Court has characterised the rule of "exhaustion of the remedies" as "a rule of policy, convenience and discretion rather than a rule of law."[9]

A writ petition is maintainable when the lis involves a public law character and when the forum chosen by the parties would not be in a position to grant appropriate relief. Question as to when discretionary jurisdiction is to be exercised or refused has to be determined having regard to the facts and circumstances of each case. No hard and fast rule can be laid down in this regard.[10]

The contention that in view of the provision in the agreement for cancellation of the agreement without assigning any reasons barred resort to writ jurisdiction under Art. 226 has been repelled as the cancellation was not for violation of any terms of the agreement and the Letter of Intent (LOI) holders and those awaiting issue of LOIs were also equally affected.[11]

The rule of exhaustion of remedies is not however an inflexible rule; it is a rule of policy, convenience and discretion rather than of law. It is a rule of practice rather than that of jurisdiction. Existence of an alternative remedy does not affect High Court's jurisdiction under Art. 226 and so it is not always obligated to relegate the petitioner to the other remedy available to him. The High Court's jurisdiction being discretionary, it will take into consideration the alternative remedy available and then decide whether in the circumstances of the case, it should grant or refuse to grant a remedy under Art. 226.[12]

The Supreme Court has observed in *Nooh*:[13]

> "If an inferior Court or tribunal of first instance acts wholly without jurisdiction or patently in excess of jurisdiction or manifestly conducts the proceedings before it in a manner which is contrary to the rules of natural justice and all accepted rules of procedure and which offends the superior Court's sense of fair-play the superior Court may, we think, quite properly exercise its power to issue the prerogative writ of *certiorari* to correct the error of the Court or tribunal of first instance even if an appeal to another inferior Court or tribunal was available..."[14]

Where there is complete lack of jurisdiction of the officer or authority or tribunal to take action or there has been a contravention of fundamental rights or there has been a violation of rules of natural justice or where the Tribunal acted under a provision of law, which is ultra vires, then notwithstanding the existence of an alternative remedy, the High Court can exercise its jurisdiction to grant relief.[15]

A writ under Art. 226 is not denied when, for instance, the alternative remedy is ill-suited, burdensome and onerous, or the petitioner has lost it through no fault of his,[16] or if the tribunal in question acts under an *ultra vires* law,[17] or without a

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9. *State of Uttar Pradesh v. Mohd. Nooh*, AIR 1958 SC 86 : 1958 SCR 595.
10. *Sanjana M. Wig. v. Hindustan Petroleum Corpn. Ltd*., (2005) 8 SCC 242 : AIR 2005 SC 3454.
11. *Onkar Lal Bajaj v. Union of India*, (2003) 2 SCC 673 : AIR 2003 SC 2562.
12. *Gopal Sen v. State of West Bengal*, AIR 1981 Cal 437; See also *Indian Airlines Ltd. v. Prabha D. Kanan*, (2006) 11 SCC 67 : AIR 2007 SC 548.
13. *State of Uttar Pradesh v. Mohd. Nooh*, AIR 1958 SC 86 : 1958 SCR 595.
14. Also see, *Whirlpool Corporation v. Registrar of Trade Marks, Mumbai*, AIR 1999 SC 22 : (1998) 8 SCC 1.
15. See also *Seth Chand Ratan v. Pandit Durga Prasad*, (2003) 5 SCC 399 : AIR 2003 SC 2736.
16. *Venkateswaran v. Wadhwani*, AIR 1961 SC 1506 : (1962) 1 SCR 753.
17. *E.B. Kendwadih Colliery Co. v. Union of India*, AIR 1983 Del 70.

law,[18] or exceeds its jurisdiction,[19] or has not followed the principles of natural justice,[20] or the writ petition seeks enforcement of a Fundamental Right.[21]

When an order has been made completely outside jurisdiction of the authority making it,[22] or in violation of natural justice,[23] the aggrieved party is entitled to invoke the writ jurisdiction of the High Court instead of availing the alternative statutory remedy. Thus, when a taxing authority acts despite the absence of basic jurisdictional facts, the assessee does not have to exhaust the available statutory remedy before seeking a writ and the High Court can stay assessment proceedings at its inception.[24]

The Registrar of Trade Marks *suo motu* gave a notice to the writ petitioner to show cause as to why the registration of his trade mark be not cancelled. The petitioner filed a writ petition questioning the notice on the ground that the Registrar had no power to issue any such notice. The High Court dismissed the writ petition by the petitioner on the ground that the petitioner had not exhausted the remedy provided by the relevant law, *viz*. The Trade and Merchandise Marks Act, 1958.

On appeal, the Supreme Court reversed the High Court saying that the High Court was not justified in dismissing the writ petition at the initial stage without examining the contention that the show-cause notice issued to the petitioner was wholly without jurisdiction. The Supreme Court quashed the notice issued by the Registrar as he had no power to issue such a notice to the petitioner. The Supreme Court stated that the High Court can entertain a writ petition "in spite of the alternative statutory remedies" "in a case where the authority against whom the writ is filed is shown to have had no jurisdiction or had purported to usurp jurisdiction without any legal foundation".[25]

In tax-assessment cases, where an appeal from the assessing officer can be taken to a higher authority only after depositing the tax assessed, the remedy provided is burdensome, and so the assessee can approach the High Court under Art. 226.[26] The Supreme Court has observed that it is not palatable to 'our jurispru-

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18. *N.M.C.S. & Weaving Mills v. Ahmedabad Municipality,* AIR 1967 SC 1801; *J.K. Manufacturers v. Sales Tax Officer,* AIR 1970 All 362.

19. *Kashi Nath v. Collector, Central Excise,* AIR 1972 All 16; *Bawa Gopal Das Bedi & Sons v. Union of India,* AIR 1982 Pat 152.

20. *Tata Electric Loco Co. v. Commr., Commercial Taxes,* AIR 1967 SC 1401; *Babu Ram Prakash Chandra Maheshwari v. Antarim Zila Parishad,* AIR 1969 SC 566 : (1969) 1 SCR 518; *T.R. Ramiah v. Dy. Commr.,* AIR 1975 Knt 77; *State of Uttar Pradesh v. Indian Hume Pipe Co.,* AIR 1977 SC 1132 : (1977) 2 SCC 724; *V. Vellaswamy v. Inspector General of Police, Tamil Nadu,* AIR 1982 SC 82 : (1981) 4 SCC 247.

21. *Whirlpool Corporation v. Registrar of Trade Marks,* AIR 1999 SC 22 : (1998) 8 SCC 1.

22. *Shyam Sunder Azad v. Transport Appellate Tribunal Rajasthan,* AIR 1971 Raj 97; *Whirlpool Corp., supra,* note 11; *Kuntesh Gupta v. Management of Hindu Kanya Mahavidyalaya,* AIR 1987 SC 2186 : (1987) 4 SCC 525.

23. *Orient Paper Mills v. Deputy Collector,* AIR 1971 Ori 25; *Titaghur Paper Mills Co. Ltd. v. Orissa,* AIR 1983 SC 603 : (1983) 2 SCC 433; *Smt. Sushila Chand v. State Transport Authority,* AIR 1999 Ori 1; *Rajan Ramnath Patil v. State of Maharashtra,* AIR 2001 Bom. 361.

24. *Veeri Chettiar v. Sales Tax Officer,* AIR 1971 Mad. 155.

25. *Whirpool Corporation v. Registrar of Trade Marks, Mumbai,* AIR 1999 SC 22, at 27 : (1998) 8 SCC 1. Also, *Khaitan (India) Ltd. v. Union of India,* AIR 2000 Cal 1.

26. *Indian Oil Corporation Ltd. v. Union of India,* AIR 1982 Goa 26.

dence' to turn down the prayer for a writ on the negative plea of 'alternative remedy' since the root principle of law 'married to justice, is *ubi jus ibi remedium*'.[27]

The existence of an adequate alternative legal remedy is not a bar to the invocation of the High Court's jurisdiction under Art. 226 when relief is sought in case of infringement of a Fundamental Right.[28] The position in this regard is very much similar to that as under Art. 32.[29] When appeal against Tribunal's decision before High Court by U.P. Avas Evam Vikas Parishad was not maintainable under S. 381 of U.P. Nagar Mahapalika Adhiniyam, a writ petition filed under Art. 226 would be maintainable.[30]

Where a party has initiated an alternative remedy but not pursued it, the High Court can call upon the party to elect either the alternative remedy or the writ petition. If the party has withdrawn from the alternative remedy by the time the writ petition was heard, the writ petition should not be rejected if otherwise maintainable, even though the party had not disclosed pendency of the alternative remedy when it filed the writ petition. Therefore, the fact that a suit had already been filed by the appellant was not such a fact the suppression of which could have affected the final disposal of the writ petition on merits.[31]

A writ petition which seeks an interpretation of intricate questions of law, or an interpretation of constitutional provisions, and a petition which raises an issue of jurisdiction is directly maintainable in the High Court.[32] But when the order of Sales Tax Tribunal is challenged in appeal as well as in writ petition simultaneously, the petition has been held to be not maintainable.[33]

(h) LACHES

No period of limitation is prescribed for a High Court to exercise its power under Art. 226. Nevertheless, a writ petition under Art. 226 may be dismissed by a High Court on the ground of petitioner's laches because courts do not like stale claims being agitated and unsettle settled matters. Therefore, writ petitions filed after inordinate delay are usually dismissed.[34] For example, in *Sadasivaswamy,*[35]

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27. *Shiv Shankar Dal Mills v. State of Haryana*, AIR 1980 SC 1037 : (1980) 2 SCC 437. Also see, *Hay Lay Poultry v. State of Haryana*, AIR 1977 SC 685 : (1976) 4 SCC 87; *Anil Kumar Panda v. State of West Bengal*, AIR 1997 Cal 128.

28. *Himmat Lal v. State of Madhya Pradesh*, AIR 1954 SC 403 : 1954 SCR 1122.

29. *Infra*, Ch. XXXIII, for discussion on Art. 32.

30. *Kanak v. U.P. Avas Evam Vikas Parishad*, (2003) 7 SCC 693 : AIR 2003 SC 3894.

31. *S.J.S. Business Enterprises (P) Ltd. v. State of Bihar*, (2004) 7 SCC 166 : AIR 2004 SC 2421.

32. *Modern Syntax [I] Ltd. v. Debts Recovery Tribunal, Jaipur*, AIR 2001 Raj 170.

33. *State of Punjab v. Punjab Fibres Ltd.*, (2005) 1 SCC 604 : AIR 2005 SC 437.

34. *Durga Pd v. Chief Controller*, AIR 1970 SC 769 : (1969) 1 SCC 185; *Krishnaswamy v. Union of India*, AIR 1973 SC 1168; *Amrit Lal v. Collector, C.E.G.*, AIR 1975 SC 538 : (1975) 4 SCC 714; *Gian Singh Mann v. High Court of Punjab & Haryana*, AIR 1980 SC 1894 : 1980 Supp SCC 449; *Roshan Lal v. International Airport Authority*, AIR 1981 SC 597 : 1980 Supp SCC 449; *R.S. Makashi v. I.M. Menon*, AIR 1982 SC 101; *Rattan Chandra Sammanta v. Union of India*, AIR 1993 SC 2276; *B.S. Bajwa v. State of Punjab*, AIR 1999 SC 1510; *Municipal Corp. of Greater Bombay v. Industrial Development Investment Co. Ltd.*, AIR 1997 SC 482; *Municipal Council, Ahmednagar v. Shah Hyder Baig*, AIR 2000 SC 671 : (2000) 2 SCC 48; See also *Printers (Mysore) Ltd. v. M. A. Rasheed*, (2004) 4 SCC 460 : (2004) 4 JT 158 delay of 3 years in challenging allotment of land. See also *State of U.P. v. Ved Pal Singh*, (2003) 9 SCC 212 : (2000) 8 SLT 706.

35. *P.S. Sadasivaswamy v. State of Tamil Nadu*, AIR 1974 SC 2271.

the writ petition was dismissed because the petitioner, a government servant, slept over the promotions of his juniors over his head for fourteen years. After such a long time, he filed the writ petition challenging these promotions. By the time the petition was filed the allottee had not only taken possession of the land but also made sufficient investment (about Rs. 80 crores in this case) as such the delay defeated the equity which had arisen in favour of the petitioner.[36] But this rule is not applied in a rigid manner. For example, dismissal on the ground of delay when the petition had been admitted and when it has been sufficiently explained has been set aside.[37] Dismissal on the ground of delay when the petition had been admitted and when it has been sufficiently explained has been set aside.[38]

When a person is not vigilant and acquiesces with the situation, and the acquiescence prejudices, or there is a change of position on the part of the party allegedly violating the rights, such person's writ petition cannot be heard after the delay on the ground that same relief should be granted as was granted to persons similarly situated but who were vigilant regarding their rights.[39]

In appropriate cases, a High Court may condone the delay if there is a satisfactory explanation for the same.

As the Supreme Court has emphasized in *Dehri Rohtas,*[40] the rule that the Court may not enquire into stale claims is not a 'rule of law' but a 'rule of practice' based on sound and proper exercise of discretion. Each case depends on its own facts. "It will all depend on what the breach of the Fundamental Right and the remedy claimed are and how delay arose."

The principle on which the party is denied relief on the ground of laches or delay is that rights may have accrued to others by reason of the delay in filing the petition and the same ought not to be disturbed unless there is reasonable explanation for the delay.[41] The Supreme Court has observed on this point :

> "The real test to determine delay in such cases is that the petitioner should come to the writ Court before a parallel right is treated and that the lapse of time is not attributable to any laches or negligence."

In this case, the district board demanded a cess from the railway company for the period 53 to 67 which was *prima facie ultra vires.* The railway company filed a suit challenging the demand which was dismissed in 1971 and an appeal against it was dismissed in 1980. The company then filed a writ petition challenging the demand and, thus, the question of laches arose. The Supreme Court condoned the delay in the circumstances of the case saying: "The real test to determine delay in such cases is that the petitioner should come to the writ Court before a parallel right is created and that the lapse of time is not attributable to any laches or negligence".

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36. *Chairman & MD, BPL Ltd. v. S. P. Gururaja,* (2003) 8 SCC 567 : AIR 2003 SC 4536. For adverse effect of delay see *Delhi Development Authority v. Rajendra Singh,* (2009) 8 SCC 582 : (2009) 10 JT 137.

37. *Ravindra Nath v. State Bank of India,* (2008) 15 SCC 256.

38. *Ravindra Nath v. State Bank of India,* (2008) 15 SCC 256.

39. *U.P. Jal Nigam v. Jaswant Singh,* (2006) 11 SCC 464 : AIR 2007 SC 924.

40. *Dehri Rohtas Light Rly. Co. Ltd. v. District Board, Bhojpur,* AIR 1993 SC 802 : (1992) 2 SCC 598.

41. *Ibid.*

When the order passed in the proceeding had worked itself out in that nothing further remained to be performed under the order in respect of which review was sought, a Court should not interfere and set the clock back after almost a decade.[42] What is the measure of delay? On this question the judicial pronouncements do not follow a coherent pattern. The Limitation Act, as such, does not apply to writ petitions but it may provide a standard to measure delay in invoking Art. 226. As the Supreme Court has observed in *Bhailal Bhai*[43]:

> "The provisions of the Limitation Act do not as such apply to the granting of relief under Art. 226. However, the maximum period fixed by the legislature as the time within which the relief by a suit in a civil Court must be brought may ordinarily be taken to be a reasonable standard by which delay in seeking remedy under Art. 226 can be measured."

However, the High Courts are not mechanically bound by the period of limitation fixed in the Limitation Act. One can find cases where petitions filed within the period of limitation have been dismissed,[44] while there are cases where petitions filed after the period of limitation have been entertained by the courts.[45] In this connection, the Supreme Court has recently observed :

> "In exercise of its writ jurisdiction, facts and circumstances of each case are to be kept in mind in ascertaining whether there have been laches on the part of the parties seeking relief in due time or not."[46]

The position has been explained by the Supreme Court in *Shri Vallabh Glass Works Ltd. v. Union of India.*[47] Art. 226 prescribes no period of limitation. What relief should be granted to a petitioner under Art. 226 where the cause of action arose in the remote past is a matter of sound judicial discretion. A writ petition filed beyond the period of limitation fixed for filing suits without any explanation for delay is unreasonable. But this is not a rigid formula. There may be cases where even a delay of a shorter period may be considered sufficient to refuse relief under Art. 226. There may be cases where there may be circumstances which may persuade the Court to grant relief even though the petition has been filed beyond the prescribed limitation period for a suit. The Court has observed:

> "Each case has to be judged on its own facts and circumstances touching the conduct of parties, the change in situation, the prejudice which is likely to be caused to the opposite party or to the general public *etc*."

In the instant case, the Supreme Court directed refund of excess excise duty paid by the petitioners within three years prior to the filing of the writ petition.

In case of delay, the petitioner has to give a satisfactory explanation as to why he did not come to the Court earlier. For example, in *Haryana State Electricity Board v. State of Punjab*,[48] the Court entertained a writ petition in respect of a

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42. *Asha Prasad v. Chandrakant Gopalka*, (2003) 12 SCC 347

43. *State of Madhya Pradesh v. Bhailal Bhai*, AIR 1964 SC 1006 : (1964) 6 SCR 261.
Also, *D. Cawasji & Co. v. State of Mysore*, AIR 1975 SC 813 : (1975) 1 SCC 636.

44. *Kamini Kumar v. State of West Bengal*, AIR 1972 SC 2060 : (1972) 2 SCC 420.

45. *Sachindra v. N.E.F. Railways*, AIR 1973 Gau 108.

46. *U.P. Pollution Control Board v. Kanoria Industries Ltd.*, AIR 2001 SC 787, at 793 : (2001) 2 SCC 549.

47. AIR 1984 SC 971 : (1984) 3 SCC 362; *Govt. of A. P. v. Kollutla Obi Reddy*, (2005) 6 SCC 493 AIR 2006 SC 642.

48. AIR 1974 SC 1806 : (1974) 3 SCC 91.

long standing service matter because of the circumstances of the case. The real position in this regard has been stated by the Supreme Court as follows: "It is not that there is any period of limitation for the courts to exercise their powers under Art. 226, nor is it that there can never be a case where the courts cannot interfere in a matter after the passage of certain length of time. But it would be a sound and wise exercise of discretion for the courts to refuse to exercise their extraordinary powers under Art. 226 in case of persons who do not approach it expeditiously for relief and who stand by and allow things to happen and then approach the Court to put forward stale claims and try to unsettle settled matters."[49] A person seeking relief against the state under Art. 226 cannot get discretionary relief under Art. 226, unless he is able to fully satisfy the High Court that the facts and circumstances of the case clearly justified the laches or undue delay on his part in approaching the Court for the grant of relief.[50] Unexplained delay would include a case where the illness of the Secretary was not of such a nature so as to prevent the union of workmen from filing the writ petition before the High Court.[51] Further, making of the representations is no excuse for long delay in filing writ petition.[52] As under Art. 32, so also under Art. 226, the Court adopts a case to case approach. The High Court does not bind its discretion by any fixed norm of limitation but decides the matter in the circumstances of each case.[53] Hence a claim by an illiterate widow with meagre resources who had been deprived by the Railways of her gangman husband's arrears of family pension was maintainable despite delay.[54] Explanation has been accepted where the widow of an employee challenged the order of dismissal based on a conviction which was subsequently set aside as the widow could only throw the challenge after setting aside of the conviction.[55]

The Supreme Court has emphasized that the question whether in a given case the delay involved is such that it disentitles a person from relief under Art. 226 is a matter within the discretion of the High Court which is to be exercised "judiciously and reasonably having regard to the surrounding circumstances."[56]

In 1980, the appellant applied for grant of a quarry lease. The same was denied to him in 1981. He filed a writ petition in 1989 challenging the order passed in

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49. *Tilokchand Motichand v. H.B. Munshi,* AIR 1970 SC 898 : (1969) 1 SCC 110; *P.S. Sadasivaswamy v. State of Tamil Nadu,* AIR 1974 SC 2271 : (1975) 1 SCC 152.

50. *State of Maharashtra v. Digambar,* AIR 1995 SC 1991, 1995 : (1995) 4 SCC 683.

51. *Jharkhand Mazdoor Sangh v. Presiding Officer,* (2002) 10 SCC 703 : (2001) 1 SLT 251.

52. *Yunus (Baboobhai) A. Hamid Padvekar v. State of Maharashtra,* (2009) 3 SCC 281 : (2009) 3 JT 487.

53. ALICE JACOB, Laches: Denial of Judicial Relief under Articles 32 and 226, 16 *JILI* 352 (1974); SEERVAI, The Supreme Court, Article 32 of the Constitution and Limitation, 71 *Bom LR* (Jl) 35-8 (1969), See also *State of Orissa v. Lochan Nayak,* (2003) 10 SCC 678 : (2003) 6 SCALE 268; *W.B. Govt. Employees (Food & Supplies) Co-op. Housing Society Ltd. v. Sulekha Pal (Dey),* (2003) 9 SCC 253 : AIR 2003 SC 2328.
Also see, *infra,* under Art. 32, Ch. XXXIII.

54. *S. K. Mastan Bee v. GM, South Central Rly.,* (2003) 1 SCC 184 *:* (2002) 10 JT 50.

55. *Basanti Prasad v. Chairman, Bihar School Examination Board,* (2009) 6 SCC 791 : (2009) 8 JT 243.

56. *Ashok Kumar v. Collector, Raipur,* AIR 1980 SC 112 : (1980) 1 SCC 180; *Radhey Shyam v. State of Haryana,* AIR 1982 P & H 519; *Dehri Rohtas Light Rly. Co. Ltd. v. District Board, Bhojpur,* AIR 1993 SC 802 : (1992) 2 SCC 598.

1981. The Court rejected the writ petition on the ground of laches as there was no explanation for a delay of eight years in filing the writ petition.[57] The Supreme Court has observed in *State of Maharashtra v. Digambar*[58] "... Persons seeking relief against the state under Art. 226 of the Constitution, be they citizens or otherwise, cannot get discretionary relief obtainable thereunder unless they fully satisfy the High Court that the facts and circumstances of the case clearly justified the laches or undue delay on their part in approaching the Court for grant of such discretionary relief."[59]

(i) QUESTIONS OF FACT

In a writ petition, theoretically, the High Court has jurisdiction to determine questions both of fact and law. But, usually, the Court is reluctant to go into questions of fact which require oral evidence for their determination. The attitude of the courts is that questions of fact are best determined in an ordinary civil suit after adducing evidence, and not in a writ petition which is in essence supervisory and not appellate jurisdiction.[60]

Ordinarily, therefore, a writ is not issued to determine questions relating to immovable property. The reason is that this may involve determination of questions of fact and such questions are best decided in a civil suit because questions of fact cannot be decided without evidence, both oral or documentary. Whether the commodity sold by the respondents fell in the category of dementhol oil or not is a question of fact which must be left to the statutory authority.[61] It would be manifest and grave error to scan the evidence or to re-appreciate and reappraise the evidence led before an authority and arrive at a finding of fact.[62] Suspicious circumstances relating to disputed title is inappropriate for adjudication under Art. 226.[63]

But in an appropriate case the Court may direct the appointment of a committee to find out whether allotments were made involving political patronage and direct the authority concerned to proceed on the basis of the committee's findings.[64]

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57. *S.A. Rasheed v. Director of Mines & Geology,* AIR 1995 SC 1739 : (1995) 4 SCC 539.
58. AIR 1995 SC 1991, 1995 : (1995) 4 SCC 683.
59. On Laches, see : *Union of India v. S.S. Kothiyal,* (1998) 8 SCC 682; *Larsen & Toubro Ltd. v. State of Gujarat,* AIR 1998 SC 1608 : (1998) 4 SCC 387; see also *National Textile Corpn. Ltd. v. Haribox Swalram,* (2004) 9 SCC 786 : AIR 2004 SC 1998.
60. *D.L.F. Housing Construction v. Delhi Municipality,* AIR 1976 SC 386 : (1976) 3 SCC 160; *Union of India v. Bata India Ltd.,* AIR 1994 SC 921 : 1994 Supp (3) SCC 79; *M/s. Padmavathi Constructions v. The A.P. Industrial Infrastructure Corp. Ltd.,* AIR 1997 AP 1; *Brij Bihari Pandey v. State of Bihar,* AIR 1997 Pat. 74; *Goa v. Leukoplast (India) Ltd.,* AIR 1997 SC 1875 : (1994) 2 SCC 124; *Mahesh Chandra v. Zila Panchayat, Mainpuri,* AIR 1997 All. 248; see also *Grid Corpn. of Orissa Ltd. v. Timudu Oram,* (2005) 6 SCC 156 : AIR 2005 SC 3971.
61. *State of U.P.v. Chemtreat Chemicals,* (2002) 10 SCC 593. See also *Director of Entry Tax v. Sunrise Timber Company,* (2008) 15 SCC 287. See also *NTPC Ltd. v. Mahesh Dutta,* (2009) 8 SCC 339 : (2009) 9 JT 537. Question as to whether possession of land acquired in terms of Section 17(1) of the Land Acquisition Act, 1894 has been taken or not.
62. *Mahesh Chandra Gupta v. U.O.I.,* (2009) 8 SCC 273 : (2009) 9 JT 199.
63. *City and Industrial Development Corpn. v. Dosu Aardeshir Bhiwandiwala,* (2009) 1 SCC 168 : AIR 2009 SC 571.
64. *Ambika Mandal v. State of Bihar (Now Jharkhand),* (2008) 15 SCC 743.

However, the matter is one of Court's discretion and not of its jurisdiction;[65] *i.e.*, when an inquiry into questions of fact arise in a writ petition, it is a question of the High Court's discretion whether or not it will enter into such an inquiry; it is not that the Court does not have jurisdiction to do so.[66] In a given situation the High Court can set up an investigation committee. Thus in a writ petition against public sector banks against denial of amounts under FDRs alleging fraud on the part of depositors and officers of the bank, the bank asserting that the amounts had already been paid by way of loans. In such circumstances, although disputed question of fact were involved and relief in a private litigation might not have been permissible, High Court could, in view of involvement of a public law element concerning a large number of people, rightly treat the writ petition as PIL and invoke S.35A of the Banking Regulation Act, 1949 to direct constitution of a high powered committee to examine the matter in detail. However, the decisions of such a committee would not be necessarily decisive.[67] High Court directed to have evidence recorded on commission or by a subordinate Court.[68]

To decide questions of fact in a writ petition, the Court takes recourse to affidavits and it may even permit cross-examination of a person who has sworn to an affidavit.[69] But this is done very rarely.

The High Court can intervene if it is a mixed question of fact and law.[70] A finding of fact recorded by Financial Commissioner on relevant considerations and based on evidence does not care for interference.[71] But where there were no denials in the written statement that the wires were loose and dropping and that the respondent had asked the appellants to tighten the wires no disputed questions of facts arose.[72]

(j) LEGAL STANDING

A petitioner should have 'legal standing' to file a writ petition.[73] As the Supreme Court has observed, "The requirement of *locus standi* of a party to a litigation is mandatory; because the legal capacity of the party to any litigation

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65. *Muni Lal v. Prescribed Authority*, AIR 1978 SC 28 : (1977) 3 SCC 336; *Ajay Kumar v. Chandigarh Adm., Union Territory*, AIR 1983 P&H 8.

66. *Zeenat v. Prince of Wales Medical College*, AIR 1971 Pat. 43; *Babubhai Muljibhai Patel v. Nandlal Khodidas Barot*, AIR 1974 SC 2105 : (1974) 2 SCC 706; see also *G.M. Kisan Sahkari Chini Mills Ltd. v. Satrughan Nishad* (2003) 8 SCC 639 : AIR 2003 SC 4531; see also *Rourkela Shramik Sangh v. Steel Authority of India Ltd.*, (2003) 4 SCC 317 : AIR 2003 SC 1060; *President, Poornathrayisha Seva Sangham v. K. Thilakan Kavenal*, (2005) 2 SCC 689 : AIR 2005 SC 2918; See also *New Okhla Industrial Development Authority v. Kendriya Karmachari Sahkari Grih Nirman Samity*, (2006) 9 SCC 524 : (2006) 6 JT 604; Petition raising complex question of fact should not be entertained.

67. *Indian Bank v. Godhara Nagrik Coop. Credit Society Ltd.*, (2008) 12 SCC 541 : AIR 2008 SC 2585.

68. *B.L. Chakraborty v. State of West Bengal*, (2005) 12 SCC 148.

69. *Barium Chemicals v. Company Law Board*, AIR 1967 SC 295 : 1966 Supp SCR 311; *Gunwant Kaur v. Bhatinda Municipality*, AIR 1970 SC 802 : (1969) 3 SCR 769; *Babubhai v. Nandlal*, AIR 1974 SC 2105 : (1974) 2 SCC 706; *Jain Plastics & Chemicals Ltd. v. State of Bihar*, AIR 2001 Pat. 16.

70. *Shama Prashant v. Ganpatrao*, AIR 2000 SC 3094 : (2000) 7 SCC 522.

71. *Sadhu Ram v. Financial Commr. Haryana*, (2005) 10 SCC 226.

72. *HSEB v. Ram Nath*, (2004) 5 SCC 793.

73. *Prasar Bharati Broadcasting Corpn. of India v. Debyajoti Bose*, AIR 2000 Cal 43.

whether in private or public action in relation to any specific remedy sought for has to be primarily ascertained at the threshold".[74] Article 226 cannot be invoked on the basis of appeal to sympathy. The applicant must have a legal right.[75]

Where a statute provides for a right, but enforcement thereof is in several stages, unless and until the conditions precedent laid down therein are satisfied, no right can be said to have been vested in the person concerned.[76]

Thus where permission was granted under Section 31(1) of the Himachal Pradesh Town and Country Planning Act, 1977 subject to the conditions that building permission would be obtained from the legal authority concerned before commencement of development work and an application for sanction of the building plan in terms of the Himachal Pradesh Municipal Corporation Act, 1994 was made but subsequently during the pendency of the application the government issued an order temporarily freezing the construction activities and the site was also declared to be a "heritage zone" it was held that the Municipal Corporation was not entitled to sanction the building plans.[77] The Supreme Court considered the concepts of 'ligitimate' or 'settled expectation' and expressed the view that they do not create any vested right (e.g. to obtain sanction of a building plan). Moreover such a settled expectation or 'legitimate expectation" cannot be countenanced against public interest and convenience and more so where the sanction violated the ecology and private interest is justly overridden.[78]

Ordinarily a person can approach the High Court under Art. 226 to enforce his legal right, or when he has sufficient interest in the subject-matter.[79] Until the petitioner shows that his legal rights are adversely affected, or that breach is likely to be committed, he is not entitled to file the petition.[80] This principle has been stated by the Supreme Court as follows in *S.P. Gupta v. President of India*:[81]

> "The traditional rule in regard to *locus standi* is that judicial redress is available only to a person who has suffered a legal injury by reason of violation of his legal right or legally protected interest by the impugned action of the state or a public authority or any other person or who is likely to suffer a legal injury by reason of threatened violation of his legal right or legally protected interest by any such action. The basis of entitlement to judicial redress is personal injury to property, body, mind or reputation arising from violation, actual or threatened, of the legal right or legally protected interest of the person seeking such redress."

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74. *Janta Dal v. H.S. Chowdhary*, AIR 1993 SC 892 : (1992) 4 SCC 305.
75. *State of MP v. Sanjay Kumar Pathak*, (2008) 1 SCC 456 : (2007) 12 JT 219.
76. *Commissioner of Municipal Corporation Shimla v. Prem Lata Sood*, (2007) 11 SCC 40 : (2007) 7 JT 336.
77. *Ibid.*
78. *Commissioner of Municipal Corporation Shimla v. Prem Lata Sood*, (2007) 11 SCC 40 : (2007) 7 JT 336.
79. *Calcutta Gas v. State of West Bengal*, AIR 1962 SC 1044 : 1962 Supp (3) SCR 1; *Maganbhai v. Union of India (The Kutch case)*, AIR 1969 SC 783 : (1970) 3 SCC 400; *N.R. & F. Mills v. N.T.G. Bros.*, AIR 1971 SC 246; *Bennett Coleman Co. v. Union of India*, AIR 1973 SC 106 : (1972) 2 SCC 788; *Town Improvement Trust v. Sahaji Rao*, AIR 1978 MP 218; *Mohd. Ibrahim Khan v. State of Madhya Pradesh*, AIR 1980 SC 517. See also *State of Uttaranchal v. Alok Sharma*, (2009) 7 SCC 647 : (2009) 6 JT 463, aggrieved but not covered by circular—no rights.
80. *Charanjit Lal v. Union of India*, AIR 1951 SC 41 : 1950 SCR 869.
81. AIR 1982 SC 149 : 1981 Supp SCC 87.

It must be shown that there is a statute which imposes a legal duty and the aggrieved party has a legal right under the statute to enforce its performance.[82] This "right" concept is not an absolute one [e.g. principles of promissory estoppel or legitimate expectations etc.]

However, this rule is not strictly applied in cases of writs of *quo warranto* and *habeas corpus.*[83]

Whether a person has sufficient interest or not is for the writ Court to decide.[84] Thus, the chairman of a statutory corporation which is superseded by the government can challenge the government's action.[85] A member of a municipality can challenge a resolution passed by the municipality on the ground that it is *ultra vires*. A tax-payer can file a writ petition against a municipal council if it misapplies its funds.[86] A resident in a locality may challenge a municipal resolution approving construction of a cinema in the locality.[87] When the Lt. Governor of Delhi superseded the New Delhi Municipal Committee, two members of the committee challenged the order on the ground that natural justice had been denied to the committee before it was superseded, and their contention was upheld.[88] A person in the same trade as another has a right to seek the cancellation of the licence granted to the latter in violation of a statute or the rules concerned.[89]

To maintain a petition for *mandamus* or *certiorari*, it is not necessary that petitioner's personal right must be infringed. If he has a genuine grievance arising from an action or inaction of the authority, he may invoke Art. 226. The Supreme Court has ruled that a rice mill-owner has no *locus standi* to challenge under Art. 226, the setting up of a new rice-mill by another person even if the setting up of a new rice-mill be in contravention of a statutory provision [s. 8(3)(*c*) of the Rice Milling Industry (Regulation) Act, 1958], the reason being that no right vested in such an applicant is infringed.[90] Similarly, the Court has ruled that the proprietor of a licensed cinema theatre has no *locus standi* to seek *certiorari* from the High Court to quash the 'no-objection' certificate granted by the Administration to a trade rival. In the Court's view, grant of 'no-objection' did not deny or deprive the petitioner of any legal right. "He has not been subjected to any legal wrong. He has suffered no legal grievance. He has no legal peg for a justiciable claim to hang on." The Court further observed that to issue *certiorari* at the petitioner's instance would, on balance be against public policy as "it will eliminate healthy competition in the business which is so essential to raise commercial morality" and it would perpetuate petitioner's monopoly of cinema business."[91]

The Supreme Court has recognized that there are other concepts (judicially evolved) which could confer a standing although no right as such is sought to be

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82. *Union of India v. C. Krishna Reddy*, (2003) 12 627 : AIR 2004 SC 1194.
83. See below.
Also, *infra*, under Art. 21, Ch. XXVI.
84. *J.M. Desai v. Roshan Kumar*, AIR 1976 SC 578 : (1976) 1 SCC 671.
85. *Jwala Prasad v. State of Rajasthan*, AIR 1973 Raj. 187.
86. *Varadarajan v. Salem Municipality*, AIR 1973 Mad. 55.
87. *K.R. Shenoy v. Udipi Municipality*, AIR 1974 SC 2177 : (1974) 2 SCC 506.
88. *S.L. Kapoor v. Jagmohan*, AIR 1981 SC 136 : (1980) 4 SCC 379.
89. *Sai Chalchitra v. Commr.*, (2005) 3 SCC 683 : (2005) 5 SLT 187 (2).
90. *Nagar Rice & Flour Mills v. N.T. Gowda*, AIR 1971 SC 246 : (1970) 1 SCC 575.
91. *Mithilesh Garg v. Union of India*, AIR 1992 SC 443 : (1992) 1 SCC 168.

vindicated. The Court has identified certain areas e.g. promissory estoppel, legitimate expectation which could be invoked where fairness is a criteria for conferring stnding. The law relating to promissory estoppel and its usual analogous principles of acquiescence and waiver as well as the principle of legitimate expectation have been discussed exhaustively by the Supreme Court in Southern Petrochemical.[1] The Court held that the doctrine of promissory estoppel would undoubtedly be applicable where an entrepreneur alters his position pursuant to or in furtherance of the promise made by a State to grant inter alia, exemption from payment of taxes or charges. The policy to exempt can not only be expressed by reason of notifications issued under statutory provisions but also under executive instructions.[2]

The Court has now strengthened the doctrine by raising it to the level of a right and has proceeded to observe that a right is preserved when it is not expressly taken away.[3] In unqualified terms the Court has held that unlike an ordinary estoppel, promissory estoppel gives rise to a cause of action. It creates a right and it also acts on equity.[4] But its application against a constitutional or statutory provision is impermissible in law.[5] The Court rejected the argument that the mere issuance of an exemption notification under a provision in a fiscal statute could not create any promissory estoppel because such an exemption by its very nature is susceptible to being revoked or modified or subjected to other conditions. Such an argument was of no avail where a right has already accrued e.g. in a case where the right to exemption of a tax for a fixed period accrues and the conditions for the exemption have also been fulfilled. In such a situation the withdrawal could not defeat the accrued right.[6]

In Southern Petrochemical[7] the Supreme Court has referred to legitimate expectation as an "emerging doctrine" of an expectation of substantive benefit. The Court has almost equated the efficacy of both the principles i.e. promissory estoppel and legitimate expectation observing that saying that if the "principle of promissory estoppel" would apply, there may not be any reason as to why the doctrine of legitimate expectation would not.

A right to an statutorily conferred cannot be taken away only because a proposal for such taking away was in the offing.[8]

In relation to challenge appointment to public post one who is qualified for the post and is a candidate for the post would have *locus standi*.[9]

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1. *Southern Petrochemical Industries Co. Ltd. v. Electricity Inspector & Etio,* (2007) 5 SCC 447 : AIR 2007 SC 1984.
2. *Ibid.*
3. *Ibid.*
4. *Ibid*
5. *Ibid*
6. *Ibid*
7. *Southern Petrochemical Industries Co. Ltd. v. Electricity Inspector & Etio,* (2007) 5 SCC 447 : AIR 2007 SC 1984.
8. *Commissioner of Municipal Corporation Shimla v. Prem Lata Sood,* (2007) 11 SCC 40 : (2007) 7 JT 336; referring to *T. Vijayalakshmi v. Town Planning Member,* (2006) 8 SCC 502 : AIR 2007 SC 25; *Howrah Municipal Corpn. v. Ganges Rope Co. Ltd.,* (2004) 1 SCC 663 : (2003) 10 JT 355; *Director of Public Works v. Ho Po Sang,* 1961 AC 901 : (1961) 2 All ER 721.
9. *B. Srinivasa Reddy v. Karnataka Urban Water Supply & Drainage Board Employees' Assn.,* (2006) 11 SCC 731 : AIR 2006 SC 3106.

There are number of cases where the Supreme Court has held that unless pleaded, a party will not be permitted to run a case at the hearing. For example, although challenge to the constitutional validity of increased tax rates levied on contract carriage was raised in the writ petition, it suffered from proper pleadings i.e. in that very sketchy. Greater details were required to be furnished before the State could submit quantifiable and measurable data justifying the impugned rate.[10]

(k) PUBLIC INTEREST LITIGATION

Lately, the courts have shown a good deal of flexibility in the matter of legal standing because with the expansion of bureaucratic power, the chances of its misuse have increased.[11] The rule of *locus standi* has assumed much wider dimensions, in the day to day expanding horizons of socio-economic justice and welfare of the state. So much so that the courts have even sanctioned 'public interest' litigation where a question of public interest may be espoused through a writ petition by some one even though he may not be directly injured or affected by it, or may have any personal interest in the matter.[12] The petitioner comes to the Court to espouse a public cause. The expression "public interest litigation" means a legal action initiated in a Court for enforcement of public interest.

As the Supreme Court observed in an earlier case anticipating the future development: "Where a wrong against community interest is done, 'no *locus standi*' will not always be a plea to non-suit an interested public body chasing the wrong doer in the Court..... '*Locus standi*' has a larger ambit in current legal semantics than the accepted, individualistic jurisprudence of old."[13]

This observation referring to the legal standing of public body is now true of a private body as well. For example, in the *Additional Judges* case,[14] writ petitions under Art. 226 by lawyers raising certain significant questions concerning High Court Judges were held maintainable because the lawyers practicing in the High Courts have great interest in the independence of the High Courts and quick disposal of cases by them. If by any illegal state action, the independence of the judiciary is impaired, the lawyers would certainly be interested in challenging the constitutionality or legality of such action.

This case can be regarded as the precursor of public interest litigation in India. Enunciating the broad aspect of PIL, BHAGWATI, J., observed that:[15]

> "Whenever there is a public wrong or public injury caused by an act or omission of the State or a public authority which is contrary to the Constitution or the law, *any member* of the public acting *bona fide* and having sufficient interest can maintain an action for redressal of such wrong or public injury."

BHAGWATI, J., observed further:[16]

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10. *R.Senthil Babu v. State of T.N.*, (2009) 2 SCC 309 : (2008) 13 JT 508.
11. *Fertilizer Corp. Kamgar Union v. Union of India*, AIR 1981 SC 344 : (1981) 1 SCC 568; *Dutta & Associates v. State of West Bengal*, AIR 1982 Cal 225; *A.U.T. Association v. Chancellor, Allahabad University*, AIR 1982 All 343; *Geeta Bajaj v. State of Rajasthan*, AIR 1982 Raj 49.
12. *Jitendra Nath v. State of West Bengal Board of Examination*, AIR 1983 Cal. 275.
13. *Maharaj Singh v. State of Uttar Pradesh*, AIR 1976 SC 2602 : (1977) 1 SCC 155.
14. *S.P. Gupta v. Union of India*, AIR 1982 SC 149 : 1981 Supp SCC 87; *supra*.
15. *Ibid.*, at 190.
16. *Ibid.*, at 194.

> "We would, therefore, hold that any member of the public having sufficient interest can maintain an action for judicial redress for public injury arising from breach of public duty or from violation of some provision of the Constitution or the law and seek enforcement of such public duty and observance of such constitutional or legal provision."

Emphasizing the need for PIL in India, BHAGWATI, J., observed:

> "If public duties are to be enforced and social collective "diffused" rights and interests are to be protected, we have to utilize the initiative and zeal of public minded persons and organizations by allowing them to move the Court and act for a general or group interest, even though, they may not be directly injured in their own rights".

Even in a case where a petitioner moves the Court in his private interest and for redressal of personal grievances, the Court may in furtherance of public interest consider it necessary to enquire into the state of affairs of the subject matter of litigation in the interest of justice reflecting the same approach as in a public interest litigation.[17]

The Supreme Court has observed in *M/s. J. Mohapatra & Co. v. Orissa*,[18] that to-day "the law with respect to *locus standi* has considerably advanced" and "in the case of public interest litigation it is not necessary that a petitioner should himself have a personal interest in the matter". The petitioner should not, however, come to the Court for personal gain or private profit or political motive or any oblique consideration.[19] Nevertheless, even though the scope of *locus standi* has been widened by the Supreme Court in the field of PIL, yet a mere busy body having no interest in the subject-matter cannot invoke the jurisdiction of the courts.[20] The Court should be careful and circumspect and should reject at the outset petitions especially involving service matters which in the guise of PIL are really intended to settle personal scores or to gain cheap popularity.[21] Where third party interest has been created on account of delay, PIL is liable to be dismissed.[22] When a public interest litigation was entertained the individual conduct of the writ petitioners would take a back seat.[23]

Public Interest Litigation relates to the nature of the proceedings and has no inbuilt implications as to the forum competent to deal with such litigation. In practice, however, PIL is, almost invariably, filed in the High Court under Article 226 or the Supreme Court under Article 32. When the complainant invokes the jurisdiction of the High Court or the Supreme Court under Articles 226 and 32 respectively, many of the principles applied by the Courts while reviewing under Article 226 or Article 32 are applied. For example, the principle that questions concerning title to property where there is a factual dispute, the High Court or the

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17. *Ashok Lanka v. Rishi Dixit*, (2005) 5 SCC 598 : AIR 2005 SC 2821.
18. AIR 1984 SC 1572, 1574 : (1984) 4 SCC 108.
19. *S. K. Kantha v. Qamarulla Islam*, (2005) 11 SCC 507, petition filed by a political rival to settle personal scores; *Delhi Municipal Workers Union v. Delhi Municipal Corpn.*, AIR 2001 Del. 68.
20. *Rajnit Prasad v. Union of India*, (2000) 9 SCC 313 : (2000) 1 SCR 663.
21. *Gurpal Singh v. State of Punjab*, (2005) 5 SCC 136 : AIR 2005 SC 2755.
22. *R&M Trust v. Koramangala Residents Vigilance Group*, (2005) 3 SCC 91 : AIR 2005 SC 894.
23. *Ashok Lanka v. Rishi Dixit*, (2005) 5 SCC 598 : AIR 2005 SC 2821.

Supreme Court will not take upon itself the burden of resolving such dispute; and more so when a civil suit relating to the same dispute and same property was pending.[24]

A few examples of writ petitions filed in the High Courts under Art. 226 as public interest litigation are mentioned below.

A member of the Legislative Assembly and an educationist can challenge the appointment of the Vice-Chancellor in the University on the ground that it has not been made properly. The M.L.A. being interested in public affairs and also being an educationist has interest in the universities and other educational institutions in the State. He therefore feels concerned if the appointment of the Vice-Chancellor has not been made properly. In case of an injury affecting the public, a public man having some interest can maintain an action challenging the action of the government.[25]

A medical practitioner who is interested in maintaining and promoting public health and an association formed for upholding public causes through litigation can maintain writ petitions challenging government decision to sell arrack in polythene containers. The grievance projected by the petitioners if substantiated would show that the government action may result in serious damage to public health. The question whether selling arrack in a polythene sachet is unsafe and a health hazard deserves serious consideration particularly in the light of Art. 47 of the Constitution. The cause sought to be espoused is a public cause and the petitioners are acting *bona fide* and, therefore, they have sufficient interest in the matter to maintain writ petitions.[26]

Where legal rights of the poor, ignorant, socially and economically disadvantaged persons are sought to be vindicated through a Court action, the High Courts permit public men or concerned voluntary associations to agitate such matters before them under Art. 226. The reason for this development is that it has been realised that if this is not permitted, rights of the poor will ever remain unredressed as such persons are least equipped to themselves bring their grievances before the courts and such a situation is destructive of Rule of Law.

A non-political, non-profit and voluntary organisation consisting of public spirited citizens interested in taking up the causes of ventilating legitimate public problems filed a writ petition to espouse the cause of old pensioners who were individually unable to seek redress through the labyrinth of legal and judicial process which is costly and protracted. The Supreme Court ruled that the body concerned undoubtedly had *locus standi* to raise the matter before the Court.[27]

Merely because it is a public interest litigation, its width cannot be unlimited. Hence, the Supreme Court held that when the grievance in such litigation is misuse of park, the High Court erred in directing cancellation of the lease of certain areas in the park because of unauthorized constructions made in such areas – particularly in the absence of requisite averments in the petition.[28]

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24. *Santosh Sood v. Gajendra Singh*, (2009) 7 SCC 314 : (2009) 8 SCALE 489.
25. *Balbir Singh v. F.D. Tapase*, AIR 1985 P & H 244.
26. *George Mampilly v. State of Kerala*, AIR 1985 Ker 24.
27. *D.S. Nakara v. Union of India*, AIR 1983 SC 130 : (1983) 1 SCC 305. Also, *Akhila Bharatiya Grahak Panchayat v. A.P.S.E. Board*, AIR 1983 AP 283.
28. *Allahabad Ladies' Club v. Jitendra Nath Singh*, (2007) 11 SCC 609 : (2007) 4 SCALE 541.

In a Public Interest Litigation the essential rules of adjudication cannot be ignored. Hence where there was no averment in the petition that the construction made were unauthorized it would not been in order for the High Court to direct cancellation of a lease on the ground of alleged violation of provisions of the U.P. Parks, Playgrounds and Open Spaces (Preservation and Regulation) Act, 1975.[29]

Public interest litigation continues to flourish in India. A large number of writ petitions are filed in the High Courts under this category. More will be said on public interest litigation later in the book.[30]

(l) TO WHOM CAN A WRIT BE ISSUED?

The law on the point remains in a flux at the present moment and lately the courts have widened the writ jurisdiction by bringing more and more bodies under it.

Ordinarily a writ of *mandamus* or *certiorari* is issued to a government instrumentality whether statutory[31] or not.[32] Accordingly, writs have been issued to such statutory bodies as the International Airport Authority,[33] or the Warehousing Corporation,[34] or to non-statutory government companies registered under the Companies Act,[35] or to a registered society sponsored, financed and supervised by the government.[36]

The Supreme Court has thrown some light in this grey area. The Court has pointed out the difficulty in drawing a line between public functions and private functions when they are being discharged by a purely private authority. A body is performing a public function when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest. There cannot be any general definition of public authority or public action. The facts of each case decide the point.[37]

The Patna High Court has ruled that the Bihar Industrial and Technical Consultancy Organisation Ltd. (BITCO) is an instrumentality of the State as becomes clear from its Articles of Association and its functions. BITCO is treated as a unit of the State Government under the Rules of Executive Business. BITCO has been set up to promote industrial growth in the State; industrial growth being a matter

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29. *Allahabad Ladies' Club v. Jitendra Nath Singh*, (2007) 11 SCC 609 : (2007) 4 SCALE 541.

30. For further discussion on PIL, see, *infra*, Ch. XXXIII, Sec. B.
For a much more elaborate discussion on PIL, see, JAIN, *A TREATISE ON ADMINISTRATIVE LAW*, II.

31. *Rajasthan State Electricity Board v. Mohan Lal*, AIR 1967 SC 1857 : (1967) 3 SCR 377.

32. *Sukhdev v. Bhagat Ram*, AIR 1975 SC 1331 : (1975) 1 SCC 421; *Mathew v. Union of India*, AIR 1974 Ker 4; *Samir Kumar v. State of Bihar*, AIR 1982 Pat 66; *U.P. Singh v. Board of Governors, MACT*, AIR 1982 MP 59.

33. *Ramana Dayaram Shetty v. International Airport Authority*, AIR 1979 SC 1628 : (1979) 3 SCC 489.

34. *U.P. Warehousing Corp. v. Vijay Narain*, AIR 1980 SC 840. Also see, *Premji Bhai Parmar v. Delhi Development Authority*, AIR 1980 SC 738 : (1980) 2 SCC 129.

35. *Som Prakash v. Union of India*, AIR 1981 SC 212 : (1981) 1 SCC 449; *B. Satyanarayana v. State of Andhra Pradesh*, AIR 1981 AP 121.

36. *Ajay Hasia v. Khalid Majid*, AIR 1981 SC 487 : (1981) 1 SCC 722.

37. *Binny Ltd. v. V. Sadasivan*, (2005) 6 SCC 657 : AIR 2005 SC 3202.

of governmental concern, any body set up to promote this growth also discharges governmental function. All share holding in BITCO is held by various statutory bodies which are all instrumentalities of the government. BITCO is closely controlled by IDBI which is another governmental instrumentality.

The Council of Indian School Certificate Examination is a society registered under the Societies Registration Act. It exercises a public function of imparting education. The council is deeply impregnated with governmental character not only structurally but also functionally. The council has been held to be an instrumentality of the State.[38]

The U.P. State Co-operative Land Development Bank Ltd. functioning as a co-operative society under the Societies Act, but constituted under the Bank Act, has been held to be an 'instrumentality' of the State and hence an 'authority' under Art. 12. Therefore, writ petitions filed by its dismissed employees to challenge the orders of their dismissal were held to be maintainable.[39]

Recently, a non-statutory body, such as a government company, under the control of the State Government has been held to be an 'authority' under Art. 12.[40]

A government instrumentality is included in the term 'authority' which is regarded as a 'state' under Art. 12. All bodies falling under the coverage of Art. 12 are subject to Fundamental Rights as stated in the Constitution. This topic has been discussed later in detail.[41]

Besides Art. 12, the word 'authority' also occurs in Art. 226. There has been a question for the consideration of the courts whether the term 'authority' in Art. 226 ought to be interpreted in the same narrow sense as in Art. 12, or more broadly than that.[42] After much confusion of thought and several conflicting judicial *dicta*, the position as it has emerged now seems to be that Art. 12 is relevant only for purposes of Art. 32 under which the Supreme Court can issue a writ only for purposes of enforcement of Fundamental Rights.

Article 226 is broader in scope than Art. 32 as under Art. 226, a High Court may issue a writ not only for enforcement of fundamental rights but "for any other purpose" as well. So it is argued that the term "authority" in Art. 226 should be given a broader and a more liberal interpretation than the term "other authority" in Art. 12. There may be a body which may not fall within the compass of Art. 12 (as it may not be regarded as an 'instrumentality' of the state) but, nevertheless, it may still be regarded as an 'authority' under Art. 226 and may thus be subject to the writ jurisdiction of the High Court.

The Sanskrit Council constituted under a government resolution to hold examinations and publish results has been held to be subject to *Mandamus* because it performs a public, though not a statutory, duty.[43] A commission of enquiry ap-

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38. *Master Vibhu Kapoor v. Council of Indian School Certificate Examination*, AIR 1985 Del. 142.
39. *U.P. State Coop. Land Development Ltd. v. Chandra Bhan Dubey*, AIR 1999 SC 753 : (1999) 1 SCC 741.
40. *The Mysore Paper Mills Ltd. v. The Mysore Paper Mills Officers Association*, AIR 2002 SC 609 : (2002) 2 SCC 167.
41. See, *infra*, Ch. XX, Sec. D.
42. For discussion on Art. 12, see, *infra*, Ch. XX, Sec. D.
43. *G. Misra v. Orissa Association of Sanskrit Language & Culture*, AIR 1971 Ori 212.

pointed under an administrative order, and not under a statutory provision, to enquire into certain allegations against an ex-Chief Minister has been held subject to *certiorari*.[44] *Certiorari* or *mandamus* may issue even to a private person or a body regarded as a government instrumentality even when it is incorporated or registered under a statute, *e.g.*, a co-operative society or a limited company.[45] A writ petition against a private unaided educational institution for refund of money paid against a payment seat for admission is maintainable.[46]

Formerly, the High Courts refused to issue *certiorari* or *mandamus* to a body not regarded as government instrumentality (*i.e.*, which fell outside Art. 12),[47] but now judicial perspective has widened. There have been cases where *mandamus* or *certiorari* has been issued under Art. 226 to such a body as well when it is a public utility service, or to enforce a statutory or public duty, or when it is discharging a function under some statutory provision. Thus, a writ can be issued to a company, or a co-operative society, or even a private person when it discharges functions under a statute. International Crops Research Institute is neither a State nor an authority as it was neither set up by a statute nor were its activities statutorily controlled nor did it perform any public or statutory duty or a public function.[48]

For purposes of Art. 226, it is not necessary that the body in question should have the character of a government instrumentality. In this sense, the scope of Art. 226 is much broader than Art. 32 where a writ can go only to a government instrumentality. For example, in *Praga Tools*,[49] the Supreme Court explained that the words "any person or authority" in Art. 226 are not to be confined only to statutory authorities and instrumentalities of the state. "They may cover any other person or body performing public duty. The form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owned by the person or authority to the affected party. No matter by what means the duty is imposed, if a positive obligation exists *mandamus* cannot be denied." The Court also maintained that *mandamus* cannot be denied on the ground that the duty to be enforced is not imposed by a statute. Only when such a person or body performed a public function or discharged a public duty that Art. 226 could be invoked and since a sugar mill was engaged in the manufacture and sale of sugar, which did not involve any public function, the jurisdiction of the High Court under Art. 226 could not be invoked.[50] And merely because there are regulatory provisions, to ensure that business or commercial activity carried on by private bodies remains within a discipline, do not confer any status upon the company nor any obligation upon it which may be enforced through issue of a writ under

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44. *Harekrishna Mahtab v. Chief Minister, Orissa*, AIR 1971 Ori 175.
45. *General Manager, United India Fire & General Ins. Co. v. Nathan*, (1981) Lab IC 1076; see also *Baba Kamala Nehru Engg. College v. Sanjay Kumar*, (2002) 10 SCC 487.
46. *Ramdeo Baba Kamala Nehru Engg. College v. Sanjay Kumar*, (2002) 10 SCC 487.
47. *Chakradhar Patel v. Sama Singha Service Co-op. Soc. Ltd.*, AIR 1982 Ori 38; *Pritam Singh v. State*, AIR 1982 P & H 228.
48. *G. Bassi Reddy v. International Crops Research Institute*, (2003) 4 SCC 225 : AIR 2003 SC 1764.
49. *Praga Tools Corp. v. C.V. Imanual*, AIR 1969 SC 1306 : (1969) 1 SCC 585; *District Co-operative Bank v. Dy. Reg., Coop. Societies*, AIR 1973 All 348.
50. *GM, Kisan Sahkari Chini Mills Ltd. v. Satrughan Nishad*, (2003) 8 SCC 639 : AIR 2003 SC 4531.

Art. 226. Writ will not be issued where there is any non-compliance with or violation of any statutory provision by a private body.[51]

In *Mewa Singh*,[52] the Shrimoni Gurudwara Prabandhak Committee, a statutory body, has been held to be an "authority" for purposes of Art. 226. The body in question is a creation of the statute. The Supreme Court has insisted that the committee should function within the four corners of the law constituting it and the rules framed by it under statutory powers. Any violation of the provisions of the Act and the Rules made by it will certainly make it amenable to the writ jurisdiction of the High Court under Art. 226 of the Constitution.

This judicial trend to issue writs against private parties to enforce public duties imposed on them is gaining momentum. In *Sarvaraya Sugars Ltd. v. A.P. Civil Supplies Corpn. Ltd.*,[53] for example, the Andhra Pradesh High Court issued a writ to enforce a public duty on sugar manufacturers. In *Rohtas Industries v. Its Union*,[54] *certiorari* was issued against the award of an arbitrator appointed under s. 10A of the Industrial Disputes Act, 1947, as such an arbitrator can legitimately be regarded as part of the methodology of "the sovereign's dispensation of justice". Although the concerned parties name the arbitrator and voluntarily submit the industrial dispute to him, yet the arbitrator has the power not only to bind the immediate parties to the reference, but even third parties and arbitrator's powers flow from s. 10A.

In this connection, *T. Gattaiah v. Commissioner of Labour* is worth mentioning.[55] Some workmen were retrenched by a company. The workmen filed a writ petition against the company claiming that their retrenchment was against mandatory provisions of the Industrial Disputes Act. The Andhra High Court issued *mandamus* against the company to compel it to act according to law and to enforce a public duty imposed on the company by law not to retrench the workers except in accordance with the statutory conditions. The Court ruled that *mandamus* can be issued to enforce a statutory duty cast on a private body so long as it is a public duty. It is the nature of the duty and not the nature of the body which is important. The Andhra High Court was of the view that even *certiorari* can be issued to a private body, but the Punjab and Haryana High Court does not subscribe to this view.[56]

The significant point to note is (which High Courts ignore at times) that to issue a writ under Art. 32, it is necessary that the body in question be characterised as an instrumentality of the government,[57] but it is not necessary for purposes of issuing a writ under Art. 226.

Under Art. 226, a writ can be issued for—(i) enforcement of Fundamental Rights; and (ii) for any other purpose. Whereas, Fundamental Rights are enforceable only against the bodies mentioned in Art. 12,[58] for purposes of 'any other

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51. *Federal Bank Ltd. v. Sagar Thomas*, (2003) 10 SCC 733 : AIR 2003 SC 4325.
52. *Mewa Singh v. Shrimoni Gurudwara Prabandhak Committee*, AIR 1999 SC 688 : (1999) 2 SCC 60.
53. AIR 1981 AP 402, 406.
54. AIR 1976 SC 425. Also, *Gujarat Steel Tubes v. Mazdoor Sabha*, AIR 1980 SC 1896 : (1980) 2 SCC 593.
55. (1981) Lab IC 942 : (1976) 2 SCC 82.
56. *Pritam Singh*, *supra*, footnote 47.
57. For discussion on this point, see, *infra*, Ch. XX, Sec. D.
58. *Ibid*.

purpose', a writ may be issued to any body which has a public character even though it does not fall under Art. 12. Therefore, a High Court may issue *mandamus* or *certiorari* to a body which is imbued with some public character even though it may not be regarded as a "government instrumentality"if it is not a question of enforcement of a Fundamental Right.

The High Courts often miss this difference between Arts. 32 and 226. For instance, the Punjab and Haryana High Court refused to issue *mandamus* to the Indian Institute of Bankers saying that it is not an instrumentality of the government.[59] The Court failed to appreciate the point that for purposes of Art. 226, a body can still be regarded as an 'authority' even though it may not be an instrumentality of the government. The institute is registered as a company; it holds examinations for bank employees and imparts in-service training to bank employees through correspondence course. A candidate was debarred from appearing at an examination conducted by the Institute for three years for using unfair means at the examination. Obviously the Institute is discharging a public function and hence it is imbued with public character and so it ought to have been subject to *mandamus* under Art. 226

Ordinarily *mandamus* has not been issued to a privately-managed college affiliated to a University and receiving grants in aid to quash an order of dismissal of a member of the staff, primarily on the ground that the relationship between the two is contractual and a writ is not issued to enforce a contract.[60] But, this judicial approach is not correct because the relationship between an aided college and its teachers is not purely contractual; it is also a matter of status which is regulated by a number of rules made by the affiliating university.

Writs are issued now against educational institutions in matters of disciplinary proceeding against the students. For example, in *Harijander Singh v. Kakatiya Medical College*,[61] the Andhra Pradesh High Court held that *certiorari* can go to a private affiliated college and an order cancelling admission of a student in breach of natural justice was quashed. But the same High Court differed from the *Harijander* view later in *Shakuntala*,[62] mainly because of the Supreme Court's decision in *Vaish College*. In *Kumkum*,[63] the Delhi High Court issued *mandamus* against the Principal of such a private college on the petition of a student in the matter of exercise of his powers under the University Ordinances. The High Court ruled that the Principal holds a public office, has statutory duties to perform and acts in a public capacity. It is not necessary for purposes of *mandamus* that the office be the creature of a statute. Public office is one where the powers and duties pertaining to the office relate to a large section of the public.

In view of the author, the *Harijander* approach had much to commend itself. After all, these institutions use public funds, are subject to the discipline of the affiliating University, are bound by the rules and regulations of the University and so they cannot thus be regarded as purely private bodies with no public char-

59. *Ram Parshad v. Indian Institute of Bankers*, AIR 1992 P&H 2-8.
60. *Vaish Degree College v. Lakshmi Narain*, AIR 1976 SC 888 : (1976) 2 SCC 58; *Arya Vidya Sabha, Kashi v. K.K. Srivastava*, AIR 1976 SC 1073 : (1976) 3 SCC 83; Ref. *Jwala Devi Vidyalaya*, AIR 1981 SC 122 : (1979) 4 SCC 160.
61. AIR 1975 AP 35.
62. *Shakuntala v. Director of Public Instruction*, AIR 1977 AP 381.
63. *Kumkum v. Principal, Jesus & Mary College*, AIR 1976 Del 35.

acter. They must therefore be subjected to the writ jurisdiction for certain purposes.[64]

The matter has now been placed beyond any shadow of doubt by the Supreme Court pronouncement in the *Anandi Mukta* case.[65] The Supreme Court has ruled that the words "any person or authority" used in Art. 226 would cover "any other person or body performing public duty". The form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body.

In the instant case, a trust registered under the Trusts Act was running a school aided by the government. The teachers filed a writ petition claiming termination benefits from the trust when it closed down the school. The Court held the trust subject to the High Court's writ jurisdiction under Art. 226 as it was discharging a public function by way of imparting education to students; it was subject to rules and regulations of the affiliating university; its activities were closely supervised by the university authorities; employment in such an institution "is not devoid of any public character".

The Supreme Court has very clearly ruled in the instant case that:—

> "The term "authority" used in Article 226 in the context must receive a liberal meaning unlike the term in Article 12. Article 12 is relevant only for the purposes of enforcement of Fundamental Rights under Art. 32. Article 226 confers powers on the High Courts to issue writs for enforcement of Fundamental Rights as well as non-fundamental rights."

Undoubtedly, the exposition of the law in *Anandi Mukta* has widened the scope of Art. 226 as well as that of *mandamus*.[66]

It is thus established now that the High Courts have power to issue writs not only to statutory authorities and instrumentalities of the state but also to "any other person or body performing public duty."[67] Thus, medical colleges which are affiliated to the Universities and are receiving aid from state funds have been held subject to Art. 226.[68] These colleges are supplementing the effort of the state.

Recently, the Supreme Court has ruled that a writ petition is maintainable even against an unaided private educational institution to enforce government instructions against it.[69] The Court has ruled that an educational institution performs a public function, *viz.* imparting education. When an element of public interest is

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64. For comments on *Harijander*, see, JAIN, *THE EVOLVING INDIAN ADM. LAW*, 263-6, (1983).

65. *Shri Anadi Mukta Sadguru Shree Muktajee Vandajiswami Surana Jayanti Mahatsav Smarak Trust v. Rudani*, AIR 1989 SC 1607 : (1989) 2 SCC 691.
Also see, *U.P. State Co-operative Land Development Bank Ltd. v. Chandra Bhan Dubey*, AIR 1999 SC 753 : (1999) 1 SCC 741.

66. For discussion on *mandamus*, see, Sec. E, *infra.*

67. *Sri Konaseema Coop. Central Bank Ltd. v. N. Seetharama Raju*, AIR 1990 AP 171.

68. *Ravneet Kaur v. Christian Medical College, Ludhiana*, AIR 1998 P&H 1. Also see, *Kobad Jehangir Bharda v. Farokh Sidhwa*, AIR 1991 Bom. 16; *TTC Yuvaraj v. Principal, Dr. B.R. Ambedkar Medical College*, AIR 1997 Kant. 261.

69. *K. Krishnamacharyulu v. Sri Venkateswara Hindu College of Engineering*, AIR 1998 SC 295 : (1997) 3 SCC 571 But see *State Bank of India v. K. C. Tharakan*, (2005) 8 SCC 428 : (2005) 12 JT 358.

created and the institution is catering to the element, the teacher, the arm of the institution, is also entitled to avail of the remedy provided by Art. 226. Under the government instructions, the teachers in the private institutions were entitled to the same pay as the government servants and it was held that the teachers could take recourse to a writ petition under Art. 226 to enforce the same because of Art. 39(d) of the Constitution which is a directive principle.[70]

This pronouncement expands the dimensions of judicial review a great deal. In the first place, even an unaided private educational institution is held subject to the writ jurisdiction under Art. 226, for certain purposes, because it performs a public function, *viz.* that of imparting education. Secondly, the Court has enforced in this case non-statutory administrative instructions which do not have any legal effect *per se*.[71]

A stock exchange has been held subject to Art. 226. A stock exchange is a public limited company but is recognised by the Securities and Exchange Board of India (SEBI) as a stock exchange and it has to comply with the conditions laid down in the Securities Contracts (Regulation) Act, 1956. The exchange is subject to the writ jurisdiction under Art. 226 if it fails to perform the public duty by going beyond the mandate of the rules and bye-laws made under the Act.[72]

As regards *certiorari*, there is no principle that it cannot go to a non-statutory body. Any adjudicatory body which affects the rights of the people may be held subject to *certiorari.* In a very famous English case,[73] the Court of Appeal has practically said that bodies which exercise public functions may be susceptible to judicial review whatever the source of power. The reason is that so long as there is a possibility, however remote, of the body abusing its powers, it would be wrong for the courts to abdicate their responsibility. In the instant case, the question was whether *certiorari* could be issued to the Panel on Take-overs and Mergers—a non statutory body. The Panel oversees and regulates an important part of U.K. Financial market. The panel has no legal authority behind it and has no statutory, prerogative or common-law powers. Yet the Panel has been held to be subject to *certiorari* because it performs public law functions with public law consequences. Its powers being great, there is need to control lest it should act in an unfair manner in any case. The significance of the case lies in the acceptance of the proposition that bodies which exercise public functions may be susceptible to judicial review, whatever the source of their powers. This case widely enhances the range of bodies to whom *certiorari* can be issued.

Certiorari has been issued to a large number of sundry bodies exercising some type of adjudicatory function, such as, industrial tribunals, disciplinary authorities, Court-martial held under the Army Act, 1950.[74]

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70. For discussion on "Directive Principles", see, *infra*, Ch. XXXIV.

71. For a detailed discussion on "Directions" see, M.P. Jain, *A TREATISE ON ADM. LAW*, Ch. VIII (1996); *CASES & MATERIALS ON INDIAN ADM. LAW*, Ch. VII (1994).

72. *Sijal Rikeen Dalal v. Stock Exchange, Bombay*, AIR 1991 Bom 30; *Rakesh Gupta v. Hyderabad Stock Exchange Ltd.*, AIR 1996 AP 413.

73. *R. v. Panel on Take-overs and Mergers, ex parte Datafin and Prudential Bache Securities Inc.*, [1987] 1 All ER 564.

74. *Union of India v. A. Hussain*, AIR 1998 SC 577 : (1998) 1 SCC 537.
For discussion on *Certiorari*, see, Sec. E, *infra.*

(m) APPLICABILITY OF CIVIL PROCEDURE CODE

A proceeding under Art. 226 is not a civil suit as envisaged in the Code of Civil Procedure. The Code itself provides that it will not apply to proceedings under Art. 226 (See explanation to S. 141 of the Code). But that does not bar the High Court from framing a rule providing that the Code would be applicable (See e.g. Rules of the Calcutta High Court relating to matters under Art. 226 of the Constitution). In any case, the principle underlying the procedure, provisions of the Code have been made applicable by judicial rulings. Thus, for example some of such provisions are cited hereafter but only as examples. Or. 8 Rule 5 of the Civil Procedure Code is applicable in relation to matters under Art. 226 of the Constitution and, as such, the absence of a specific denial of the averments made in the writ petition would be deemed to have been admitted.[75]

(i) Necessary Parties.—In a writ petition, necessary parties must, and proper parties may, be impleaded.

A necessary party is one without whom no effective order can be made. The question is whether the presence of a particular party is necessary in order to enable the Court effectively and completely to adjudicate upon and settle all the questions which are involved in the writ petition.[76] If the number of such parties is large, at least some of them must be joined in a representative capacity. The Supreme Court has said in *Prabodh Verma v. State of Uttar Pradesh*[77] :

> "A High Court ought not to decide a writ petition under Art. 226 of the Constitution without the persons who would be vitally affected by its judgment being before it as respondents or at least by some of them being before it as respondents in a representative capacity if their number is too large."

Selection and appointment of candidates made by the Subordinate Services Selection Board, Haryana, were quashed by the High Court without impleading the selected/appointed candidates as parties. The High Court order was set aside by the Supreme Court because the High Court quashed the selection/appointment without hearing the persons concerned. It is settled law that no order to the detriment of a person can be passed without hearing him.[78]

The Central Government allotted a limited quantity of liquid fuel to the State of Kerala. Several applicants including the respondent applied for allotment of fuel to their independent power projects (IPP). The entire quantity of the fuel was allotted to four IPPs excluding the respondent. The respondent filed a writ petition challenging the selection policy of the State without inpleading the applicants whose IPPs had been selected. The writ petition was held not maintainable in the absence of those applicants as parties.[79]

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75. *Bharat Sanchar Nigam Ltd. v. Abhishek Shukla*, (2009) 5 SCC 368 : (2009) 5 JT 310.

76. *A. Janardhana v. Union of India,* AIR 1983 SC 769 : (1983) 3 SCC 601; *State of Himachal Pradesh v. Kailash Chand Mahajan,* AIR 1992 SC 1277, 1308 : 1992 Supp (2) SCC 351; *Harcharan Singh v. Financial Commissioner, Revenue, Punjab, Chandigarh,* AIR 1997 P&H 40.

77. AIR 1985 SC 167, 180 : (1984) 4 SCC 258.

78. *Bhagwanti v. Subordinate Services Selection Board*, (1995) Supt. 2 SCC 663.
Also see, *Ishwar Singh v. Kuldip Singh,* (1995) Supt. I SCC 179**;** *Rajesh Kumar Gupta v. State of U.P.,* (2005) 5 SCC 172 : AIR 2005 SC 2540.

79. *State of Kerala v. W.I. Services & Estates Ltd.,* (1998) 5 SCC 583.

In a petition for *certiorari*, the tribunal whose order is sought to be quashed, and also the parties in whose favour the said order is issued, are regarded as necessary parties.[80]

A proper party is one, in whose absence, an effective order can be made but whose presence is considered proper for a complete and final decision on the question involved in the proceeding.[81] A proper party is one whose presence is considered to be proper in order to provide effective relief to the petitioner and for avoiding multiplicity of litigation. Proper party is one whose presence is considered appropriate for effective decision of the case, although no relief may have been claimed against him. Where High Court felt that issues concerning public interest had arisen it should have framed specific issues and then put the State on specific notice inviting pleadings and documents. Any other party likely to be adversely affected and interested in being heard should have been allowed an opportunity of doing so.[82]

SUPPRESSION OF FACTS

It is a well established principle that suppression of materials exposes the petitioner to the risk of threshold dismissal. The principle emanates from the very nature of the power of interference under Art.226 {and since the court is sitting} i.e. a discretionary jurisdiction. A person who approaches the court for justice must come with clean hands and not one who deliberately attempts to deflect the court from the true path of justice by leading the court to injustice.[83]

Since it is a discretionary jurisdiction a petition may be dismissed on the ground that the petitioners have suppressed material facts in their petition.[84] Identification of material facts will be a case by case exercise and the definition of the expression has been attempted. The latest attempt (2009) of the Supreme Court,[85] is prefaced by saying that there is no definition of "material facts" in the Code of Civil Procedure nor in many statutes which come before the courts. But the Supreme Court in a series of judgments has laid down that all facts necessary to formulate a complete cause of action should be termed as "material facts". All basic and primary facts which must be proved by a party to establish the existence of cause of action or defence are material facts. "Material facts" in other words mean the entire bundle of facts which would constitute a complete cause of action.[86]

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80. *Udit Narayan v. Board of Revenue*, AIR 1963 SC 786 : 1963 Supp (1) SCR 676; *Birendra Nath v. State of West Bengal*, AIR 1973 Cal 94.

81. *G.M., S.C. Rly v. A.V.R. Siddhanti*, AIR 1974 SC 1755; A. *Janardhana v. Union of India*, AIR 1983 SC 769 : (1983) 3 SCC 601.

82. *State of U. P. v. Satya Narain Kapoor*, (2004) 8 SCC 630 : (2004) 9 JT 410.

83. *Arunima Baruah v. U.O.I.*, (2007) 6 SCC 120 : (2007) 6 SCALE 293; *Bhagubhai Dhanabhai Khalasi v. State of Gujarat*, (2007) 4 SCC 241 : (2007) 5 SCALE 357; *S.J.S. Business Enterprises (P) Ltd. v. State of Bihar*, (2004) 7 SCC 166 : AIR 2004 SC 2421.

84. See e.g. *Chancellor v. Bijayananda Kar*, AIR (1994) SC 529.

85. *Anil Salgaonkar*, (2009) 9 SCC 310.

86. *Anil Vasudev Salgaonkar v. Naresh Kushali Shigaonkar*, (2009) 9 SCC 310, relying on *Manubhai Nandlal Amorsey v. Popatlal Manilal Joshi*, (1969) 1 SCC 372; *Samant N. Balkrishna v. George Fernandez*, (1969) 3 SCC 238; *Udhav Singh v. Madhav Rao Scindia*, (1977) 1 SCC 511; *V.Narayanaswamy v. C.P.Thirunavukkarasu*, (2000) 2 SCC 294 : AIR 2000 SC 694; *L.R. Shivaramagowda v. T.M.Chandrashekar*, (1999) 1 SCC 666; *Harmohinder Singh Pradhan v. Ranjeet Singh Talwandi*, (2005) 5 SCC 46 : AIR 2005 SC 2379; *Harkirat Singh v. Amrinder Singh*, (2005) 13 SCC 511 : AIR 2006 SC 713; *Hardwari Lal v. Kanwal Singh*, (1972) 1 SCC 214; *Sudarsha Avasthi v. Shiv Pal Singh*, (2008) 7 SCC 604 : AIR 2008 SC 2724.

The Supreme Court has reiterated that a Court of law is also a Court of equity and in granting relief under Art. 226 the Courts will bear in mind the conduct of the party who was invoking the jurisdiction. Non disclosure of full facts or suppression of relevant materials or otherwise misleading the Court would disentitled a party to any relief.[87] This was a case where the appellant company had taken a collusive route to prevent a bank from realizing its dues and also created third party interest in the property mortgaged with the Bank.

Where the agent of the State (Karnataka State Forest Industries Corporation) being a Government of Karnataka Undertaking, is guilty of suppression of facts, the State as the principal was obliged to disclose the entire facts before the Court.[88]

(ii) Res Judicata.—The rule of *res judicata* envisages that finality should attach to the binding decisions pronounced by courts of competent jurisdiction so that individuals are not made to face the same litigation twice. It is basically a rule of private law but has been transposed into the area of writs proceedings as well. Thus, a person is debarred from taking one writ proceeding after another, and urging new grounds every time, in respect of one and the same cause of action, thus, causing harassment to the opposite party. This means that when once a High Court has disposed of a writ petitition under Art. 226, then a subsequent writ petition under Art. 226 cannot be moved in the High Court relating to the same cause of action.[89]

In *Ram Saran Tripathy v. Chancellor Gorakhpur University*,[90] the High Court dismissed a writ petition under Art. 226 against the Chancellor and the Vice-Chancellor of the University. Thereafter, the petitioner made representation to the Vice-Chancellor and the Chancellor, but it was rejected. He then filed another writ petition under Art. 226 in the High Court on the same subject-matter, but the High Court dismissed the same on the ground of *res judicata.*

When once a tax assessment order has been unsuccessfully challanged through a writ petition, it cannot be challenged again even though the petitioner-assessee wishes to raise some new ground against the order which he failed to urge before. But a tax assessment order for the subsequent year may be challanged on the basis of new grounds.[91]

The principle *res judicata* has been applied by the Supreme Court to determine the mutual relationship under Arts. 32 and 226. Disposal of a writ petition under Art. 226 by a High Court on merits bars a subsequent petition for a writ under Art. 32,[92] or even a regular suit,[93] between the same parties for the same cause of action, because of the principle of *res judicata*.[94] Claiming in the second writ petition a relief which had been voluntarily not claimed in the earlier writ petition

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87. *Prestige Lights Ltd. v. State Bank of India*, (2007) 8 SCC 449 : (2007) 10 JT 218.
88. *Karnataka State Forest Industries Corporation v. Indian Rocks*, (2009) 1 SCC 150 : AIR 2009 SC 684.
89. *M.S.M. Sharma v. Sinha*, AIR 1960 SC 1136 : 1959 Supp (1) SCR 806; *Ishwar Dutt v. Land Acquisition Collector*, (2005) 7 SCC 190 : AIR 2005 SC 3165.
90. AIR 1990 All 96.
91. *Devilal v. S.T.O.*, AIR 1965 SC 1150 : (1965) 1 SCR 686.
92. *Daryao v. State of U.P.*, AIR 1961 SC 1457 : (1962) 1 SCR 574; *Nagabhushanam v. Ankem Ankaiah*, AIR 1968 AP 74; Also see, *infra*, under Art. 32, Part V, Ch. XXXIII.
93. *Gulab Chand v. State of Gujarat*, AIR 1965 SC 1153 : (1965) 2 SCR 547.
94. YOGENDER SINGH, Principle of Res Judicata & Writ Proceedings, 16 *JILI*, 399 (1974); ILI, *ANNUAL SURVEY OF INDIAN LAW*, 124 (1970).

filed against the same parties, is not permissible.[1] The principle of constructive *res judicata* is also applicable.[2] An issue not raised in the first round of litigation cannot be raised in the second.[3]

The Supreme Court has emphasized in *Daryao*[4] that the rule of *res judicata* is based on public policy. It is in the interest of the public at large that finality should attach to the binding decisions pronounced by the courts of competent jurisdiction. Further, it is also in public interest that individuals should not be vexed twice over the same kind of litigation. Therefore, if a writ petition filed under Art. 226 is disposed of on merits, the decision would bar a writ petition under Art. 32 made on the same facts and for obtaining the same or similar orders or writs.

But when a writ petition is dismissed by the High Court *in limine* without passing a speaking order, it does not create *res judicata*. If a writ petition is dismissed on the ground that the petitioner was guilty of laches, or that he had an alternative remedy, then it would not be a bar for a subsequent writ petition under Art. 32 "except in cases where and if the facts thus found by the High Court may themselves be relevant even under Art. 32."[5] And an order which is a nullity cannot be brought into effect for invoking the principles of estoppel, waiver or *res judicata*.[6]

In case a writ petition under Art. 226 is dismissed on any ground (laches, alternative remedy), then another writ petition under Art. 226 before another bench is barred. The reason is that entertaining the second writ petition would render the order of the same Court dismissing the earlier writ petition redundant and nugatory. Further, if a petitioner is allowed to file a second writ petition after the dismissal of his earlier petition *in limine*, it would encourage an unsuccessful petitioner to go on filing one writ petition after another in the same matter in the same High Court, and there could thus be no finality for a Court order dismissing a writ petition.[7]

When the Supreme Court dismisses a special leave appeal petition filed under Art. 136, without a speaking order, it does not create *res judicata* for a subsequent writ petition under Art. 226. Dismissal of a special leave petition only means that the Court had decided that the case was not fit for appeal; it is not a decision on merits and so a writ petition under Art. 226 is maintainable to try identical issues.[8]

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1. *State Bank of India v. K. C. Tharakan*, (2005) 8 SCC 428 : (2005) 12 JT 358.
2. *State of Punjab v. Varinder Kumar* (2005) 12 SCC 435. See also *Raghavendra Rao v. State of Karnataka*, (2009) 4 SCC 635 : (2009) 2 JT 520. See also *Food Corporation of India v. Ashis Kumar Ganguly*, (2009) 7 SCC 734 : AIR 2009 SC 2582, plea not available when representation was pending.
3. *M.P. Palanisamy v. A.Krishnan*, (2009) 6 SCC 428 : AIR 2009 SC 2809.
4. *Daryao v. State of U.P., supra*, footnote 92.
5. *Daryao v. State of U.P.*, AIR 1961 SC at 1466 : (1962) 1 SCR 574. *Hoshnak Singh v. Union of India*, AIR 1979 SC 1328 : (1979) 3 SCC 135.
6. *Jayendra Vishnu Thakur v. State of Maharashtra*, (2009) 7 SCC 104 at p. 108 : (2009) 8 JT 5.
7. *State of Uttar Pradesh v. Labh Chand*, AIR 1994 SC 754, at 761. Also, *Brij Bihari Pandey v. State of Bihar*, AIR 1997 Pat. 74.
8. *Workmen of Cochin Port Trust v. Board of Trustees of the Cochin Port Trust*, AIR 1978 SC 1283 : (1978) 3 SCC 119; *supra*, 428; *Ahmedabad Manufacturing & Calico Printing Co. Ltd. v. Workmen*, AIR 1981 SC 960 : (1981) 2 SCC 663; *Indian Oil Corporation Ltd. v. State of Bihar*, AIR 1986 SC 1780 : (1986) 4 SCC 146; *Sahi Ram v. Avtar Singh*, AIR 1999 Del 96.

In case of *habeas corpus*, the principle of *res judicata* does not apply. Thus, when a petition challenging an order of detention is dismissed by the High Court, a second petition can be filed on fresh, additional grounds to challenge the legality of the continued detention of the petitioner.[9] This is because the courts attach great value to the right of personal freedom of a person.[10]

When a writ petition under Art. 226 is withdrawn without seeking permission of the High Court to file a fresh petition, the petitioner cannot file a fresh writ petition for agitating the same cause once again. This is on the ground of public policy.[11] But when the subject matter of the second writ petition is different from that of the first, the second petition is competent.[12]

ABUSE OF PROCESS

Abuse of process means utilizing the court's process not for justice but for some other ulterior motive. For example, where the court directs the Government to consider a representation made by a school and in furtherance thereof the State Government, after hearing the party concerned rejects the representation but such rejection is not challenged, another Writ Petition for the same issue merely on the ground that a few subsequent representations had been made reiterating the same issue and seeking similar relief amounted to abuse of the process.[13]

(n) DISMISSAL OF WRIT PETITIONS *IN LIMINE*

The Supreme Court has at times come with a heavy hand on the practice of the High Courts dismissing writ petitions *in limine*. The Supreme Court has pointed out that the High Court may, in exercise of its discretion, decline to exercise its extra- ordinary jurisdiction under Art. 226. The discretion however is judicial.

If the petition makes a frivolous, vexatious, or *prima facie* unjust claim, or a claim which may not appropriately be tried, or seeks a relief which the Court cannot grant, in a petition invoking extraordinary jurisdiction, the Court may decline to entertain the writ petition.[14] But when a writ petition raises an arguable or triable issue, or when the party claims to have been aggrieved by the action of a public body on the plea that the action is unlawful, high-handed, arbitrary or *prima facie* unjust, he is entitled to a hearing on its petition on the merits. Dismissal of the petition *in limine* would be unjustified in such a situation.[15] If the Court finds that the writ petition on its face does not raise any triable issue, it is liable to be dismissed *in limine*.[16]

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9. *Lallubhai Jogibhai v. Union of India,* AIR 1981 SC 728 : (1981) 2 SCC 427; *Kirit Kumar v. Union ofIndia,* AIR 1981 SC 1621 : (1981) 2 SCC 436.

10. For a full-fledged discussion on "Right to Personal Liberty", see, *infra,* Ch. XXVI.
For *habeas corpus,* see, Sec. E, *infra.*

11. *Sarguja Transport Service v. State Transport Appellate Tribunal,* AIR 1987 SC 88 : (1987) 1 SCC 5.

12. *G.N. Nayak v. Goa University,* (2002) 2 SCC 712 : AIR 2002 SC 790.

13. *State of Tamil Nadu v. Amala Annai Higher Secondary School,* (2009) 9 SCC 386.

14. *Gunwant Kaur v. Municipal Committee, Bhatinda,* AIR 1970 SC 802 : (1969) 3 SCC 769.

15. *Century Spg. & Mfg. Co. v. Ulhasnagar Municipality,* AIR 1971 SC 1021 : (1970) 1 SCC 582; *Exen Industries v. Chief Controller of Imports,* AIR 1971 SC 1025 : (1972) 3 SCC 176; *Prem Chandra v. Collector, Faizabad,* AIR 1970 SC 802.

16. *Himansu Kumar Base v. Jyoti Prakash Mitter,* AIR 1964 SC 1636; *Union of India v. S.P. Anand,* AIR 1998 SC 2615, at 2618; *Cf. Director of Entry Tax v. Sunrise Timber Company,* (2008) 15 SCC 287.

The High Court may decline a writ petition *in limine* if it is frivolous or without substance. But a writ petition should not be thrown out if a *prima facie* case for investigation is made out. The High Court may reject a petition *in limine* if it takes the view that the authority in question had not acted improperly, or if the Court feels that the petition raises complicated questions of fact for determination which could not be properly adjudicated upon in a proceeding under Art. 226.[17]

The Haryana Government superseded the Kaithal Municipality. The order was challenged through a writ petition on the ground of *mala fides* on the part of the government. The High Court dismissed the petition *in limine.* The Supreme Court criticised this and observed:[18]

> "... in a case of the present kind the writ petition ought not to have been dismissed in the manner in which it was done without obtaining any return from the respondents and considering the same."

The Supreme Court has emphasized that when the High Court seeks to dismiss a writ petition *in limine,* it should give reasons for doing so. Absence of reasons deprives the Supreme Court of knowing the circumstances which weighed with the High Court to dismiss the writ petition at the threshold. Also, the petitioner not knowing the reasons cannot challenge the reasons in the higher forum.

In the following cases,[19] the Supreme Court remanded the writ petitions to the High Court concerned for fresh disposal on merits, because these writ petitions had been dismissed *in limine* without reasoned orders by the High Courts.

(o) DECLARATORY RELIEF

Normally, under Art. 226, the High Court does not grant merely a declaration unless the person aggrieved has asked for the consequential relief available to him. But the High Court can grant a mere declaration if the petitioner is not entitled to the further consequential relief on account of some legal bar of circumstances beyond his control.

> "In exceptional cases, the High Court may be justified to grant the relief merely in a declaratory form after being satisfied that the person approaching the Court was prevented from praying for any other consequential relief on account of legal impediment or bar of jurisdiction created by same statute."

In the instant case,[20] the petitioner came to the High Court for declaration of a University Service Rule as unconstitutional. The problem was that unless the rule was declared unconstitutional, the petitioner could not get any relief. The relief

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17. *D.D. Suri v. A.K. Barren,* AIR 1971 SC 175 : (1970) 3 SCC 313; *Jagdish Prasad v. State of Uttar Pradesh,* AIR 1971 SC 1224; *Ram Chandra v. State of Madhya Pradesh,* AIR 1971 SC 128.

18. *Gyan Chand v. State of Haryana,* AIR 1971 SC 333 : (1970) 1 SCC 582.

19. *Subash Chandra Choubey v. State of Bihar,* (1998) 8 SCC 714; *State of Punjab v. Surinder Kumar,* (1992) 1 SCC 489; *Sat Pal Chopra v. Director-cum-Joint Secretary,* AIR 1991 SC 970 : 1991 Supp (2) SCC 352; *Gram Panchayat, Bari v. Collector, Sonepat,* AIR 1991 SC 1082 : 1991 Supp (2) SCC 407; *Llewyn Furtado v. Govt. of Goa,* (1997) 7 SCC 533; *Nurul Station Complex Businessmen's Assn. v. City and Industrial Development Corpn. of Maharashtra Ltd.,* (2005) 11 SCC 478.

20. *M.C. Sharma v. The Punjab University, Chandigarh,* AIR 1997 P & H 87.

could be given by the Administrative Service Tribunal and not by the High Court. But the Tribunal could not declare the rule in question unconstitutional. Only the High Court could do so. Because of this division of jurisdiction between the High Court and the Tribunal, the High Court gave the declaration holding the impugned rule to be unconstitutional.

After referring to earlier authorities, the Supreme Court has reiterated that in the absence of a statutory framework and depending on a given situation, it and the High Court can issue a "positive mandamus" by directing the authorities to do what was required to be done in such a situation.[21]

(p) MOULDING OF RELIEF

The High Courts under Art. 226 have power not only to issue writs but also to make orders and to issue directions. Accordingly, the High Courts do not only issue writs, but discharge a much wider function, *viz.*, to mould relief in accordance with the facts of the case with a view to do complete justice between the contending parties. One or two examples of how the courts mould relief may be given here. High Court's power to consider subsequent events is limited to the purpose of moulding the relief and does not extend to grant of a relief for which no foundation was laid in pleadings of the parties.[22]

In *Grindlays Bank v. I.T.O.*,[23] the High Court while quashing the income-tax assessment proceedings also directed that fresh assessment be made. The appellant company contested this direction on the ground that the I.T.O. could not make an assessment as it was time-barred. Over-ruling this objection, the Supreme Court held that under article 226, the High Court may not only quash the offending assessment order but may also mould the remedy to suit the facts of the case. A party ought not to be permitted to gain any undeserved or unfair advantage by invoking the Court's jurisdiction. The Court's direction for a fresh assessment was necessary for properly and completely disposing of the writ petition. It had jurisdiction to do so and acted in the sound exercise of its judicial discretion in making it.

In *Shiv Shankar Dal Mills v. State of Haryana*[24], the market committee increased the market fees from 2 per cent to 3 per cent and the appellants paid the increased fees. On being challenged, the Supreme Court held that the increase in fee was *ultra vires*. Consequently, the committee became liable to refund the illegal payment made to it. The Court ruled that there could be no dispute about the amounts payable. Where public bodies, under colour of public laws, recover people's money, later discovered to be erroneous levies, the *dharma* of the situation admits of no equivocation. There is no law of limitation, especially for public bodies, on the virtue of returning what was wrongly recovered to whom it belongs.

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21. *Destruction of Public & Private Properties v. State of Andhra Pradesh*, (2009) 5 SCC 212 (3-Judge Bench) : AIR 2009 SC 2266.
22. *Ramrao v. All India Backward Class Bank Employees Welfare Asson.*, (2004) 2 SCC 76 : AIR 2004 SC 1459.
23. AIR 1980 SC 656 : (1980) 2 SCC 191.
24. AIR 1980 SC 1037.

However, in the instant case, the difficulty was that the petitioners, who were traders, had themselves collected the amount in question in small levies from the next purchasers. To meet the situation, the Court referred to the procedure devised by it in *Nawabganj Sugar Mills* case.[25] There the Court devised a scheme to enable the consumers who had paid the excess amount to get back their money. The Court justified its decision by saying that article 226 grants an 'extraordinary remedy which is essentially discretionary, although founded on legal injury', and it is perfectly open to the Court, 'exercising that flexible power', to pass such order as 'public interest dictates and equity projects.[26]

(q) GRANT OF COMPENSATION

A very innovative development has taken place with respect to Art. 226, namely, in certain situations, courts have granted compensation to the victims of government lawlessness or negligence. Although Art. 226 does not make any reference to "compensation", but only says that a High Court may issue "directions or orders or writs", the Supreme Court has interpreted this constitutional provision in a flexible manner so as to permit award of compensation where a person's fundamental or legal right is infringed.[27]

In *DK Basu v. State of West Bengal*,[28] the Supreme Court accepted that compensation can be awarded to the victims of torture in police custody. In the instant case, the Supreme Court granted compensation for the custodial death of a person as this was held to be an infringement of Art. 21.[29]

In a very recent case, under Art. 226, compensation has been awarded to a Bengala Deshi lady who was gang raped by railway employees at the Sealdah station.[30]

After the husband underwent vasectomy operation, his wife conceived. This happened because of the negligence of the doctor in the government hospital. The Allahabad High Court ruled that, in the circumstances, it was the duty of the State to maintain the child as the said lady never wanted another child. The Court directed the State Government to deposit Rs. 50,000 in a bank for the purpose.[31]

A six year old child fell in a deep sewerage tank and died. The tank was not covered with a lid and was left open. On a writ petition being filed by the mother of the child in the High Court under Art. 226, compensation of Rs. 50,000/- was awarded to her.[32]

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25. *Nawabganj Sugar Mills Co. v. Union of India*, AIR 1976 SC 1153.
26. Also see on this topic *infra*, Ch. XXXIII, under Art. 32.
27. *Nilabati Behera v. State*, 1993 AIR SCW 2366 : AIR 1993 SC 1960.
28. AIR 1997 SC 610.
Also see, *Rudal Shah v. State of Bihar*, AIR 1993 SC 1086 : (1983) 4 SCC 141; *Murti Devi v. Delhi*, (1998) 9 SCC 604; *Sebastian M. Hongray v. Union of India*, AIR 1984 SC 1026; *Rajendra Singh v. Smt. Usha Rani*, AIR 1984 SC 956; *Bhim Singh v. State of Jammu & Kashmir*, AIR 1986 SC 494 : (1985) 4 SCC 677; *Saheli v. Commr. of Police*, AIR 1990 SC 513 : (1990) 1 SCC 422; *Kumari (Smt.) v. State of Tamil Nadu*, (1992) 2 SCC 223 : AIR 1992 SC 2069.
For a full-fledged discussion on "compensation", see, M.P. JAIN, *A TREATISE ON ADM. LAW*, II; *CASES & MATERIALS ON ADM. LAW*, IV.
Also see, Ch. XXXIII, *infra*, Ch. XXXVIII, Sec. E.
29. For discussion on Art. 21, see, *infra*, Ch. XXVI.
30. *Chairman, Railway Board v. Chandrima Das*, AIR 2000 SC 988 : (2000) 2 SCC 465.
31. *Shakuntala Sharma v. State of Uttar Pradesh*, AIR 2000 All 219.
32. *Kumari (Smt.) v. State of Tamil Nadu*, AIR 1992 SC 2069 : (1992) 2 SCC 223.

Where, however, disputed questions of fact arise, a petition under Art. 226 is not a proper remedy.[33]

It is true that most of the cases coming before the courts for compensation under Art. 226, relate to deprivation of life or personal liberty guaranteed by Art. 21.[34] But, in theory, there could be no reason for not extending the same principle to the violation of any other Fundamental Right (under Art. 226) or to the breach of any other legal right.[35] The matter is discussed further at a later stage.[36]

(r) INTERLOCUTORY ORDERS

When a writ petition is filed, the Court may make an interim or interlocutory order. The purpose of such an order is to preserve in *status quo* the rights of the parties, so that, the proceedings do not become infructuous or ineffective by any unilateral overt acts by one side or the other during the pendency of the writ petition.[37]

The scope and effect of an interim order would depend upon terms of the order itself. In case of any ambiguity the interim order should be understood in the light of prayer made for interim relief, facts of the case and terms of the interim order.[38]

Exceptional situations can emerge where the granting of an interim relief would tantamount to granting the final relief itself. And then there may be converse cases where withholding of an interim relief would tantamount to dismissal of the main petition itself; for, by the time the main matter comes up for hearing there would be nothing left to be allowed as relief to the petitioner though all the findings may be in his favour. In such cases the availability of a very strong *prima facie* case of a standard much higher than just *prima facie* case, the considerations of balance of convenience and irreparable injury forcefully tilting the balance of the case totally in favour of the applicant may persuade the Court to grant an interim relief though it amounts to granting the final relief itself. Of course, such would be rare and exceptional cases. The Court would grant such an interim relief only if satisfied that withholding of it would prick the conscience of the Court and do violence to the sense of justice, resulting in injustice being perpetuated throughout the hearing, and at the end the Court would not be able to vindicate the cause of justice. Obviously such would be rare cases accompanied by compelling circumstances, where the injury complained of is immediate and pressing and would cause extreme hardship. The conduct of the parties shall also have to be seen and the Court may put the parties on such terms as may be prudent. Hence the Court has accepted the submission that since the election was for a period of one year out of which a little less than half of the time has already elapsed and in the absence of interim relief being granted to him there is nothing which would survive for being given to him by way of relief at the end of the final hearing. In *Deoraj* the Supreme Court indicated the factors to be considered

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33. *Tamil Nadu Electricity Board v. Sumathi,* AIR 2000 SC 1603 : (2000) 4 SCC 543; *Chairman, Grid Corp. of Orissa v. Sukamani Das,* AIR 1999 SC 3412 : (1999) 7 SCC 298.
34. *Common Cause v. Union of India,* (1999) 6 SCC 667.
35. *Lucknow Development Authority v. M.K. Gupta,* (1994) 1 SCC 243.
Also see, *Rabindra Nath Ghoshal v. University of Calcutta,* (2002) 7 SCALE 137.
36. See, *infra,* Ch. XXXVIII. Also, Ch. XXXIII.
37. *Kihota Hollohon v. Zachillu,* AIR 1993 SC 412 : 1992 Supp (2) SCL 651.
38. *BPL Ltd. v. R. Sudhakar,* (2004) 7 SCC 219 : AIR 2004 SC 3606.

before granting any interim relief namely, *prima facie* case, irreparable injury and balance of convenience. The Court expressed the view that ordinarily the Court is inclined to maintain *status quo*. The Court said: Interim order should not be granted as a matter of course, particularly in relation to matter where standards of institutions are involved and the permission to be granted to such institutions is subject to certain provisions of law and regulations applicable to the same and unless the same are complied with. Indeed by grant of such interim orders students who have been admitted in such institutions would be put to serious jeopardy, apart from the fact whether such institutions could run the medical college without following the law.[39]

All India Dravida Munnetra Kazagam (AIADMK) along with other political parties gave a call for total cessation of work and closure of shops etc. on 1.10.2007. This call was challenged in a writ petition filed in Madras High Court contending that the call in substance was for a 'bandh'. The High Court, by its interim order gave various directions on State Government and its police officers, basically, to ensure that persons who were not honestly responsive to the call should be able to carry on their normal activities. Aggrieved by the order, AIDMK took the matter to the Supreme Court. The Court after referring to the Full Bench judgment of the Kerala High Court,[40] which had declared 'bandh' and its enforcement to be illegal and unconstitutional, virtually incorporated the Kerala judgment and held that although generally an interim order should not be granted which would result in granting the main relief, in cases such as the one under consideration such relief could be granted and confirmed the interim order of the Madras High Court.[41]

In Ghouse[42] a show cause notice issued under FERA was challenged and interim relief was prayed for staying the notice upon which the High Court directed status quo. The Supreme Court held that High Court ought to have give reasons for granting such relief. The Court, however directed that the proceedings before the authority would continue but the final order should not be communicated without leave or further orders of the High Court.

Where the landlord files an application for execution of a eviction decree filed but an order under U.P. Accommodation Requisition Act, 1947 passed for requisition of the premises and the landlord challenged the requisition order as well as order pursuant to which possession of the premises was taken by State, interim order was issued directing the State either to proceed under Land Acquisition Act or vacate the premises within a week. But neither the order of DM produced before the Court nor any law or rule brought to the notice of the Court which would authorize the DM to take possession of any premises in such manner in which possession was taken by DM, This was labelled as high handed, arbitrary and without any legal sanction.[43]

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39. *Medical Council of India v. Rajiv Gandhi University of Health Sciences,* (2004) 6 SCC 76 : AIR 2004 SC 2603.
40. *Bharat Kumar v. State of Kerala,* AIR 1997 Ker 291.
41. *All India Anna Dravida Munnetra Kazhagam v. L.K.Tripathi,* (2009) 5 SCC 417, 452 : AIR 2009 SC 1314.
42. *Ibid.*
43. *State of Uttranchal v. Ajit Singh Bhola,* (2004) 6 SCC 800 : (2004) 5 JT 513.

While considering an interim application High Court is not justified in rendering a categorical finding on merits.[44]

The Supreme Court has cautioned the High Courts that *ex parte* injunctions should be granted only under "exceptional circumstances".[45]

An exparte order on the view that since the matter had to be remitted no prejudice would be caused to the respondents if they were not brought on record has been negatived.[46]

E. THE WRITS

(i) HABEAS CORPUS

The writ of *habeas corpus* is used to secure release of a person who has been detained unlawfully or without legal justification. The great value of the writ is that it enables an immediate determination of a person's right to freedom. Detention may be unlawful if *inter alia* it is not in accordance with law, or the procedure established by law has not been strictly followed in detaining a person, or there is no valid law to authorise detention, or the law is invalid because it infringes a Fundamental Right, or the Legislature enacting it exceeds its limits.[47]

Detention should not contravene Art. 22, as for example, a person who is not produced before a magistrate within 24 hours of his detention is entitled to be released.[48] The power of detention vested in an authority, if exceeded, abused or exercised *mala fide* makes the detention unlawful.[49]

Article 21 of the Constitution having declared that no person shall be deprived of life and liberty except in accordance with the procedure established by law, a machinery was needed to examine the question of illegal detention with utmost promptitude. The writ of habeas corpus is such a device. The writ has been described as a writ of right which is grantable *ex debito justitiae*. Though a writ of right, it is not a writ of course. The applicant must show a *prima facie* case of unlawful detention. Once, however, he shows such a case and the return is not good and sufficient, he is entitled to this writ as of right. While dealing with a habeas corpus application undue importance is not to be attached to technicalities, but at the same time where the Court is satisfied that an attempt has been made to deflect the course of justice by letting loose red herrings, the Court has to take serious note of unclean approach.[50]

While dealing with a petition for a writ of *habeas corpus*, the Court may examine the legality of the detention without requiring the person detained to be pro-

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44. *Union of India v. Kundan Rice Mills Limited*, (2009) 1 SCC 553 : (2008) 12 JT 36.
45. *Morgan Stanley Mutual Fund v. Kartick Das*, (1994) 4 SCC 225; *Union of India v. Era Educational Trust*, AIR 2000 SC 1573 : (2000) 5 SCC 57; see also *State of U.P. v. Ram Sukhi Devi*, (2005) 9 SCC 733 : AIR 2004 SC 284.
46. *Cyrill Lasrado v. Juliana Maria Lasrado*, (2004) 7 SCC 431 : AIR 2004 SC 1367.
47. *State of Bihar v. K.P. Verma*, AIR 1965 SC 575 : (1963) 2 SCR 183.
48. *Infra*, Ch XXVII.
49. *G. Sadanandan v. State of Kerala*, AIR 1966 SC 1925 : (1966) 3 SCR 590; *Ram Manohar Lohia v. State of Bihar*, AIR 1966 SC 740 : (1966) 1 SCR 709.
50. *Union of India v. Paul Manickam*, (2003) 8 SCC 342 : AIR 2003 SC 4622.

duced before it.[51] Thus the High Court will not direct the authorities concerned to lodge the report with the Police along with documents to enable them to register a case under the provisions of the Indian Penal Code, since the matter in issue before the court was the validity of the detention order and the curtailment of the personal liberty of the detenu and nothing more. Further, in such a case the court was not justified in issuing a direction and awarding exemplary costs (Rs.50,000/-) to be paid by the petitioner.[52] The writ is issued to the authority having the custody of the aggrieved person. It may be prayed for by the prisoner himself, or if he is unable to do so, by someone else on his behalf.[53] The writ is not issued if the Court is satisfied that the prisoner is not under unlawful restraint.[54]

Because the courts regard personal liberty as one of the most cherished values of mankind, the Supreme Court has lately sought to reduce procedural technicalities to the minimum in the matter of issue of *habeas corpus*. The Supreme Court has pointed out in *Icchu Devi v. Union of India*, that in case of an application for a writ of *habeas corpus*, the Court does not, as a matter of practice, follow strict rules of pleading. Even a postcard by a detenu from jail is sufficient to activise the Court into examining the legality of detention. Also, because of Art. 21, the Court places the burden of showing that detention is in accordance with the procedure established by law on the detaining authority.[55] The Court may grant an interim bail while dealing with a *habeas corpus* petition.[56]

There have been cases where persons picked up by the police or the army have disappeared without a trace. In such cases, on petitions for *habeas corpus* being moved by their relatives, courts have awarded compensation.[57]

In October, 1991, some officers and policemen of the Punjab Police abducted seven persons. As all efforts to have these persons released failed, a petition for *habeas corpus* was filed in the Supreme Court under Art. 32 seeking release of these persons. After perusing the various affidavits filed by various persons and after hearing arguments of the counsels, the Court became convinced that the enquiry into the matter so far by the Punjab Police had been highly unsatisfactory and that an independent enquiry at a very high level was called for. Accordingly, the Court directed the Director, CBI, to personally conduct the enquiry into the matter and report to the Court.[58]

The above matter came before the Court again in 1995 after the Director, CBI, completed the inquiry and placed his report before the Court. The Director concluded that the seven persons had been liquidated by the police. The Court held the whole police action as illegal and expressed its 'disapprobation' of the Punjab Police as it failed to discharge its primary duty of upholding law and order and of protecting the citizens. Instead, the whole episode "betrays scant respect for the life and property of innocent citizens". The Court directed the State to pay Rs. 1.50

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51. *Kanu Sanyal v. District Magistrate*, AIR 1973 SC 2684 : (1973) 2 SCC 674.
52. *Pooja Batra v. U.O.I.*, (2009) 5 SCC 296 : AIR 2009 SC 2256.
53. *Sheela Barse v. State of Maharashtra*, AIR 1983 SC 378 : (1983) 2 SCC 96.
54. *Janardan v. State of Hyderabad*, AIR 1951 SC 217; *Godavari v. State of Maharashtra*, AIR 1966 SC 1404 : (1966) 3 SCR 314.
55. AIR 1980 SC 1983 : (1980) 4 SCC 531. Also see, *infra*, Ch. XXVII, Sec. B.
56. *State of Bihar v. Rambalak Singh*, AIR 1966 SC 1441 : (1966) 3 SCR 344.
57. *Nilabati Behera v. State of Orissa*, AIR 1993 SC 1960 : (1993) 2 SCC 746; *Smt. Postsangbam Ningol Thokchom v. General Officer Commanding*, AIR 1997 SC 3534 : (1997) 7 SCC 725. Also see, *infra*, Ch. XXXIII.
58. *Inder Singh v. State of Punjab*, AIR 1995 SC 312.

lakhs for each of the said seven persons to his legal representatives. The Court took the view that the police force being the arm of the State, it must bear the consequences for its failure to enforce law and order and protect the citizens. The Court also directed initiation of legal action against the guilty policemen. When the guilty policemen were identified, the State should seek to recover from them the amount paid by the State as compensation as this was the tax-payers' money.[59]

A *habeas corpus* petition was filed by the father of T. It was alleged that T had been kept in illegal custody by the police officers. It was established that T was killed in an encounter with the police. The Court awarded Rs. 5 lac as compensation to the petitioner.[60]

A foreigner who enters India secretly cannot claim freedom of movement, and his detention with a view to expel him from India is not illegal.[61]

The petitioner was convicted by a Court martial for criminal misappropriation of money and was sentenced to a term of imprisonment. Rejecting his petition for a writ of *habeas corpus*, the High Court stated that *habeas corpus* was not available to question the correctness of a decision by a legally constituted Court of competent jurisdiction. The High Court can go into questions of jurisdiction of the Court martial, or whether it was properly constituted, or whether there was such an irregularity or illegality as would go to the root of its jurisdiction.[62]

Habeas corpus may also be issued when a person complains of illegal custody or detention by a private person.[63] When conflicting claims are made for the custody of an infant, the Court can enquire into these claims and award the custody to the proper person.[64]

After dismissal of criminal appeal, review petition and curative petition, the petitioner's plea that the Supreme Court allowed his appeal to the extent that his conviction under S. 121 of IPC was set aside, but he was convicted under S. 123 of IPC read with S. 39 Cr. PC though this was not the charge against him, and therefore he was deprived of opportunity to defend himself, the Court held that this aspect had been considered while dismissing review and curative petitions and entertaining a fresh petition under Art. 32 on the same ground would require setting aside the orders passed in review and curative petitions.[65]

(ii) *QUO WARRANTO*

The writ lies only in respect of a public office of a substantive character.[66] The writ does not therefore lie to question the appointment of a college principal as it is not a public office.[67]

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59. *Inder Singh v. State of Punjab*, AIR 1995 SC 1949 : (1995) 3 SCC 702. Also see, *Malkiat Singh v. State of Uttar Pradesh*, AIR 1999 SC 1522.
60. *Malkiat Singh v. State of Uttar Pradesh*, AIR 1999 SC 1522.
61. *Anwar v. State of Jammu & Kashmir*, AIR 1971 SC 337.
62. *S. Soundarajan v. Union of India*, AIR 1970 Del. 29.
63. *Madhu Bala v. Narendra Kumar*, AIR 1982 SC 938.
64. *Gohar Begum v. Suggi*, AIR 1960 SC 93 : (1960) 1 SCR 597; *Veena Kapoor v. Varinder Kumar*, AIR 1982 SC 792 : (1981) 3 SCC 92.
65. *Shaukat Hussain Guru v. State (NCT) Delhi*, (2008) 6 SCC 776 : AIR 2008 SC 2419.
66. *Ram Singh Saini v. H.N. Bhargava*, AIR 1975 SC 1852 : (1975) 4 SCC 676; *Arun Kumar v. Union of India*, AIR 1982 Raj 67.
67. *Niranjan Kumar v. Univ. of Bihar*, AIR 1973 Pat 85. For a clear enunciation as to when such writ is issued see *N. Kannadasan v. Ajoy Khose*, (2009) 7 SCC 1, 55.

The writ calls upon the holder of a public office to show to the Court under what authority he is holding that office. The Court may oust a person from an office to which he is not entitled. It is issued against the usurper of an office and the appointing authority is not a party. The Court can thus control election or appointment to an office against law, and protect a citizen from being deprived of a public office to which he may be entitled.[68]

If the statute prescribes certain qualifications for holding a public office, it is certainly open to the Court on a petition filed by a citizen to scrutinise the qualifications of the person whose appointment to the public office is called into question.[69]

To file a petition for *quo warranto*, it is not necessary that the petitioner should have suffered a personal injury himself, or should seek to redress a personal grievance.[70] Petitions for *quo warranto* have been moved to test the validity of election of a person to a university syndicate, or as the mayor of a municipal corporation,[71] nomination of members to a Legislative Council by the Governor,[72] appointment of the Chief Minister of a State,[73] or the Chief Justice of India,[74] or the Advocate-General in a State,[75] or a public prosecutor,[76] University teachers,[77] presiding officer of a labour Court,[78] etc.

The motives of the appointing officer in making the appointment in question are irrelevant in a *quo warranto* petition.[79] Also, the Court would not issue the writ if it is futile, *e.g.*, if the person holding the office, on being ousted by *quo warranto* can be reappointed.[80]

A petition for *quo warranto* was filed against the Chief Minister of Rajasthan on the ground that he was not validly elected to the House. The Rajasthan High Court rejecting the petition ruled that *quo warranto* may be issued on the petition of a member of the public if a Chief Minister holds office without lawful authority, and in breach of any constitutional provision. The office of the Chief Minister is one of substantive character created by the Constitution. But membership of an Assembly is not an office for the purposes of *quo warranto* and it is not a proper remedy to raise questions relating to the election of the Chief Minister to the House. Such a question can be raised properly only through an election petition.[81]

When the Governor of a State appoints as the Chief Minister under Art. 164 of the Constitution a person who is not qualified, or is disqualified, to be a member

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68. *Univ. of Mysore v. Govinda Rao*, AIR 1965 SC 491 : (1964) 4 SCR 575; *Puranlal v. P.C. Ghosh*, AIR 1970 Cal 118.
69. *Durga Chand v. Administrator*, AIR 1971 Del. 73.
70. *Satish Chander v. Rajasthan Univ.*, AIR 1970 Raj 184. But see, *Arun Kumar v. Union of India*, AIR 1982 Raj 67.
71. *Rajendar Singh v. Shejwalkar*, AIR 1971 MP 248.
72. *Supra*, Ch. VI.
73. *Supra*, Ch. VII.
74. *Supra*, Ch. IV.
75. *Karkare v. Shevde*, AIR 1952 Nag 330; see, *supra*, Ch. VII.
76. *Mohambaran v. Jayavelu*, AIR 1970 Mad. 63.
77. *Supra*, footnote 68.
78. *State of Haryana v. Haryana Co-op. Transport*, AIR 1977 SC 237 : (1977) 1 SCC 271.
79. *S.C. Malik v. P.P. Sharma*, AIR 1982 Del. 83.
80. *P.L. Lakhanpal v. A.N. Ray*, AIR 1975 Del. 66; *supra*, Ch. IV.
81. *Purshottam Lal v. State of Rajasthan*, AIR 1979 Raj 23. Also see, *infra*, Ch. XIX, under Elections.

of the State Legislature, the appointment is contrary to Art. 164 and is, thus, unconstitutional. Although the discretion of the Governor is not challengeable because of Art. 361, the appointment of the Chief Minister can be quashed by the High Court by issuing *quo warranto* to him.[82]

No writ of *quo warranto* is issuable against the Council of Ministers on the ground that it does not command majority support in the House. Under Art. 164, the choice of the Chief Minister by the Governor is not circumscribed by anything in the Constitution in terms of majority or minority party. The only effective check is that the Ministry shall fall if it fails to command a majority in the Assembly. But once installed, so long as the Legislature is not in session, a Ministry may carry on without being sure of such a majority. So long as the Ministry enjoys the pleasure of the Governor, no *quo warranto* can issue on the ground that it does not command majority support of the Assembly without the Assembly itself deciding that matter on its floor. No one can say that the Ministry does not enjoy the confidence of the Assembly when it is prorogued. Even when the Ministry is defeated on the floor of the House, the Governor may ask it to stay in office until alternative arrangements are made and no *quo warranto* shall issue during that period.[83]

A *quo warranto* cannot be issued seeking dismissal of the Chief Minister of a State on the ground of non-performance of a constitutional duty.[84] The Chief Minister holds office during the pleasure of the Governor; the Council of Ministers is collectively responsible to the State Assembly.[85] Therefore, the matter liesprimarily in the domain of the State Assembly or the Governor's discretion who appoints the Chief Minister. The proper remedy in the situation may be *mandamus* directing the Chief Minister to discharge his constitutional obligation. In this connection, the A.P. High Court has observed:[86]

> "Ordinarily, no action would lie against a person who holds elected office by virtue of an election and one who is not removable by the elector cannot be removed by issuance of a writ in the nature of *quo warranto,* unless one has incurred the disqualification to hold the elected office, specifically provided by the Constitution or any statutory law enacted thereunder. Disqualification cannot be read into the Constitution implicitly or by process of reasoning and presumptions, how so ever moralistic, ethical, desirable, high sounding they may be".

The Speaker of the Goa Assembly declared the Chief Minister and his two colleagues in the Cabinet disqualified for membership of the Assembly under the Anti-defection law.[87] The High Court passed an interim stay order. Thereafter, the Assembly removed the Speaker from office and the Deputy Speaker, acting as the Speaker, reviewing the earlier Speaker's order set it aside and thus removed the disqualification of the Chief Minister and his two colleagues.

Nearly after ten months, a writ petition was filed challenging the order passed by the Deputy Speaker. It was argued that the writ petition was not maintainable

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82. *B.R. Kapur v. State of Tamil Nadu,* AIR 2001 SC 3435 : (2001) 7 SCC 231.
83. *R.K. Nokulsana Singh v. Rishang Keising,* AIR 1981 Gau 48. Also see, *supra,* Chs. III and VII.
84. *Y.S. Rajasekara Reddy v. Nara Chandrababu Naidu,* AIR 2000 AP 142.
85. *Supra,* Ch. VII, Sec. A(iii)(c); Sec. B.
86. AIR 2000 AP, at 147.
87. See, *supra,* Ch. II, Sec. F and Ch. VI, Sec. B(iv).

because of laches,[88] but the Supreme Court rejected the contention and held that the petition for *quo warranto* was maintainable in the instant case for the following reasons : the petitioner was not asserting any personal interest; the persons concerned were holding high public offices inspite of being disqualified for membership of the House, *i.e.*, these persons continued to usurp the office and perpetuate an illegality and it was necessary to prevent the same.[89]

Appointment of a government pleader was quashed because the procedure prescribed in the relevant rules for this purpose had not been followed. The petition was made one year after the appointment. Ignoring the plea of *laches*, the Court observed that in a matter involving the right to a public office and violation of legal procedure to be adopted in making appointment to a public office, delay should not deter the Court in granting the discretionary relief and rendering justice.[90]

(iii) *MANDAMUS*

Mandamus is a command issued by a Court commanding a public authority to perform a public duty belonging to its office.[91] *Mandamus* is issued to enforce performance of public duties by authorities of all kinds. For example, when a tribunal omits to decide a matter which it is bound to decide, it can be commanded to determine the questions which it has left undecided.[92] Although the Court ordinarily is reluctant to assume the functions of the statutory functionaries it will step in by mandamus when the State fails to perform its duty. It shall also step in when the discretion is exercised but the same has not been done legally and validly. And even though existence of an alternative remedy is no bar to exercise jurisdiction under Art. 226, it will not ordinarily do so unless it is found that an order has been passed wholly without jurisdiction or contradictory to the constitutional or statutory provisions or where an order has been passed without complying with the principles of natural justice.[93]

The object of mandamus is to prevent disorder from a failure of justice and is required to be granted in all cases where law has established no specific remedy and where justice despite demanded has not been granted.[94] In the State of *Kerala Scheduled Tribes* case[95] although the statutory provision required restoration of "equal" extent of land, the Court, perhaps, without reference to the word "equal" issued a mandamus (in cases where restoration was not possible) directing the State to allot not only equal extent of land, but, where restoration was not possible to allot such land by taking recourse to acquisition proceedings with

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88. On 'Laches', see, *supra*, Sec. D(h).
89. *Kashinath G. Jalmi v. The Speaker*, AIR 1993 SC 1873 : (1993) 2 SCC 703.
90. *K. Bheema Raju v. State of Andhra Pradesh*, AIR 1981 AP 24.
91. *Guruswami v. Mysore*, AIR 1954 SC 592; Mysore *v. Chandrasekhara*, AIR 1965 SC 532; *S.I. Syndicate v. Union of India*; AIR 1975 SC 460; *Bihar Eastern Gangetic Fishermen Coop. Society v. Sipahi* Singh, AIR 1977 SC 2149 : (1977) 4 SCC 145; *Chet Ram v. Delhi Municipality*, AIR 1981 SC 653; *Samir Kumar v. State of Bihar*, AIR 1982 Pat. 66; *Comptroller & Auditor General v. K.S. Jagannathan*, AIR 1987 SC 537 : (1986) 2 SCC 679.
92. *Parry & Co. v. Commercial Employees Association*, AIR 1952 SC 179 : 1952 SCR 519; *K.V.R. Setty v. State of Mysore*, AIR 1967 SC 993.
93. *Guruvayoor Devaswom Managing Committee v. C.K. Rajan*, (2003) 7 SCC 546 : AIR 2004 SC 561.
94. *Union of India v. S. B. Vohra*, (2004) 2 SCC 150 : AIR 2004 SC 1402.
95. (2009) 8 SCC 46 : (2009) 9 JT 579.

a further direction not to allot hilly or other types of land not suitable for agricultural purposes. These directions are not in consonance with the substantive laws of the country and could be cited to effectively stifle non agricultural projects of national importance or conceived in public interest by vested interests This is what happened to the Tata Motors 'NANO' project when Tata pulled out of West Bengal due to political agitation and siege of the project site by a political party purportedly in the interest of owners of agricultural land acquired by Tata for setting up their plant.

Mandamus can be granted only when a legal duty is imposed on the authority in question and the petitioner has a legal right to compel the performance of this duty. The performance of the duty should be imperative and not discretionary. The existence of a right duty situation is no longer the sole basis for issuing a mandamus. The Courts now recognize promissory estoppel and legitimate expectations as causes of action for invoking the mandamus jurisdiction.[1]

It is not possible to lay down the standard exhaustively as to in what situation a writ of mandamus will issue and in what situation it will not. In other words, exercise of its discretion by the Court will also depend upon the law which governs the field, namely whether it is a fundamental law or an ordinary law. Ordinarily the Court will not exercise the power of the statutory authorities. It will at the first instance allow the statutory authorities to perform their own functions and would not usher the said jurisdiction itself.

The legal right of an individual may be founded upon a contract or a statute or an instrument having the force of law. For a public law remedy enforceable under Article 226 of the Constitution, the actions of the authority need to fall in the realm of public law be it a legislative act of the State, an executive act of the State or an instrumentality or a person or authority imbued with public law element. Thus the Court will not exercise its jurisdiction to entertain a writ application wherein public law element is not involved. In any event, the modern trend also points to judicial restraint in relation to administrative action. It may not be possible to generalize the nature of the action which would come either under public law remedy or private law field nor is it desirable to give exhaustive list of such actions. The question as to whether the judicial review is permissible and to what extent, will vary from case to case and no broad principles can be laid down.[2]

According to the Supreme Court, *mandamus* is issued, *inter alia*, "to compel performance of public duties which may be administrative, ministerial or statutory in nature". Usually the use of the word "shall" or "must" indicates a mandatory duty, but this is not conclusive and these words may be interpreted as "may". On the other hand, at times, the word "may" may be interpreted as "shall". Therefore, the Court has further observed: "What is determinative of the nature of duty, whether it is obligatory, mandatory or directory, is the scheme of the statute in which the 'duty' has been set out. Even if the 'duty' is not set out clearly and specifically in the statute, it may be implied as correlative to a 'Right'."[3] For example, *mandamus* can be issued directing the executive to do its legal duty by implementing the order of a tribunal.[4] Again, since it was the duty of

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1. See *Ramprovesh Singh v. State of Bihar*, (2006) 8 SCC 294 : (2006) 9 JT 35.
2. *Union of India v. S. B. Vohra*, (2004) 2 SCC 150 : AIR 2004 SC 1402.
3. *Mansukhlal Vithaldas Chauhan v. State of Gujarat*, AIR 1997 SC 3400 at 3405 : (1997) 2 SCC 622.
4. *Sharif Ahmad v. R.T.A., Meerut*, AIR 1978 SC 209 : (1978) 1 SCC 1.

the police to give necessary protection to properties being interfered with by lawless elements and unauthorized persons it is obliged to give such protection without insisting on payment by the private party seeking such protection.[5]

The scope of mandamus is determined by the nature of the duty to be enforced, rather than the identity of the authority against whom it is sought. However, the courts always retain the discretion to withhold the remedy where it would not be in the interest of justice to grant.[6]

Mandamus is a discretionary remedy and the High Court has full discretion to refuse to issue the writ in unsuitable cases.[7]

The Madhya Pradesh Government made a rule making it a matter of its discretion to grant dearness allowance to its employees. As no right was conferred on government servants to the grant of dearness allowance, and no duty was imposed on the government to grant it, and as the government had merely taken the power to grant the allowance at its own discretion, *mandamus* could not be issued to compel the government to exercise its discretionary power.[8]

Under Art. 229(2), the Chief Justice of a High Court can make rules prescribing conditions of service of officers and servants of the Court. However, the rules relating to salaries *etc*. require the approval of the State Executive.[9] It has been held that *mandamus* cannot be issued against the government directing it to give its approval to the rules made by the Chief Justice regarding salaries *etc*. of the staff the High Court. There is no obligation on the government to approve these rules. Also, the government's consent under the proviso to Art. 229(2) is not a mere formality.[10]

Article 16(4) of the Constitution confers discretion on the government to reserve posts for backward classes. Art. 16(4) neither imposes any obligation, nor confers power coupled with duty on the government to make reservations. Accordingly, *mandamus* cannot be issued directing the government to make reservations under Art. 16(4).[11]

The petitioner contended that persons junior to him in service had been appointed by the government but his claims had been ignored. The Supreme Court refused to issue the writ, for the persons appointed were qualified for the posts while the petitioner himself was not so qualified and so he could not be regarded as a person aggrieved for the purpose of the relief claimed.[12]

Mandamus cannot be issued to the State Government directing it to appoint a commission to inquire into changes in climatic cycle, floods in the State etc. be-

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5. *Howrah Mills Co. Ltd. v. Md. Shamin*, (2006) 5 SCC 539 : (2006) 6 SCALE 50.
6. *Binny Ltd. v. V. Sadasivan*, (2005) 6 SCC 657 : AIR 2005 SC 3202.
7. *State of Kerala v. K.P.W.S.W.L.C. Coop. Society Ltd.*, AIR 2001 Ker. 60.
8. *State of Madhya Pradesh v. Mandawar*, AIR 1954 SC 493 : (1955) 1 SCR 599.
In, *Jagdish Prasad v. M.C.D.*, AIR 1993 SC 1254 : 1993 Supp (2) SCC 221, the Supreme Court refused to issue *mandamus* to enforce the claim of municipal employees for transfer of ownership of municipal quarters to them because they had no legal right thereto.
Also see, *Rajashekhar v. State of Karnataka*, AIR 2000 Knt. 221.
9. *Supra*, this Chapter, Sec. B(u).
10. *State of Andhra Pradesh v. T. Gopalakrishnan*, AIR 1976 SC 123 : (1976) 2 SCC 883. Also, *State of Mysore v. Syed Mahmood*, AIR 1968 SC 1113 : (1968) 3 SCR 363; *Bihar E.G.F. Coop. Soc. v. Sipahi Singh*, AIR 1977 SC 2149 : (1977) 4 SCC 145; *State of Bihar v. Sri Chandradip Rai*, AIR 1981 SC 2071 : (1982) 2 SCC 272.
11. *Ajit Singh v. State of Punjab*, AIR 1999 SC 3471, 3481. Also see, Ch. XXIII, *supra.*
12. *Umakant v. State of Bihar*, AIR 1973 SC 964 : (1973) 1 SCC 485.

cause the government's power to appoint a commission is discretionary and optional.[13] *Mandamus* cannot be issued to the government directing it to bring a statute into force.[14] The writ cannot be issued to the legislature directing it to enact a particular law[15] *Mandamus* cannot also be issued directing a delegated legislative authority to make rules in furtherance of a statutory provision.[16] A policy decision or a matter of policy is not totally immune from judicial review. Inadequate study of a factor on the basis of which a policy decision is taken and where there is manifest arbitrariness or irrationality, interference by the courts is permissible.[17]

In the exercise of power of judicial review the Court cannot alter the status of a post e.g. directing the University to treat a honorary Visiting Professor a member of teaching post.[18]

In relation to a public interest litigation filed under Article 32 of the Constitution where a CBI investigation had been ordered relating to the protection of the Taj Mahal and it was alleged that the prosecuting Judges would not pursue the matter due to prevailing political situation, it was held that the jurisdiction of the Court was confined to seeing that proper criminal investigation is carried out and the Court cannot take over the function of the Magistrate or interfere with the Magistrate's function.[19] The Court however proceeded to observe that once a final report has been filed in terms of Section 173 of Cr. P.C. , it was the Magistrate alone who could take an appropriate decision in the matter which, however, could be subjected to judicial review.

Mandamus can be issued when the government denies to itself a jurisdiction which it undoubtedly has under the law.[20]

Mandamus is not issued if the right is purely of a private character. A private right, such as arising out of a contract, cannot be enforced through *mandamus* and the proper course is a civil suit except when the matter falls in the public law domain.[21] For example, in *Lotus Hotel*,[22] the Court issued a direction under Art.

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13. *Vijay Mehta v. State of Rajasthan*, AIR 1980 Raj 207.
For a full discussion on this point see, M.P. JAIN, *A TREATISE ON ADM. LAW*, Ch. XVI; *CASES & MATERIALS ON INDIAN, ADM. LAW*, III, Ch. XVII, Sec. B, 2465-2644.

14. *Altemesh Rein v. Union of India*, AIR 1988 SC 1768 : (1988) 4 SCC 54.

15. *State of Jammu & Kashmir v. A.R. Zakki*, AIR 1992 SC 1546 : 1992 Supp (1) SCC 548; *R.C. Poudyal v. Union of India*, AIR 1993 SC 1804 : 1994 Supp (1) SCC 324; *Union of India v. Deoki Nanda Aggarwal*, AIR 1992 SC 96; *R.K. Singh v. Union of India*, AIR 2001 Del. 12; *Karnataka v. State of Andhra Pradesh*, AIR 2001 SC 1560; *A.P. Sarpanchs Ass. v. State of Andhra Pradesh*, AIR 2001 AP 474.

16. *A.P. Sarpanchs Ass. v. A.P. supra.*

17. *Sanjay Singh v. U.P. Public Service commission, Allahabad*, (2007) 3 SCC 720 : AIR 2007 SC 950.

18. *State of Karnataka v. C. K. Pattamashetty*, (2004) 6 SCC 685.

19. *M. C. Mehta v. Union of India*, (2008) 1 SCC 407 : AIR 2008 SC 180.

20. *E.A. Coop. Society v. State of Maharashtra*, AIR 1966 SC 1149 : (1966) 3 SCR 365.

21. *Lekhraj Sathrandas v. Dy. Custodian*, AIR 1966 SC 334 : (1966) 1 SCR 120; *Har Shankar v. Dy. E.T Commr.*, AIR 1975 SC 1121 : (1975) 1 SCC 737; *D.R. Mills v. Commissioner, Civil Supplies*, AIR 1976 SC 2243; *Radhakrishna Agarwal v. State of Bihar*, AIR 1977 SC 1496; *Food Corporation of India v. Sujit Roy*, AIR 2000 Gau 61; *Divisional Forest Officer v. Bishwanath Tea Co.*, AIR 1981 SC 1368; *LIC v. Escorts Ltd.*, AIR 1986 SC 1370 : (1986) 1 SCC 264; *Namakkal South India Transports v. Kerala S.C.S. Corpn. Ltd.*, AIR 1997 Ker 56; *State of Gujarat v. M.P. Shah Charitable Trust*, (1994) 3 SCC 552; *Food Corpn. of India v. Jagannath Dutta*, AIR 1993 SC 1494; *State of Himachal Pradesh v. Raja Mahendra Pal*, AIR 1999 SC 1786; *State of Kerala v. K.P.W.S.W.L.C. Coop. Soc. Ltd.*, AIR 2001 Ker. 58; *LIC v. Asha Goel*, AIR 2001 SC 549 : (2001)

[Footnote 21 Contd.]

226 to enforce a contractual obligation by applying the doctrine of promissory estoppel.[23] Recourse may be had to *mandamus* if a public authority acts in an arbitrary and unlawful manner even though the source of the right of the petitioner may initially be in a contract.[24] As the Supreme Court has observed: [25]

> "Even though the rights of the citizens, therefore, are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play and natural justice, equality and non-discrimination."

Even in contractual matters, public authorities have to act fairly, and if they fail to do so, approach to Art. 226 would always be permissible because that would amount to violation of Art. 14 of the Constitution.[26] The Supreme Court has observed in *Mahabir Auto*:[27]

> "Even though the rights of the citizens are in the nature of contractual rights the manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play, natural justice , equality and non-discrimination in the type of the transactions and nature of the dealing as in the present case".

The Supreme Court has emphasized in *Tata Cellular v. Union of India*[28] that while the Court does not interfere with government's freedom of contract, invitation of tenders and refusal of any tender which pertain to policy matter, the Court can interfere when the state decision or action is vitiated by arbitrariness, unfairness, illegality, irrationality or unreasonableness.

To the same effect is the following observation of the Supreme Court in *LIC v. Escorts Ltd.*:[29]

> "… If the action of the state is related to contractual obligations or obligations arising out of the tort, the Court may not ordinarily examine it unless the action has some public law character attached to it. Broadly speaking, the Court

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[Footnote 21 Contd.]

2 SCC 160; *Alok Prasad Verma v. Union of India,* AIR 2001 Pat. 211; *State of Bihar v. Jain Plastics and Chemicals Ltd.,* AIR 2002 SC 206 : (2002) 1 SCC 216; *Supriyo Basu v. W. B. Housing Board,* (2005) 6 SCC 289 : AIR 2005 SC 4187.

For a fuller discussion on this topic, see, M.P. JAIN, *A TREATISE*, II; *CASES & MATERIALS*, IV; and Ch. XXXIX, *infra.*

22. *Gujarat State Financial Corporation v. Lotus Hotel,* AIR 1983 SC 848 : (1983) 3 SCC 379.

23. For the doctrine of promissory estoppel see, JAIN, A TREATISE ON ADM. LAW, II; JAIN, CASES & MATERIALS ON ADM. LAW, IV.

24. *D.F.O. v. Ram Sanehi Singh,* AIR 1973 SC 205 : (1971) 3 SCC 864.

25. *L.I.C. of India v. Consumer Education and Research Centre,* AIR 1995 SC 1811, 1821 : (1995) 5 SCC 482.

Also see, *R.D. Shetty v. International Airport Authority of India*, AIR 1979 SC 1628 : (1979) 3 SCC 489.

26. *Shreelekha Vidyarthi v. State of Uttar Pradesh,* AIR 1991 SC 537 : (1991) 1 SCC 212.

27. *Mahabir Auto Stores v. Indian Oil Corp.*, AIR 1990 SC 1031, 1037 : (1990) 3 SCC 752.

Also see, *Radhakrishna Agarwal v. State of Bihar,* AIR 1977 SC 1496 : (1977) 3 SCC 457; *Sterling Computers Ltd. v. M.N. Publications Ltd.*, (1993) 1 SCC 445; *Union of India v. Graphic Industries Co.*, (1994) 5 SCC 398 : AIR 1995 SC 409.

For a full discussion on "Government Contracts and Writs", see, M.P. JAIN, *A TREATISE OF ADM. LAW*, II, Ch; *CASES & MATERIALS ON INDIAN ADM. LAW*, IV.

28. (1994) 6 SCC 651 : AIR 1996 SC 11.

29. AIR 1986 SC 1370. Also, *LIC of India v. Consumer Education & Research Centre,* AIR 1995 SC 1811 : (1995) 2 SCC 482.

> will examine actions of state if they pertain to the public law domain and refrain from examining them if they pertain to the private Law field".[30]

Mandamus is not available to enforce a payment of money due to the claimant under a civil liability, as this is a question which is better determined in a civil suit, but an order to pay money may be made against the State to enforce a statutory obligation.[31] But more in keeping with the trend of the law, the Court has held that a consequential monetary claim can be made and given.[32] *Mandamus* can be issued when tax is collected illegally.[33]

In the case noted below, a cess was collected from the sugar mills under an unconstitutional law. The mills paid the cess under protest and did not pass on the cess to any third party but bore the brunt themselves. In the circumstances, the Court issued *mandamus* to the taxing authorites to refund the money illegally collected as cess.[34]

Mandamus cannot be issued to the legislature to enact a particular legislation.[35] Similarly, *mandamus* cannot be issued to the executive to make a particular rule in the exercise of its power of delegated legislation, as the power to frame rules is legislative in nature.[36]

Mandamus cannot be issued to violate law. A writ of *mandamus* can be issued to a statutory authority to compel it to perform its statutory obligation. But *mandamus* cannot issue to compel it to pass an order in violation of a statutory provision.[37]

Mandamus cannot be denied on the ground that the duty to be enforced is not imposed by statute. As De Smith has observed:

> "To be enforceable by *mandamus* a public duty does not necessarily have to be one imposed by statute. It may be sufficient for the duty to have been imposed by charter, common law, custom or even contract".

The Supreme Court has adopted with approval the above statement in the *Shri Anadi Mukta Sadguru* case with the following observation:[38]

> "The judicial control over the fast expanding maze of bodies affecting the rights of the people should not be put into water-tight compartment. It should

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30. Also see, *infra*, Chs. XXXVIII and XXXIX; See also *Jagdish Mandal v. State of Orissa*, (2007) 14 SCC 517 : (2006) 14 SCALE 224.

31. *Burmah Construction v. State of Orissa*, AIR 1962 SC 1320 : 1962 Supp (1) SCR 242; *Hari Raj v. Sanchalak Panchayati Raj*, AIR 1968 All. 246.

32. *ABL International Ltd. v. Export Credit Guarantee Corpn. of India Ltd.*, (2004) 3 SCC 553 : (2003) 10 JT 300.

33. *Sales Tax Officer v. Kanhaiyalal*, AIR 1959 SC 135; *Sugammal v. State of Madhya Pradesh*, AIR 1965 SC 1740 : (1965) 56 ITR 84; *Shree Baidyanath Ayurved Bhawan Pvt. Ltd. v. State of Bihar*, AIR 1996 SC 2829 : (1996) 6 SCC 86.

34. *U.P. Pollution Control Board v. Kanoria Industrial Ltd.*, AIR 2001 SC 787 : (2001) 2 SCC 549.

35. *Asif Hameed v. State of J&K*, AIR 1989 SC 1899, 1906 : 1989 Supp (2) SCC 364.

36. *Supreme Court Employees' Welfare Ass. v. Union of India*, AIR 1990 SC 334; *State of Jammu & Kashmir v. A.R. Zakki*, AIR 1992 SC 1546 : 1992 Supp (1) SCC 548; *A.P. Sarpanchs Ass. v. State of Andhra Pradesh*, AIR 2001 AP 474, 484.
Also see, *supra*, Ch. II, Sec. N.

37. *Santosh Kumar v. State of Bihar*, AIR 1997 SC 978; *Hope Textiles Ltd. v. Union of India*, (1995) Supp (3) SCC 199.

38. AIR 1989 SC 1607, at 1613 : (1989) 2 SCC 691.
For a discussion on "Administrative Duties, see, M.P. JAIN, *CASES & MATERIALS ON ADM. LAW*, III, Ch. XIX.

> remain flexible to meet the requirements of variable circumstances. *Mandamus* is a very wide remedy which must be easily available 'to reach injustice wherever it is found.' Technicalities should not come in the way of granting that relief under Art. 226."

In the modern era, extensive discretionary powers are being conferred on the executive.[39] In such cases, the Court cannot ask an authority to exercise its discretion in a particular manner not expressly required by law, or question its exercise on merits, or substitute its own discretion for that of the authority in which it is vested. The Court can issue *mandamus* only to direct the authority to exercise discretion according to law.[40]

When a statutory authority is invested with certain powers, it may do all things which are necessary for giving effect to such power. Hence directions given by the Delhi Electricity Regulatory Commission that all existing meters should be replaced by electronic meters in exercise of its power to frame tariff were held to be valid.[41] The Court observed that with the advance in science and technology it should adopt the course of creative interpretation of the provisions of a statute.[42]

The Court does not sit in appeal over the order and is not entitled to consider the propriety or the correctness or the satisfactory character of the reasons given by the government for making the order. But if an authority having discretion is also under a duty to act and exercise its discretion then the courts may enforce this duty and ask the authority to act according to law.[43]

A rule framed under the City of Bombay Police Act, 1902, provided that the Commissioner of Police "shall have power in his absolute discretion at any time to cancel or suspend any licence granted under these rules". Interpreting the rule, the Supreme Court stated that where the Commissioner has before him objections received from the public to the grant of a cinema licence, the Commissioner was obligated to exercise his discretion either to cancel the licence or to reject the objections.[44]

The Syndicate of a University cancelled the examination in a subject and directed re-examination as it was satisfied that there had been leakage of questions. The Supreme Court emphasized that it was not the Court's function to substitute its discretion for that of the University authorities.[45] The Supreme Court has observed recently in *State of West Bengal v. Nuruddin Malik*:[46]

> "The courts can either direct the statutory authorities, where it is not exercising its discretion, by mandamus to exercise its discretion or when exercised to see whether it has been validly exercised. It would be inappropriate for the Court to substitute itself for the statutory authorities to decide the matter."

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39. For discussion on "Discretionary Powers" see, M.P. JAIN, *A TREATISE ON ADM. LAW*, I, Chs. XVII, XVIII & XIX; JAIN, *CASES & MATERIALS ON INDIAN ADM. LAW*, III, Ch. XVI.

40. *U.P. State Road Transport Corpn. v. Mohd. Ismail*, AIR 1991 SC 1099 : (1991) 3 SCC 239; *State of Haryana v. Naresh Kumar Bali*, (1994) 4 SCC 448, 453.

41. *Suresh Jindal v. Bses Rajdhani Power Ltd.*, (2008) 1 SCC 341 : AIR 2008 SC 280.

42. *Ibid.*

43. *Comptroller and Auditor-General v. K.S. Jagannathan*, AIR 1987 SC 545 : (1986) 2 SCC 679.

44. *Commr. of Police v. Gordhandas*, AIR 1952 SC 16 : (1991) 3 SCC 239; *Ruttonjee v. State of West Bengal*, AIR 1967 Cal. 450.

45. *Vice-Chancellor v. S.K. Ghosh*, AIR 1954 SC 217 : 1954 SCR 883; *State of Mysore v. Chandrasekhar*, AIR 1966 SC 532.

46. AIR 1999 SC 1466 at 1471 : (1998) 8 SCC 143.

In case of discretion vested in an authority, the Court would ordinarily quash the order if discretion has been abused, or not been properly exercised, or when the public authority has acted against law or not in accordance with law,[47] or has exceeded the limits of its powers,[48] or has acted *mala fide*,[49] or has not applied its mind,[50] or has taken into account an irrelevant consideration,[51] or passes an order without there being any material to support the same.[52] Thus, under S. 10(1)(d) of the Industrial Disputes Act, 1947, the government may refer an industrial dispute for adjudication to an industrial tribunal. Once a matter has been so referred, the government has no power to cancel or supersede the reference subsequently, and if the government seeks to do so, *mandamus* can be issued.[53]

If the bid of a party was rejected erroneously, and he had no knowledge thereof, he can challenge not only the rejection of his bid but also a direction upon the authority for the acceptance of his bid as in such a situation, filing of another writ petition would have been an exercise in futility.[54]

A government decision taken on purely political considerations, without any material, can be quashed by the writ Court.[55]

Under sec. 6 of the Prevention of Corruption Act, 1947, a public servant could not be prosecuted for certain specified offences without the sanction of the concerned government. The Supreme Court has emphasized in the case noted below,[56] that the grant of sanction was a solemn affair and not merely a matter of form. Sanction granted mechanically and without the application of mind by the concerned authority could not be regarded as valid and *mandamus* could be issued to quash the same. The Court has observed in this connection:[57]

> "In the performance of this duty, if the authority in whom the discretion is vested under the statute, does not act independently and passes an order under the instructions and orders of another authority, the Court would intervene in the matter, quash the order and issue a mandamus to that authority to exercise its own discretion".

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47. *Satwant Singh v. A.P.O.*, AIR 1967 SC 1836 : (1967) 3 SCR 525; *Jaisinghani v. Union of India*, AIR 1967 SC 1427 : (1967) 2 SCR 703; *Mangudi v. State of Tamil Nadu*, AIR 1971 Mad. 275; *Krishna Cinema v. State of Gujarat*, AIR 1971 Guj. 103.

48. *Calcutta Discount Co. v. I.T.O.*, AIR 1961 SC 372 : (1961) 2 SCR 241.

49. *Pratap Singh v. State of Punjab*, AIR 1964 SC 72 : (1964) 4 SCR 733; *Rowjee v. State of A.P.*, AIR 1964 SC 962 : (1964) 6 SCR 330; *State of Punjab v. Ramjilal*, AIR 1971 SC 1228 : (1970) 3SCC 602; *A. Periakaruppan v. State of Tamil Nadu*, AIR 1971 SC 2303; *State of Haryana v. Rajendra*, AIR 1972 SC 1004; *State of Punjab v. Gurdial Singh*, AIR 1980 SC 319 : (1980) 2 SCC 471.

50. *State of Punjab v. Hari Kishan*, AIR 1966 SC 1081; *King-Emperor v. Sibnath Bannerjee*, 72 I.A. 241; *Kishori Mohan v. State of West Bengal*, AIR 1972 SC 1749; *Nandlal v. Bar Council*, AIR 1981 SC 477.

51. *Irani v. State of Madras*, AIR 1961 SC 1731; *Rohtas Industries v. S.D. Agrawal*, AIR 1969 SC 707; *Sheo Nath Singh v. App. Asstt. Commr. of I.T.*, AIR 1971 SC 2451; *Manu Bhushan v. State of West Bengal*, AIR 1973 SC 295; *Asstt. Controller of Estate Duty v. Prayag Dass*, AIR 1981 SC 1263 : (1981) 3 SCC 181.

52. *Union of India v. Brij Fertilizers Pvt. Ltd.*, (1993) 3 SCC 564.

53. *State of Bihar v. Ganguly*, AIR 1958 SC 1018 : 1959 SCR 1191; *Mahboob Sherrif v. Mysore State Tr. Authority*, AIR 1960 SC 321.

54. *Jespar I. Slong v. State of Meghalaya* (2004) 11 SCC 485 : AIR 2004 SC 3533.

55. *N.V. Rajula Reddy v. Govt. of A.P.*, AIR 1997 AP 222.

56. *Mansukhlal Vithaldas v. State of Gujarat*, AIR 1997 SC 3400 : (1997) 7 SCC 622.

57. *Ibid*, at 3405.

A mere irregularity, however, in an authority exercising its power is not a sufficient ground for issue of the writ.[58] A *mandamus* can be issued to restrain a public authority from acting under a void law.[59] Ordinarily *mandamus* would not be issued to enforce administrative directions which do not have the force of law,[60] but in some cases, the courts have enforced the directions.[61]

A *mandamus* can issue to quash an illegal assessment of a tax and for refund of money illegally realised as tax as a consequential relief.[62] But *mandamus* would not issue merely for refund of money due from the State on account of its having made an illegal exaction, and for this purpose a suit should be filed in a civil Court.[63]

A party seeking *mandamus* must first call upon the authority concerned to do justice by performing its legal obligation and show that it has refused or neglected to carry it out within a reasonable time before applying to a Court for *mandamus* even where the alleged obligation is established.[64]

But, the Patna High Court has disagreed with this approach.[65] The Court has characterised this rule as a "technical requirement of the English Courts" which need not be followed in India. As has been emphasized by the Supreme Court, the law relating to writs in India "has gone far ahead of the technicalities which are associated with the issuance of writ in English courts." If, therefore, in a given situation, the Court finds that the demand for justice would be an idle formality, the Court can issue *mandamus.*

Where a challenge is thrown to show cause notice against proposed classification of goods under Central Excise Tariff Act, 1985, the Court will follow normal practice of principle non interference at the stage of issuance of show cause notice. However, a show cause notice issued without jurisdiction or in abuse of process of law would certainly be interfered with. Such interference would be rare and in order to invoke such interference, it should be *prima facie* established that the notice was without jurisdiction or was abuse of process of law. Mere assertion to such effect will not be sufficient. The Supreme Court upheld the High Court quashing the show cause notice on the ground that the same was a mere

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58. *Cooverji v. Excise Commr.*, AIR 1954 SC 220.

59. *Dwarka v. State of Uttar Pradesh*, AIR 1954 SC 224.

60. *State of Assam v. A.K. Sarma*, AIR 1965 SC 1196 : (1965) 1 SCR 890; *Fernandez v. State of Mysore*, AIR 1967 SC 1753 : (1967) 3 SCR 636; *J.R. Raghupaty v. State of Andhra Pradesh*, AIR 1988 SC 1681 : (1988) 4 SCC 364.

61. *Jewat Bai & Sons v. G.C. Batra*, AIR 1967 Del 310; *Baleshwar Dass v. State of Uttar Pradesh*, AIR 1981 SC 41 : (1980) 4 SCC 226; *Bishamber Dayal Chandra Mohan v. State of Uttar Pradesh*, AIR 1982 SC 33 : (1982) 1 SCC 39.

For a full discussion on "Directions", see, M.P. JAIN, *A TREATISE ON ADM. LAW*, I, Ch. VIII; *CASES & MATERIALS*, I, Ch VII.

62. *State of Madhya Pradesh v. Bhailal Bhai*, AIR 1964 SC 1006 : (1964) 6 SCR 261; *A. Match Industries v. Union of India*, AIR 1971 AP 69; *SAIL v. State of Orissa*, AIR 2000 SC 946 : (2000) 3 SCC 200; *U.P. Pollution Control Board v. Kanoria Industrial Ltd.*, AIR 2001 SC 787 : (2001) 2 SCC 549.

63. *Suganmal v. State of Madhya Pradesh*, AIR 1965 SC 1740 : (1965) 56 ITR 84.

But see, *Food Corporation of India v. Viramgam Nagar Palika*, AIR 2000 Guj 91.

64. *State of Haryana v. Chaman Mal*, AIR 1976 SC 1654; *Kamini Kumar Daschoudhary v. State of West Bengal*, AIR 1972 SC 2060 : (1972) 2 SCC 42; *S.I. Syndicate v. Union of India*, AIR 1975 SC 460; *Amritlal v. Collector, C.E.C. Revenue*, AIR 1975 SC 538 : (1975) 4 SCC 714.

65. *Hem Narain Singh v. Ganesh Singh*, AIR 1995 Pat. 1.

repetition of earlier show cause notices with slight variations not relatable to any different test.[66]

(iv) CERTIORARI & PROHIBITION

The writs of *certiorari* and prohibition are issued practically on similar grounds. The only difference between the two is that *certiorari* is issued to quash a decision after the decision is taken by a lower tribunal while prohibition is issuable before the proceedings are completed.

The object of prohibition is prevention rather than cure. For example, the High Court can issue prohibition to restrain a tribunal from acting under an unconstitutional law. But if the tribunal has already given its decision then *certiorari* is the proper remedy in such a situation.

It may be that in a proceeding before an inferior body, the High Court may have to issue both prohibition and *certiorari*; prohibition to prohibit the body from proceeding further, and *certiorari* to quash what has already been done by it.

In the absence of very cogent or strong reasons, issuance of writs of prohibition is improper. It was pointed out that since under CPC the civil Court had sufficient powers to decide its own jurisdiction the High Court erred in interfering by prohibition and directed the civil Court to decide preliminary issues as to the maintainability of the suit and applicability of the bar of res judicata/estoppel.[67]

The jurisdiction to issue *certiorari* is a supervisory jurisdiction and the High Court exercising it is not entitled to act as an appellate Court.

The Supreme Court has emphasized that a writ in the nature of *certiorari* is a wholly inappropriate relief to ask for when the constitutional validity of a legislative measure is being challenged. In such a case, the proper relief to ask for would be a declaration that a particular law is unconstitutional and void. If a consequential relief is thought necessary, than a writ of *mandamus* may be issued restraining the state from enforcing or giving effect to the provisions of the law in question.[68]

Certiorari can be issued even if the lis is between two private parties. The law has always been, that a writ of certiorari is issued against the acts or proceedings of a judicial or quasi judicial body conferred with power to determine question affecting the rights of subjects and obliged to act judicially. Since the Writ of certiorari is directed against the act, order or proceedings of the subordinate Court, it can issue even if the lis is between two private parties.[69]

These writs go to a body acting in an adjudicatory capacity and according to natural justice or fair procedure and not to one acting in a purely administrative

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66. *Union of India v. Vicco Laboratories*, (2007) 13 SCC 270 : (2007) 13 SCALE 481.

67. *Thirumala Tirupati Devasthanams v. Thallappaka Ananthacharyulu,* (2003) 8 SCC 134 : AIR 2003 SC 3290.

68. *Praboth Verma v. Uttar Pradesh*, AIR 1985 SC 167 : (1984) 4 SCC 251; See also *Surya v. Ram Chander Rai* (2003) 6 SCC 675 : AIR 2003 SC 3044.

69. *Surya Dev Rai v. Ram Chander Rai,* (2003) 6 SCC 675 : AIR 2003 SC 3044; *T. C. Basappa v. T. Nagappa*, AIR 1954 SC 440 : (1955) 1 SCR 250; *Province of Bombay v. Khushaldas S. Advani,* AIR 1950 SC 222 : 1950 SCR 621; *Dwarka Nath v. ITO,* AIR 1966 SC 81 : (1965) 3 SCR 536 relied on *Ganga Saran v. Civil Judge, Hapur,* 1991 All LJ 159 : AIR 1991 All 114 (FB).

manner. It is not usual to find an express provision in a statute to indicate whether the body set up by it is to act according to natural justice or otherwise. In most cases, it is to be implied from the statute. A writ of certiorari can be issued in relation to an order passed by a subordinate court.[70]

Over time, courts have been expanding the horizons of natural justice.[71] Thus, *certiorari* has been issued to: authorities dealing with licensing liquor shops,[72] passing the order of confiscation or imposing penalty under the Sea Customs Act,[73] tax assessment proceedings,[74] cancellation of examination results of a candidate, or expulsion of a student by a University,[75] an enquiry commission under the Commissions of Enquiry Act,[76] industrial tribunals,[77] election tribunals,[78] dismissal from service,[79] or removal from membership of a body,[80] cancellation of a licence,[81] requisitioning of property for a public purpose,[82] or an enquiry committee.[83]

The District Consumer Forum, the State Consumer Forum as well as the National Commission constituted by the Consumer Protection Act, 1986, have adjudicatory powers and also have same "trappings of a Court". These bodies can therefore be regarded as 'tribunals'[84] and, thus, subject to *certiorari.*

Certiorari can be isued under Art. 226 to a Court-martial. A Court-martial is not subject to High Court's superintendence under Art. 227.[85] In *Major A. Hussain*[86] the Supreme Court pointed out that Court Martial is to a significant degree a specialized part of overall mechanism by which the military discipline is preserved. It is its special character which justifies adjudication by such courts try offences under the Army Act. The Court Martial discharges judicial functions. Their decisions are reviewable under Art. 226 if the Court martial has failed to follow the prescribed

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70. *Surya Dev Raj v. Ram Chander Rai*, 2003 (6) SCC 675 : AIR 2003 SC 3044.

71. *Ridge v. Baldwin*, (1963) 2 WLR 935; *Kraipak v. Union of India*, AIR 1970 SC 150 : (1969) 2 SCC 262; 13 JILI 362 (1971).

For a detailed discussion on the concept of natural justice, see, M.P. JAIN, *A TREATISE OF ADMINISTRATIVE LAW*, I, Chs. IX-XII; M.P. JAIN, *CASES & MATERIALS ON INDIAN ADM. LAW*, I, Chs. VIII-XI.

72. *Nagendra v. Commr., Hills Division*, AIR 1958 SC 398 : 1958 SCR 1240; also *infra*.

73. *Sewpujanrai v. Customs Collector*, AIR 1958 SC 845 : 1959 SCR 821; *Asstt. Collector Customs v. Malhotra*, AIR 1972 SC 2083.

74. *K.T. Moopil Nair v. State of Kerala*, AIR 1961 SC 552 : (1961) 3 SCR 77; *Board of Revenue v. Vidyawati*, AIR 1962 SC 1217 : 1962 (Supp) 3 SCR 50; *Sovachand Mulchand v. Collector, Central Excise*, AIR 1968 Cal. 174.

75. *Board of High School v. Ghanshyam*, AIR 1962 SC 1110 : 1962 Supp (3) SCR 36; *Board of High School v. Chitra*, AIR 1970 SC 1039 : (1970) 1 SCC 121.

76. *State of Jammu & Kashmir v. Bakshi Ghulam Mohd.*, AIR 1967 SC 122.

77. *Kirloskar Electric Co. v. Their Workmen*, AIR 1973 SC 2119 : (1973) 2 SCC 247.

78. *Durga Shankar v. Raghuraj*, AIR 1954 SC 520 : (1955) 1 SCR 267.

79. *State of Orissa v. Dr. Binapani*, AIR 1967 SC 1269 : (1967) 2 SCR 625.

80. *State of Punjab v. Bakhtawar Singh*, AIR 1972 SC 2083; *Bhagat Ram v. State of Punjab*, AIR 1972 SC 1571 : 1972 (2) SCC 170.

81. *Mahabir Prashad Santosh Kumar v. State of Uttar Pradesh*, AIR 1970 SC 1302 : (1970) 1 SCC 764.

82. *Madan Gopal v. District Magistrate*, AIR 1972 SC 2656 : (1973) 1 SCC 89.

83. *Union of India v. M.B. Patnaik*, AIR 1981 SC 858 : (1981) 2 SCC 159.

84. *Spring Meadows Hospital v. Haroj Ahluwalia*, AIR 1998 SC 1801 : (1998) 4 SCC 39.

85. *Ranjit Thakur v. Union of India*, AIR 1987 SC 2386 : (1987) 4 SCC 611; *Union of India v. Major A. Hssain*, AIR 1998 SC 577; *Union of India v. R.K. Sharma*, AIR 2001 SC 3053.

86. *Union of India v. Major A. Hussain*, (1998) 1 SCC 537 : AIR 1998 SC 1344.

procedure or act without or in excess of has jurisdiction and the evidence is sufficient for the punishment.[87]

The grounds for the issue of *certiorari* have been succinctly stated by the Supreme Court in *Syed Yakoob v. K.S. Radhakrishnan.*[88] The writ of *certiorari* or prohibition is issued, *inter alia* on the following grounds:

(1) when the body concerned proceeds to act without, or in excess of, jurisdiction, or
(2) fails to exercise its jurisdiction[89]; or
(3) there is an error of law apparent on the face of the record in the impugned decision of the body; or
(4) the findings of fact reached by the inferiror tribunal are based on no evidence; or
(5) it proceeds to act in violation of the principles of natural justice; or
(6) it proceeds to act under a law which is itself invalid, *ultra vires* or unconstitutional, or
(7) it proceeds to act in contravention of the Fundamental Rights.[90]

(a) JURISDICTIONAL ERROR

Want of jurisdiction may arise from the nature of the subject-matter so that the inferior body might not have authority to enter on the inquiry.[91] It may also arise from the absence of some essential preliminary, or from the absence of a jurisdictional fact. A plea as to the lack of jurisdiction where it does not involve any question of fact and is a pure question of law can be raised even before the highest Court.[92]

Where the jurisdiction of a body depends upon a preliminary finding of fact in a proceeding for writ of *certiorari*, the Court may determine whether or not that finding of fact is correct. The reason is that by wrongly deciding such a fact, the body cannot give itself jurisdiction;[93]

In *Anisminic*,[94] the House of Lords has given a very broad connotation to the concept of "jurisdictional error". It has been laid down in *Anisminic* that a tribunal exceeds jurisdiction not only at the threshold when it enters into an inquiry which it is not entitled to undertake, but it may enter into an enquiry within its jurisdiction in the first instance and then do some thing which would deprive it of its jurisdiction and render its decision a nullity. In the words of Lord Reid :

> "But there are many cases where, although the tribunal had jurisdiction, to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given

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87. Followed in *Pradeep Singh v. Union of India,* (2007) 11 SCC 612 : (2007) 6 JT 1.
88. AIR 1964 SC 477 : (1964) 5 SCR 64.
89. *S.T.O. v. Shiv Ratan,* AIR 1966 SC 142 : (1965) 3 SCR 71; *C.I.T. v. A. Raman & Co.*, AIR 1968 SC 49; *Chetkar v. Viswanath,* AIR 1970 SC 1832 : (1970) 2 SCC 217; *Tata Consulting Engineers v. Workmen,* AIR 1981 SC 599.
90. *U.P. Sales Tax Service Assn. v. Taxation Bar Assn.,* (1995) 5 SCC 716.
91. *Express Newspapers. v. Workers,* AIR 1963 SC 569; *Mayapati v. State of Haryana,* AIR 1973 P&H 356.
92. *Pushpa Devi Bhagat v. Rajinder Singh,* (2006) 5 SCC 566 : AIR 2006 SC 2628.
93. *Raja Brahma Anand v. State of U.P.*, AIR 1967 SC 1081 : (1967) 1 SCR 373; *State of Madhya Pradesh v. Jadav,* AIR 1968 SC 1186; *Raja Textiles v. I.T.O., Rampur,* AIR 1973 SC 1362.
94. *Aiminic Ltd. v. Foreign Compensation Commission,* [1969] 2 AC 147.

> its decision in bad faith. It may have made a decision which it had not power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account some thing which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive."

The essence of the above observation is that even though a tribunal may have 'threshold jurisdiction' to enter upon an inquiry yet it may later do something which may render its decision invalid. The events amount to jurisdictional errors, mentioned above, are : bad faith, non complying with natural justice, making the formal order without having any power to do so, misconstruing decision-making power so that the decision-maker fails to deal with the question remitted to him but decides some other question not remitted to him for decision, not taking into account relevant considerations, or basing the decision on irrelevant considerations. In any of these circumstances, the decision of a body would be a nullity. This list is not exhaustive but only represents the variety of 'jurisdictional' grounds of attack. *Anisminic* has thus given a very broad significance to the expression "jurisdictional error". In any of these circumstances, the writ Court can issue *certiorari* to quash the decision.

(b) ERRORS OF LAW

The writ is also issued for correcting an 'error of law apparent on the face of the record.'[1]

To attract the writ, a mere error of law is not sufficient; it must be one which is manifest or patent on the face of the record; mere formal or technical errors, even of law, are not sufficient'.[2]

This concept is indefinite and cannot be defined precisely or exhaustively, and so it has to be determined judicially on the facts of each case. The concept, according to the Supreme Court, "is comprised of many imponderables: it is not capable of precise definition, as no objective criterion can be laid down, the apparent nature of the error, to a large extent, being dependent upon the subjective element."[3]

A general test to apply however is that no error can be said to be apparent on the face of the record if it is not 'self-evident' or 'manifest', if it requires an examination or argument to establish it, if it has to be established by a long drawn out process of reasoning, or lengthy or complicated arguments, on points where there may conceivably be two opinions.[4] If two opinions on the same material are reasonably possible, the finding arrived at one way or the other cannot be called a patent error.[5] But this test is not articulate and may fail because what might be

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1. *J.D. Jain v. Management, State Bank,* AIR 1982 SC 673; *State of Uttar Pradesh v. Prescribed Authority Kichhu,* AIR 1982 All. 151.
2. *Padeananda v. Board of Revenue,* AIR 1971 Ass 16.
3. *Shanmugam v. S.R.V.S.,* AIR 1963 SC 1626 : (1964) 1 SCR 809; *T. Prem Sagar v. S.V. Oil Co.,* AIR 1965 SC 111 : (1964) 5 SCR 1030.
4. *Satyanarayan v. Mallikarjun,* AIR 1960 SC 137 : (1960) 1 SCR 890.
5. *Ranjeet Singh v. Ravi Prakash* (2004) 3 SCC 682 : AIR 2004 SC 3892.

considered by one Judge as self-evident might not be considered so by another Judge.[6]

The Supreme Court has observed on this point:[7]

> "Where it is manifest or clear that the conclusion of law recorded by an inferiror Court, or tribunal is based on an obvious misinterpretation of the relevant statutory provision, or something in ignornace of it, or may be, even in disregard of it, or is expressly founded on reasons which are wrong in law, the said conclusion can be corrected by a writ of *certiorari.*

In *Ambica Mills v. Bhatt*,[8] the construction placed by the Tribunal on two clauses of an agreement between the Ahmedabad Mill-Owners' Association and the Textile Labour Association was held to be patently and manifestly erroneous. "It is not a case where two alternative conclusions are possible; it is a case of plain misreading of the two provisions ignoring altogether the very object with which the two separate provisions were made."

Where the question involved is one of interpreting a statutory provision which is reasonably open to two interpretations, of which the authority concerned adopts one interpretation, *certiorari* would not be issued merely on the ground that the view taken by the authority appears to be less reasonable than the alternative construction.[9]

Mere formal and technical errors of law are not sufficient to attract the writ. If a *quasi*-judicial authority ignores relevant considerations, or takes into account irrelevant considerations, it would amount to an error of law.[10]

There is a distinction between an error of law pure and simple, and one of jurisdictional nature. The former can be cured only when *patent*, but the latter can be cured even if not patent for no authority can be allowed to assume jurisdiction by taking a wrong view of law.[11]

A *certiorari* or prohibition does not lie when a tribunal disregards executive directions having no statutory force.[12]

When a person obtains an order from a tribunal by fraud, the High Court is bound to exercise its jurisdiction under Art. 226 and quash such an order. Fraud and justice never go together.[13]

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6. *Baldwin and Frances Ltd. v. Patents Appeal Tribunal*, (1959) 2 WLR 826, illustrates the difficulties of applying this rule. *H.V. Kamath v. Ishaque*, AIR 1955 SC 233 : (1955) 1 SCR 1104.

7. *Syed Yakoob v. K.S. Rahdakrishnan*, AIR 1964 SC 477 : (1964) 5 SCR 64.
Also see, *Sohan Modi v. Special Court under A.P. Land Grabbing (Prohibition) Act*, AIR 2000 AP 482.

8. AIR 1961 SC 970 : (1961) 3 SCR 220.

9. *Syed Yakoob v. Radhakrishnan*, AIR 1964 SC 477 : (1964) 5 SCR 64; *Principal, Patna College v. Raman*, AIR 1966 SC 707; *V. V. Iyer v. Jasjit Singh*, AIR 1973 SC 194 : (1973) 1 SCC 148.

10. *Sri R.V. Service v. Chandrasekharan*, AIR 1965 SC 107 : (1964) 5 SCR 869; *Murlidhar v. State of Uttar Pradesh*, AIR 1974 SC 1924 : (1974) 2 SCC 472; *Kays Concern v. Union of India*, AIR 1976 SC 1525 : (1976) 4 SCC 706; *Smt. Ram Piari v. Rallia Ram*, AIR 1982 SC 1314 : (1982) 2 SCC 536.

11. *Joharimal Saraogi v. Bakhatawar Singh*, AIR 1967 Man. 1.

12. *Raman & Raman v. State of Madras*, AIR 1959 SC 694; *Shanmugam v. S.R.V.S.*, AIR 1963 SC 1626 : (1964) 1 SCR 809.

13. *United India Insurance Co. Ltd. v. Rajendra Singh*, AIR 2000 SC 1165 : (2000) 3 SCC 581.
The Court of Appeal in England has observed : "No Court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a Court, no order of a Minister can be allowed to stand, if it has been obtained by fraud. Fraud unravels everything."
Lazarus Estates Ltd. v. Beasley, [1956] 1 All ER 341.

(c) FINDINGS OF FACT

Certiorari does not lie to correct mere errors of fact even though these may be apparent on the face of the record. The writ jurisdiction is supervisory and the Court exercising it is not to act as an appellate Court.[14]

The writ Court would not re-appreciate evidence and substitute its own conclusions of fact for that recorded by the adjudicating body below.[15] A finding of fact recorded by the adjudicatory body cannot be challenged in proceedings for *certiorari* on the ground that the relevant and material evidence adduced before the concerned body was insufficient or inadequate to sustain the impugned finding. The adequacy or sufficiency of evidence led on a point and the inference of fact to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal and these points cannot be agitated before the writ Court.[16]

The relevant principle in this connection has been laid down by the Supreme Court as follows:[17]

> "The findings of fact recorded by a fact finding authority duly constituted for the purpose and which ordinarily should be considered to have become final, cannot be disturbed for the mere reason of having been based on materials or evidence not sufficient or credible in the opinion of the writ Court to warrant those findings at any rate, as long as they are based upon some material which are relevant for the purpose or even on the ground that there is yet another view which can be reasonably and possibly under taken".

But findings of fact based on *no* evidence or purely on surmises and conjectures, or which are perverse, may be challenged through *certiorari* as such findings may be regarded as an error of law.[18] Interference will be justified if finding of fact is perverse or not based on legal evidence.[19]

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14. *Pioneers Traders v. C.C. Exports & Imports*, AIR 1963 SC 734 : 1963 Supp (1) SCR 349; *S.T.O. v. Shiv Ratan*, AIR 1966 SC 142; *C.I.T. v. Walchand & Co.*, AIR 1967 SC 1435; *Andhra Scientific Co. v. Seshagiri Rao*, AIR 1967 SC 408; *Dabur v. Workmen*, AIR 1968 SC 17 : (1968) 1 SCR 61; *Rukmanand v. State of Bihar*, AIR 1971 SC 746.
But see, footnote 93, *supra*, concerning jurisdictional facts.

15. *Joao Andrade e Souza v. K.S. Vediekdir*, AIR 1971 Goa 2; *Mukund Lal Bhandari v. Union of India*, 1993 AIR SCW 2508 : AIR 1993 SC 2127; *Union of India v. Mohan Singh*, (1996) 10 SCC 35; *Union of India v. R.V. Swamy*, AIR 1997 SC 2069 : (1997) 9 SCC 446; *Maharashtra State Board of Secondary and Higher Secondary Education v. K.S. Gandhi*, (1991) 2 SCC 714.

16. *Hari Vishnu Kamath v. Ahmad Ishaque*, AIR 1955 SC 233 : (1955) 1 SCR 804; *Nagendra Nath v. Commissioner of Hills Division*, AIR 1958 SC 398 : 1958 SCR 1240; *Kaushalya Devi v. Bachittar Singh*, AIR 1960 SC 1168; *Syed Yakoob v. K.S. Radhakrishnan*, AIR 1964 SC 477 : (1964) 5 SCR 64.

17. *Indian Overseas Bank v. I.D.B. Staff Canteen Workers' Union*, AIR 2000 SC 1508, 1517 : (2000) 4 SCC 245.

18. *D.C. Works v. Saurashtra*, AIR 1957 SC 264 : 1957 SCR 152; *Syed Yakoob v. Radhakrishnan*, AIR 1964 SC 477 : (1964) 5 SCR 64; *Parry & Co. v. Second Ind. Tr.*, AIR 1970 SC 1334; *Sub-divisional Officer v. Gopal Chandra*, AIR 1971 SC 1190; *Aziz Wani v. Director, Consolidation*, AIR 1971 J&K 67; *Swaran Singh v. State of Punjab*, AIR 1976 SC 232; *M. Mayandi v. Director, T.N. State Transport Dept.*, AIR 1981 SC 1707; *Mukunda v. Bangsidhar*, AIR 1980 SC 1524 : (1980) 4 SCC 336; *Gujarat Steel Tubes v. Its Mazdoor Sabha*, AIR 1980 SC 1896 : (1980) 2 SCC 593; *Bhagat Ram v. State of Himachal Pradesh*, AIR 1983 SC 454 : (1983) 2 SCC 442; *State of West Bengal v. Atul Krishna Shaw*, AIR 1990 SC 2205 : 1991 Supp (1) SCC 414; *Ahmedabad Municipal Corpn. v. Virendra Kumar J. Patel*, AIR 1997 SC 3002 : (1997) 6 SCC 650; *Union of India v. Mustafa & Najibhai Trading Co.*, AIR 1998 SC 2526 : (1998) 6 SCC 79.

19. *Madurantakam Coop. Sugar Mills Ltd. v. S. Viswanathan*, (2005) 3 SCC 193 : AIR 2005 SC 1954.

The collector of central excise confiscated some foreign and local coins and imposed a fine on the petitioner without there being any evidence to establish that the said coins were imported by the accused. The High Court quashed the order on the ground of *no* evidence.[20] The rule of 'no' evidence envisages that if there is *some* evidence to support a finding of fact, the Court will not interfere with it.[21]

The findings of fact may also be questioned if it is shown that in recording them, the adjudicatory body has erroneously refused to admit admissible and material evidence, or has erroneously admitted inadmissible evidence which has influenced the impugned findings.

In *Dulal Chandra*[22] the High Court quashed the finding by the revenue board on the ground that it was not based on evidence, was even contrary to the evidence on record and was vitiated by non-consideration of relevant materials on record.

The findings of fact are not challengeable merely on the ground that the evidence to sustain them is inadequate or insufficient. Adequacy, reliability or sufficiency of evidence on a point, review or appreciation thereof, and the inference of facts to be drawn therefrom are matters exclusively for the adjudicatory body concerned.[23]

As the Supreme Court has observed : "A finding of fact recorded by the tribunal cannot be challenged on the ground that the relevant and material evidence adduced before the tribunal is insufficient or inadequate to sustain a finding. The adequacy or sufficiency of evidence led on a point and the inference of fact to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal."[24] The Supreme Court has observed recently in the case noted below in relation to disciplinary proceedings:[25]

> "… the departmental authority… is the sole judge the facts, if the inquiry has been properly conducted. The settled legal position is that if there is some legal evidence on which the findings can be based, then adequacy or even reliability of that evidence is not a matter for canvassing before the High Court in a writ petition filed under Art. 226 of the Constitution.

The Supreme Court has emphasized that in departmental disciplinary proceedings against employees, the disciplinary authority is the sole judge of facts. Once findings of fact, based on appreciation of evidence are recorded, the High Court in its writ jurisdiction does not normally interfere with those findings unless these findings are based on *no* evidence, or the findings are wholly perverse and/or legally untenable, or the findings are such which no reasonable person would have reached.[26] The High Court does not concern itself with the adequacy or inadequacy of evidence.

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20. *Amulya Chandra v. Collector, Central Excise,* AIR 1971 Tri. 3. Also, *Teja Singh v. Union of India,* AIR 1971 P&H 96.
21. *Shew Bhagwan v. Collector of Customs,* AIR 1971 Cal 112.
22. *Dulal Chandra v. Assam Board of Revenue,* AIR 1971 Ass 123.
23. *Shew Bhagwan v. Collector of Customs, supra,* footnote 21; *Nand Kishore v. State of Bihar,* AIR 1978 SC 1277 : (1978) 3 SCC 366.
24. *State of Andhra Pradesh v. Chitra Venkata Rao,* AIR 1975 SC 2151 : (1975) 2 SCC 557.
25. *High Court of Judicature at Bombay v. Shashikant S. Patil,* AIR 2000 SC 22 at 26 : (2000) 1 SCC 416.
26. *Apparel Export Promotion Council v. A.K. Chopra,* AIR 1999 SC 625 : (1999) 1 SCC 759; *Kuldeep Singh v. Commissioner of Police,* AIR 1999 SC 677 : (1999) 2 SCC 10; *Yoginath D. Bagde v. State of Maharashtra,* AIR 1999 SC 3734 : (1999) 7 SCC 739.

But even in cases where the 'no evidence' rule or perversity is established, the court will not ordinarily substitute finding with its own. It will set aside the erroneous order and remand the matter to the authority concerned.[27]

In the matter of punishment imposed by the disciplinary authority, ordinarily the High Court does not interfere as it is a matter of the discretion of the disciplinary authority. The High Court can interfere only if the punishment is impermissible, or is such that it shocks the conscience of the Court.[28] The punishment awarded has to be reasonable. If it is unreasonable; Art. 14 is infringed.[29] The Court can decide upon the proportionality of the punishment when punishment is shockingly disproportionate. In a recent case,[30] the Supreme Court has observed in this connection:

> "It is only in extreme cases, which on their face show perversity or irrationality that there can be judicial review. Merely on compassionate grounds a Court should not interfere."
>
> The Court would not under Art. 226 or 32 interfere with the punishment "because it considers the punishment disproportionate."

The law regarding judicial review of administrative action through *certiorari* or prohibition has become complicated and involved in many artificial distinctions, as for example, distinction is drawn between an error of law and one which is 'patent'. There was no compulsive reason for the courts in India to adopt such a distinction from Britain. As already noted, the Indian courts do not have to follow the whole of the English Law in the area of writs and they could have thus taken upon themselves the task of curing errors of law in decisions of *quasi*-judicial bodies.[31] Similarly, on facts, instead of adopting the restrictive *no* evidence rule, the Indian courts could have adopted the more broad-based American rule of substantial evidence[32] which would have enabled the courts to better supervise *quasi*-judicial adjudications than what they do at present and that would have been in accord with the modern enlightened democratic thinking in many countries.

(d) NATURAL JUSTICE

Certiorari or prohibition usually goes to a body which is bound to act fairly or according to natural justice and it fails to do so.[33] In recent days, there is an in-

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27. For propriety of remand see *DCM Limited v. Commissioner of Sales Tax, Delhi,* (2009) 4 SCC 231 : (2009) 4 JT 395.

28. *B.C. Chaturvedi v. Union of India,* (1995) 6 SCC 749; *Apparel Export Promotion Council v. A.K. Chopra,* (1999) I SCC 759, 770, 771 : AIR 1999 SC 625; *Union of India v. Permananda,* (1989) 2 SCC 177; *B.C. Chaturvedi v. Union of India,* (1995) 6 SCC 749; *State of Tamil Nadu v. A. Rajapandian,* (1995) I SCC 216 : AIR 1995 SC 561.

29. *Infra,* Ch. XXI.

30. *Union of India v. R.K. Sharma,* AIR 2001 SC 3052, at 3056 : 2001 (9) SCC 592.

31. *Supra*.

32. *Universal Camera Corp. v. N.L.R.B.* 340 U.S. 474.
See, BYSE, *The Federal Administrative Procedure Act,* I JILI, 89 (1958).
On questions of law, S. 706 of the A.P.A. provides that the reviewing Court would decide all relevant questions of law, interpret constitutional and statutory provisions.

33. *U.P., Warehousing Corp. v. Vijay Narain,* AIR 1980 SC 840; *State of Punjab v. Dewan Chuni Lal,* AIR 1970 SC 2086 : (1970) 1 SCC 479; *Ravi Bhatt v. The Director General, Armed Forces Medical Services,* AIR 1997 Mad. 78.

creasing judicial trend of imposing the requirements of natural justice on different types of bodies and different types of administrative action.[34]

If a policy decision is accepted without any demur by the complaining party, it would not be permissible for him to say that the implementation of the policy without giving any hearing was in violation of the principles of natural justice.[35]

Fixation of rent by a market Committee being an executive function, the courts will not interfere except on Wednesbury principles[36]. The Court observed:

> "There is broad separation of powers under the Constitution and ordinarily one organ of the State should not encroach into the domain of another. Montesquieu's theory of separation of powers (XIth Chapter of his book The Spirit of Laws) broadly applies in India too."

These appeals to MONTES QUIRE'S theory in todays Constitutionalism which features overlapping of functions of the different organs of the State of which executive law making (or delegated legislation) is a prime example.

The concept of natural justice is very important in the modern Administrative Law for it provides a basis for judicial control of the procedure followed by adjudicatory bodies, but it is vague, and has no fixed connotation. The concept of natural justice is flexible as its content depends *inter alia* upon the nature and constitution of the body concerned, the function it is exercising, the stature under which it is acting.

The question whether in a particular case principles of natural justice have been contravened or not is a matter for the courts to decide from case to case.[37] However, even with all its vagueness and flexibility, its two elements have been generally accepted, *viz.*,

(1) that the body in question should be free from bias, and

(2) that it should hear the person affected before it decides the matter.

That the principles of natural justice requires circumstantial flexibility was considered by the Supreme Court in a case where the Reserve Bank of India issued a requisition to the Registrar, Co-operative Societies to supersede the board and appointed an administrator under section 30(5) of Karnataka Cooperative Societies Act, 1959. The requisition was made in public interest and to prevent the conduct of the affairs of the Cooperative Bank in a manner detrimental to the interest of the depositors and for securing proper management of the bank. Rejecting the complain that no hearing had been given to the management of the bank, the Supreme Court held that on a receipt of a requisition in writing from Reserve Bank of India, the Registrar, cooperative Societies was statutorily bound

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34. This topic is discussed extensively in JAIN, *A TREATISE ON ADM. LAW*, I, Chs. IX-XII (1995); *CASES & MATERIALS ON INDIAN ADM. LAW*, I, VIII–XI (1994).

Also see, *A.K. Kraipak v. Union of India*, 1970 SC 150 : (1969) 2 SCC 262; *Mohinder Singh v. Chief Election Commr.*, AIR 1978 SC 851 : (1978) 1 SCC 405; *Maneka Gandhi v. Union of India*, AIR 1978 SC 597 : (1978) 1 SCC 248; *S.L. Kapoor v. Jagmohan*, AIR 1981 SC 136; *Swadeshi Cotton Mills v. Union of India*, AIR 1981 SC 818; *Fedco v. Bilgrami*, AIR 1960 SC 415; *Hira Nath v. Rajendra Medical College*, AIR 1973 SC 1260 : (1973) 1 SCC 805; *State of Punjab v. Ajudhia Nath*, AIR 1981 SC 1374 : (1981) 3 SCC 251; *Raj Restaurant v. Municipal Corp., Delhi*, AIR 1982 SC 1550 : (1982) 3 SCC 338.

35. *Central Power Distribution Company v. Central Electricity Regulatory Commission*, (2007) 8 SCC 197 : AIR 2007 SC 2912.

36. *Fruit Commission Agents Assn. v. Govt. of A.P.*, (2007) 8 SCC 511 : AIR 2008 SC 34.

37. *A.K. Roy v. Union of India*, AIR 1982 SC. 709.

to issue an order of supercession of the body of management and at that stage the affected Bank or its Managing Committee had no right of hearing or to raise any objection.[38]

The Supreme Court has observed that the principles of natural justice have undergone a sea change and it is now settled that complainant must show that he has suffered some real prejudice. It is not applied in a vacuum without reference to the relevant facts. It is no unruly horse nor could it be put in a strait jacket formula. A decision will be vitiated where no hearing is given at alland nor where the infringement is technical.[39] This decision like its precursors cited therein and particularly Sharma[40] has caused confusion in the law. S. L. Kapoor[41] which unqualifiedly stated that non observance of the principle of natural justice itself causes prejudice has not been overruled. So long as the view in Kapoor remains it is almost impossible to reconcile the two inconsistent views which subsist in relation to invoking the principles of natural justice.

The subject of Natural Justice is discussed elaborately in the area of Administrative Law rather than under Constitutional Law. Below is given a rather sketchy description of the subject.

RULE AGAINST BIAS

The first principle means that the adjudicator should be disinterested and unbiased; that the prosecutor himself should not be a judge; that the judge should be a neutral and disinterested person; that a person should not be a judge in his own cause; that a person interested in one of the parties to the dispute should not, even formally, take part in the adjudicatory proceedings.

It is often said that justice should not only be done but it should appear to have been done. Justice must be rooted in confidence; and confidence is destroyed when right minded people go away thinking : "The Judge was biased". The logic is equally applicable to governmental action and the Government.[42]

The basis of this principle is that justice should not only be done, but should manifestly and undoubtedly be seen to be done.[43]

Actual existence of bias is not necessary. The test of bias is "real likelihood of bias." "If a reasonable man would think on the basis of the existing circumstnaces that he (i.e. adjudicator) is likely to be prejudiced, that is sufficient to quash the decsion.".[44]

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38. *Reserve Bank of India v. M. Hanumaiah,* (2008) 1 SCC 770 : AIR 2008 SC 994.
39. *P. D. Agarwal v. State Bank of India,* (2006) 8 SCC 776 : AIR 2006 SC 2064 .
40. (1996) 3 SCC 364 : AIR 1996 SC 1669.
41. (1980) 4 SCC 379.
42. *Centre for Public Interest Litigation v. Union of India,* (2005) 8 SCC 202 : AIR 2005 SC 4413.
43. See, JAIN, *A TREATISE, op cit.,* Ch. XI; *Cases, I, op. cit.,* Ch. X.
44. *S. Parthasarathi v. State of Andhra Pradesh,* AIR 1973 SC 2701 : (1974) 3 SCC 459.
Also see, *Metropolitan Properties Co. Ltd. v. Lannon,* [1968] 3 W.L.R 694; *Manak Lal v. Prem Chand,* AIR 1957 SC 425 : 1957 SCR 575; *Blaze and Central (P) Ltd., v. Union of India,* AIR 1980 Knt 186; *Rattan Lal Sharma v. Managing Committee, Dr. Hari Ram Hr. Sec. School,* AIR 1993 SC 2155 : (1993) 4 SCC 10; *Tata Cellular v. Union of India,* AIR 1996 SC 11; *Kumaon Mandal Vikas Nigam v. Girja Shankar Pant,* AIR 2001 SC 24 : (2001) 1 SCC 182; *State of Punjab v. V.K. Khanna,* AIR 2001 SC 343 : (2001) 2 SCC 330; *Amar Nath Chowdhury v. Braithwaite & Co. Ltd.,* AIR 2002 SC 678 : (2002) 2 SCC 290.

Bias may arise when the adjudicator has some interest in the subject-matter of the proceedings before him. If the interest is pecuniary, disqualification arises howsoever small the interest may be. In case of other interest, it is necessary to consider whether there is a reasonable ground for assuming the likelihood of bias and whether it is likely to produce in the minds of the litigant or the public at large a reasonable doubt about the fairness of the administration of justice.

In a departmental inquiry against N.,[45] the person presiding over the inquiry himself gave evidence against N., and thereafter continued to preside over the inquiry. This clearly evidences a state of biased mind against N.

In *Gullapalli I*, the hearing held under S. 68(*d*) of the Motor Vehicles Act by the Secretary of the Transport Department was held to be vitiated because his Department had prepared the scheme against which the hearing had taken place and "it is one of the fundamental principles of judicial procedure that the person or persons who are entrusted with the duty of hearing a case judicially should be those who have no personal bias in the matter."[46]

In *Gullapalli II*,[47] the Supreme Court held that the hearing given by the Chief Minister was not vitiated because there was an essential distinction between the functions of a Secretary and a Minister; the former was a part of the Department and the latter was only primarily responsible for the disposal of the business pertaining to that department and, therefore, the Minister could not be regarded to suffer from bias like the Secretary.[48]

If a person is hostile to a party whose cause he is called upon to try, that introduces the infirmity of personal bias and would disqualify him from trying the cause.[49] The chairman of a statutory corporation dismissed an employee. The employee preferred an appeal to the board of directors of the corporation. The board at a meeting at which the chairman was present, dismissed the appeal. The board's decision was quashed as there was likelihood of bias because of the presence of the chairman who had dismissed the employee.[50]

The all-important *Kraipak* case[51] may also be noted here. In a selection board for certain posts, a member was himself a candidate who was selected along with a few others. On a challenge by the candidates not selected, the Supreme Court quashed the list of successful candidates on the ground of bias in so far as a person personally interested in the matter sat on the selection committee. Similarly,

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45. *State of Uttar Pradesh v. Nooh*, AIR 1958 SC 86 : 1958 SCR 595.
46. AIR 1959 SC 308 : 1959 Supp (1) SCR 319. But see, *T.G. Mudaliar v. State of Tamil Nadu*, AIR 1973 SC 974 : (1973) 1 SCC 336.
47. AIR 1959 SC 1376.
48. *Kondala Rao v. A.P.S.R.T. Corp.*, AIR 1961 SC 82. But see, *T.G. Mudaliar v. State of Tamil Nadu, supra.*
49. *Mineral Development Ltd. v. State of Bihar*, AIR 1960 SC 468; *Registrar, Cooperative Societies v. Dharam Chand*, AIR 1961 SC 1743; *State of Andhra Pradesh S.R.T. Corp v. Satyanarayana Transports*, AIR 1965 SC 1303.
50. *K. Chelliah v. Chairman, I.F. Corp.*, AIR 1973 Mad 122.
51. AIR 1970 SC 150 : (1969) 2 SCC 262.
For comments on the case, see, 13 *JILI* 362 (1971).

selection of a candidate was quashed because his son-in-law was a member of the selection committee.[52]

A senior officer expresses appreciation of the work of a junior in the confidential report. It does not amount to bias nor would it disqualify the senior officer from being a part of the departmental promotion committee to consider the junior officer along with others for promotion. The Supreme Court has stated that every preference does not vitiate an action. "If it is rational and unaccompanied by considerations of personal interest, pecuniary or otherwise, it would not vitiate a decision".[53]

FAIR HEARING

Another cardinal principle of natural justice is that the body deciding upon the rights of a party must give a reasonable opportunity to the party concerned to present his case. That no one should be condemned unheard is an important maxim of civilised jurisprudence.[54]

But the Court will not strike down an order merely because the order has been passed against the petitioner in breach of natural justice. It would be justified in refusing to do so if such striking down would result in restoration of another order passed earlier in favour of the petitioner and against the opposite party in violation of principle of natural justice or is otherwise not in accordance with law.[55]

The right to fair hearing does not necessarily include an oral hearing. What is essential is that the party affected should be given sufficient opportunity to meet the case against him and this could be achieved by filing written representations.[56] The party concerned should have adequate notice of the case against him which he has to meet, and that the party affected should be apprised of the evidence on which the case against him is based and be given opportunity to rebut these materials.[57]

Refusal of sufficient time to file a reply to MPs who were charged with incurring disqualification was recognized in principle, but on facts it was held that adequate time was given.[58]

No evidence should be taken behind the back of the party.[59] Though the Indian Evidence Act, as such, does not apply to *quasi*-judicial bodies, yet the rules of natural justice require that such a body does not act on evidence which has no probative value.[60] A party should have the opportunity of adducing all relevant evidence on which he relies.

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52. *D.K. Khanna v. Union of India,* AIR 1973 HP 30. Also see *S.P. Kapoor v. State of Himachal Pradesh,* AIR 1981 SC 2181 : (1981) 4 SCC 716.
53. *G.N. Nayak v. Goa University,* (2002) 2 SCC 712 : AIR 2002 SC 790.
54. *Board of Education v. Rice,* 1911 A.C. 179; *Local Govt. Board v. Arlidge,* 1915 A.C. 120; *North Bihar Agency v. State of Bihar,* AIR 1981 SC 1758 : (1981) 3 SCC 131.
55. *Raj Kumar Soni v. State of UP,* (2007) 10 SCC 635 : (2007) 5 JT 114.
56. *M.P. Industries v. Union of India,* AIR 1966 SC 671.
57. *D.C. Mills v. Commr., Income-tax,* AIR 1955 SC 65; *Prem Prakash v. Punjab University,* AIR 1972 SC 1408 : (1973) 3 SCC 424; *U.P. Warehousing Corp. v. Vijay Narayan; supra.*
58. *Jagjit Singh v. State of Haryana,* (2006) 11 SCC 1 : AIR 2007 SC 590.
59. *S.C. Paul v. Calcutta University,* AIR 1970 Cal . 282; *State of Orissa v. Murlidhar,* AIR 1963 SC 404; see also *Administrator, Unit Trust of India v. B. M. Malani,* (2007) 10 SCC 101 : (2007) 12 SCALE 107.
60. *Union of India v. Verma,* AIR 1957 SC 882; *B.E. Supply Co. v. The Workmen,* AIR 1972 SC 303.

A person lodging a FIR is entitled to hearing when on the basis of police report Magistrate prefers to drop the proceedings instead of taking cognizance of offence.

If a particular Association was not called to participate in a discussion relating to policy making, such decision making policy would not be hit by the principle of natural justice. Hence the policy regarding integration of employees and other technical matters while considering the merger of Airlines—Vayudoot with Indian airlines, the decision will not be arbitrary, unreasonable or capricious, and particularly so, when lengthy deliberation had taken place in various meetings to arrive at a proper decision. It was reiterated that a policy which did not suffer from any arbitrariness, the courts will not interfere.[61]

In *Central Power Distribution Company*,[62] it was urged that the order made by the Central Electricity Regulatory Commission fixing Unscheduled Interchanged Charges was made in breach of the principles of natural justice inasmuch as the same was made suo moto and without hearing the parties concerned. The contention was rejected on the ground that it had been passed after hearing of parties including the predecessor (State of Andhra Pradesh) of the Central Power Distribution Company.[63]

Representation by a lawyer is not regarded as a necessary element of natural justice, but there may be circumstances when denial of a lawyer may amount to denial of natural justice, *e.g.*, when one side is represented by a legally trained officer, it will be denial of natural justice to refuse representation by a lawyer to the other side.[64]

It is not necessary to permit cross-examination of witnesses in all cases.[65] However, in disciplinary proceedings against civil servants, this has been held to be essential.[66]

An obligation to give reasons for their decisions has also been imposed on *quasi*-judicial bodies.[67]

And subsequently the court has emphasized that the necessity of giving reasons is not confined to tribunals, lower courts or administrative bodies but extends to High Courts also.[68]

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61. *Indian Airlines Officerss' Assn. v. Indian Airlines Ltd.*, (2007) 10 SCC 684 : AIR 2007 SC 2747.

62. *Central Power Distribution Company v. Central Electricity Regulatory Commission*, (2007) 8 SCC 197.

63. Judgment however is not very clear on facts as to why and how the State of A.P. was the predecessor of the Central Power Distribution Company.

64. *Kalindi v. Tata Loco & Eng. Co.*, AIR 1960 SC 914 : (1960) 3 SCR 407; *Zonal Manager, L.I.C. v. City Munsif, Meerut*, AIR 1968 All. 270; *C.L. Subramanian v. Collector of Customs*, AIR 1972 SC 2178; *Nandlal v. State of Punjab*, AIR 1981 SC 2041 : (1981) 4 SCC 327; *Board of Trustees, Port of Bombay v. Dilipkumar*, AIR 1983 SC 109 : (1983) 1 SCC 124.

65. *State of Jammu & Kashmir v. Bakshi Gulam Mohd.*, AIR 1967 SC 122 : 1966 Supp SCR 401.

66. *Channabasappa v. State of Mysore*, AIR 1972 SC 32 : (1971) 1 SCC 1. Also see, *infra*, Ch. XXXI.

67. *Travancore-Rayons v. Union of India*, AIR 1971 SC 862 : (1969) 3 SCC 868. See for a comment, 14 *JILI*, 602 (1972) Also, *Siemens Engg. & Mfg Co. v. Union of India*, AIR 1976 SC 1785 : (1976) 2 SCC 981; *Imperial Chemical Industries Ltd. v. Registrar Trade Marks*, AIR 1981 Del. 190; *Cycle Equipments (P.) Ltd. v. Municipal Corp. of Delhi*, AIR 1983 Del. 94; *Alok Prasad Verma v. Union of India*, AIR 2001 Pat. 211, at 217.

68. *State of Himachal Pradesh v. Sada Ram*, (2009) 4 SCC 422 : (2009) 4 JT 165.

Interference by High Court without assigning any reason is unsustainable.[69]

Where the High Court, without recording any error or perversity in appointment process, reverses the Collector's decision which based its judgment on stray facts, the Supreme Court held the reversal was not proper and without jurisdiction.[70]

REASONS

It has been held that an order of affirmation by an appellate authority must also disclose reasons even though not as elaborately as a reversal.[71]

F. INDEPENDENCE OF THE HIGH COURTS

In a democracy governed by law, independence of the judiciary is very essential. Judiciary constantly stands as the sentinel on the *qui vive* to protect the Fundamental Rights of the people. The judiciary keeps the scales of justice even between the citizens and the state, or between the Centre and the States, or between the States *inter se*.

Independence of the judiciary is an essential attribute of Rule of Law. Because of these paramount considerations, judicial review, independence of the judiciary, and Rule of Law have been declared as the basic features of the Constitution which cannot be deleted even by a constitutional amendment.[72]

As in the case of the Supreme Court,[73] so in the case of the High Courts, there exist provisions in the Constitution to preserve and safeguard their impartiality, integrity and independence. In the appointment of the High Court Judges, the Chief Justice of India plays a crucial role; they are appointed for a fixed tenure, and the process to remove them from office before the age of retirement is very dilatory and elaborate.[74]

The expenses of a High Court are charged on the State Consolidated Fund [Art. 202(3)(d)].[75] The conduct of a High Court Judge in discharge of his duties cannot be discussed in the State Legislature or Parliament except when a motion for his removal is under consideration.[76] The salaries of the High Court Judges are determined by Parliament by law.[77] The allowances, leave and pension of a High Court Judge are determined by Parliament by law, but these cannot be varied to his disadvantage after his appointment. [Art. 221].[78] It is laid down in Art. 220 that after retirement, a permanent High Court Judge shall not plead or act in a Court or before any authority in India, except the Supreme Court and a High Court other than the High Court in which he has held his office.

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69. *Mohd. Yusuf v. Faij Mohammad*, (2009) 3 SCC 513 : (2009) 1 SCALE 71.
70. *Mahavir Singh v. Khiali Ram*, (2009) 3 SCC 439 : AIR 2009 SC 1761.
71. *Chairman, Disciplinary Authority, Rani Lakshmi Bai Kshetriya Gramin Bank v. Jagdish Sharan Varshney*, (2009) 4 SCC 240 : (2009) 4 JT 519.
72. See, *infra*, Ch. XLI.
73. *Supra*, Ch. IV, Sec. K.
74. *Supra*, this Chapter, Sec. B(r).
75. *Supra*, Ch. VI, Sec. F(iii).
76. *Supra*, Ch. II, Sec. L(i)(a); Ch. VI, Sec. H(a).
77. *Supra*, this Chapter, Part B(l).
78. *Ibid*.

The jurisdiction of a High Court in so far as it is specified in the Constitution, as for example, Art. 226 cannot be curtailed by the Legislature. In other respects, however, the matter of jurisdiction has been left to Parliament and the State Legislatures.[79] However, as pointed out earlier, if a State law derogates from the constitutional position of the High Court, then the Bill has to be reserved by the Governor for Presidential assent.[80] But the constitution and organisation of the High Courts fall under the legislative sphere of Parliament and, thus, the High Courts have been largely insulated from local influences.[81]

The State Executive does not have much say *vis-a-vis* the High Court. It is consulted at the time of appointment of the Judges.[82] It also approves the rules made, and the table of the fees prescribed, by the High Court; it also approves the rules made by the Chief Justice of the High Court specifying the salaries *etc.* of officers and servants of the High Court.[83]

As already stated earlier, Art. 224(1) provides for the appointment of additional judges in the High Courts. Such judges are appointed for a period of two years and may be made permanent Judges thereafter. The institution of additional judges somewhat detracts from the independence of the judiciary. The reason is that an additional Judge may not be able to act fully independently as he may be obsessed with the fear of losing his job after two years. The provision in the Constitution permitting appointment of additional Judges on a temporary tenure is however open to objection, more so as there is no limit on the number of such Judges who can be appointed at one time.[84] The criticism is however diluted to some extent by the fact that the power in this respect lies with the Centre and not with the State Executive and the power is exercisable on the advice of the Chief Justice of India.[85] Lastly, the dangers inherent in the re-employment of retired Judges have already been pointed out and these operate as much in the case of High Courts as in the case of the Supreme Court.[86]

Great emphasis has been laid on the independence of the High Courts by several Judges of the Supreme Court in *S.P. Gupta v. Union of India*.[87] It has been said that judicial independence is one of the central values inherent in the Constitution; that the judiciary plays a creative role in so far as it keeps government organs within legal limits and protects the citizen against abuse of power by them and so it is essential that the judiciary be free from government pressure or influence.

In the *S.C. Advocates-on-Record* case,[88] again, the Supreme Court has laid great emphasis on the independence of the Judiciary in a democratic society. "Independence of the judiciary" has been characterised "as a part of the basic structure of the Constitution", "to secure the 'rule of law', essential for the preserva-

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79. *Infra*, Sec. H.
80. *Supra*, Ch. VI, Sec. F(i).
81. *Infra*, Sec. H.
82. *Supra*, Sec. B(b).
83. *Supra.*Sec. B(t).
84. *Supra*, Sec. B(h) and (p).
85. *Ibid.*
86. The question regarding the appointment of additional Judges to the High Courts has been thoroughly discussed by the Supreme Court in *S.P. Gupta v. Union of India*, *supra*, Sec. B(c).
87. AIR 1982 SC 149; *supra*, Sec. B(c).
88. *Supra*, Sec. B(d).

tion of the democratic society".[89] In *Kumar Padma Prasad v. Union of India*[90] the Supreme Court has observed: "The independence of judiciary is part of the basic structure of the Constitution."[91]

Emphasizing upon the independence of the judiciary in a democracy, the Supreme Court has observed in *Shishir Patil* :[92]

> "In a democracy governed by rule of law, under a written constitution, judiciary is the sentinel on the *qui vive* to protect the fundamental rights and posed to keep even scales of justice between the citizens and the state or the states *inter se*. Rule of law and judicial review are basic features of the Constitution. As its integral constitutional structure, independence of the judiciary is an essential attribute of rule of law. Judiciary must, therefore, be free from pressure or influence from any quarter. The Constitution has secured to them, the independence".

It has been judicially ruled that the Judges of the Supreme Court and the High Courts are not government servants in the ordinary sense of the term. A Judge of any of these Courts does not hold "a post in the service under the State". He is not under the Government of India as to hold so will militate against the concept of independence of the judiciary which is a basic feature of the Constitution.[93] A Judge holds a constitutional office. In *Union of India v. Sankalchand Himatlal Sheth*[94], the Supreme Court has described the position of a High Court Judge as follows:

> "... Judges of the High Court owe their appointment to the Constitution and hold a position of privilege under it... They, the Judges of the High Court, are not government servants in the ordinary signification of that expression... In fact a High Court Judge has no employer, he occupies a high constitutional office which is coordinate with the executive and the legislature. The independence of the judiciary is a fighting (sic) faith of our Constitution".

The same is true of the Supreme Court Judges. The Supreme Court has ruled in *Union of India v. Pratibha Bonnerjee*[95] that Arts. 50, 214, 217, 219 and 231 of the Constitution show that a High Court Judge belongs to the third organ of the State which is independent of the other two organs, the Executive and the Legislature. Therefore, a person belonging to the judicial wing cannot be subordinate to the other two wings of the State. A High Court Judge occupies a unique position under the Constitution. He will not be able to discharge his duty without fear or favour, affection or ill will, unless he is fully independent of the Executive. Hence the relation between the Government and a High Court Judge is not that of master and servant; the Judge does not hold his office under the Government; he cannot be regarded as a gov-

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89. AIR 1994 SC at 421 : (1993) 4 SCC 441.
Also see, *High Court of Judicature of Bombay v. Shirish Kumar R Patil,* AIR 1997 SC 2631 : (1997) 6 SCC 339.
For explanation of the concept of "Basic Structure of the Constitution", see, *infra,* Ch. XLI.

90. AIR 1992 SC 1213, 1232 : (1992) 2 SCC 428, Sec. B(b).

91. For discussion on the doctrine of "Basic Structure of the Constitution", see, *infra,* Ch. XLI.

92. *High Court of Judicature at Bombay v. Shirish Kumar R. Patil,* AIR 1997 SC at 2627.

93. *Supreme Court Advocates on Record Assn. v. Union of India,* (1993) 4 SCC 441.
Also see, *infra,* Ch. XLI, under Constitutional Amendment, for discussion on this concept.

94. *Supra,* Sec. B(o).
Also see, *All Kerala Poor Aid Legal Ass., Trivandrum v. Chief Justice of Kerala,* AIR 1990 Ker 241.

95. (1995) 6 SCC 765 : AIR 1996 SC 693.

ernment servant; he holds a constitutional office and is able to function independently and impartially because not being a government servant he does not take orders from any one.

It is arguable that the increasing control that the Supreme Court has exercised not only in the matter of appointment of High Court judges, their transfers to other High Courts, their appointment as Chief Justices of High Courts and as Judges of the Supreme Court, but also in matters which pertain to the internal administration of the High Court, has led to an unwonted deference by the judges of the High Court to the judges of the Supreme Court. There is a danger consequently of a lack of robust independence in the High Court, although the Supreme Court has justified its interference on the ground of judicial independence.[1]

At times, sitting High Court Judges are appointed to head tribunals or commissions. To preserve the independence of High Court Judges, the Supreme Court has now laid down guidelines for the appointment of these Judges to tribunals, committees or commissions.[2]

G. SUBORDINATE JUDICIARY

In each State there is a system of subordinate courts below the High Court.[3] The Constitution makes a few provisions in Articles 233 to 237 to regulate the organisation of these courts and to ensure independence of the subordinate judges.

The Supreme Court has emphasized again and again on the maintenance of independence and integrity of the subordinate judiciary which is closest to the people.[4] Accordingly, the Court has through its various decisions promoted the independence of these courts from executive control and, to this effect, has expanded the control of the High Courts over the subordinate judiciary, so as to strengthen the independence of the subordinate courts from executive control.

The subordinate judiciary constitutes a very important segment of the judicial system as it is in these courts that the judiciary comes in close contact with the people. It is therefore essential to maintain the independence and integrity of the subordinate judiciary and for this purpose Arts. 233 to 237 have been placed in the Constitution. These Articles have been so interpreted by the Supreme Court as to strengthen the control of the High Courts on the subordinate judiciary. It is thus incumbent on each High Court to maintain and uphold the honour and integrity of the subordinate judiciary in the concerned State.

The Supreme Court through its various pronouncements, which are noted below, has sought to strengthen the position of the subordinate judiciary in several ways, *viz.*,

(1) The subordinate courts have been freed from executive control and brought under the control of the concerned High Court.

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1. *Tirupati Balaji v. State of Bihar,* (20040 5 SCC 1 : AIR 2004 SC 2351.
2. *T. Fenn Walter v. Union of India,* (2002) 6 SCC 184 : AIR 2002 SC 2679.
3. For a description of the Judicial System in the States, see, Jain, *OUTLINES OF INDIAN LEGAL HISTORY,* Ch. XVIII.
4. See, for example, *State of Maharashtra v. Labour Law Practitioners' Association,* AIR 1998 SC 1233 : (1988) 2 SCC 688.

(2) The disciplinary control over the subordinate courts vests in the High Court. The Supreme Court has sought to ensure that the High Court exercises this jurisdiction properly and according to the principles of natural justice.

(3) To protect these courts, the Supreme Court has assumed power to punish contempt of these courts. Likewise, a High Court can also do so.

(4) The Supreme Court has directed the High Courts not to make stringent remarks in their decisions against the subordinate judiciary.

(5) Disciplinary action cannot be initiated against a subordinate judge for just delivering a wrong decision on making a wrong order.

A mistake made by a judge can always be corrected on appeal.

(6) The Supreme Court has constantly endeavoured to improve the working conditions of the subordinate courts and to improve the logistic/infrastructrual support to these judges. The Supreme Court has constantly sought to improve the pay scales of these judges and seek for them other necessary facilities.

(a) STRENGTH OF THE SUBORDINATE JUDICIARY

Having regard to the huge backlog of cases and the recommendations of the Law Commission in its 120th Report the Standing Committee of Parliament in its 85th Report and the observations of the Chief Justice of India, in 2002, the Supreme Court in *All India Judges' Assn. v. Union of India*[5] felt that it was constitutionally obliged to ensure that the disposal of cases was increased because

> "[a]n independent and efficient judicial system is one of the basic structures of our Constitution. If sufficient number of judges are(is) not appointed, justice would not be available to the people, thereby undermining the basic structure".

It therefore directed the filling in of all vacancies within 1 year and the increase in the judge strength from the ratio of 13 judges per 10,00,000 people to 50 judges per 1,00,000 people within 5 years.

(b) APPOINTMENT OF DISTRICT JUDGES

Under Art. 233 (1), appointment, posting and promotion of district judges[6] in a State are made by the Governor in consultation with the High Court. Under Art. 233(2), a person not already in the 'service of the State' is eligible to be appointed as a district judge only if—

(*i*) he has been for not less than seven years an advocate or a pleader, and

(*ii*) is recommended by the High Court for such appointment.

From the tenor of Art. 233, it appears that there are two sources of recruitment of district judges, *viz*.;

(i) service of the Union or the State;

(ii) members of the Bar.

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5. (2002) 4 SCC 247 : AIR 2002 SC 1752.

6. The expression 'district judge' includes judge of a city civil Court, additional district judge, joint district judge, assistant district judge, chief judge of a small cause Court, chief presidency magistrate, additional chief presidency magistrate, sessions judge, additional sessions judge and assistant sessions judge: Art. 236(*a*).

The judges from the first source are appointed in *consultation* with the High Court [Art. 233(1)], and those from the second source are appointed on the recommendation of the High Court [Art. 233(2)] No one can be appointed from the Bar until and unless his name is recommended by the High Court.

These constitutional provisions have given rise to several important controversies.

The Governor of Rajasthan made a rule, in consultation with the Rajasthan High Court, laying down the condition that an advocate who had practised in the Rajasthan High Court for 7 years would be eligible to be appointed in the State Higher Judicial Service. The rule thus excluded all advocates practising in other High Courts even from applying for the post in the Rajasthan Higher Judicial Service. The Supreme Court ruled that the rule was unconstitutional being violative of Art. 14. The Court asserted that India is one country from Kashmir to Kanyakumari and there is no "intelligible differentia" distinguishing advocates practising in the Rajasthan High Court from those practising in other High Courts.[7]

Under Art. 233(2), a candidate from the Bar can be appointed as a district judge only on the recommendation of the High Court and not otherwise.[8] In *Chandra Mohan v. State of U.P.*,[9] the Supreme Court held that the appointment of district judges on the recommendation of a Selection Committee consisting of two High Court Judges and the Judicial Secretary, and not in consultation with the High Court, as a whole, was unconstitutional.

The Supreme Court has emphasized in *Bal Mukund Sah*[10] that Art. 233 enacts a complete code for the purpose of appointment of district judges and consultation with the High Court is an inevitable essential feature of Art. 233.

The Supreme Court has interpreted the term "advocate" in Art. 233(2)(i), somewhat broadly. If a person on being enrolled as an advocate ceases to practise law and takes up employment, he is not regarded as an "advocate". But, if a person who is on the rolls of any Bar Council, is engaged either by employment or otherwise of the Union or any State, corporate body or person, practices as an advocate before a Court for and on behalf of such government, corporation or authority or person, he is to be regarded as an "advocate". Thus, an assistant government advocate is qualified to be appointed as a district judge.[11]

The Supreme Court has also ruled that the words 'service of the State' mean only 'judicial service'[12] and no other service. Noting that the Constitution lays emphasis on the independence of the judiciary, and on the separation of the ex-

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7. *Ganga Ram Moolchandani v. State of Rajasthan*, AIR 2001 SC 2616 : (2001) 6 SCC 89. For Art. 14, see, Ch. XXI, *infra*.

8. *A. Panduranga Rao v. State of Andhra Pradesh*, AIR 1975 SC 1922 : (1975) 4 SCC 709; *M.S. Jain v. State of Haryana*, AIR 1977 SC 276 : (1977) 1 SCC 486.

9. AIR 1966 SC 1987 : (1967) 1 SCR 77.

10. *State of Bihar v. Bal Mukund Sah*, AIR 2000 SC 1296, 1321 : (2000) 4 SCC 640. Also see, *infra*, for further discussion on this case.

11. *Sushma Suri v. Govt. of N.C.T. of Delhi*, (1999) I SCC 330 : 1999 SCC (L &S) 208.

12. According to Art. 236(b), the expression "judicial service" means "a service consisting exclusively of persons intended to fill the post of district judge and other civil judicial posts inferior to the post of district judge". Also see, *Satya Narain Singh v. High Court at Allahabad*, AIR 1985 SC 308.

ecutive and the judiciary,[13] the Court has concluded that only persons from 'judicial service' were eligible to be appointed as district judges and not persons from any other service like police, excise *etc*. The Court has taken the view that appointment of executive officers as district judges would damage the good name of the judiciary. This pronouncement has made a significant contribution to the long term improvement of the quality of the subordinate judiciary by ensuring its separation from the executive.

The appointment to the posts of district judges, and their first posting, are to be made by the Governor in consultation with the High Court. The consultation with the High Court is mandatory.[14] The consultation with the High Court has to be 'meaningful and purposive'. Therefore, the Governor has to consult the High Court in respect of appointment of each person as a district judge or additional district judge[15] and the opinion of the High Court must be given full weight by the Governor, which means the State Executive.[16]

In *M.M Gupta v. State of Jammu & Kashmir*,[17] appointment of district judges by the Government was quashed because these appointments were made without full and effective consultation with the High Court. The Supreme Court held that, normally, as a rule, the High Court's recommendations for the appointment of a district judge should be accepted by the State Government, and the Governor should act on the same. If, in any particular case, the State Government for good and weighty reasons finds it difficult to accept the High Court's recommendations, it should communicate its views to, and have complete and effective consultation with, the High Court. There is no doubt that if the High Court is convinced that the Government's objections are for good reasons, it will reconsider its earlier recommendation. Efficient and proper judicial administration being the main object, both the High Court and the State Government must necessarily approach the question in a detached manner.

The Supreme Court has emphasized that the expression "consultation" does not mean "concurrence", but it does postulate effective consultation which involves exchange of mutual view points of each other and examination of the relative merits of the other point of view. Consultation is not complete or effective before the parties thereto make their respective points of view known to the other or others and discuss and examine the relative merits of their views.

In *State of Kerala v. A. Lakshmikutty*,[18] the Supreme Court has elaborately discussed the respective roles of the Government and the High Court in the matter of appointment of district judges. This matter is governed by Art. 233 of the Constitution according to which the appointment of district judges is to be made by the State Governor in *consultation* with the High Court [Art. 233(1)]. A person not being in the service of the State or of the Centre can be appointed only when

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13. Directive Principle 50; *infra*, Ch. XXXIV.
14. *Prem Nath v. State of Rajasthan*, AIR 1976 SC 1599 : (1967) 3 SCR 186; *State of Assam v. Ranga Mohammad*, AIR 1967 SC 903 : (1967) 1 SCR 454; *Chandramouleshwar v. Patna High Court*, AIR 1970 SC 370 : (1969) 3 SCC 56.
15. Including district sessions judge or additional district or sessions judge.
16. *A Panduranga Rao v. State of Andhra Pradesh*, AIR 1975 SC 1922 : (1975) 4 SCC 709.
17. AIR 1982 SC 1579. Also see, *Chandramouleshwar Prasad v. Patna High Court*, AIR 1970 SC 370 : (1969) 3 SCC 56.
18. AIR 1987 SC 331 : (1986) 4 SCC 632.

recommended by the High Court [Art. 233(2)]. Some of the salient points which emerge from the Court's opinion in *Lakshmikutty* are:

1. The power of the State Government to appoint district judges is not absolute and unfettered but is hedged in with restrictions. The power is conditioned by the requirement of "consultation" with the High Court.

2. The power of appointment is an executive function of the Government.

3. The eligibility for appointment as a district judge by direct recruitment depends entirely on the High Court's recommendation. The State Government cannot appoint any one from outside the panel of names forwarded by the High Court.

4. 'Consultation' between the High Court and the State Government, as envisaged by Art. 233(1), must be "real, full and effective". This means that there must be an interchange of views between the High Court and the State Government. On this point, the Court has emphasized thus:

> "If the State Government were simply to give lip service to the principle of consultation and depart from the advice of the High Court in making judicial appointments without referring back to the High Court the difficulties which prevent the Government from accepting its advice, the consultation would not be effective and any appointment of a person as a district judge.....under Art. 233(1) would be invalid."[19]

5. Normally, as a matter of rule, the recommendation of the High Court for appointment as a district judge should be accepted by the State Government. If, in any particular case, the State Government for "good and weighty" reasons finds it difficult to accept the recommendations of the High Court, the Government should communicate its views to the High Court and must have complete and effective consultation with the High Court in the matter.

In the instant case, the High Court forwarded to the State Government, a panel of names for appointment as district judges. For some reasons, the State Government did not want to accept the panel but it did not communicate its views to the High Court in the matter. The Supreme Court ruled that before rejecting the panel forwarded by the High Court, the Government should have conveyed its views to the High Court to elicit its opinion. The Government should have taken the High Court into confidence. Accordingly, a *mandamus* was issued to the State Government requiring it to communicate its views to the High Court to elicit its opinion.

It becomes clear from the above pronouncements that no recruitment to the post of a district judge can be made by the Governor without recommendations of the High Court.

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19. Commenting on this provision [Art. 233(1)], AHMADI, J., has observed in *S.C. Advocates on Record v. Union of India*, AIR 1994 SC 268, 376 : (1993) 4 SCC 441.

"Consultation would not be complete, meaningful and effective unless there has been an exchange of views and in the event of disagreement the executive has indicated the reasons for its disagreement with the High Court and has disclosed the material on which the disagreement is based.... In order that the requirement of consultation does not end up as an empty formality or is not reduced to a mere mockery it is essential that in the event of difference of opinion there is an effective interchange of view points between the two functionaries so that each is able to appreciate the views of the other and there is a genuine attempt to iron out the creases before a final decision is taken".

While there is no legal bar against the High Court reviewing its earlier decision taken on the administrative side on the question of *inter se* seniority of recruitees, it can do so only after hearing the parties likely to be affected by the decision, and provided there has been no judicial decision directly deciding the issue *inter partes*.[20]

If any rules are made (under Art. 309)[21] for regulating recruitment and conditions of service of district judges, the rules have to be in conformity with Art. 233. The rules will be *ultra vires* if they violate the constitutional mandate of Art. 233.[22]

(c) APPOINTMENT OF SUBORDINATE JUDGES

Below the district judges, there are other subordinate courts. According to Art. 234, appointment of persons, other than district judges, to the State judicial service[23] is made by the Governor in accordance with the rules made by him for the purpose after consultation with the State Public Service Commission and the High Court.

Consultation with the High Court under Art. 234 is mandatory. If rules are made by the State Government without consulting the High Court then such rules would be *ultra vires.*[24] "Consultation" envisaged by Art. 234 is not a matter of mere formality; it has to be meaningful and effective. Rules made without consultation with the concerned High Court are void and a nullity. The reason underlying Art. 234 is that judicial service must be independent of the executive influence. Therefore, judicial service has been placed on a pedestal different from other services under the State. The constitutional scheme aims at securing an independent judiciary which is the bulwark of democracy.[25]

Certain rules made by the Governor of Gujarat regulating promotion of civil judges to the posts of assistant judges were declared by the Supreme Court as "irrational, arbitrary and unreasonable" as these rules came in conflict with Arts. 14 and 16.[26]

Under Art. 234, the consultation with the High Court is only in respect of making the rules and not for actual selection of the appointees.[27] However, in view of the High Court's ultimate responsibility for judicial administration in the State, the Law Commission has suggested that the Article be suitably amended so as to provide that persons appointed to the subordinate judiciary may be persons recommended by the High Court.[28]

Now, the deficiency in the phraseology of Art. 234 has been removed by the Supreme Court through its ruling in *Ashok Kumar Yadav v. State of Haryana.*[29]

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20. *D. Ganesh Rao Patnaik v. State of Jharkhand*, (2005) 8 SCC 454, 472 : AIR 2005 SC 4321.
21. *Infra*, Ch. XXXVI, Sec. B.
22. *Hari Datt v. State of Himachal Pradesh*, AIR 1980 SC 1426 : (1980) 3 SCC 189.
23. For definition of "judicial service", see, *supra*, note 70.
24. *A.C. Thalwal v. High Court of Himachal Pradesh*, AIR 2000 SC 2732 : (2000) 7 SCC 1.
25. *Ibid.*
26. *Indravadan v. State of Gujarat*, AIR 1986 SC 1035 : 1986 Supp SCC 254.
For discussion on Arts. 14 and 16, see, *infra*, Chs. XXI and XXIII.
27. *Farzand v. Mohan Singh*, AIR 1968 All. 67; *State of West Bengal v. N.N. Bagchi*, AIR 1966 SC 447 : (1966) 1 SCR 771.
28. LAW COMM, *XIV REPORT*, 217-220.
29. AIR 1987 SC 454 : (1985) 4 SCC 417.
The Court has reiterated this view in *State of Uttar Pradesh v. Rafiquddin*, AIR 1988 SC 162 : 1987 Supp SCC 401.

The Court has laid down a procedure to recruit subordinate judges where the High Court will have a substantial role to play. The Court has insisted that when selection of judges is being made by the State Public Service Commission, a sitting Judge of the High Court, nominated by the Chief Justice, should be invited to participate in the interview as an expert and, ordinarily, his opinion ought to be accepted, except when there are strong and cogent reasons for not accepting his advice. These reasons must be recorded in writing by the chairman and the members of the Commission.

The Supreme Court has emphasized that it is necessary to recruit as judges "competent and able persons possessing a high degree of rectitude and integrity," otherwise, the whole democratic set up in the country will be put in jeopardy. The Court gave this direction to the Public Service Commission in every State because it was anxious that "the finest talent should be recruited in the Judicial Service and that can be secured only by having a real expert whose advise constitutes a determinative factor in the selection process".[30]

The Supreme Court had imposed the qualification of minimum three years' practice for recruitment to the lowest rung of judicial office.[31] Although the Supreme Court reiterated this ruling in the case noted below[32] and stated that while the qualification of a minimum of three years' legal practice is a must for recruitment in the lowest rung of judicial office, it is open to a State to prescribe a higher qualification by way of standing at the Bar, this requirements has subsequently been dispensed with.[33]

The persons presiding over industrial and labour courts constitute a 'Judicial Service' and so these judges ought to be recruited in accordance with Art. 234.[34]

(d) DE FACTO DOCTRINE

When appointment of a district judge was declared invalid because of the breach of Art. 233, the decisions given by him were not affected because of the *de facto doctrine*.[35]

Again, in *State of Uttar Pradesh v. Rafiquddin*,[36] appointment of munsiffs suffered from legal infirmity as these were made inconsistent with the relevant rules. Nevertheless, the decisions given by them as munsiffs were protected by applying the *de facto* doctrine.

The Supreme Court has asserted that the doctrine is founded upon sound principles. These judges could not be regarded as usurpers of office. These persons, though not qualified according to the rules, were, nevertheless, appointed by competent authority to the posts of munsiffs with the concurrence of the High Court. They had been working all these years in the Judicial Service. They had been performing their functions and duties as *de facto* judicial officers. "A person who is ineligible to judgeship, but who has nevertheless been duly appointed and

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30. The Court has reiterated this ruling in *All India Judges' Ass. v. Union of India*, AIR 1993 SC at 2506, 2507 : (1993) 4 SCC 288.
31. *All India Judges' Association v. Union of India*, AIR 1993 SC 2493 : (1993) 4 SCC 288.
32. *All India Judges' Association v. Union of India*, AIR 1994 SC 2771 : (1994) 6 SCC 314.
33. All India Judges Association III: (2002).
34. *State of Maharashtra v. Labour Law Practitioners' Association*, AIR 1998 SC 1233 : (1998) 2 SCC 688.
35. *Gokaraju Rangaraju v. State of Andhra Pradesh*, AIR 1981 SC 1473 : (1981) 3 SCC 132.
36. AIR 1988 SC 162, 179-180 : 1987 Supp SCC 401.

who exercises the powers and duties of office is a *de facto* judge, he acts validly until he is properly removed." Judgments and orders made by a *de facto* judge cannot be challenged on the ground of his ineligibility for appointment.

(e) HIGH COURT'S CONTROL OVER DISTRICT AND SUBORDINATE COURTS

According to Art. 235, the control over district and subordinate courts is vested in the High Court, including the posting and promotion of, and the grant of leave to, persons belonging to the State judicial service, and holding a post inferior to that of a district judge. However, the High Court is not authorised to deal with any such person otherwise than in accordance with the conditions of service prescribed under the law. Art. 235 is not to be construed as taking away from any such person any right of appeal which he may have under the law regulating his conditions of service.

In what came to be known as the "fodder scam", ex-Chief Minister of Bihar, had been charged with large scale defalcation of public funds and falsification of accounts. The High Court's appointment of a particular Additional District Judge as a Special Judge to conduct the trials was subjected to scrutiny by the Supreme Court in *Rajiv Ranjan Singh "Lalan" (VI) v. Union of India*[37]. The issue had come up before the Supreme Court by way of public interest litigation in which a prayer was made for monitoring the conduct of the trials. On the ground that the question of appointment of a Special Judge was exclusively within the domain of the High Court, the prayer for change of the Special Judge was ultimately rejected.[38]

Article 235 is the pivotal provision. The control vested in the High Court by Art. 235 over the subordinate judiciary is for the purpose of preserving its independence and its protection from executive interference.

The control vested in the High Court by Art. 235 over the judiciary below it complete and comprehends a wide variety of matters and is "exclusive in nature, comprehensive in extent and effective in operation."[39] The High Court is the sole custodian of the control over the judiciary. The word 'control' in Art. 235 is used in a comprehensive sense; it includes general superintendence over the working of the subordinate courts. The expression control in Art. 235 includes "disciplinary control".

Transfers, promotions and confirmations including transfer of district and subordinate judges vest in the High Court. Therefore, a judicial officer who had, with the consent of the High Court, been appointed as an ad-hoc Deputy Secretary in the Legislative Department of the State Government could not be regularized or promoted by the State Government without consultation with the High

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37. (2006) 1 SCC 356 : (2005) 9 SCALE 332.

38. *Rajiv Ranjan Singh "Lalan" (VIII) v. Union of India*, (2006) 6 SCC 613 : (2006) 8 JT 328; See also *Tirupati Balaji Developers (P.) Ltd. v. State of Bihar*, (2004) 5 SCC 1 : AIR 2004 SC 2351.

39. *Chief Justice, Andhra Pradesh v. L.V.A. Dikshitulu*, AIR 1979 SC 193, 201 : (1979) 2 SCC 34. See also *Gauhati High Court v. Kuladhar Phukan*, (2002)4 SCC 524 : AIR 2002 SC 1589*; High Court of Judicature for Rajasthan v. P.P. Singh*, (2003) 4 SCC 239 : AIR 2003 SC 1029*; D. Ganesh Rao Patnaik v. State of Jharkhand*, (2005) 8 SCC 454 : AIR 2005 SC 4321; *Parkash Singh Badal v. State of Punjab*, (2007)1 SCC 1 : AIR 2007 SC 1274*; Anil Kumar Vitthal Shete v. State of Maharashtra*, (2006) 12 SCC 148 : AIR 2006 SC 2167.

Court. The Supreme Court cited the doctrine of separation of powers and the need for an independent judiciary to invalidate the regularization and promotion by the State Government.[40]

The power to transfer subordinate judges, including district judges, from one place to another,[41] power to promote persons from one post in the subordinate judiciary to another, and the power to confirm such promotions,[42] vest in the High Court and not the State Government,*e.g.*, power to promote a munsiff to the post of a subordinate judge[43], or promotion of a subordinate judge to the selection grade post of subordinate judge, or his promotion from one post to another in the same judicial service.

Article 235 would not apply when one reaches the stage of giving promotion as a district or additional district sessions judge, and the power to give promotion would vest in the Governor after consultation with the High Court which means on its recommendation. However, giving of further promotion to district judges is the sole right of the High Court.[44]

The power of confirmation of district judges and below lies with the High Court and not the State Government. Accordingly, a rule vesting power of confirmation of district judges in the Governor (in consultation with a High Court) has been declared *ultra vires* the Constitution, for the power of confirmation vests in the High Court.[45] Under Art. 235, the High Court exercises disciplinary powers over the district and subordinate judges.[46] 'Control' under Art. 235 is control over the conduct and discipline of the judges. The control is vested in the High Court to secure the independence of the subordinate judiciary. Accordingly, the High Court can suspend a judge with a view to hold disciplinary inquiry.

An inquiry into the conduct of a member of the judiciary can be held by the High Court alone and by no other authority.[47]

The High Court can itself impose punishments over judicial officers, short of 'dismissal or removal' or 'reduction in rank'. These major punishments fall within the purview of the Governor under Art 311,[48] but even such an action can be taken only on the recommendation of the High Court made in exercise of the power of control vested in it. The advice of the High Court is binding on the Governor in this matter.[49] The Governor should not consult the Public Service

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40. *Gauhati High Court v. Kuladhar Phukan*, (2002) 4 SCC 524 : AIR 2002 SC 1586.
41. *State of Assam v. Ranga Mohammad, supra; Chandramouleshwer v. Patna High Court, supra.*
42. *State of Assam v. Sen*, AIR 1972 SC 1028 : (1971) 2 SCC 889; *State of Bihar v. Madan Mohan Prasad*, AIR 1976 SC 404 : (1976) 1 SCC 529.
43. *High Court, Calcutta v. Amal Kumar*, AIR 1962 SC 1705 : (1963) 1 SCR 437.
44. *Punjab & Haryana High Court v. State of Haryana, supra; State of Assam v. Kuseswar Saikia*, AIR 1970 SC 1616 : (1969) 3 SCC 505.
45. *Punjab & Haryana H.C. v. State of Haryana, ibid.*
46. *State of West Bengal v. N.N. Bagchi, supra*, footnote 27; *Baradakanta v. Registrar, Orissa High Court*, AIR 1974 SC 710 : (1974) 1 SCC 374.
47. *Punjab & Haryana High Court v. State of Haryana*, AIR 1975 SC 613 : (1975) 1 SCC 843.
48. See, *infra*, Ch. XXXVI.
49. *Baldev Raj v. Punjab & Haryana High Court*, AIR 1976 SC 2490; *B Mishra v. Orissa High Court*, AIR 1976 SC 1899 : (1976) 3 SCC 327; *State of Haryana v. Inder Prakash*, AIR 1976 SC 1841; *T. Lakshmi Narasimha Chari v. High Court of Andhra Pradesh*, AIR 1996 SC 2067 : (1996) 5 SCC 90.

Commission in respect of judicial officers.[50] In *State of West Bengal v. Nripendra Nath Bagchi*,[51] the Supreme Court set aside an order of dismissal of an officiating district and sessions judge passed by the Governor after consulting the State Public Service Commission but without consulting the High Court.

Compulsory retirement is not dismissal or removal or reduction in rank because the concerned person does not lose the terminal benefits earned by him. The power to recommend compulsory retirement of a district and subordinate judge belongs to the High Court and it is binding on the Governor.[52] Article 235 enables the High Court to assess the performance of any judicial officer at any time with a view to discipline the black sheep or weed out the deadwood. The constitutional power of the High Court cannot be circumscribed by any rule or order.[53]

As the Governor is the appointing authority, so he makes a formal order of compulsory retirement but only in accordance with the recommendation of the High Court. However formal the Governor's power to make such an order may be, such an order is essential for effectuation of the retirement of the concerned person.[54] When the State Government compulsorily retired a subordinate judge against the recommendation of the High Court to revert him, the government order was quashed.[55] The Supreme Court emphasized:

> "The control vested in the High Court is that if the High Court is of the opinion that a particular judicial officer is not fit to be retained in service the High Court will communicate that to the Governor because the Governor is the authority to dismiss, remove, reduce in rank or terminate the appointment. In such cases it is the contemplation in the Constitution that the Governor as the head of the State will act in harmony with the recommendation of the High Court. If the recommendation of the High Court is not held to be binding on the State consequences will be unfortunate. It is in public interest that the State will accept the recommendation of the High Court. The vesting of complete control over the subordinate judiciary in the High Court leads to this that the decision of the High Court in matters within its jurisdiction will bind the State. The Government will act on the recommendation of the High Court. That is the broad basis of Article 235."

While, in form, the High Court's recommendation is advisory, in substance and effect, it is well nigh peremptory. The recommendation of the High Court is binding on the Government. But the High Court cannot pass the order itself; it is only the recommending authority.[56]

In Art. 235, the word 'control' has been used in a comprehensive sense. The High Court exercises administrative, judicial and disciplinary control over the members of the judicial service in the State. It includes general superintendence

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50. *Baldev Raj, ibid*.
For Public Service Commission, see, *infra*, Ch. XXXVI, Sec. K.

51. AIR 1966 SC 447 : (1966) 1 SCR 771.

52. *High Court of Punjab and Haryana v. State of Haryana*, AIR 1967 SC 613 : (1975) 1 SCC 843; *State of Uttar Pradesh v. Batuk Deo Pati Tripathi*, 1978 Lab. IC 839; *Chief Justice, State of Andhra Pradesh v. L.V.A. Dikshitulu*, AIR 1979 SC 193 : (1979) 2 SCC 34. *Nawal Singh v. State of U.P*, (2003) 8 SCC 117 : AIR 2003 SC 4303; *Chandra Singhd v. State of Rajasthan*, (2003) 6 SCC 545, 562 : AIR 2003 SC 2889.

53. *Chandra Singh v. State of Rajasthan*, (2003) 6 SCC 545 : AIR 2003 SC 2889.

54. *Registrar, High Court of Madras v. R. Rajiah*, AIR 1988 SC 1388 : (1988) 3 SCC 211.

55. *State of Haryana v. Inder Prakash Anand*, (1976) 2 SCC 977 : AIR 1976 SC 1841.

56. *Registrar (Adm.), High Court of Orissa v. Sisir Kanta Satapathy*, AIR 1999 SC 3265 : (1999) 7 SCC 725.

of the working of subordinate courts, disciplinary control over judges and recommending the imposition of punishment of dismissal, removal, reduction in rank and compulsory retirement. This Constitutional power of the High Court cannot be circumscribed by any rule or order[57] 'Control' would also include suspension of a judge for purposes of holding a disciplinary inquiry and also transfer, confirmation and promotion.[58]

The disciplinary control which the High Court exercises over the subordinate judiciary is a very sensitive and delicate function. The Supreme Court has cautioned that in exercising its disciplinary powers over the subordinate judiciary, the High Court is to act with fairness and in a non-arbitrary manner. While, on the one hand, it is imperative on the High Court to protect honest judges, on the other hand, it cannot ignore any dishonest performance by any subordinate judge. As the Supreme Court has emphasized, judicial service is not merely an employment nor the judges merely employees. "They are holders of public offices of great trust and responsibility." "Dishonest judicial personage is an oxymoron".[59]

There have been several occasions when the Supreme Court has quashed the action taken by the High Courts against subordinate judges because of one infirmity or another.[60] For example, in *R.C. Sood*,[61] the Supreme Court has characterised the action of the High as lacking in *bona fides.* The Court has observed: "The High Court acted in the manner which can only be termed as arbitrary and unwarranted, to say the least".[62]

The High Court of Madhya Pradesh recommended compulsory retirement of a sessions judge and the State Government passed the necessary order. But the Supreme Court quashed the High Court's recommendation (as well as the government order) because the High Court had not taken into consideration all the relevant material in reaching its decision.[63]

Similarly, in *Madan Mohan Choudhary v. State of Bihar*[64] the Supreme Court quashed the recommendation made by the High Court to compulsorily retire a district judge as it was a case where there was no material on the basis of which an opinion could have been reasonably formed that it would be in the public interest to retire the district judge from service prematurely. If there is some material before the High Court against a member of the judicial service, and on the basis of this material the High Court takes the view that he be compulsorily re-

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57. *Chandra Singh v. State of Rajasthan,* (2003) 6 SCC 545, 562 : AIR 2003 SC 2889.

58. *State of Rajasthan v. Ramesh Chand Paliwal,* AIR 1998 SC 1079 : (1998) 3 SCC 72. See also *Gauhati High Court v. Kuladhar Phukan,* (2002) 4 SCC 524 : AIR 2002 SC 1589.

59. *High Court of Judicature at Bombay v. Shashikant S. Patil,* AIR 2000 SC 22, at 27 : (2000) 1 SCC 416.

Also, *High Court of Judicature at Bombay v. Shirishkumar Rangrao Patil,* AIR 1997 SC 2631 : (1997) 6 SCC 339; *Ramesh Chandra Singh v. High Court of Allahabad,* (2007) 4 SCC 247 : (2007) 4 JT 135.

60. *R.C. Sood v. State of Rajashtan,* 1995 AIR SCW 198 : 1994 Supp (3) SCC 711; *Yoginath D. Bagde v. State of Maharashtra,* AIR 1999 SC 3734 : (1999) 7 SCC 739; *High Court of Judicature at Allahabad v. Sarnam Singh,* AIR 2000 SC 2150 : (2000) 2 SCC 339.

61. *R.C. Sood v. High Court of Judicature at Rajasthan,* AIR 1999 SC 707 : (1998) 5 SCC 493.

62. *Ibid*., at 716.

63. *Brij Behari Lal v. High Court of Madhya Pradesh,* AIR 1981 SC 594 : (1981) 1 SCC 490.

64. AIR 1999 SC 1018 : (1999) 3 SCC 396.

tired, "the adequacy or sufficiency of such materials cannot be questioned, unless the materials are absolutely irrelevant for the purpose of compulsory retirement."

An order of compulsory retirement was also quashed in *Rajiah*[65] as there was no material before the High Court to justify such a decision.

Under Art. 235, the Governor can pass an order of premature retirement only on the recommendation of the High Court. The Supreme Court has emphasized that it is for the High Court, on the basis of assessment of performance and all other aspects germane to the matter, to come to the conclusion whether any particular judge is to be prematurely retired. The conclusion has to be of the High Court since the control vests therein. The recommendation of the High Court should precede the Governor's order.

The initiative to retire a subordinate judge rests with the High Court and not with the government. If the government has any material having a bearing on the conduct of a subordinate judge, it can bring the same to the notice of the High Court, but the ultimate decision in the matter rests with the High Court. The recommendation of the High Court is binding on the government.[66]

In *Nripendra*,[67] the State Government passed an order dismissing a district judge after consulting the State Public Service Commission but not the High Court. The Supreme Court quashed the order.

As stated above, under Art. 235, "total and absolute" control over subordinate judiciary is vested in the full High Court. All the High Court Judges collectively and individually share that responsibility. But the full Court can pass a resolution and delegate its power to a committee of Judges. If so, the committee can then act on behalf of the Court without making any reference to it. The decision of the committee is then regarded as the decision of the Court itself.[68]

The full Bombay High Court passed a resolution constituting a disciplinary committee of five Judges for taking disciplinary action against subordinate judges. The Supreme Court ruled that the committee was competent to take procedural steps from appointment of enquiry officer, framing of charges and to recommend to the Government imposition of penalty of dismissal. There was no further necessity to refer the matter again to the full Court. The concurrence of the full Court is not necessary in such a situation.[69]

According to the rules made by the Allahabad High Court, the Administrative Committee could act for, and on behalf of, the Court, and, therefore, the Administrative Committee could recommend to the Governor to pass an order of compulsory retirement in respect of a district judge or a subordinate judicial officer. In the instant case,[70] an order was passed by the State Government for premature

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65. *Rajiah*, *supra*, footnote 54.
66. *Registrar (Administration), High Court of Orissa, Cuttack v. Sisir Kumar Satapathy*, AIR 1999 SC 3265 : (1999) 7 SCC 725.
67. *State of West Bengal v. Nripendra Nath Bagchi*, AIR 1966 SC 447 : (1966) 1 SCR 771.
68. *State of Uttar Pradesh v. Batuk Deo Pati Tripathi*, 1978 Lab IC 839: (1978) 2 SCC 102; See also *High Court of Judicature for Rajasthan v. P.P. Singh*, (2003) 4 SCC 239 : AIR 2003 SC 1029.
69. *High Court of Judicature at Bombay v. Shirish Kumar R. Patil*, AIR 1997 SC 2631 : (1997) 6 SCC 339; *Yoginath D. Bagde v. State of Maharashtra*, AIR 1999 SC 3734 : (1999) 7 SCC 739.
70. *Tej Pal Singh v. State of Uttar Pradesh*, AIR 1986 SC 1814 : (1986) 3 SCC 604.

retirement of an additional district and sessions judge on the basis of the recommendation of the Administrative Judge. The Administrative Judge gave his opinion in favour of premature retirement of the concerned judge without consulting his other colleagues in the Administrative Committee. The Committee came to know of the order only after it had been passed by the Governor when it approved the recommendation of the Administrative Judge. The Supreme Court quashed the order as null and void on the ground that the government had passed the same without the recommendation of the full Court or its Administrative Committee. The Administrative Judge alone could not have so acted; he had no such power and his own agreement to the proposal of compulsory retirement would be of no consequence. His satisfaction could not be regarded as the satisfaction of the Court for purposes of Art. 235 of the Constitution. The approval was given by the Administrative Committee *ex post facto* and this did not validate the order. According to the Court : "The deviation in this case is not mere irregularity which can be cured by the *ex post facto* approval given by the Administrative Committee to the action of the Governor after the order of premature retirement had been passed. The error committed in this case amounts to an incurable defect amounting to an illegality."[71]

The Supreme Court has ruled that the decisions regarding confirmation, promotion, supersession of subordinate judges, ought to be taken at full Court meetings, and not by the Chief Justice alone. Every High Court Judge is expected to contribute to the discussion and participate in the decisions arrived at. This mode of dealing with the confirmation, promotions and supersessions of subordinate Judges is a sure safeguard against arbitrary or motivated decisions. This case is interesting because here the order of the High Court passed on its administrative side was quashed by a Division Bench of the Court. The High Court appealed to the Supreme Court against the decision of the Division Bench. The dispute was regarding the date of confirmation of a civil Judge. The Supreme Court quashed the decision of the Division Bench and restored the decision of the High Court.[72]

The Supreme Court has clarified in the instant case that the decision as to disciplinary action of a subordinate judge is taken by the High Court on the Administrative side of the High Court; this decision can be challenged through a writ petition under Art. 226 on the judicial side of the High Court. The petitioner can make the High Court a party to the writ proceedings as it is the High Court order which is being challenged. If the writ petition is decided by the Division Bench against the High Court, and its administrative order is set aside, it will then be an aggrieved party and, as such, it can appeal to the Supreme Court under Art. 136.

The Supreme Court has emphasized in *Samsher Singh v. State of Punjab*,[73] that under Art. 235 the High Court is invested with control over the subordinate judiciary. The members of the subordinate judiciary are not only under the control, but also under the care and custody, of the High Court. Accordingly, the Supreme Court has emphasized that enquiries against subordinate judges should be held by the High Court through judicial officers subject to its control and it should not leave this task to the government. To do so will be an act of self-

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71. *Ibid.*, at 1821.

72. *High Court of Madhya Pradesh v. Mahesh Prakash*, AIR 1994 SC 2595 : (1995) 1 SCC 203. Also see, *Tejpal Singh v. State of Uttar Pradesh*, *supra*, footnote 70; *Yoginath*, *infra*, footnote 75.

73. AIR 1974 SC 2192 : (1974) 2 SCC 831; see, Ch. III, *supra.*

abnegation on the part of the High Court. "The members of the subordinate judiciary look up to the High Court not only for discipline but also for dignity".

Any inquiry against a judicial officer must be conducted according to natural justice.[74] An order of the High Court dismissing a subordinate judge was quashed by the Supreme Court because the High Court failed to act according to natural justice. The concerned judge was not given a hearing by the High Court.[75]

The Supreme Court has emphasized that as the appointing authority the Governor has to pass the ultimate order imposing punishment on a member of subordinate judiciary, he cannot take any action without, or contrary to, the recommendation of the High Court. After the High Court comes to the conclusion that some action by way of imposition of punishment needs to be taken against a member of the subordinate judiciary, the Court makes a recommendation to the Governor and he passes the order accordingly.[76] "The test of control is not the passing of the order against a member of the subordinate judicial service, but the decision to take such action".

The Supreme Court has pointed out that disciplinary action against a government employee has two parts—(1) a decision has to be taken if any disciplinary action is to be taken; (ii) this decision is then carried out by a formal order. The control of the High Court over subordinate judiciary relates to the first stage. The second stage comes after the High Court decision to take disciplinary action. The High Court makes a recommendation to the Governor who then issues a formal order in accordance with the High Court recommendation. The recommendation of the High Court is binding on the Governor, but the High Court itself cannot issue the formal order. While the High Court has disciplinary control over the subordinate judiciary, including the power to initiate disciplinary proceedings, suspend them pending inquiries and impose punishments on them, but when it comes to the question of dismissal, removal, reduction in rank or termination of service of a judicial officer on any count whatsoever, the High Court acts as a recommendatory authority and cannot itself pass such an order.

At times, while disposing of appeals from lower courts, the High Court Judges make adverse remarks on the performance of the judges in the lower courts. Such remarks may affect the reputation and career of such judges. In this connection, the Supreme Court has advised caution and restraint on the part of the High Court Judges in making adverse comments on the judges of the lower courts. The aggrieved judge may move the Supreme Court to expunge the adverse remarks against him because he has no other remedy in law to vindicate his position. In quite a few cases, the Supreme Court has expunged such adverse remarks.[77]

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74. *State of Andhra Pradesh v. S.N. Nizamuddin*, AIR 1976 SC 1964 : (1976) 4 SCC 745; *State of Gujarat v. Ramesh Chandra Mashruwala*, AIR 1977 SC 1619 : (1977) 2 SCC 12.

75. *Yoginath D. Bagde v. State of Maharashtra*, AIR 1999 SC 3734, 3477 : (1999) 7 SCC 739.

76. *The Registrar, High Court of Madras v. R. Rajiah*, AIR 1988 SC 1388 : (1988) 3 SCC 211; *Registrar (Admn.), High Court of Orissa v. Sisir Kanta Satapathy*, AIR 1999 SC 3265 : (1999) 1 SCC 725.

77. *Ishwari Prasad Mishra v. Mohd. Isa*, AIR 1963 SC 1728 : (1963) 3 SCR 722; *K.P. Tiwari v. State of Madhya Pradesh*, AIR 1994 SC 1031; *Kashi Nath Roy v. State of Bihar*, 1996 AIR SCW 2098 : (1996) 4 SCC 539; *Brij Kishore Thakur v. Union of India*, AIR 1997 SC 1157; *In the matter of : 'K'— a Judicial Officer*, AIR 2001 SC 972 : (2001) 3 SCC 54; In the matter of *R. v. A Judicial Officer*, (2007) 7 SCC 729 : (2007) 9 JT 1.

Posting of judicial officers to administrative posts can be with the consent of the High Court and for such time as it agrees.[78] The practice of appointing judicial officers to administrative posts is not sound as it dilutes the principle of separation of the judiciary from the executive. The fact that a post in the Secretariat is in the line of promotion of a judicial officer may offer temptations from which a judge should be immune. Therefore, the principle that a judicial officer can be seconded to an administrative post only for such time as the High Court may permit is salutary to the extent it goes but the better thing will be to stop this practice altogether so that the judiciary may be immunized from any temptation whatsoever.

In *B.S. Yadav v. State of Haryana*,[79] the Supreme Court has ruled that the power to make the law regulating conditions of service of the judicial officers of the State vests in the Legislature under Art. 309, and, until it acts, the Governor can make rules for the purpose.[80] The Supreme Court has suggested that the High Court may be consulted while framing or amending the rules though it is not mandatory under Art. 309.

These rules must be of general application and they must not interfere with the powers of the High Court. Thus, while the Governor can formulate the rules of seniority of the district and sessions judges, the application of the rules to individual cases must be left to the High Court. Similarly, though rules can provide for a period of probation, the question whether a particular judicial officer has satisfactorily completed his probation or not is a matter lying exclusively in the domain of the High Court.

In *Beena Tiwari v. State of Madhya Pradesh*,[81] the Supreme Court has reiterated that the question of confirmation of a member of subordinate Judicial Service is absolutely the concern of the High Court as the matter squarely falls within Art. 235. No rule framed by the State Government can interfere with the control vested in the High Court under Art. 235. Rules made by the Government are to be read subject to, and in harmony with, the control vested in the High Court under Art. 235.[82]

The Supreme Court has suggested that *in exercise of* its control function, the High Court should devise a proper and uniform system of inspection of the courts subordinate to it. The Supreme Court has emphasized that such inspection is of vital importance as it helps these courts to give the best results. But the inspection should not be casual but both effective and productive.[83]

In *K.K. Dhawan's* case,[84] the Supreme Court has indicated the basis on which disciplinary action can be initiated against subordinate Judges, viz. :

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78. *State of Orissa v. Sudhansu Sekhar*, AIR 1968 SC 647 : (1968) 2 SCR 154.
79. AIR 1981 SC 561 : 1980 Supp SCC 524.
80. For discussion on Art. 309, see, *infra*, Ch. XXXVI, Sec. B.
81. AIR 1988 SC 488 : 1988 Supp SCC 213.
82. *The Registrar, High Court of Madras v. R. Rajiah*, AIR 1988 SC 1388 : (1988) 3 SCC 211.
83. *High Court of Punjab and Haryana v. Ishwarchand Jain*, AIR 1999 SC 1677 : (1999) 4 SCC 579.
Also, *High Court of Judicature at Allahabad v. Sarnam Singh*, AIR 2000 SC 2150 : (2000) 2 SCC 339.
84. *Union of India v. K.K. Dhawan*, AIR 1993 SC 1478 : (1993) 2 SCC 56.
Also see, *Union of India v. A.N. Saxena*, AIR 1992 SC 1333; *Ishwar Chand Jain v. High Court of Punjab and Haryana*, AIR 1988 SC 1395 : (1988) 3 SCC 370.

(1) Where the judicial officer has conducted in a manner as would reflect on his reputation or integrity or good faith or devotion to duty;

(2) that there is *prima facie* material to show recklessness or misconduct in the discharge of his duty;

(3) that he has acted negligently or that he omitted the prescribed conditions which are essential for the exercise of the statutory powers;

(4) that he had acted to unduly favour a party;

(5) that he had been actuated by corrupt motive.

The Supreme Court has clarified that there is possibility on a given set of facts to arrive at a different conclusion. This cannot be a ground "to indict a judicial officer for taking one view" and to infer misconduct for that reason alone. Merely because the order passed by a judicial officer is wrong or that the action taken could have been different would not warrant initiation of disciplinary proceedings. According to the Supreme Court, unless there are strong grounds to suspect the officer's bonafides and that the order has been actuated by malice, bias or illegality, disciplinary proceedings against the officer would affect the morale of the subordinate judiciary and no officer would be able to exercise power freely and independently.[85]

In *P.C. Joshi v. State of Uttar Pradesh,*[86] the Supreme Court quashed an order of dismissal passed on a judicial officer by the High Court of Allahabad because there was no material to prove that there was any "*mala fide* or extraneous reasons" on the part of the judge to pass the order. Merely because some orders passed by the judge are wrong, it does not warrant initiation of disciplinary proceedings against the judge.

The Court has observed in *Joshi*:[87]

> "If in every case where an order of a subordinate Court is found to be faulty a disciplinary action were to be initiated, the confidence of the subordinate judiciary will be shaken and the officers will be in constant fear of writing a judgment so as not to face a disciplinary enquiry and thus judicial officers cannot act independently or fearlessly."

The "control" under Art. 235 extends to ministerial officers and servants on the establishment of the subordinate courts as well.[88]

(f) CRIMINAL JUDICIARY

Ordinarily the magistracy is under the control of the State Executive and is not covered by the constitutional provisions above-mentioned. However, separation of the judiciary from the executive being an accepted policy objective,[89] Art. 237 gives power to the State Executive to direct, by a public-notification, that any of the above-mentioned constitutional provisions relating to persons in the State Judicial Service [Arts. 233-235] will apply to any class of magistrates in the State with such exceptions and modifications as it may deem fit. This Article thus

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85. *Ramesh Chander Singh v. High Court of Allahabad,* (2007) 4 SCC 247 : (2007) 4 JT 135.
86. AIR 2001 SC 2788 : 2001 SCC (L&S) 984.
87. *Ibid,* at 2789.
88. *R.M. Gurjar v.High Court of Gujarat,* AIR 1992 SC 2000 : (1992) 4 SCC 10.
89. Directive Principle 50, see, *infra,* Ch. XXXIV on "Directive Principles".

makes a flexible arrangement and enables a State to take measures progressively to secure the control of the High Court over the magistracy as well.

Explaining the purport of Art. 237, the Supreme Court has observed:[90]

> "Art. 237 enables the Governor to implement the separation of the judiciary from the executive. Under this Article, the Governor may notify that Arts. 233, 234, 235 and 236 of the Constitution will apply to magistrates subject to certain modifications or exceptions, for instance, if the Governor so notifies, the said magistrates will become members of the judicial service; they will have to be appointed in the manner prescribed in Art. 234; they will be under the control of the High Court under Art. 235 and they can be appointed as District Judges by the Governor under Art. 233(1). To state it differently, they will then be integrated in the judicial service... Indeed, Art. 237 emphasizes the fact that till such an integration is brought about, the magistrates are outside the scope of the said provisions. The said view accords with the constitutional theme of independent judiciary..."

Reference may be made to one serious problem existing in the area of criminal justice, viz., delayed justice. It usually takes long to complete a criminal trial.

The Supreme Court has interpreted Art 21 to include the right to a speedy trial.[91] Nevertheless, the Court has refused to set a maximum time-limit within which a criminal trial must be completed. The question is far too complex to impose a rigid maximum time-limit for all criminal trials to complete. Each case needs to be decided on its own facts whether there has been undue delay and the trial needs to be quashed.

The Court has however reminded the State that it is its constitutional obligation to dispense speedy justice, more so in the field of criminal law.[92]

(g) IMPROVEMENT OF SUBORDINATE JUDICIARY

The Supreme Court has constantly endeavoured to secure the betterment of the conditions of service of the members of the subordinate judiciary.

In 1992, in *All-India Judges' Association v. Union of India*[93] the Supreme Court considered a writ-petition under Art. 32[94] filed by the All-India Judges' Association seeking directions for setting up of an All-India Judicial Service and for bringing about uniform conditions of service for members of the subordinate judiciary throughout the country. The Court referred to what the Law Commission had said in its XIV Report in the year 1958 on the question of setting up of an All-India Judicial Service and observed:

> "There is considerable force and merit in the view expressed by the Law Commission. An All-India Judicial Service essentially for manning the higher services in the subordinate judiciary is very much necessary. The reasons advanced by the Law Commission for recommending the setting up of an All-India Judicial Service appeal to us."

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90. *Chandra Mohan v. State of Uttar Pradesh*, AIR 1966 SC 1987 : (1967) 1 SCR 77.
91. See, Ch. XXVI, *infra*, for discussion on this question.
92. *P. Ramachandra Rao v. State of Karnataka*, (2002) 4 SCC 578, 604 : AIR 2002 SC 1856. Also see, Ch. XXXIV, on Directive Principles of State Policy.
93. AIR 1992 SC 165 : (1992) 1 SCC 119.
94. For discussion on Art. 32, see, *infra*, Ch. XXXIII, Sec. A.

The Court has thus directed the Central Government and other authorities concerned to take appropriate steps to set up an All-India Judicial Service, and bring about uniformity in the designation of judicial officers. This requires action being taken under Art. 312.[1]

In addition, the Supreme Court also directed various improvements being effectuated in the conditions of service of the subordinate judiciary, *e.g.*, raising the retirement age to 60 years, examination of the pay structure of judicial officers, provisions of allowance for purchase of law books and journals for a residential library for every judicial officer, provision of residential accommodation, *etc.*

Justifying the higher retirement age for judicial officers than executive officers, the Court has said that the work of a judge involves more of a mental activity than physical. In case of a judge "experience is an indispensable factor and subject to the basic physical fitness with growing age experience grows".

On the question of pay scales for judiciary, the Court had said that "the judiciary compares unfavourably with the executive branches of the Government". This opinion was subsequently modified.[2]

On the need for a library allowance for subordinate judiciary, the Supreme Court justified it by saying: "Law books, Law reports and legal journals are indispensable to a judicial officer. They are in fact his tools".

The Court also observed: "Provision of an official residence for every judicial officer should be made mandatory".

The Court emphasized that "dispensation of justice is an inevitable feature in any civilized society". The Court also pointed out that income from Court-fees is more than the expenditure on the administration of justice.[3] The Court, therefore, suggested that "what is collected as Court-fees at least be spent on the administration of justice instead of being utilised as a source of general revenue of the State". The Court has also suggested that provision must be made for in-service training of judicial officers.

Petitions for review of the above decision were filed by several State Governments and the Central Government. They raised several objections to the directions given by the Supreme Court in the above case. The main objections on their behalf were—(1) It falls within the exclusive purview of each State to regulate service conditions for subordinate judiciary. When the Supreme Court gives directions for this purpose, it encroaches upon the State power; (2) Implementation of the directions given by the Supreme Court would impose a heavy financial burden on the States.

After considering these objections, the Court rejected the same and reiterated its earlier directions in *All-India Judges Association v. Union of India* (II).[4] The Court asserted that it made the recommendations to improve the system of justice and thereby to improve the content and quality of justice administered by the courts.

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1. For this provision, see, Ch. XIII, Sec. G, *infra.*
2. *All India Judges Assn.v. Union of India (III),* (2002) 4 SCC 247, 266-267 : AIR 2002 SC 1752. See further *infra.*
3. For discussion on Court fees, see, *infra*, Ch. XI, Sec. H.
4. AIR 1993 SC 2493 : (1993) 4 SCC 288.

Commenting on the various objections raised by the various governments to the directions issued by the Court to improve the working conditions for subordinate judiciary, the Court stated that this was because of lack of realization that judicial service is different from executive service. In this connection, the Court has stated:

> "The judicial service is not service in the sense of 'employment'. The judges are not employees. As members of the judiciary they exercise the sovereign judicial power of the state".

The Supreme Court had prescribed the qualification of minimum of three years' legal practice for recruitment in the lowest rung of judicial office,[5] justifying such a qualification, saying:

> "Considering the fact that from the first day of his assuming office, the judge has to decide, among others, questions of life, liberty, property and reputation of the litigants, to induct graduates fresh from the Universities to occupy seats of such vital powers is neither prudent nor desirable".

Nevertheless, this requirement was done away with in the subsequent decision of the Supreme Court in All India Judges' Assocn.(III) in 2002.[6]

The Court also recommended that the service conditions of the judicial officers should be laid and reviewed from time to time by an independent commission exclusively constituted for the purpose. The judiciary should be adequately represented in the composition of the commission.[7]

Pursuant to the directions of the Supreme Court, the Central Government constituted the First National Judicial Pay Commission under the Chairmanship of Justice K.J.Shetty. The Commission submitted its Report in 1999 making various recommendations relating to the betterment of the service conditions of the subordinate judiciary, including a revision of pay scales. This led to the filing of the third writ petition before the Supreme Court by the All India Judges' Association for enforcement of the recommendations.[8] On the basis of the Shetty Report, the Supreme Court revised its earlier views regarding parity of pay scales between the Administrative Service and the Judiciary[9] and the requirement of an advocate to have experience of three years as a criteria for eligibility to enter the judicial service[10]. In addition directions were issued regarding recruitment to the Higher Judicial Service, accommodation and other allowances[11].

The highlight of the Court's pronouncement in the second All India Judges Association case is that the Court has distinguished judicial service from executive service and put the former on a higher pedestal than the latter. The Court has emphasized that "the Judicial service is not service in the sense of 'employment'. "The Judges are not employees. As members of the judiciary, they exercise the sovereign judicial power of the State". The Court has observed further on this point.[12]

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5. AIR 1993 SC 2493 : (1993) 4 SCC 288.
6. (2002) SCC 247, 272 (Para 32) : AIR 2002 SC 1752; see also *infra*.
7. Also see, *State of Rajasthan v. Rajasthan Judicial Service Officers' Association*, (1999) 5 SCC 675 : AIR 1999 SC 1965.
8. *All India Judges' Assocn v. Union of India (III)*, (2002) 4 SCC 247 : AIR 2002 SC 1752.
9. *Ibid*, p. 267
10. *Ibid*, p. 272
11. *Ibid*, pp. 270, 273.
12. AIR 1993 SC at 2502.

> "The Judges, at whatever level they may be, represent the State and its authority unlike the administrative executive or the members of other services. The members of the other services, therefore, cannot be placed on par with the members of the judiciary, either constitutionally or functionally."

The Court has put great emphasis on judicial independence and, in the opinion of the Court, this cannot be secured if the judges are kept in want of their essential accoutrements. The Court has emphasized that judicial independence cannot be secured by making mere solemn proclamations about it. It has to be secured both in substance and in practice. "It is trite to say that those who are in want cannot be free. Self-reliance is the foundation of independence". The society has a stake in ensuring the independence of the judiciary, and "no price is too heavy to secure it."[13]

In *All-India Judges Ass. v. Union of India* (III),[14] the Supreme Court considered such questions pertaining to district and subordinate judges as pay scales, sufficiency of judicial strength, qualifications and recruitment of judges. The Court gave suitable directions as regards these matters.

The Court has also answered the objection that by making the directions, the Court was encroaching upon the powers of the State conferred by Art. 309.[15] The Court has observed in this connection:[16]

> "But the mere fact that Art. 309 gives power to the executive and the legislature to prescribe the service conditions of the judiciary does not mean that the judiciary should have no say in the matter. It would be against the spirit of the Constitution to deny any role to the judiciary in that behalf, for theoretically it would not be impossible for the executive or the legislature to turn and twist the tail of the judiciary by using the said power. Such a consequence would be against one of the seminal mandates of the Constitution, namely, to maintain the independence of the judiciary".

Because of these reasons, the Supreme Court has reiterated what it said in its 1992 judgment for effectuating various improvements in the service conditions of the district and subordinate judges. The Court has however modified somewhat its direction to raise the age of retirement to 60 years. The benefit of this extension in retiring age would not accrue automatically to all judicial officers irrespective of their past record of service and evidence of their continued utility to the judicial system in future. The benefit would be available only to those whom the High Court thought "have a potential for continued useful service".

In subsequent, pronouncements, the Supreme Court has reiterated some of the abovementioned directions. For example, in *All India Judges' Association v. Union of India*,[17] the Court has ruled again that the "qualification of legal practice for a minimum three years is a must for recruitment in the lowest rung of judicial office." A State can however make rules prescribing a higher qualification, *e.g.*, five years standing at the Bar.

When a State makes rules enhancing the age of retirement of judicial officers to 60 years, the direction issued by the Court on this point ceases to operate. The

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13. *Ibid.*
14. (2002) 4 SCC 247.
15. For Art. 309. see, *infra*, Ch. XXXVI.
16. AIR 1993 SC at 2503.
17. AIR 1994 SC 2771 : (1994) 6 SCC 314.

enhancement in the age of retirement of judicial officers comes into operation by virtue of the rules. This means that the rider put by the Court concerning review of the work of a judicial officer before extending his age of retirement to 60 years also comes to an end.[18]

In the case noted below,[19] the Supreme Court has called upon the High Courts to furnish a detailed status report of the compliance of its orders made by it in the above two cases.

(h) FAST TRACK COURTS

The Supreme Court has been insisting from time to time that adequate number of judges be appointed in the subordinate courts to cope with the large number of cases filed in these courts. "Justice delayed is justice denied." The Court has emphasized in *Judges* (iii):[20] "an independent and efficient judicial system is one of the basic structures of our constitution. If sufficient number of Judges are not appointed, justice would not be available to the people, thereby undermining the basic structure."

To deal with the long standing problem of backlog of cases pending for long, the Central Government put into force a scheme of setting up fast track courts in the States. In *Brij Mohan Lal v. Union of India*,[21] while commending the scheme, the Supreme Court issued certain directions, consistent with Arts. 233 and 234, discussed above, with a view to ensure the independence and efficiency of these courts.

(i) FAMILY COURTS

Family Courts set up under the Family Courts Act, 1984 are subject to the supervisory jurisdiction of the High Court under Article 235. Although the State Government has the power to create and shift a family Court from one place to another, the High Court has a say in the matter and can make its recommendations for the shifting having regard to its control over sub-ordinate courts on its administrative side. In *M.P.Gangadharan v. State of Kerala*[22] the Supreme Court said that while constituting a family Court the State must provide adequate infrastructure so as to meet the objects for which family courts are established.

(j) RESERVATION OF JUDICIAL POSTS FOR BACKWARD CLASSES

The Supreme Court has made a very momentous pronouncement in *State of Bihar v. Bal Mukand Sah*[23] settling a very significant problem having an abiding impact on the integrity and independence of the subordinate judiciary.

In *Bal Mukand*, the Court considered the question: Can a State Legislature enact a law to reserve posts in the subordinate judiciary for Scheduled Castes, Scheduled Tribes and other backward classes?

The question arose in the following factual context.

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18. *Rajat Baran Ray v. State of West Bengal*, AIR 1999 SC 1661 : (1999) 4 SCC 235.
19. *All India Judges Association v. Union of India*, AIR 1999 SC 1555.
20. *Ibid.*
21. (2002) 5 SCC 1 : AIR 2002 SC 2096.
22. (2006) 6 SCC 162 : AIR 2006 SC 2360.
23. AIR 2000 SC 1296 : (2000) 4 SCC 640.

The Bihar Legislature enacted the Bihar Reservation of Vacancies in Posts and Services (for Schedule Castes, Scheduled Tribes and other Backward Classes Act (1991). The Act reserved 50% posts for Scheduled Castes, Scheduled Tribes and other Backward Classes in Government services. The question for the consideration of the Supreme Court in *Bal Mukund Sah* was whether this Act could be applied to the recruitment of district judges [Art. 233(2)] and to direct recruitment at grass root level of the subordinate judiciary in the State [Art. 234]. The Court answered in the negative.

The Court has argued that Arts. 233-235 make special provisions for appointment to the posts of district and subordinate judges. These Articles constitute a complete code.

First, as to recruitment of district judges. The Court has argued that Art. 233 dealing with appointment of district judges, on its own express terminology, projects a complete scheme regarding appointment of persons to the posts of district judges. Art. 233 is not made subject to any law passed by the State Legislature. So far as direct recruitment to the posts of district judges is concerned, Art. 233(2) leaves no doubt that unless a candidate is recommended by the High Court, the Governor cannot appoint him as a district judge.[24]

As regards the appointment of judicial officers other than district judges, a complete scheme is provided by Art. 234. Under Art. 234, Governor makes rules in consultation with the High Court. Art. 234 is not made subject to the laws made by the State Legislature. This means that the State Legislature cannot make any law regulating the appointment of subordinate judges.[25]

Under Art. 309, rules can be made for regulating conditions of service of these judges. The State Legislature can make a law under Art. 309 for similar purposes. But Art. 309 is expressly made subject to other provisions of the Constitution and rules concerning appointment of the subordinate judiciary can only be made under Art. 234 which is beyond legislative interference. The field of recruitment to the judicial service is carved out of Art. 309 by Art. 234.[26]

Similarly, Art. 245[27] is made subject to other provisions of the Constitution which would include Arts. 233 and 234. As these twin articles cover the entire field regarding recruitment and appointment of district judges and subordinate judges at base level pro tanto, the legislative power of the State Legislature to operate in this field clearly gets excluded by the constitutional scheme itself.

Both Arts. 245 and 309 have to be read subject to Arts. 233 and 234. If any reservation of judicial posts is to be made, it can be done only through rules made under Arts. 233 and 234 after consultation with the High Court. The Legislature cannot by-pass the High Court and enact a law making reservation in judicial appointments for district judges and subordinate judiciary. No law can be made to interfere with the process of recruitment and appointment to the district judiciary without consultation with the High Court.

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24. For Art. 233, see, this Chapter Sec. G(b), *supra.*
25. For Art. 234, see, Sec. G(c), *supra.*
26. For Art. 309, see, *infra*, Ch. XXXVI, Sec. B.
27. See, *infra*, Ch. X, Secs. A and B.

The Court linked the process of appointment of these judges with independence of the judiciary which is one of the basic features of the Constitution. It is with a view to fructify the independence of judiciary that Arts. 233 and 234 insulate the process of recruitment and appointment of these judges from outside legislative interference. Arts. 233 and 234 constitute a complete code for the purpose.

Referring to *Indra Sawhney*;[28] the Supreme Court has stated that even if under Art. 16(4),[29] the State proposes to provide reservation on the ground of inadequate representation of certain backward classes in services "if it is considered by the appropriate authority that such reservation will adversely affect the efficiency of the administration, then exercise under Art. 16(4) is not permissible".[30] The matter whether efficiency will be affected in the judicial administration if reservation is made, is within the exclusive jurisdiction of the High Court which has to be consulted in this regard.

Therefore, no law can be made under Art. 16(4) concerning judicial service without consultations with the High Court. No law can therefore be made to interfere with the process of recruitment and appointment to the district judiciary without consultation with the High Court as this is essential "for fructifying the constitutional mandate of preserving the independence of judiciary which is its basic structure".[31] The Supreme Court has declared: "Judicial independence is the very essence and basic structure of the Constitution".[32]

The Ex-servicemen (Reservation of Vacancies in the H.P. Judicial Service) Rules, 1981, framed by the Governor, without consultation with the High Court, as required by Art. 234, have been held to be invalid by the Supreme Court in *A.C. Thalwal v. High Court of Himachal Pradesh*.[33] The Supreme Court has insisted that consultation with the High Court is mandatory and consultation must be effective and meaningful and not merely formal. The constitutional scheme seeks to attain an independent judiciary which is the bulwork of democracy.

(k) CONTEMPT OF SUBORDINATE JUDICIARY

As already stated,[34] a High Court is a Court of record under Art. 215 and has power to punish for its own contempt. Under Art. 227, a High Court has power of superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction.

Interpreting Ss. 10, 14 and 15 of the Contempt of Courts Act, 1971, the Supreme Court has ruled in *S.K. Sarkar, member, Board of Revenue, State of U.P. v. Vinay Chandra*[35], that the High Court can take cognizance of criminal contempt of a subordinate Court *suo motu* on its own motion on the basis of information received by it. The Court has also ruled that the phrase "courts subordinate to it" used in S. 10 is wide enough to include all courts which are judicially

28. *Infra*, Ch. XXIII
29. *Infra*, Ch. XXIII.
30. See, *infra*, Ch. XXXV.
31. For discussion on this doctrine, see, *infra*, Ch. XLI
32. See, *High Court of Orissa, Cuttack v. Sisir Kanta Satapathy*, AIR 1999 SC 3265 : (1999) 7 SCC 725.
33. AIR 2000 SC 2732 : (2000) 7 SCC 1.
34. *Supra*, this Chapter, Sec. C(i).
35. AIR 1981 SC 723.

subordinate to the High Court, even though administrative control over them under Art. 235 does not vest in the High Court. Therefore, the Board of Revenue is a Court subordinate to the High Court within the contemplation of S. 10.

Under Art. 129, the Supreme Court has been declared a Court of record and can punish for its own contempt.[36] The Supreme Court has made a very creative use of Art. 129 to protect the honour and integrity of the lower courts. In *Delhi Judicial Service Association v. Gujarat*,[37] the Supreme Court has given a broad and liberal interpretation to its contempt power. The Court has ruled that under Art. 129, it has power to punish not for its own contempt but even that of the High Courts and the lower courts.[38] Explaining the reasons for taking such a liberal view of its own contempt power, the Court has observed:

> "The subordinate courts administer justice at the grass roots level. Their protection is necessary to preserve the confidence of people in the efficacy of courts and to ensure unsullied flow of justice at its base level."

The Court has emphasized that as it has the power of judicial superintendence and control over all the courts and tribunals. Correspondingly it has a duty to protect and safeguard the inferior courts so as to keep the flow of justice. The subordinate courts do not have adequate power under the law to protect themselves and, therefore, it is necessary that the Supreme Court should protect them.

In the instant case, police had misbehaved with a magistrate in a State. The Supreme Court took a very serious view of the misbehaviour by the police officers, initiated contempt proceedings against these officers and awarded them suitable punishments.

This is a pronouncement of great significance. This ruling will go a long way towards maintaining the integrity and independence of the subordinate judiciary. The Supreme Court has now taken them all under its own protective umbrella.[39]

The Supreme Court has again reiterated in *Re Ajay Kumar Pande*[40] that Art. 129 is not restricted or limited by the contempt of Courts Act, 1971. As the highest Court of the land, the Supreme Court has not only the right to protect itself but also has the right, jurisdiction and the authority to protect the High Courts and the subordinate courts from being insulted, abused or denigrated in any other way.

H. LEGISLATIVE POWER REGARDING THE JUDICIARY

The legislative power regarding the High Courts and the subordinate courts are distributed between the Centre and the States.[41]

Article 4 is an independent power not referable to List I Entry 78. There is ample power under Art. 4 to clothe Parliament with power to invest High Courts with the necessary "jurisdiction and powers" of every description.[42]

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36. *Supra*, Ch. IV, Sec. C(i)(a).
37. AIR 1991 SC 2176.
38. Also see, *supra*, Ch. IV, Sec. C(i)(b).
39. *Income Tax Appellate Tribunal v. V.K. Agarwal*, 1999(1) SCC 16 : AIR 1999 SC 452.
40. (1996) 6 SCC 510 : 1996 SCC (Cri) 1391. See *Pallav Seth v. Custodian*, (2001) 7 SCC 549, 561-562 : AIR 2001 SC 2763.
41. Part IV, Ch. X, *infra*.
42. *Jamshed N. Guzdar v. State of Maharashtra*, (2005) 2 SCC 591 : AIR 2005 SC 862.

Parliament has exclusive power to make laws with respect to: Constitution, organisation, jurisdiction and powers of the Supreme Court; persons entitled to practise before the Supreme Court (entry 77, List I); Constitution and organisation of the High Courts except provisions as to officers and servants of the High Courts; persons entitled to practise before the High Courts (List I, entry 78); Extension of the jurisdiction of a High Court to, and exclusion of the jurisdiction of a High Court from, any Union Territory (List 1, entry 79); Jurisdiction and powers of all courts except the Supreme Court, with respect to any of the matters in the Union List; admiralty jurisdiction (List 1, entry 95); Allowances, leave of absence and pensions of the High Court Judges [Art. 221(2)].[43] Further, under Art. 247, Parliament has been authorised to establish any additional courts for the better administration of law made by it.

"Administration of justice; constitution and organisation of all courts, except the Supreme Court and the High Courts" has now been transferred from List II to List III (Entry 11A in List III). The topics of "officers and servants of the High Courts; procedure in rent and revenue courts; fees taken in all courts except the Supreme Court (List II, entry 3)"; "Jurisdiction and powers of all Courts, except the Supreme Court, with respect to any matter in the State List (List II, entry 65)" remain exclusively State subjects.

Under List III, entry 46, a concurrent legislative power has been conferred on Parliament and the State Legislatures to make laws with respect to the "jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters" in the Concurrent List.

The 'administration of justice' is now a concurrent subject (Entry 11A, List III). Barring affecting the constitution and organisation of the High Courts, a State Legislature can create courts, invest them with power and jurisdiction to try every cause and matter, whether civil or criminal, and define, enlarge, alter, amend and diminish the jurisdiction of courts and define their jurisdiction, in a general manner, except admiralty jurisdiction.[44] The State can create courts of general jurisdiction. Thus, a State Legislature is competent to confer power on village panchayats to try criminal offences.[45]

Entry 65, List II, confers special power on the State Legislature. Therefore, under entry 65, the Legislature while legislating with regard to a matter in List II can make provisions concerning the jurisdiction and powers of the courts with respect to that subject-matter specifically. The Legislature can exclude or bar the jurisdiction of a Court, or confer special jurisdiction on it, with regard to a matter in that List.

Similar is the case with regard to a matter in the Concurrent List. Parliament can, under entry 95, List I, or entry 46 in List III, specifically confer jurisdiction on any Court, or bar its jurisdiction, in relation to any matter in List I or List III, but so long as the jurisdiction is not barred, a Court is entitled to try all cases as authorised under the State legislation even with respect to matters in List I or List III. List III, entry 3, authorises the conferment of general jurisdiction on courts

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43. *Supra*, this Chapter.
44. *K. Kumaraswani v. Premier Electric Co.*, AIR 1959 AP 3; *Mohindroo v. Bar Council*, AIR 1968 SC 888 : (1968) 2 SCR 709.
45. *Infra*, , Ch. X; entry 5, List II.

while all other entries authorise the creation of special jurisdiction limited to particular matters.

As regards the High Courts, their constitution and organisation is a central subject. Parliament can set up a High Court, constitute and organise it. Thus, a uniformity can be maintained among the various High Courts in the matter of their constitution and organisation. It may however be noted that for the most part the Constitution itself fixes the constitution and organisation of the High Courts and only a few matters have been left to Parliament, *e.g.*, fixing of allowances, leave and pensions of Judges. Parliament has no control over the officers and servants of a High Court who fall within the State sphere.[46]

Recently, however, the Supreme Court has claimed a say in settling the service conditions of the staff of the subordinate courts on the ground that this matter constitutes a significant factor "having relevance in the functioning of the subordinate courts. This question is, therefore directly connected with the administration of justice and thereby with the rule of law". This being so, the Court can examine this matter in a writ petition under Art. 32 of the Constitution. "If necessary, with the aid of Art. 142 of the Constitution of India, this Court can issue necessary directions to the State Governments/Union Territories for due compliance."[47]

As regards the jurisdiction of a High Court, Parliament has power to confer special jurisdiction on a High Court with respect to any matter in List I or List III.[48] Parliament or a State Legislature can confer general jurisdiction on it under its power to legislate for administration of justice (List III, entry 11A). A State Legislature can invest it specifically with any special jurisdiction with respect to any matter in List II or List III. A law enacted by the Madras Legislature establishing courts of sessions to try criminal cases committed within the Presidency Town of Madras and, to that extent, curtailing the original criminal jurisdiction of the Madras High Court, was held valid. It would fall under entries 1, 2, 11-A and 46 of List III, and not under entry 78 of List I.[49]

A State Law establishing a City Civil Court at Calcutta, giving it jurisdiction to try cases up to Rs. 50,000, to enable it to try suits of certain types, and excluding the High Court from trying those types of suits has been held to be valid as falling under entry 11-A, List III.[50] A State law making a change in the number of judges who should hear an appeal in the High Court is a matter pertaining not to the constitution and organisation of the High Court, but to "administration of justice" (entry 11 A, List III) and is, thus, valid.[51] A State law abolishing letters patent appeals in a High Court in matters pertaining to 'land' has been held valid un-

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46. Art. 229(2): List I, entry 78; List II, entry 3.

47. *All India Judges Association v. Union of India*, AIR 1999 SC 1555.
See, Ch. IV, Sec. G, *supra*, for Art. 142.
See, *infra*, Ch. XXXIII, Sec. A, for Art. 32.

48. *Amarendra v. Bikash*, AIR 1957 Cal. 534.
For an illustration, see, the Income-tax Act where the High Court has been given an advisory role in income-tax assessments.

49. *Ahmed Moideen v. Inspector, D. Div.*, AIR 1959 Mad. 261.

50. *Indu Bhushan De. v. State of West Bengal*, AIR 1986 SC 1783 : 1980 Supp SCC 343.

51. *Panicker v. Panicker*, AIR 1953 TC 53; *Shivarudrappa v. Kapurchand*, AIR 1965 Mys. 76.

der entry 18, List II, which gives power to the State Legislature to legislate in relation to 'land'.[52]

The Bombay City Civil Court Act, 1948, establishing a City Civil Court and excluding the original jurisdiction of the High Court from trying civil cases upto one lakh within the local limits of Bombay was held valid in *State of Bombay v. Narottamdas*.[53] The Court explained that the terms "administration of Justice" and "constitution and organisation of courts" are "wide enough to include the power and jurisdiction of courts". The power of the State includes "the power of defining, enlarging, altering, amending and diminishing the jurisdiction of the courts and defining their jurisdiction territorially and pecuniarily."[54]

Consequently, legislation by the States effectively denuding the High Court of its original jurisdiction and abolishing Letters Patents Appeals were held to be constitutionally valid.[55]

Parliament has extensive power to re-organise States and to do every thing that is consequential thereto.[56] Therefore, while forming a new State, or reorganising the existing States, Parliament has power not only to constitute and organise a new High Court but even to vest it with general jurisdiction. The legislative power with respect to the Supreme Court is exclusively vested in Parliament.

I. TRIBUNALS

Article 323A and 323B provide for proliferation of the tribunal system in the country.

Article 323A provides that Parliament may by law establish tribunals for adjudication of disputes concerning recruitment and conditions of service of persons appointed to public service under Central, State or any local or other authority, or a corporation owned or controlled by the government. The law made by Parliament for the purpose may specify the jurisdiction and procedure of these tribunals. Under Cl. 2(d), the parliamentary law may exclude the jurisdiction of all courts, except that of the Supreme Court under Art. 136, with respect to the service matters falling within the purview of these tribunals.[57] Under Cl. 3 of Art. 323A, the provisions of Art. 323A override any other provision in the Constitution or in any other law.

Articles 323B(1) and (2) empower the appropriate legislature[58] to provide, by law, for adjudication or trial by tribunals of any disputes and offences with respect to the following matters:

(i) taxation:
(ii) foreign exchange;

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52. *Hakim Singh v. Shiv Sagar*, AIR 1973 All. 596.
53. AIR 1951 SC 69 : 1951 SCR 69.
54. AIR 1951 SC 69 : 1951 SCR 69. See also *Amarendra Nath Ray Chowdhary v. Bikash Chandra Ghose*, AIR 1957 584.
55. *Jamshed N.Gazdar v. State of Maharashtra,* (2005) 2 SCC 591 : AIR 2005 SC 591.
56. *Supra*, Ch. V.
57. For discussion on Art. 136, see, *supra*, Ch. IV, Secs. D and E.
58. "Appropriate Legislature" means Parliament or the State Legislature which may be competent to legislate with respect to the concerned matter in accordance with the scheme of distribution of power under Act. 246 read with Schedule VII. See, *infra*, Part IV, Ch. X.

(iii) industrial and labour disputes;
(iv) land reforms;
(v) ceiling on urban property;
(vi) elections to Parliament or State Legislature;
(vii) production, procurement, supply and distribution of foodstuffs and other essential goods and control of prices of such goods;
(viii) rent, regulation of tenancy issues including the right, title and interest of landlords and tenants;
(ix) offences against laws with respect to these matters.

Such a law may establish a hierarchy of tribunals [Art. 323B(3)(a)], specify their powers and jurisdiction [Art. 323B(3)(b)], and lay down their procedure [Art. 323B(3)(c)]. Under cl. 3(d) of Art. 323B, the law establishing these tribunals may exclude the jurisdiction of all courts except of the Supreme Court under Art. 136, with respect to all or any of the matters falling within the jurisdiction of these tribunals. Under Art. 323B(4), Art. 323B has effect notwithstanding anything in any other constitutional or legal provision.

The provisions contained in Arts. 323A and 323B are not self-executing provisions. These are enabling provisions. Tribunals can be set up when necessary legislation is enacted for the purpose by the concerned legislature. This means that Arts. 323A and 323B only provide the necessary constitutional authority for such legislation. A law under Art. 323A can be enacted by Parliament alone; a law under Art. 323B can be enacted both by Parliament and the State Legislatures. They do not however, bar the legislature from establishing tribunals not covered thereunder but covered under appropriate legislative entries of Schedule VII (Para 36).[59] Arts. 323A and 323B do not derogate from legislative competence of the Parliament to establish other tribunals like Central or State Commissions under the Consumer Protection Act, 1986.[60]

It was envisaged that these provisions when fully implemented would drastically change the character of the Indian Judicial System. The tribunals established under Art. 323B can be authorised to try certain categories of criminal offences and thus impose penal sanctions. This was an innovation in the Indian legal system for criminal punishments were imposed only by the courts and not by non-judicial bodies. The idea underlying these provisions was to lighten the load of work on the courts. For example, a large number of service cases came before the High Courts through writ petitions. It was also hoped that establishment of these tribunals would make for an effective enforcement of some of the laws for the tribunals can decide cases much more quickly than the courts. In fact, the Tribunals being replications of the Courts have not succeeded in fulfilling either of the objectives. The delays in determination have led to a large pendency of cases. Furthermore since every decision of a tribunal is judicially reviewable, the work of the High Courts has not been reduced. On the other hand where a petitioner could have an issue decided by the High Court directly, which was only subject to appeal by the Supreme Court, at present an additional round of litigation has been added which compels the litigant to approach the tribunal first.

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59. *State of Karnataka v. Vishwabharathi House Building Coop. Society,* (2003) 2 SCC 412 : AIR 2003 SC 1043.
60. *State of Karnataka v. Vishwabharathi House Building Coop. Society,* (2003) 2 SCC 412 : AIR 2003 SC 1043.

The idea underlying Arts. 323A and 323B was that the tribunals established thereunder will practically have the same status as the High Courts as appeals from these tribunals could go to the Supreme Court under Art. 136. Under Cl. 2(d) of Art. 323A and cl. 3(d) of Art. 323B, the relevant law establishing these tribunals could exclude the jurisdiction of the High Courts in relation to the matters falling within the jurisdiction of these tribunals. Thus, the High Courts could be barred from exercising their writ jurisdiction under Art. 226 or their power of superintendence under Art. 227. Even the writ jurisdiction of the Supreme Court under Art. 32 could be excluded.[61] The Supreme Court accepted this position in *S.P. Sampath Kumar v. Union of India.*[62]

However, the Supreme Court changed its position in *L. Chandra Kumar v. Union of India*.[63] The Court ruled that since judicial review is a fundamental feature of the Constitution,[64] the jurisdiction conferred on the High Courts under Arts. 226/227 and upon the Supreme Court under Art. 32 of the Constitution cannot be ousted even by a provision in the Constitution. The Court has observed:

> "The jurisdiction conferred upon the High Courts under Arts. 226/227 and upon the Supreme Court under Art. 32 of the Constitution is part of the inviolable basic structure of our Constitution".

In view of the above position, the courts and tribunals "may perform a supplemental role in discharging the powers conferred by Arts. 226/227 and 32 of the Constitution". About the Tribunals created under Arts. 323-A and 323-B, the Court has said that these tribunals—

> "are possessed of the competence to test the constitutional validity of statutory provisions and rules. All decisions of those Tribunals will, however, be subject to scrutiny before a Divisions Bench of the High Court within whose jurisidction the concerned Tribunal falls. The Tribunals will, nevertheless continue to act like courts of first instance in respect of the areas of law for which they have been constituted."

The Court ruled that "all decisions of Tribunals, whether created pursuant to Art. 323 A or Art. 323B, of the Constitution will be subject to the High Court's writ jurisdiction under Articles 226/227 of the Constitution, before a Division Bench of the High Court within whose territorial jurisdiction the particular tribunal falls."[65]

Under the presently prevailing arrangement, direct appeals lie from all tribunals to the Supreme Court under Art. 136. The Court has now ruled that no appeal from the decision of a tribunal will henceforth directly lie to the Supreme Court under Art. 136. The aggrieved party will now be entitled to move the High Court under Arts. 226/227 and from the High Court decision, the aggrieved party could then move the Supreme Court under Art. 136.[66]

The Court has firmly asserted that the jurisdiction conferred upon the High Courts under Arts. 226/227 and upon the Supreme Court under Art. 32 "is part of the invio-

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61. For a fuller discussion on Art. 32, see, *infra*, Ch. XXXIII.
62. AIR 1987 SC 386 : (1987) 1 SCC 124. Also, *Union of India v. Deep*, (1992) 4 SCC 432 : AIR 1993 SC 382.
63. AIR 1997 SC 1125 : (1997) 3 SCC 261.
64. See, *infra*, Ch. XLI.
65. AIR 1997 SC at 1154 : (1997) 3 SCC 261. See also *State of West Bengal v. Ashish Kumar Ray*, (2005) 10 SCC 110 : AIR 2005 SC 254.
66. *State of H.P. v. Pawan Kumar Rajput*, (2006) 9 SCC 161 .

lable basic structure of our Constitution," "an integral and essential feature of the Constitution constituting part of its basic structure".[67] It means that these powers of judicial review cannot be ousted by any constitutional or statutory provision.

Other courts may perform a supplemental role in discharging the powers conferred by Arts. 32, 226 and 227 on the Supreme Court and the High Courts. Accordingly, the Supreme Court has declared Cl. 2(d) of Art. 323A and Cl. 3(d) of Art. 323B unconstitutional to the extent these clauses bar the jurisdiction of the High Courts under Art. 226/227 and that of the Supreme Court under Art. 32. All clauses in the legislation enacted under Arts. 323A and 323B excluding the High Court's, and Supreme Court's writ jurisdiction are unconstitutional.

The supervisory jurisdiction of the High Courts under Art. 227 has also been declared to be part of the basic structure of the Constitution.[68]

In pursuance of Art. 323A, Parliament has enacted the Administrative Tribunals Act, 1985, setting up the Central Administrative Tribunal (CAT) to adjudicate upon service matters pertaining to Central Employees. An appeal from the Tribunal lies to the Supreme Court by special leave under Art. 136.[69]

In these days of tribunalisation, a question has been raised whether Parliament has power to create any other tribunal outside Arts. 323A and 323B. The question has been raised in the context of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (RDB Act, 1993) enacted by Parliament with a view to set up the Debt Recovery Tribunal. The tribunal has been set up to hasten the recovery of debts due to the banks. The question has been whether Parliament has power to enact such an Act.

The Supreme Court has ruled in *Union of India v. Delhi High Court Bar Association*[70] that Parliament has power to enact the law in question. The Court has argued that Arts. 323A and 323B are enabling provisions which specifically authorise the legislatures to enact laws for the establishment of tribunals, in relation to the matters specified therein. The power of Parliament to establish a tribunal for any other matter not covered by Arts. 323A and 323B has not been taken away. Parliament has exclusive jurisdiction to make a law with respect to any entry in List I, as well as in the residuary area—area not covered by List II and III.[71]

The Supreme Court has justified the RBD Act as falling under entry 45, List I—dealing with Banking. Banking operations do include acceptance of loans and deposits and recovery of the debts due to banks.

The tribunals have now become an essential part of the judicial system in India. These bodies, though not courts, yet do perform an effective role in justice delivery system in India.[72]

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67. AIR 1997 SC 1125 at 1156 : (1997) 3 SCC 261.

68. Also see, *Asish Kumar Roy v. Union of India,* AIR 1999 Cal 242; *Commissioner of Entertainment Tax v. Mitra Cinema,* AIR 2000 Cal. 247. For Art. 227, see, *supra.*

69. For detailed discusson on this Tribunal, see, JAIN, *A TREATISE ON ADM. LAW,* I, 563-570. *CASES & MATERIALS,* II, Ch. XII, Sec. W, 1215-1254.
Also see : *Kendriya Vidyalaya Sangathan v. Subhash Sharma,* JT 2002 (2) SC 568 : (2002) 4 SCC 145.

70. (2002) 4 SCC 274 : AIR 2002 SC 1479; See also *State of Karnataka v. Vishwa Bharti House Building Co-op. Society,* (2003) 2 SCC 412 : AIR 2003 SC 1043.

71. See, *infra,* Chs. XI-XIV.

72. Also see, Ch. XXXIV, *infra,* under Directive Principles.

CHAPTER IX

UNION TERRITORIES, TRIBAL AREAS AND SPECIAL PROVISIONS CONCERNING SOME STATES

SYNOPSIS

A. UNION TERRITORIES

There exist a few centrally administered units which do not form part of any State but have been kept as separate and distinct entities because of several historical, cultural or political reasons. These administrative units are designated as Union Territories.

There are at present the following 7 Union Territories: (1) Delhi, (2) The Andaman and Nicobar Islands, (3) Lakshadweep, (4) Dadra and Nagar Haveli, (5)

Daman and Diu, (6) Pondicherry (known as Puducherry with effect from 1st October 2006) and (7) Chandigarh.[1]

Before 1956, the present-day Union Territories were characterised as Part C States. The States' Reorganisation Commission in its report submitted in 1955 suggested that the Part C States be converted into centrally administered territories as these States were neither financially viable nor functionally efficient. The States' Reorganisation Act, and the Seventh Constitution Amendment Act[2] abolished the Part C States and created the present day Union Territories.

A Union Territory is administered directly by the Central Executive. A Union Territory is to be administered by the President acting, to such extent as he thinks fit, through an Administrator to be appointed by him with such designation as he may specify.[3] But this does not mean that the Union Territories become merged with the Central Government. Although they are independent entities, they are centrally administered. Any instruction or directive issued by the Central Government or the President[4] is binding on the administration of the Union Territory.[5]

Parliament may by law provide otherwise [Art. 239(1)]. A Governor of a State may also be appointed as the Administrator of a Union Territory adjoining to that State. In that capacity, the Governor is to act independently of his Council of Ministers [Art. 239(2)].

It has been held by the Supreme Court that the Administrator of a Union Territory is not a purely constitutional functionary. His position is somewhat different from that of a State Governor.[6] The Administrator is a delegate of the President. His position is wholly different from that of a State Governor. He cannot thus be equated with a State Governor. After differing with his Council of Ministers, the Administrator may act under orders of the President, which means the Central Government.[7] The Administrator thus is not a purely constitutional functionary.

The Supreme Court has ruled that the Central Government is the appropriate Government under s. 10(1) of the Industrial Disputes Act to make a reference of an industrial dispute in a Union Territory to a tribunal for adjudication.[8]

In several cases, the Supreme Court has declared that the Union Territories, though centrally administered, under the provisions of Art. 239, they

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1. See, The First Schedule to the Constitution.
2. For the Constitution Amendment Act, See, Ch. XLII, *infra.*
3. *Dilip Chowdhary v. Registrar of Co-op. Societies, A&N Islands, Port Blair*, AIR 2000 Cal 228; *Andaman Wood Products India Pvt. Ltd. v. Union of India*, AIR 2001 Cal 61.
4. *S. Pushpa v. Sivachanmugavelu*, (2005) 3 SCC 110 : AIR 2005 SC 1038.
5. See *infra*, *Chandigarh Administration v. Surinder Kumar*, (2004) 1 SCC 530 : AIR 2004 SC 992.
6. *Devji Vallabhbhai v. Administrator, Goa, Daman, Diu*, AIR 1982 SC 1029 : (1982) 2 SCC 222.
For the position of a State Governor, see, Ch. VII, Sec. A(i), *supra.*
7. *Goa Sampling Employees' Association v. G.S. Co.*, AIR 1985 SC 357 : (1985) 1 SCC 206; *Express Newspapers v. Union of India*, AIR 1986 SC 872 : (1986) 1 SCC 133; *Andaman Wood Products India Pvt. Ltd. v. Union of India*, AIR 2001 Cal 61.
8. *Goa Association, op. cit.*

are not part of the Central Government but are distinct constitutional entities.[9]

The President who is the executive head of a Union Territory does not function as the head of the Central Government, but as the head of the Union Territory under powers specially vested in him under Art. 239 thereby occupying a position analogous to the Governor of a State.[10] But the status of the Union Territories is not akin to that of the States. The Supreme Court has observed in this connection.[11] "Though the Union Territories are centrally administered under the provisions of Article 239 they do not become merged with the Central Government…"

(a) PONDICHERRY

The Constitution makes some special provisions for administration of the Union Territory of Puducherry.

Parliament is empowered to create by law for Puducherry, a Legislature (elected, or partly elected and partly nominated) and/or a Council of Ministers with such constitution, powers and functions, in each case, as may be specified in the law [Art. 239A(1)].[12] Such a law is not to be regarded as an amendment of the Constitution under Art. 368 even though the law in question contains provisions amending the Constitution [Art. 239A(2)].[13]

The Administrator of the Union Territory of Pondicherry can promulgate an ordinance when the Legislature is not in session if he is satisfied that circumstances exist which render it necessary for him to take immediate action. The ordinance-making power of the Administrator is similar to that of a State Governor, except that:[14]

(*i*) the Administrator cannot promulgate an ordinance without first seeking instructions from the President in that behalf; and

(*ii*) he cannot promulgate any ordinance when the Legislature is suspended or dissolved.

The ordinance is to be laid before the Legislature of the Union Territory, and it ceases to have effect after six weeks of the reassembly of the Legislature, or earlier if the Legislature disapproves the same [Art. 239B]. The ordinance has the same effect as an Act of the Legislature.

(b) OTHER UNION TERRITORIES

It will thus be seen that out of the seven Union Territories, it is only in respect of Pondicherry and Delhi[15] that some democratic set-up is envisaged by the Constitution itself. The other Union Territories are governed more directly by the Centre under the provisions of Art. 239 mentioned above.

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9. *Satya Dev Bhushahri v. Padam Dev,* AIR 1954 SC 587 : (1955) 1 SCR 549; *Vindya Pradesh v. Shri Moula Bux,* AIR 1962 SC 145 : (1962) 2 SCR 794; See also *Chandigarh Admn v. Surinder Kumar,* (2004) 1 SCC 530 : AIR 2004 SC 992.

10. *New Delhi Municipal Council v. State of Punjab,* AIR 1997 SC 2847; *Govt. of NCT Delhi v. All India Central Civil Accounts,* (2002) 1 SCC 344 : AIR 2001 SC 3090.

11. *Govt. of NCT Delhi v. A.I.C.C.A., JAO's Ass.,* AIR 2001 SC 3090, 3093 : (2002) 1 SCC 344.

12. See, *Gobalousamy v. Pondicherry,* AIR 1970 Mad. 419.

13. For the process of Amendment of the Constitution, see, *infra,* Ch. XLI.

14. See, *supra,* Ch. VII, Sec. D(ii)(c), for the Governor's ordinance-making power.

15. See below, Sec. (f).

The Union Territories of Andaman and Nicobar, Lakshdweep, Dadar & Nagar Haveli, Daman and Diu and Chandigarh have no legislatures.

(c) LEGISLATION FOR UNION TERRITORIES

Under Art. 246(4), Parliament can make a law for a Union Territory with respect to any matter, even if it is one which is enumerated in the State List.[16] Parliament can also legislate for Union Territories under its residuary powers, viz., Art. 248 and entry 97, List 1.[17] Parliament thus has plenary power to legislate for the Union Territories with regard to any subject.

With regard to the Union Territories, there is no distribution of legislative power.[18] The three Lists have no relevance so far as the Union Territory of Delhi is concerned as Parliament can make a law with respect to any entry in any list.[19] The Supreme Court has stated in *Mithan Lal v. Delhi*,[20] in this connection:

> "To legislate for Part C States… the power of Parliament is plenary and absolute subject only to such restrictions as are imposed by the Constitution".

Parliament is however a busy body and is always pressed for time and it is not, therefore, possible for it to enact all the legislation in relation to matters falling in Lists II and III, which may be essential and desirable for the governance of a Union Territory. To relieve pressure on Parliament, therefore, certain other provisions have been made.

The President may make Regulations for the peace, progress and good government of the Union Territories of the Andaman and Nicobar Islands, Lakshdweep, Dadar and Nagar Haveli, Daman and Diu and Pondicherry [Art. 240(1)]. The President has no regulation-making power *vis-à-vis* Chandigarh.

The President shall not make Regulations for Pondicherry if a Legislature, as stated above, is established there. But the President can make Regulations for Pondicherry as well if the legislature there is dissolved or suspended. [Proviso to Art. 240(1)].

A Regulation made by the President has the same force and effect as an Act of Parliament. A Regulation may even repeal or amend an Act of Parliament, or any other law, applicable to the Union Territory concerned [Art. 240(2)].

The Home Minister has however given an assurance in Parliament that the President's Regulations would be placed on the tables of the Houses and the Houses would have full authority to make any modifications therein.

The Regulation-making power of the President is plenary and a Regulation can be made for a Union Territory on all subjects on which Parliament can make

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16. For distribution of legislative powers between the Centre and the States, see, *infra*, Ch. X.
Also see, *Mithan Lal v. Delhi*, AIR 1958 SC 682 : 1959 SCR 445; *In re Sea Customs* case, AIR 1963 SC 1760 : (1964) 3 SCR 787.

17. *Satpal & Co. v. Lt. Governor of Delhi*, AIR 1979 SC 1550 : (1979) 4 SCC 232.
For discussion on residuary powers of Parliament, see, *infra*, Ch. X and XI.

18. *Ram Kishore Sen v. Union of India*, AIR 1966 SC 644 : (1966) 1 SCR 430; *T.M. Kanniyan v. I.T.O.*, AIR 1968 SC 637 : (1968) 2 SCR 103.

19. *Govt. Servant Co.op. House Building Socy. Ltd. v. Union of India*, AIR 1998 SC 2636, 2638 : (1998) 6 SCC 381.

20. AIR 1958 SC 682, 685 : 1959 SCR 445.
Also, *N.D.M.C. v. State of Punjab*, AIR 1997 SC 2847.

laws. Thus, a Regulation can be made for any matter falling in List I, List II or List III.[21]

As regards Parliamentary legislation for Union Territories, the problem arises that these are small territories and Parliament hardly has sufficient time to hold threadbare discussion before legislating for Union Territories. To require Parliament to specifically legislate for these Territories will put a disproportionate pressure on parliamentary time. Therefore, to meet the situation, the following expedient has been adopted.

For all these Union Territories, except Andamans and Lakshadweep, various Acts of Parliament[22] provide that the Central Government may, by notification in the official Gazette, extend with such restrictions and modifications as it thinks fit, to a Union Territory any enactment which is in force in a State at the date of the notification.

Parliament has thus delegated some of its legislative power in relation to the Union Territories to the Central Government with a view to lighten its own burden and save its time. This means that the Central Government can extend, after adaptation, to a Union Territory any law in force in any other area in the country. Such a provision was held valid in the *Delhi Laws Act case*.[23]

When a law prevalent in a State is extended to a Union Territory under this provision, and if the said law is declared unconstitutional as being beyond the legislative competence of the enacting State under Art. 246, the Act in the Union Territory will not be affected, for there the question is to be judged not with reference to the power of the State Legislature but with reference to that of Parliament. If Parliament can make such a law, it will be valid.[24]

It may be noted that the Regulation-making power of the President with respect to Pondicherry is broader than the power delegated to the Central Government under the Union Territories (Laws) Act in two respects, *viz.* :

(1) The Regulation-making power extends to the whole of the legislative area (Lists I, II and III), while under the Act, delegation is confined only to matters falling within the State sphere, *i.e.*, Lists II and III.

(2) A Regulation can affect an Act of Parliament, but the same cannot be done under the power delegated under the Act in question.

The President can also issue Ordinances for the Union Territories under his general Ordinance-making power discussed earlier.[25] A presidential ordinance authorising the Delhi Administration to levy a special duty on the import of

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21. *T.M. Kanniyan v. I.T. Officer, Pondicherry*, AIR 1968 SC 637 : (1968) 2 SCR 103.

22. The Union Territories (Laws) Act. 1950, S. 2; The Dadra and Nagar Haveli Act, 1961. S. 10; The Daman and Diu (Administration) Act, 1962, S. 6; The Pondicherry (Administration) Act, 1962, S. 8; The Punjab Re-organisation Act, 1966, S. 87.

23. *Supra*, Ch. II, Sec. N.
Also, *Ramesh Birch v. Union of India*, AIR 1990 SC 560 : (1989) Supp (1) SCC 430.
For clarification of the scope of this power of delegated legislation, **See**, *Smt. Marchi v. Mathu Ram*, AIR 1969 Del 267; *Faqir Chand v. C.P.W.D. Works*, AIR 1972 Del. 135.
For further comments on the *Delhi Laws Act* case, M.P. JAIN, *A TREATISE ON ADM. LAW*, I, 61-64; *CASES & MATERIALS ON INDIAN ADM. LAW*, I, 39-48.

24. *Mithan Lal v. Delhi*, AIR 1958 SC 682 : 1959 SCR 445.

25. *Supra*, Ch. III, Sec. D(ii)(c).

country liquor in Delhi was held valid because the President's ordinance-making power is co-extensive with Parliament's legislative power.[26]

Under Art. 73(1)(a), the executive power of the Union Government is co-extensive with the legislative powers of Parliament.[27] Consequently, the Union Government can validly issue executive directions to the Administrator of a Union Territory. In the absence of conflict between a direction issued by the Union Government, and a Presidential Regulation issued under Art. 240, the Administrator is bound to execute the directions of the Union Government.[28]

(d) HIGH COURT FOR UNION TERRITORIES

Parliament may by law constitute a High Court for a Union Territory or declare any court in any Territory to be a High Court [Art. 241(1)]. The constitutional provisions applicable to the High Courts in the States would apply to the High Courts of the Union Territories as well with such modifications or exceptions as Parliament may by law provide [Art. 241(2)].

Parliament may extend or exclude the jurisdiction of any High Court to, or from any Union Territory [Art. 241(4)]. Thus, Chandigarh falls under the jurisdiction of the Punjab and Haryana High Court and Delhi has a separate High Court of its own. Pondicherry falls under the jurisdiction of the Madras High Court. The Kerala High Court exercises jurisdiction over Lakshadweep, and the Calcutta High Court over the Andamans. By the High Court at Bombay (Extension of Jurisdiction Act), 1981, the High Court of Bombay has been made a common High Court for the States of Maharashtra and Goa and the Union Territory of Daman and Diu.

(e) THE UNION TERRITORIES ACT, 1963

The Parliament has enacted the Union Territories Act 1963, in pursuance of Art. 239A. The object of the Act is to provide for Legislative Assemblies and Council of Ministers for certain Union Territories. In effect, the Act applies only to Pondicherry as Art. 239A is confined only to Pondicherry and does not apply to any other Union Territory . Thus, some form of democracy and parliamentary government has been introduced by this Act in Pondicherry as has been envisaged by Art. 239-A. The status of the Union Territory has not however been fully assimilated to that of the States as it is even now much more directly controlled by the Centre.

Pondicherry has an Assembly which can make laws with respect to matters enumerated in the State[29] and the Concurrent Lists,[30] but Parliament's overall power to pass laws for a Union Territory on any subject is preserved. In case of inconsistency between a law of Parliament and that of the Assembly, the law of Parliament prevails. However, in the area of Concurrent List or the State List, a law made by the Assembly prevails against a parliamentary law if it has received the assent of the President.

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26. *Satpal & Co.*, *supra*, footnote 17.
For discussion on this power, see, *supra*, Ch. III, Sec. D(ii)(c).
27. See Ch. VII, *supra.*
For further discussion on the matter, see, Ch. XII, *infra.*
28. *J. Fernandes & Co. v. Dy. Chief Controller*, AIR 1975 SC 1208 : (1975) 1 SCC 716.
29. For State List, see, *infra*, Ch. X, Sec. E.
30. For the Concurrent List, see, Ch. X, Sec. F, *infra.*

The position of the Administrator is similar to that of the Governor in the matter of assent to the bills passed by the legislature.

The Territory has a Council of Ministers with the Chief Minister at its head to aid and advise the Administrator in exercise of his functions in relation to the matters with respect to which the Assembly of the Union Territory has power to make laws except in so far as he is required by or under the Act to act in his discretion or by or under any law to exercise any judicial or *quasi*-judicial functions.

The Administrator and his Council of Ministers function under the general control of the President. They must comply with the directions issued by the President. The Administrator is not bound by the aid and advice of his Ministers when he is acting in his discretion. In case of difference of opinion between the Administrator and the Council of Ministers, the matter is to be referred to the President for decision.

It is needless to say that when President decides the point, it is in effect the Central Government which decides the point. And that decision is binding on the Administrator and also the Ministers. The Chief Minister of the Union Territory is appointed by the President who also makes rules for the conduct of business.

In case of an emergency, when the administration of a Union Territory cannot be carried on in accordance with the Act, or for the proper administration of the Union Territory, the President can suspend the operation of all or any provisions of the Act. In such a case, the Administrator administers the Territory as the agent of the President under the provisions of Art. 239 of the Constitution.

(f) DELHI

As Delhi is the national capital of India, it is maintained as a Union Territory and has not been given the status of a full-fledged State, because it is felt that Delhi must remain under the effective control of the Union Government. At the same time, it is felt that the people of Delhi ought to enjoy some semblance of democracy.

By virtue of the Constitution (Sixty Ninth Amendment) Act, 1991,[31] Delhi has been given a special status.

Under Art. 239AA, introduced by the Constitutional Amendment in 1991, Delhi is now called the National Capital Territory of Delhi [Art. 239-AA(1)]. The Administrator thereof (appointed under Art. 239) is designated as the Lt. Governor.

Delhi has a Legislative Assembly elected directly by the people under the supervision of the Election Commission [Art. 239-AA(2)(a)(b)(c)].[32] The Assembly can make laws with respect to matters enumerated in the State List or the Concurrent List barring certain entries therein[33] [Art. 239AA(3)(a)]. Parliament retains power to make laws with respect to any matter for the Union Territory [Art. 239AA(3)(b)]. In case of repugnancy between a law made by Parliament and a law made by the Legislative Assembly of Delhi, the former prevails over the lat-

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31. For this Amendment, see, Ch. XLII, *infra.*
32. For Election Commission, see, Ch. XIX, *infra.*
33. For these Lists, see, Ch. X. The excepted entries are : 1, 2 and 18 of the State List; entries 64, 65 and 66 of the State List insofar as they relate to entries 1, 2 and 8. These entries relate to public order, police and intoxicating liquors.

ter to the extent of the repugnancy [Art. 239AA(3)(c)]. But the law made by the Assembly can prevail over the Central Law if it is assented to by the President. But Parliament can legislate thereafter with respect to the same subject-matter contrary to the Delhi law.[34]

Provision has been made for a Council of Ministers with the Chief Minister at the head to aid and advise the Lt. Governor except when he is required to act in his discretion by law. [Art. 239AA(4)]. In case of difference of opinion between the Lt. Governor and his Ministers, the matter is to be referred to the President and his decision shall be binding. Pending the decision of the President, if in the opinion of the Lt. Governor the matter is urgent and needs immediate action; he can take such action as he deems necessary.[35]

The Chief Minister is appointed by the President and the other Ministers are appointed by the President on the Chief Minister's advice.[36] They hold office at the pleasure of the President and are collectively responsible to the Assembly.[37]

The Lt. Governor of Delhi has power to promulgate ordinances similar to the Administrator of Pondicherry.[38]

The President has power under Art. 239 AB to take over the administration in case there is breakdown of the constitutional machinery therein, or for the proper administration of the National Capital Territory. The operation of Art. 239 AA may be suspended. The President can make by order such incidental and consequential provisions as may appear to him to be necessary or expedient for administering the NCT in accordance with the provisions of Arts. 239 and 239AA.[39] Parliament has been given power to make law to give effect to these provisions or supplement these provisions [Art. 230AA(7a)]. Such a law is not to be deemed as an amendment of the Constitution for purposes of Art. 368.[40] Accordingly, Parliament has enacted the Government of National Capital Territory of Delhi Act, 1991, to effectuate and supplement the above-mentioned constitutional provisions.

S. 52(b) of the Act provides that all suits and proceedings in connection with the administration of the Capital shall be instituted by or against the Government of India.

In a dispute before a Tribunal, the Central Government and the Government of NCT Delhi were separately impleaded as respondents. The Govt. of NCT Delhi sought to file an appeal to the Supreme Court under Art. 136 against the Tribunal order adversely affecting it. The Central Govt. raised a preliminary objection under S. 52(b) of the Govt. of NCT of Delhi Act. The Supreme Court rejected the objection saying that when the Central Govt. and the Delhi Govt. were separately impleaded as parties, and the Tribunal order went against the Delhi Govt., "it is difficult to conceive as to why that party cannot file an appeal invoking the provisions of Art. 136 of the Constitution which is a proceeding against the orders

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34. Proviso to Art. 239AA(3)(c)].
35. Proviso to Art. 239AA(4)].
36. Art. 239AA(5).
37. Art. 239AA(6).
38. Art. 239 AA(8) read with Art. 239B.
39. Art. 239 AB.
40. Art. 239AA(7b).
For Art. 368, see Ch. XLI, *infra*

made by the courts and tribunals. The Court further maintained that "though the Union Territoires are centrally administered under the provisions of Article 239 of the Constitution, they do not become merged with the Central Government and they form part of no state and yet are territories of the Union... Thus, it must be held that the Union Territory does not entirely lose its existence as an entity though large control is exercised by the Union of India."[41]

B. SPECIAL PROVISIONS REGARDING CERTAIN STATES

(a) GUJARAT AND MAHARASHTRA

With the formation of the States of Maharashtra and Gujarat, the President was authorised [Art. 371(2)] to provide for any special responsibility of the Governor for—

(a) the establishment of separate development boards for (i) Vidarbha, Marathawada and the rest of the Maharashtra; (ii) Saurashtra, Kutch and the rest of the Gujarat, with the provision that a report on the working of each of these boards will be placed each year before the State Legislative Assembly;

(b) the equitable allocation of funds for developmental expenditure over the above-mentioned areas subject to the requirements of the State as a whole; and

(c) an equitable arrangement providing adequate facilities for technical education and vocational training and adequate opportunities for employment in services under the control of the State Government, in respect of the said areas, subject to the requirements of the State as a whole.

The object of Art. 371(2) is to enable the President to lay special responsibility on the Governors of Maharashtra and Gujarat for the development of certain areas.

(b) NAGALAND

Article 371A makes a few special provisions for the State of Nagaland, partly because of the disturbed law and order condition there, and partly because of the prevalence of strong feelings regarding their customs etc. among the people of the State, known as the Nagas. For long, the territory comprised in the State, Naga Hills—Tuensang Area, had been administered as a Scheduled Area under the provisions of Schedule VI to the Constitution.

According to Art. 371A, notwithstanding anything in the Constitution, no Act of Parliament concerning any of the following matters would apply to Nagaland unless the State Legislative Assembly so decides by a resolution: (*i*) religious or special practices of the Nagas; (*ii*) Naga Customary law and procedure; (*iii*) Administration of civil and criminal justice involving decisions according to Naga customary law; (*iv*) ownership and transfer of land and its resources [Art. 371A(1)].

So long as there occur internal disturbances in the State, the Governor of Nagaland shall have special responsibility with respect to law and order, and in the

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41. *Govt. of NCT Delhi v. All India Central Civil Accounts,* (2002) 1 SCC 344, 348 : AIR 2001 SC 3090.

discharge of his functions, the Governor, after consulting the Council of Ministers, exercises his individual judgment as to the action to be taken.

In case a question arises whether any matter falls within the Governor's individual judgment or not, the Governor's decision in his discretion is final. The validity of anything done by the Governor is not to be called in question on the ground that he ought or ought not to have acted in the exercise of his individual judgment. The Governor's special responsibility shall cease when the President makes an order to the effect, on being satisfied, that it is no longer necessary for the Governor to have special responsibility for law and order in the State [Art. 371A(2)].

The Governor is also to see that the money provided by the Central Government for any specific service or purpose is included in the demand for a grant relating to that service or purpose and not in any other demand moved in the State Legislature [Art. 371A(2)(c)].

A regional council is to be established for the Tuensang district of the State. The Governor is to make rules for the composition of the council, manner of choosing its members, their terms of office, salaries etc.; the procedure of the council; appointment of officers of the council and their condition of service; any other matter for the proper functioning of the council.

For a period of ten years, or for such further period as the Governor may specify on the recommendation of the regional council, the following provisions are to operate for this district;

(*a*) The administration of the Tuensang district is to be carried on by the Governor;

(*b*) The Governor shall in his discretion arrange for equitable distribution between Tuensang district and the rest of the State of money provided by the Government of India to meet the requirements of the State;

(*c*) No Act of Nagaland Legislature is to apply to Tuensang district unless the Governor so directs on the recommendations of the regional council; the Governor may also introduce such modifications in the Act as the regional council may recommend;

(*d*) The Governor may make Regulations for the Tuensang district and any such Regulation may repeal or amend any law (whether an Act of Parliament or any other law) prevailing there;

(*e*) There shall be a Minister for Tuensang affairs in the Council of Ministers; he is to be appointed by the Governor on the advice of the Chief Minister from amongst the members representing Tuensang in the Legislature.

The Minister for Tuensang Affairs is to deal with all matters relating to the district and have direct access to the Governor for the purpose; but he shall keep the Chief Minister informed about the same. The final decision on all matters relating to Tuensang is to be made by the Governor in his discretion [Arts. 371A(1)(d) and (2)].

Members in the Nagaland Legislative Assembly from Tuensang are not elected directly by the people as in other States but by the regional council;

members from the districts of Kohima and Mokokechung (*i.e.*, the rest of the Nagaland) are elected in territorial constituencies.

(c) ASSAM

Article 371B provides for the constitution of a committee of the members of the Assam Legislative Assembly elected from the Tribal Areas mentioned in Part I of the table appended to the Sixth Schedule. The intention is that this committee should consider bills introduced in the Assembly from the point of view of the people in these Areas.[42]

According to Art. 371C, the President may provide for the creation of a committee of the Manipur Legislative Assembly consisting of the members elected from the Hill areas of the State.

The State Governor has been placed under an obligation to make an annual report to the President regarding the administration of the Hill Areas. The Central Government may give directions to the State Government regarding administration of these Areas.

(d) MANIPUR

Arts 371C makes provision for setting up a committee in the Legislative Assembly of Manipur to look after the interests of the Hill Areas in the State. The committee is to consist of the members of the Assembly elected from the Hill Areas of that State.

(e) ANDHRA PRADESH

Arts. 371D and 371E make some special provisions for the State of Andhra Pradesh.[43]

Article 371D is peculiar to Andhra Pradesh due to historical background. It was enacted to give effect to certain safeguards in the matter of employment opportunities for the residents of the Telengana region of Andhra Pradesh.

The primary purpose of Art. 371D appears to be two fold:

(1) to promote speedy development of the backward areas of the State of Andhra Pradesh with a view to secure balance in the development of the State as a whole; and

(2) to provide equitable opportunities to different areas of the State in the matter of education, employment and career prospects in public service.

Under Art. 371D(10), the provisions of Art. 371D, and of any order made by the President thereunder, "shall have effect notwithstanding anything in any other provision of this Constitution or in any other law for the time being in force."[44]

The genesis of these Articles is that, for quite some time, the people of Telengana region in Andhra Pradesh were carrying on an agitation for the creation of a separate Telengana State. These provisions were therefore enacted to meet some of the aspirations of the Telengana people so that they may give up their demand for a separate State.

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42. See also, Art. 244 A, *infra*.
43. Added by the Constitution (Thirty-Second Amendment) Act, 1973.
For this Amendment, see, Ch. XLII, *infra.*
44. See, *V. Jagannadha Rao v. State of Andhra Pradesh,* AIR 2002 SC 77 : (2001) 10 SCC 401.

According to Art. 371D(1), the President may by order provide, having regard to the requirements of the State as a whole, for equitable opportunities for the people belonging to different parts of the State in the matter of public employment and education and different provisions may be made for different parts of the State. In this regard, the President may require the State Government to organise civil posts in local cadres for different parts of the State and provide for direct recruitment to posts in any local cadre.

According to the Andhra Pradesh High Court, the special provisions under Art. 371D(1) could be made only by a Presidential order and not by any other instrument. "There is no provision that the Presidential powers can be exercised by the State Legislature or any other authority of the State."[45]

Provision has also been made for establishing an Administrative Tribunal in the State for redressing grievances of the people *inter alia* in such matters as appointment, allotment or promotion to civil posts in the State [Art. 371-D(3)].[46]

According to Art. 371-D(5), the order of the Tribunal finally disposing of any case becomes effective upon its confirmation by the State Government, or, on the expiry of three months from the date on which the order is made whichever is earlier. The State Government is authorised to modify or annul the Tribunal's order before it becomes effective for reasons to be specified. [Proviso to Art. 371D(5)].

The High Court is not to have any powers of superintendence over the Administrative Tribunal. No Court (other than the Supreme Court) is to exercise any jurisdiction, power or authority in respect of any matter subject to the jurisdiction of the Tribunal. [Art. 371D(7)] The officers and servants of the High Court and members of the judicial service including district judges remain outside the purview of Art. 371D.[47]

The Supreme Court has declared Art. 371D(5) invalid in *P. Sambhamurthy v. State of Andhra Pradesh*[48] on the ground that it violates the basic feature of the Constitution. Executive interference with the order of a tribunal has been held to be against Rule of Law. "The rule of law would cease to have any meaning because then it would be open to the State Government to defy the law and get away with it:". Rule of law is a "basic and essential feature of the Constitution".[49] The Court upheld the validity of the rest of Art. 371D.[50]

Article 371D(3) authorizing setting up of the tribunal has been upheld in that very case.

Article 371E empowers Parliament to establish a university in the State of Andhra Pradesh.

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45. *Govt. of A.P. v. Medwin Educational Society*, AIR 2001 AP 148.
46. The Tribunal has been set up by the Andhra Pradesh Administrative Tribunal Order, 1975.
47. *Chief Justice, A.P. v. L.V.A. Dikshitulu*, AIR 1979 SC 193 : (1979) 2 SCC 34.
48. AIR 1987 SC 663 : (1987) 1 SCC 362. Also see, *Cases & Materials on Indian Administrative Law, II*, 1382-1385.
49. For discussion on the doctrine of Basic Features of the Constitution, see, *infra*, Ch. XLI.
50. Also see, *C. Surekha v. Union of India*, AIR 1989 SC 44 : (1988) 4 SCC 526; *S. Prakash Rao v. Commr. of Commercial Taxes*, AIR 1990 SC 997 : (1990) 2 SCC 259.

C. SCHEDULED AND TRIBAL AREAS

Provisions for the administration of the Scheduled Areas and Scheduled Tribes in any State, other than the States of Assam and Meghalaya, Tripura and Mizoram, are contained in Art. 244(1) and the Fifth Schedule to the Constitution.

The Fifth Schedule to the Constitution can be amended by Parliament. Para 7 of the Schedule empowers Parliament to amend it by way of addition, variation or repeal of any provision thereof.

These areas are treated differently from the other areas in the country because they are inhabited by aboriginals who are socially and economically rather backward, and special efforts need to be made to improve their condition. Therefore, the whole of the normal administrative machinery operating in a State is not extended to the Scheduled Areas, and the Central Government has somewhat greater responsibility for these Areas.

The executive power of a State extends to the Scheduled Areas therein. The Governor annually, or whenever required by the President, makes a report to the President regarding the administration of the Scheduled Areas. The Central Government can give directions to the State regarding the administration of such Areas.

The President may by order declare an area to be a Scheduled Area.[51] Such Areas lie in the States of Bihar, Gujarat, Madhya Pradesh and Tamil Nadu.

Each State having Scheduled Areas has a Tribes Advisory Council consisting of not more than twenty members, three-fourths of whom are to be the representatives of the Scheduled Tribes in the State Legislative Assembly. A similar Council may be created in the State which has Scheduled Tribes, but not Scheduled Areas, if the President so directs.

It will be noted that in the case of Scheduled Areas there is an obligation to create an Advisory Council, but there is no such obligation to create an Advisory Council, in case of Scheduled Tribes and the matter had been left to the discretion of the Central Government.

The Tribes Advisory Council advises on such matters pertaining to the welfare and advancement of the Scheduled Tribes as the Governor may refer to it. The Governor may direct by public notification that a law made by Parliament or the State Legislature shall not apply to a Scheduled Area, or shall apply subject to specified exceptions and modifications. [Cl. 1 of Para 5].

The Governor has power to make Regulations for the peace and good government of a Scheduled Area after consulting the Tribes Advisory Council [Cls. 2 and 5 of Para 5]. A Regulation may amend or repeal an Act of Parliament or of the State Legislature applicable to the area in question [Cl. 3 of Para 5]. A Regulation comes into force only when it is assented to by the President [Cl. 4 of Para 5]. This provision confers the "widest" power to legislate on the Governor.[52]

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51. Cl. 6 of the V Schedule to the Constitution.
Also See, The Scheduled Areas (Part A States) Order, 1950, and The Scheduled Areas (Part B States) Order, 1950.

52. *Ram Kirpal v. State of Bihar*, AIR 1970 SC 951 : (1969) 3 SCC 471. For comments on the Fifth Schedule, see, *Samatha v. State of Andhra Pradesh*, AIR 1997 SC 3297 : (1997) 8 SCC 191.

TRIBAL AREAS IN ASSAM AND MEGHALAYA

The conditions in the Tribal Areas of Assam, Meghalaya, Tripura and Mizoram, are very different from those in the other Tribal Areas. These Tribal Areas are divided into fairly large districts inhabited by single tribes or fairly homogeneous groups of tribes with highly democratic and mutually exclusive tribal organisation. The tribes in Assam have not assimilated much the life and ways of the other people in the State.

These areas have hitherto been anthropological specimens. The tribal people in other parts of India have more or less adopted the culture of the majority of the people in whose midst they live. The Assam tribes, on the other hand, have still their roots in their own culture, customs and civilization. These areas are therefore treated differently by the Constitution, and sizeable amount of autonomy has been given to these people for self-governance. The provisions of the Sixth Schedule apply to the administration of these tribal areas.

These areas have been constituted into autonomous districts. If a district has different Scheduled Tribes, autonomous regions may be created therein by the Governor except with regard to the Bodo Land Territorial Areas Districts.[53] Each district has a District Council most of whose members are elected on adult suffrage. Some are nominated by the Governor. Nominated members hold office at the pleasure of the Governor, and are removable at his discretion. The Governor can exercise the discretionary power only according to the advice of the Council of Ministers.[54] An autonomous region has a Regional Council. A separate provision has been made for the Bodo Land Territorial Council.[55] Administration is vested in these bodies for the areas under their jurisdiction. They can make laws for certain matters of proximate interest to the tribal people, *e.g.*, marriage, social customs, inheritance of property, village administration, shifting cultivation, forests, land, use of canal or water-course for agriculture, etc. These laws come into force after being assented to by the Governor.[56] The Autonomous Hill Councils of the Tribal Areas listed in Part I of the Table appended to clause 20 of Schedule VI as well as the Bodo Land Territorial Council have been given additional powers to make laws which are subject to the assent of the President.[57]

Power under para 2 of Schedule VI *i.e.* the power of the Governor to divide areas occupied by scheduled tribes is to be exercised as envisaged under various provisions of Constitution, especially Art. 163 that is on the aid and advice of the Council of Ministers. Schedule VI is a part of the Constitution.[58]

Administration of justice is carried on by village courts, the District Council or the Regional Council. The Gauhati High Court has such jurisdiction over these areas as the Governor may specify.

There is a District Fund or a Regional Fund to which all moneys received by the District Council or the Regional Council are credited. The District and Regional Councils have powers of taxation.

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53. *Vide* Act 44 of 2003 dt. 7-9-2003.
54. *Pu Myllai Hlychho v. State of Mizoram*. (2005) 2 SCC 92 : AIR 2005 SC 1537.
55. *Vide* Act 44 of 2003 dt. 7-9-2003.
56. The terms "Governor" and "State Legislature", in this section mean, in case of the Union Territory of Mizoram, the "Administrator" and the Assembly of Mizoram.
57. *Vide* Act 44 of 2003 dt. 7-9-2003.
58. *Pu Myllai Hlychho v. State of Mizoram* (2005) 2 SCC 92 : AIR 2005 SC 1537.

An act or resolution of a District or Regional Council may be suspended or annul-led by the Governor if he is satisfied that it is likely to endanger the safety of India. Such an order of the Governor is to be laid before the State Legislature and it remains in force for 12 months unless revoked by the Legislature. The Legislature can pass a resolution to extend the duration of the order further by 12 months at one time.

Acts of the State Legislature dealing with a matter within the purview of the District or Regional Council applies to a district only when the District Council so directs by public notification. The Council can also make amendments in the Act. As regards other Acts of the State Legislature, the Governor is authorised to notify that they do not apply to an autonomous district or region, or that they apply subject to such modifications as the Governor may specify in the notification. In case of the State of Meghalaya, the Acts of the Legislatures prevail over those made by the District or Regional Council. As regards the Acts of Parliament, the power vests in the President to extend them, subject to such modifications as he may specify, to the autonomous districts or regions.

The Governor may appoint a commission to examine and report on any matter relating to the administration of the autonomous districts or regions. The report of the commission, the Governor's recommendations thereon and an explanatory memorandum regarding the action proposed to be taken by the Government are placed before the State Legislature. A District or Regional Council may be dissolved by the Governor on the recommendation of the commission.

It is clear that Governor shall consult the Council of Ministers and consultation with District/Regional Council is optional. On facts, merely because Governor consulted the Council of Ministers for nominating the four members, and the file for nominating the new members was initiated by the Council of Ministers it cannot be assumed that Governor failed to exercise his discretionary powers.[59]

The State Government pays to a District Council an agreed share of the royalties arising each year from licences and leases for prospecting and extraction of minerals from any areas in the district. In case of a dispute regarding the share of royalties, the Governor decides the matter 'in his discretion'. This clause indicates that in all other matters pertaining to the Tribal Areas in the Schedule, the Governor acts on the advice of the Ministers.[60]

The provisions of the Sixth Schedule may be amended from time to time by Parliament by making a law for the purpose. Any changes introduced by Parliamentary legislation in the Sixth Schedule are not to be deemed to amount to an amendment of the Constitution for the purposes of Art. 368.[61]

Provisions have been made under Art. 244A for creation, by a law of Parliament, of an autonomous State within the State of Assam consisting of the Tribal Areas mentioned in Part I of clause 20 of the VI Schedule.[62] Details have

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59. *Pu Myllai Hlychho v. State of Mizoram* (2005) 2 SCC 92 : AIR 2005 SC 1537.

60. Cf. See, comments of Hidayatullah, J., in *Edwingson v. State of Assam*, AIR 1966 SC 1220, 1240 : (1966) 2 SCR 770.

The learned Judge holds that the Governor has special responsibilities in relation to the administration of the Tribal Areas in Assam. Also see (1967) *JILI*, 237.

61. For Art. 368, see, Ch. XLI, *infra*.

62. These Areas are: The North Cachar Hills District and The Mikir Hills District.

not been worked out in the constitutional provisions but have been left to Parliament.

The autonomous State may have an elected Legislature and a Council of Ministers. The Act of Parliament will specify the matters enumerated in List II or III with respect to which the Autonomous State Legislature will have power to make laws.

The idea underlying Art. 244A is that "consistent with the need to provide adequate scope for the political aspirations of the hill people, and the well-being of the people inhabiting the other parts of the State of Assam, the over-all unity should be preserved."[63]

The autonomous state of *Meghalaya* was constituted in exercise of the power under Art. 244A. With effect from January 21, 1972, *Meghalaya* has been upgraded as a full-fledged State. Later, another State of Mizoram was created in 1987.

A North-Eastern Council has been set up, to provide for a unified and coordinated approach to the development of the entire region. This region comprises the States of Assam, Manipur, Meghalaya, Nagaland, Tripura, Arunachal Pradesh and Mizoram. The Council consists of the Governors and Chief Ministers of the States, and a Union Minister to be nominated by the President. The Council is an advisory body. It may discuss any matter in which some States may be interested and may advise the Central Government and the State Governments as to the action to be taken.[64]

D. SIKKIM

By the Constitution (Thirty-Fifth Amendment) Act, 1974,[65] Sikkim was associated with the Union of India as an "Associated State". This did not satisfy the aspirations of the people of Sikkim as they wanted to be an integral part of India as a full-fledged state. To give effect to the wishes of the people, Parliament passed the Constitution (Thirty-Sixth Amendment) Act, 1975,[66] which on being ratified by eleven State Legislatures became effective on May 16, 1975. Sikkim thus became a State of the Indian Union. The Amendment introduced Art. 371F laying down some special provisions applicable to Sikkim to provide for certain peculiar circumstances prevailing there.

The State of Sikkim has one seat each in the Lok Sabha and the Rajya Sabha. Under a newly added Article [Art. 371F], Parliament has been given power to provide for the number of seats in the Sikkim Legislative Assembly (which cannot be less than thirty) which may be filled by candidates belonging to different sections of the people of the State. This has been done to protect the rights and interests of the different sections of the State population.

Another provision in this Article confers special responsibility on the Governor of Sikkim for peace and for an equitable arrangement for ensuring the social and economic advancement of different sections of the State population. In dis-

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63. The proposal was announced in Parliament on September, 11, 1968.
64. For details, see, The North-Eastern Council Act, 1971.
65. See, Ch XLII, *infra*, for the Constitution Amendment.
66. See, Ch. XLII, *infra*, for the Amendment.

charge of this responsibility, the Governor is subject to such directions as may be issued by the President from time to time.

Sikkim has a High Court of its own. Clause (k) of Art. 371F guarantees continued operation to earlier Sikkim laws even though they may be inconsistent with the Constitution until these laws are amended or repealed by a competent legislature or any other authority.[67]

Article 371F(f) authorises Parliament to reserve seats in the Sikkim Legislative Assembly for different sections of the population of Sikkim for the purpose of protecting their rights and interests. Accordingly, Parliament has reserved certain seats for ethnic and religious groups. In terms of Art. 371F, Parliament has reserved 12 out of 32 seats for the Sikkimese of "Bhutia-Lepcha" origin and one seat for the "Sangha", the Budhist Lamaic Monastries.

This provision was challenged as unconstitutional. Two questions were brought before the Supreme Court for decision, *viz.*: (1) whether a seat can be earmarked in the State Legislative for a representative of a group of religious institutions to be elected by them; (2) whether seats can be reserved in favour of a particular tribe far in excess of its population.

It was argued that Art. 371F(f) itself violated the basic features of the Constitution. It was also argued that the statutory provisions for reserving seats, were also unconstitutional as violative of a basic feature of the Constitution, such as, the democratic principle.[68] However, in *R.C. Poudyal v. Union of India*,[69] the Supreme Court rejected the argument. The reservation in favour of certain groups was held necessary because of the state of development of the newly admitted State of Sikkim. The Court by majority ruled that the principle of "'one person one vote' is in its very nature considerably tolerant of imbalances and departures from a very strict application and enforcement". The court went on to observe : "The provision in the Constitution indicating proportionality of representation is necessarily a broad, general and logical principle but not intended to be expressed with arithmetical precision". Adjustments are possible having regard to the political maturity, awareness and degree of political development in different parts of India.

The inequalities in the case of Sikkim in representation "are an inheritance and compulsion from the past. Historical considerations have justified a differential treatment". The reservation of one seat in favour of Sangha was justified on the ground that though it was a religious institution yet it was closely interwoven with the political and social life of Sikkim.

E. MIZORAM

Article 371G makes some special provisions with regard to the State of Mizoram. It provides, that "notwithstanding anything in the Constitution", no parliamentary law in respect of religious or social practices of the Mizos, Mizo customary law and procedure, administration of civil and criminal justice involving decisions according to Mizo customary law, ownership and transfer of land, shall apply to the State of Mizoram unless the State Legislative Assembly by a resolution so decides.

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67. *Purna Bahadur Subba v. Sabitri Devi Chhetrini*, AIR 1982 NOC. 311.
68. For further discussion on this aspect, see, Ch. XLI, *infra.*
69. AIR 1993 SC 1804 : 1984 Supp (1) SCC 324; see, *supra*, Ch. V.

F. ARUNACHAL PRADESH

According to Art. 371HF, the Governor of Arunachal Pradesh has been entrusted with special responsibility with respect to law and order in the State. In discharging this function, the Governor after consulting his Council of Ministers, exercise his individual judgment as to the action to be taken.

The President can by an order put an end to this special responsibility of the Governor, if after receiving a report from the Governor or otherwise, the President is satisfied that it is no longer necessary for the Governor to have any such responsibility.

G. TRIPURA

According to Art. 332(3B) added by the 72nd Constitution Amendment, in the Tripura Legislative Assembly, the number of seats reserved for the Scheduled Tribes "shall be such numbers of seats as bears to the total number of seats, a proportion not less than the number, as on the date of coming into force of the Constitution (Seventy-Second Amendment) Act, 1992,[70] of members belonging to the Scheduled Tribes in the Legislative Assembly in existence on the said date bears to the total number of seats in that Assembly."

The provision means that the proportion of seats reserved for S/Ts to the total number of seats in the Assembly will continue to be the same as it existed on the date of enforcement of the 72nd Amendment of the Constitution.

On the relevant date, the S/Ts had 20 seats in the Assembly having a membership of 60. On the basis of the proportion of their population to the total state population, they would be entitled to 17 seats. Thus, the formula contained in the 72nd Amendment gave the S/Ts a few more seats than they would be entitled on a population basis.

This provision was challenged on the ground of being against the 'basic feature' of the Constitution contained in Art. 332(3),[71] viz. that the S/Ts would be entitled to the seats in the State Legislature in proportion to their population. The Supreme Court however rejected the challenge on several grounds,[72] viz., the provision was of a transient nature; referring to *Poudyal*,[73] the court said that the concept of "one person one vote" could not be enforced with mathematical precision; the provision was justifiable in the context of the factual situation prevailing on the ground in Tripura; the provision promoted the constitutional value—"social, economic and political justice to the people of India".

H. VILLAGE PANCHAYATS

The Constitution (Seventy-Third Amendment) Act, 1992,[74] has been enacted to strengthen the *panchayat* system in villages in a bid to strengthen democratic institutions at the grass root level. The underlying idea is to make *panchayats* as vibrant units of self government and local administration in the rural areas so that they can subserve the teeming millions living there. The Amendment is of his-

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70. For the specific Amendment, see, Ch. XLII, *infra.*
71. For this constitutional provision, see, Ch. XXXV, *infra.*
72. *Subrata Acharjee v. Union of India*, (2002) 2 SCC 725 : AIR 2002 SC 843.
73. *Poudyal*, see, footnote 69, *supra.*
74. For the Amendment, see, Ch. XLII, *infra.*

toric value as it is designed to establish strong, effective and democratic local administration. It is hoped that this will lead to rapid implementation of rural development programmes.

Until the enactment of the 73rd Amendment of the Constitution, the *panchayat* system was based purely on State laws and the functioning of the system was very sporadic. The Constitutional Amendment seeks to strengthen the system by giving it constitutional protection. A new Part, Part IX, has been added to the Constitution consisting of Arts. 243 to 243-O. A new Schedule, *viz.*, Eleventh Schedule, has also been added to the Constitution.[75]

Following its earlier decision[76] it has been held that Part IX of the Constitution or Article 243 makes no change in the essential feature of the Panchayat Organization. It was pointed out that what was sought to be done by the Seventy-third Amendments which inserted Part IX was to confer Constitutional status on District Panchayat, Taluka Panchayat and Village Panchayats as instruments of local self government.[77]

The notable feature of these constitutional provisions is that these are in the nature of basic provisions which need to be supplemented by law made by the respective State Legislature. The reason is that local government including the self-governing institutions for the rural areas, is exclusively a State subject under entry 5, List II.[78] Parliament does not have legislative power to enact any law relating to village panchayats. However, it is open to the Centre, if statutorily authorised, to extend the provisions of State legislation on panchayats to Union Territories.[79]

Under these Constitutional provisions, *panchayats* are to be established in every State at the village, intermediate and district levels [Art. 243B]. Art. 243(d) defines "panchayat" as an institution of self-government constituted under Art. 243-B, for the rural areas. There will be direct elections to all these bodies by the electorate from territorial constituencies in the respective *panchayat* area [Art. 243C(2)]. The detailed provisions are to be made by the State Governments by passing laws subject to the Constitutional provisions contained in Part IX of the Constitution now introduced by the 73rd Constitutional Amendment. [Art. 243C(1)].[80] Where the appropriate Government had failed to create the posts necessary for discharge of duties under the relevant statute, the Court directed the Government to create such posts.[81] According to Art. 243A, a gram sabha exer-

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75. For comments on these constitutional provisions, see, *Velpur Gram Panchayat v. Asstt. Director of Marketing, Guntur*, AIR 1998 AP 142.

76. *Kishan Singh Tomar v. Municipal Corporation*, (2006) 8 SCC 352 : AIR 2007 SC 269.

77. *Gujarat Pradesh Panchayat Parishadn v. State of Gujarat*, (2007) 7 SCC 718 : (2007) 9 JT 503.

78. For these entries and lists, see, *infra*, Ch. X.

79. In exercise of powers conferred under section 87 of the Punjab Reorganisation Act, 1966, the Central Government notified that the provisions of the Punjab Panchayati Raj Act, 1994 would be applicable to the Union Territory of Chandigarh. See in this connection *UT Chandigarh v. Avtar Singh*, (2002) 10 SCC 432.

80. For discussion on Art. 243C, see, *Jagdish Prasad Bhunjwa v. State of Madhya Pradesh*, AIR 1997 MP 184; *State of Uttar Pradesh v. Pradhan, Sangh Kshettra Samiti*, AIR 1995 SC 1512 : 1995 Supp (2) SCC 305. See also *Lalit Mohan Pandey v. Pooran Singh*, (2004) 6 SCC 626 : AIR 2004 SC 2303.

81. *UT Chandigarh v. Avtar Singh*, (2002) 10 SCC 432.

cises such powers and performs such functions at the village level as the State Legislature may by law provide.

Article 243-D(1) mandates that seats be reserved for the Scheduled Castes and the Scheduled Tribes in every *panchayat*. Art. 243-D(4) also directs that the offices of the chairpersons in the *panchayats* at the village or any other level shall be reserved for the Scheduled Castes, the Scheduled Tribes and women in such manner as the State Legislature may, by law, provide.[82]

Under 243D(6), a State Legislature may make any provision for reservation of seats in any panchayat or offices of chairpersons in the panchayats at any level in favour of "backward class of citizens". The expression "Backward class" has not been defined. The Patna High Court has ruled that "it is well within the domain of the legislative to determine as to who is the Backward class and the caste can be one of the factors for such determination."[83]

According to Art 243C(5), the chairperson at the intermediate or district level *panchayat* is to be elected by the elected members thereof. The chairperson of the village *panchayat* is to be elected in such manner as the State Legislature may provide by law.

Article 243F lays down the disqualifications for membership. Under Art. 243E, the normal tenure of a *panchayat* is five years unless sooner dissolved under the law made by the State.

Under Art. 243G, the State Legislature may, by law, endow the *panchayats* with such powers and authority as may be necessary to enable them to function as institutions of self government. Such a law may contain provisions for the devolution of powers and responsibilities upon panchayats with respect to—(a) the preparation of plans for economic development and social justice; (b) the implementation of schemes for economic development and social justice as may be entrusted to them including those in relation to the matters listed in the XI Schedule to the Constitution.[84] A provision making a person having more than two living children ineligible to contest for the post of Panch or Sarpanch has been held to be Constitutional and in keeping with the objective of popularising socio-economic welfare and healthcare of the masses. [85]

Under Art. 243H, the State Legislature may confer power on panchayats to levy and collect specified taxes, duties, tolls and fees. Under Art. 243I, the State Government has to constitute a Finance Commission after every five years to review the financial position of *panchayats* and suggest ways and means to strengthen their financial position.

Under Art. 243K, elections to *panchayats* are to be conducted under the supervision of the State Election Commission. This provision ensures that all elections to panchayats are completely free from fear and political interference. Art. 243-O imposes restrictions on calling into question any election to a *panchayat*

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82. *Vinayakrao Gangaramji Deshmukh v. P.C. Agarwal*, AIR 1999 Bom. 142; *Jagdish Prasad Bhunjwa v. State of Madhya Pradesh*, AIR 1997 MP 184.

83. *Kirshna Kumar Mishra v. State of Bihar*, AIR 1996 Pat 112.
Also see in this connection, discussion under Art. 15(4), *infra*, Ch. XXII; *Indra Sawhney v. Union of India*, AIR 1993 SC 477 : 1992 Supp (3) SCC 217, *infra*, Ch. XXIII.

84. See, *Mukesh Kumar Ajmera v. State of Rajasthan*, AIR 1997 Raj 250.

85. *Javed v State of Haryana*, (2003) 8 SCC 369 : AIR 2003 SC 3057.

except through an election petition before a prescribed authority. Art. 243-O also bars challenge in a court of law to the validity of any law relating to delimitation of constituencies or the allotment of seats to such constituencies made under Art. 243-K. As Art. 243-O is *pari passu* with Art. 243ZG relating to municipalities the effect of Art. 243-O is discussed later along with Art. 243ZG.[86]

Under Art. 243-I, within one year of the 73rd Constitutional Amendment coming into force, and thereafter every 5 years, the State Government is required to appoint a finance commission to review the financial position of the *panchayats*.

Arts. 243 to 243-O provide for the constitution of panchayats, the terms of the members of panchayats, reservations to be made in the panchayats. Any law made by a State Legislature which runs counter to the said constitutional provisions, requires to be declared as unconstitutional.[87]

I. MUNICIPAL BODIES

Municipal bodies are units of local administration in urban areas. For legislative purposes, they fall within the domain of State Legislatures under entries 5 and 6, List II.

Although municipal bodies have been in existence in India for long, their functioning, on the whole, has not been satisfactory. As a means of decentralisation of power, Parliament has enacted the Constitution (Seventy-fourth Amendment) Act, 1992 inserting Arts. 243P to 243ZG in the Constitution.[88]

The 74th Amendment seeks to strengthen the institution of municipal bodies so as to make them effective democratic institutions at the grass root level in urban areas. The Amendment seeks to promote greater participation by the people in self-rule. The underlying ideas is to place local self-government in urban areas on a sound effective footing. The Amendment lays down the framework to which the State Legislation concerning municipalities has to conform with.

A *Nagar Panchayat* is to be established in a place in transition from rural to urban area. [Art. 243Q(1)(a)]. A Municipal Council is to be established for a smaller urban area [Art. 243Q(1)(b)] and a Municipal Corporation for a larger urban area [Art. 243Q(1)(c)]. All these bodies are to be directly elected.[89]

The State Government is to specify "a transitional area", "a smaller urban area", or "a larger urban area", keeping the following factors in view: the population of the area, the density of the population therein, the revenue generated for local administration, the percentage of employment in non-agricultural activities, the economic importance, such other factors as may be deemed fit [Art. 243-Q(2)].

According to Art. 243P (e), "Municipality" means an institution of self-government constituted under Art. 243(Q). Art. 243T provides for reservation of seats in every municipality for the Scheduled Castes and the Scheduled Tribes and also for women. Under Art. 243R, all seats in a Municipality are to be filled

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86. See, *infra*, Sec. H.
87. *Lakshmappa Kallappa v. State of Karnataka*, AIR 2000 Knt. 61.
88. For the Amendment, see, Ch. XLII, *infra.*
89. *Saij Gram Panchayat v. State of Gujarat*, AIR 1999 SC 826 : (1999) 2 SCC 366; *S. Shekhar v. Commissioner/Returning Officer, Bangalore City Corporation*, AIR 1999 Kant 174.

by persons chosen by direct election from the territorial constituencies in the Municipal area. For this purpose, each Municipal area is to be divided into territorial constituencies known as wards.

Article 243-T provides for reservation of seats for Scheduled Castes and Scheduled Tribes on the basis of their population and the total population in the municipal area. Of these seats, seats are to be reserved for women belonging to Scheduled Castes and Scheduled Tribes. Of the total number of seats to be filled in a municipality by direct election, seats are to be reserved for women including the seats reserved for women of Scheduled Castes and Scheduled Tribes.

Under Art. 243U, the normal tenure of a municipality is five years unless sooner dissolved under the relevant law. But before its dissolution, the Municipality is to be given a reasonable opportunity of being heard.[90] The requirement to hold an election before the expiry of 5 years is mandatory and may not be deviated from except under very exceptional circumstance such as an Act of God.[91] However in *State of Maharashtra v. Jalgaon Municipal Council*,[92] more latitude was granted in the case of conversion of a Municipal Council to a Corporation.

Article 243-W authorises the State Legislature to confer such powers and authority as may be necessary to enable the municipalities to function as institutions of self government.[93] The municipalities may be authorised to prepare plans for economic development and social justice. Under 243-X, the State Legislature may by law authorise a Municipality "to levy, collect and appropriate such taxes, duties, tolls and fees" as may be specified in law. This provision makes it clear that even under the new scheme, the municipalities have not been assigned any independent powers of taxation. The concerned State Legislature has to pass a law to confer taxing powers on the municipalities.

Under Art. 243Y, the State Government is to appoint a Finance Commission to review the financial position of the Municipalities and make suitable recommendations to strengthen municipal finances. The commission may recommend distribution of taxing powers between the State and the Municipalities, giving of grants-in-aid by the State to the Municipalities, and other measures needed to improve the financial position of the Municipalities.

Elections to Municipalities are to be supervised by the State Election Commission [Art. 243ZA]. Under Art. 243ZG, no election to a Municipality is to be called in question except through an election petition presented to such authority as may be provided for by law. Art. 243ZG also says that the validity of a law relating to the delimitation of wards or constituencies for a municipality, or the allotment of seats to such constituencies made under Art. 243ZA "shall not be questioned in any court".

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90. In *K. Pramila Patnaik v. State of Orissa*, AIR 2001 Ori 190, a government order dissolving a municipality was quashed by the High Court because no hearing had been given to the municipality as required by Art. 243-O.
The High Court has rightly ruled that the provisions of the relevant State Act "should be read in consonance with the provision contained in the Constitution."
Ibid., at 192.

91. PER PASAYAT, J: In re Special Reference 1 of 2002 : (2002) 8 SCC 237 : AIR 2003 SC 87 affirmed in *Shanti G. Patel v. State of Maharashtra*, (2006) 2 SCC 505 : AIR 2006 SC 1104.

92. (2003) 9 SCC 731 : AIR 2003 SC 1659.

93. *Municipal Board, Hapur v. Jassa Singh*, AIR 1997 SC 2689 : (1996) 10 SCC 377.

But a delimitation order can be challenged as it does not have the force of law.[1]

Article 243ZE requires constitution of a Metropolitan Planning Committee in every Metropolitan Area. A Metropolitan Area means an area having a population of 10 lakhs or more. The purpose of the Committee is to prepare a development plan for the Metropolitan area as a whole.

It may be noted that Arts. 243 to 243ZG dealing with *Panchayats* and Municipalities are in the nature of basic provisions which only lay down the outlines of the envisaged system of panchayats and municipalities. These provisions need to be supplemented by legislation in each State defining the details.

The interpretation of Arts. 243-O and 243ZG has caused some dichotomy in judicial opinion. The question for the consideration of the courts has been : how far do these constitutional provision which contain privative clauses and bar judicial review, restrict or limit the jurisdiction of the High Courts under Art. 226.

By and large two different judicial views seem to have emerged on this question. One view arises from a purely literal reading to these provisions. The other view is based on a constitutional fundamental, viz., judicial review is a basic feature of the Constitution[2] which can be limited neither by a statutory provision nor even by a constitutional amendment.

In *State of Uttar Pradesh v. Pradhan Sangh Kshettra Samiti*,[3] the Supreme Court ruled that neither delimitation of the panchayat area nor of the constituencies in the said areas and the allotment of seats to the constituencies, could be challenged nor could the court entertain such a challenge except on the ground that before the delimitation no objections were invited andno hearing was given. Even such a challenge could not be entertained after the notification for holding elections was issued.

In *Jaspal Singh Arora v. State of Madhya Pradesh*,[4] the Supreme Court has ruled that in view of the statutory mode provided by the State Act, and also Art. 243-ZG, the election of the President of the municipal council could not be challenged through a writ petition.

In *Anugrah Narain Singh v. State of Uttar Pradesh*,[5] the Supreme Court has ruled that once a notification for municipal election has been issued, there arises a "complete and absolute bar" in terms of Art. 243ZG in considering "any matter relating to municipal elections on any ground whatever. No election to a municipality can be quashed except by an election petition".

When election is imminent or well under way, the court should not intervene to stop the election process. "If this is allowed to be done, no election will ever take place, because someone or the other will always find some-excuse to move the Court and stall the elections".[6] The Court did accept the proposition that an order of delimitation of municipal areas could be challenged as it is not law and

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1. *Anugrah Narain Singh v. State of U.P., infra,* footnote 5.
2. On this question, see, *infra,* Ch. XLI.
3. AIR 1995 SC 1512 : 1995 Supp (2) SCC 305.
4. (1998) 9 SCC 594.
5. (1996) 6 SCC 303 : (1996) 8 JT 733.
6. Also see, *G.K. Durga v. State Election Commissioner,* AIR 2001 AP 519.

is, thus, not beyond challenge under Art. 243ZG. It can be challenged on the ground of colourable exercise of power or of any other ground of arbitrariness.

In *Shiv Shankar Dubey v. State Election Commission*,[7] the High Court has ruled that in view of Art. 243-O(b), the High Court cannot interfere under Art. 226 with an order passed by the State Election Commission recounting of ballots.

In *Lal Chand v. State of Haryana*,[8] a full Bench of the Punjab and Haryana High Court entertained writ petitions challenging election of members to a gram panchayat and a municipal committee. The High Court argued, and rightly so, that judicial review is a fundamental and basic feature of the Constitution which cannot be taken away even by a constitutional amendment. Therefore, argued the court, Arts. 243-O and 243-ZG would have to be read subject to Arts. 226 and 227 of the Constitution. This means that the High Court would have power to entertain a writ petition with regard to challenge to election to any panchayat or municipality in spite of the bar imposed by the two constitutional provisions in question. The High Court may, however, keeping in view the facts and circumstances of the case, relegate the petitioner to the remedy available before the election tribunal.

In *Prem Nath Bhatia v. State of Punjab*,[9] the High Court has ruled that an order dealing with delimitation of wards is not 'law' and so it is not beyond challenge through a writ petition because of Art. 243ZG. But such a challenge ought to be made before the process of election is put into motion and soon after the final order is passed.

In *S. Fakruddin v. Govt. of A.P.*,[10] after reviewing several Supreme Court cases declaring judicial review as a basic feature of the Constitution, the High Court has come to the conclusion that the bar contained in Art. 243-O is to "the ordinary jurisdiction of the courts and not to extraordinary jurisdiction under Art. 226 of the Constitution and Art. 136 thereof." Art. 243-O does not take away the power of the High Court under Art. 226 to examine the validity of any law relating to elections. However, in the facts and circumstances of a case, the court may refrain to interfere except on grounds of jurisdictional error if there is available an alternative, effective and independent mechanism.

In *V. Kunhabdulla v. State of Kerala*,[11] the High Court has asserted that it can interfere under Art. 226, in spite of the privative clauses, with the decision of the State Election Commission delimiting constituencies on the ground of misuse of power and when the election process has not yet started. In such a situation, "absence of judicial review will create a constitutional despot beyond the pale of accountability." Art. 243-O cannot apply in a case where the action of the Election Commission affects the very purity and probity of the election cutting at the very root of the democratic process. "The power of judicial review being a basic structure of the Constitution is very much available to see that the election commission has acted within the contours of the Constitution and the law" inspite of Arts. 243-O and Art. 243ZG.

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7. AIR 2000 All 336.
8. AIR 1999 P&H 1 (FB).
9. AIR 1997 P&H 309.
10. AIR 1996 AP 33.
11. AIR 2000 Ker 376 at 382.

There are very good reasons for taking the view that the privative clauses contained in Arts. 243-O and 243ZG should not be allowed to curtail judicial review under Arts. 226 and 32. This is because of the constitutional fundamental, accepted by the Supreme Court in a large number of cases,[12] that judicial review is a basic feature of the Constitution which cannot be diluted by any constitutional amendment. In some pronouncements, the analogy of Art. 329 has been brought in to interpret Arts. 243-O and 243ZG. But, on a deeper consideration, this analogy is not correct even though the phraseology of all these provisions is similar. There is a fundamental difference between Art. 329 and the other constitutional provisions.[13]

Article 329 is part and parcel of the original Constitution, and its interpretation became established before the doctrine of 'basic features of the Constitution' emerged. On the other hand, Arts. 243-O and 243ZG were added to the Constitution through constitutional amendments very much after the doctrine of judicial review being a basic feature of the Constitution had become very well established. Further, there are two more crucial reasons for the High Courts to exercise writ jurisdiction under Art. 226 in relation to the electoral process for panchayats and municipalities, *viz.*:

(1) Unlike the Election Commission established under Art. 324 which is an independent body,[14] the State Election Commissions are established by State laws and these bodies cannot claim the same objectivity and independence as the Election Commission which is a constitutional body. There is always a possibility of the State Commissions misusing their powers as is borne out by *Kunhabdulla*, cited above;

(2) The election tribunals under the Representation of the People Act are the High Courts. The election tribunals under the State laws are constituted by retired civil servants and/or subordinate courts. Needless to say that these bodies ought to be subject to judicial superintendence of the High Courts under Arts. 226 and 227 of the Constitution.[15]

12. See, *infra*, Ch. XLI.
13. For Art. 329, see, Ch. XIX, *infra.*
14. *Ibid.*
15. See, Ch. VIII, *supra*, for these Articles of the Constitution.

PART IV

THE FEDERAL SYSTEM

A. INTRODUCTION

Federalism constitutes a complex governmental mechanism for governance of a country. It has been evolved to bind into one political union several autonomous, distinct, separate and disparate political entities or administrative units. It seeks to draw a balance between the forces working in favour of concentration of power in the centre and those urging a dispersal of it in a number of units. It thus seeks to reconcile unity with multiplicity, centralisation with decentralisation and nationalism with localism.[1]

The originality of the federal system lies in that power is, at one and the same time, concentrated as well as divided. There is centralisation of administration and legislation in certain respects along with decentralisation in other respects. A federal constitution establishes a dual polity as it comprises two levels of government. At one level, there exists a Central Government having jurisdiction over the whole country and reaching down to the person and property of every individual therein. At the other level, there exist the regional governments, each of which exercises, jurisdiction in one of the regions or administrative units into which the country is divided under the constitution. A citizen of a federal country thus becomes subject to the decrees of two governments—the Central and the regional. The regional governments are called the State Governments as in the U.S.A, Australia or India, or Provincial Governments as in Canada.

The two levels of government divide and share the totality of governmental functions and powers between themselves. The distribution of legislative powers

1. On Federalism generally see: DICEY, LAW OF THE CONSTITUTION, Ch. III, 138 et seq. (1952); Federalism; Problems and Methods, 4 International Bulletin of Social Science, 5 et seq. (1952): BOWIE, PROBLEMS OF FEDERALISM; WHEARE, FEDERAL GOVERNMENT; SCHWARTZ, AMERICAN CONSTITUTIONAL LAW, Chs. II & VI; FRIEDRICH & BOWIE, STUDIES IN FEDERALISM; MCWHINNEY, COMPARATIVE FEDERALISM (1962); SAWER, MODERN FEDERALISM (1969); RIKER, FEDERALISM; ORIGIN, OPERATION, SIGNIFICANCE (1964); LIVINGSTONE, FEDERALISM AND CONSTITUTIONAL CHANGE (1956); JAIN, Federal Grants-in-aid in the U.S.A., 1956 VYAVAHARA NIRANAYA, 245; JAIN, Some Aspects of Indian Federalism, 28 JI. of Max-Plank Inst., 301-364 (1968); JAIN, Federalism in India, 6 JILI, 355 (1965); ALICE JACOB, Centre-State Governmental Relations in the Indian Federal System, X JILI., 583 (1968); S.N. JAIN, Freedom of Trade and Commerce and Restraints on the State Power to tax Sale in the course of Inter-State Trade and Commerce, X JILI 547 (1968); M.P. JAIN, Indian Federalism—A Background Paper in I.L.I., Constitutional Developments since Independence, 205-254 (1974); SETALVAD, UNION AND STATE RELATIONS UNDER THE INDIAN CONSTITUTION (1974); JAIN & KASHYAP, THE UNION & THE STATE (1972); REPORT OF THE SARKARIA COMMISSION ON CENTRE-STATE RELATIONS (1988).

between the Centre and the States is the most important characteristic, rather the core, of any federal system. In reality the whole federal system revolves around this basic core of distribution of powers. A federal constitution thus envisages a demarcation or division of governmental functions and powers between the Centre and the regions by the sanction of the Constitution itself which is usually a written document and also a rigid one, *i.e.*, which is not capable of amendment easily. From this follow two necessary consequences—

(1) that any invasion by one level of government on the area assigned to the other level of government is a breach of the constitution; and

(2) that such a breach of the constitution is a justiciable issue to be determined by the courts. Each level of government thus functions within the area assigned to it by the constitution.

The several governments do not, however, function in watertight compartments. They come in contact with each other at many points. Their areas of operation and functioning cross and intersect in several respects thus creating a variety of governmental relations between the Centre and the regions and between the regions *inter se*. The pattern of intergovernmental relations in a federal country is not static; it is dynamic and is constantly finding a new balance in response to the centripetal and centrifugal forces operating in the country.

As contradistinguished with the federal constitution, there is the unitary constitution in which the Central Government is supreme. There may, and usually do, exist local governments in a unitary state having certain assigned functions to discharge, but these local governments exist, at the sufferance of the Centre, and their area of operation is confined to what the Centre seeks to confer on them which may be curtailed, restricted and modified by the Centre and at its own will.

The local units in a unitary constitution have no higher status than mere administrative agencies of the Central Government. The constitutional status of the constituent units in a federation is comparatively more permanent, more enduring, more immutable and they possess a much larger amount of functional autonomy than what the local governments enjoy in a unitary constitution.

The units in a federation act under the constitution; their functions are governed under it and their area of operation can be changed only by an amendment in the constitutional law, *i.e.*, by a constituent process and it cannot ordinarily be done at the instance solely of the Federal Government. The units in a federation thus have their own identity and personality and have their own separate functions to discharge apart from the Federal Government.

The Constitution of India establishes a dual polity in the country, consisting of the Union Government and the State Governments.[2] The States are the regional administrative units into which the country has been divided and, thus, India has been characterised as the Union of States [Art. 1(1)][3]. The fabric of the Indian federal system stands on three pillars, *viz.*, a strong Central Government, flexible federal system and co-operative federalism.[4] This will be apparent as we go along with the discussion of the details of the Indian federal system in the following pages.

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2. *Supra*, Chs. II—VIII.
3. *Supra*, Ch. V.
4. *Infra*, Ch. XIV

The strength of the Centre lies in its large legislative[5] and financial[6] powers and in its emergency powers.[7] The flexibility of the Indian Federalism lies in the expedients adopted in the Constitution to mitigate the rigidity of a federal system and to increase temporarily the powers of the Central Government if the contemporary situation so demands.[8] The formal method to amend the federal portion of the Constitution is also not so rigid as is to be found in other federations.[9] The concept of co-operative federalism has been worked out in a number of constitutional provisions as well as strengthened through legislation and administrative practices.[10]

The framers of the Indian Constitution learnt a great deal from the experiences—the problems faced and the solutions attempted—of the Federations of the U.S.A., Canada and Australia. The approach of the framers of the Indian Constitution was conditioned in good measure by the knowledge of the working of these Federations. They have tried to incorporate in the Indian Federal Structure the main developments in those Federations, and have also sought to avoid the difficulties faced therein from time to time. But, still, the Indian Federal System breaks some new ground and the Indian Constitution contains some novel provisions which are not to be found in other Federations.[11]

5. Chapter X, *infra.*
6. Chapter XI, *infra.*
7. *Infra.* Chapter XIII.
8. Chs. X, XI, XII and XIII, *infra.*
9. Ch. XLI, *infra.*
10. *Infra,* Chapter XIV.
11. *Supra,* Chapter I; also see, *infra,* Chs. X-XIV .

CHAPTER X

LEGISLATIVE RELATIONS

SYNOPSIS

There is in a federation, a division of functions between the Centre and the regions, known as the State Governments in India. This division of functions is two-fold—from the point of view of :

(i) Territory, and

(ii) The subject-matter.

A. TERRITORIAL JURISDICTION TO LEGISLATE

From the territorial point of view, Parliament may make laws for the whole of India, or a part thereof [Art. 245(1)]. A law made by Parliament is not invalid merely because it has an extra-territorial operation [Art. 245(2)].

As explained by KANIA, C.J., in *A.H. Wadia v. Income-tax Commissioner*:[1] "In the case of sovereign legislature, questions of extra-territoriality of any enactment can never be raised in the municipal Courts as a ground for challenging its validity. The legislation may offend the rules of international law, may not be recognised by foreign Courts or there may be practical difficulties in enforcing them but these are questions of policy with which the domestic tribunals are not concerned."

Accordingly, the government can proceed under the Hindu Marriage Act against a Hindu who returns to India after marrying a second wife in a foreign country, for the Act applies to all Hindus who are domiciled in India but who may be outside India for the time being.

A State Legislature, on the other hand, may make laws only for the State concerned [Art. 245(1)]. A State Legislature has no legislative competence to make laws having extra-territorial operation. A State can legislate effectively only for its own territory. A State law can affect persons, properties or things within the State and not outside the State. A State law is not immune from challenge in a Court on the ground of extra-territorial operation. A State law having operation outside the State is not valid.

A State law is not valid if it purports to affect men and property outside the State. A State law may apply to persons within its territory, to property—moveable and immovable—situated within the State, or to acts and events which occur within its borders. To decide whether or not a State law has an extra-territorial operation, the doctrine of *territorial nexus* is invoked.

The doctrine of territorial nexus is applied to find out whether a particular State law has extra-territorial operation. It signifies that the object to which the law applies need not be physically located within the territorial boundaries of the State, but what is necessary is that it should have a sufficient territorial connection with the State. If there is a *territorial nexus* between the subject-matter of the Act and the State making the law, then the statute in question is not regarded as having *extra-territorial* operation.

Thus, a State may levy a tax on a person, property, object or transaction not only when it is situated within its territorial limits, but also when it has a sufficient and real territorial connection with it.

The principle of territorial nexus can be illustrated with reference to an old case. A company was incorporated in the United Kingdom and had its control and management exclusively situated there. A member of it carried on business

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1. AIR 1949 FC 18, 25.

in India. The company made an overall profit of which a major part accrued from India. It was held that India could levy an income-tax on the entire income of the company, and not only on the portion accruing from India, for there was a sufficient territorial nexus between the company and India for this purpose.[2]

The Bihar legislature enacted the Bihar Hindu Religious Trusts Act, 1950, for the protection and preservation of properties appertaining to the Hindu religious trusts. The Act applied to all trusts any part of which was situated in the State of Bihar. A question was raised whether the Act would apply to trust properties situated outside the State of Bihar. Applying the doctrine of territorial nexus, the Supreme Court held that the Act could affect the trust property situated outside Bihar, but appertaining to a trust situated in Bihar where the trustees functioned. The Act aims to provide for the better administration of Hindu religious trusts in the State of Bihar. This aim is sought to be achieved by exercising control over the trustees in *personam.* The trust being situated in Bihar, the State has legislative power over it and also over its trustees. The Act thus has no extra-territorial operation. The fact that the trust is situated in Bihar gives enough territorial connection to enable the Bihar legislature to make a law with regard to such a trust.

What is necessary is that the connection between the trust and the property appertaining thereto is real and not illusory and that the religious institution and the property appertaining thereto form one integrated whole.[3] "It cannot be disputed that if the religious endowment is itself situated in Bihar and the trustees function there, the connection between the religious institution and the property appertaining thereto form one integrated whole and one cannot be dissociated from the other. If, therefore, any liability is imposed on the trustees, such liability must affect the trust property."

In *State of Bombay v. RMDC,*[4] the respondent, the organiser of a prize competition, was outside the State of Bombay. The paper through which the prize competition was conducted was printed and published outside the State of Bombay but it had a wide circulation within the State of Bombay. Most of the activities which the gambler was expected to undertake took place within the State. A tax levied by the State of Bombay on lotteries and prize competitions was extended to the newspapers published outside the State "in a lump sum having regard to the circulation or distribution of the newspaper" in the State.

The provision was questioned on the ground that it purported to affect men residing and carrying on business outside the State. Nevertheless, it was held valid because the newspapers although printed and published outside Bombay had a wide circulation there; they had collectors in Bombay to collect the entry fee for the competition. The State sought to collect the tax only on the amount received by the newspapers from the State and, therefore, there was sufficient territorial nexus entitling the State of Bombay to impose a tax on the gambling that took place within its boundaries. Therefore, the law could not be struck down on the ground of extra-territoriality.

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2. *Wallace v. Income-tax Commissioner,* AIR 1948 P.C. 118.
Also see, *Wadia, supra,* note 1.

3. *State of Bihar v. Charusila Dasi,* AIR 1959 SC 1002 : 1959 Supp (2) SCR 601; *State of Bihar v. Bhabapritananda,* AIR 1959 SC 1073.
Also, *Ananta Prasad v. State of Andhra Pradesh,* AIR 1963 SC 853.

4. *State of Bombay v. RMD Chamarbaugwala,* AIR 1958 SC 699.

A State is entitled to levy a tax on the carriage of goods through its territory although the goods belong to, and the tax is payable by, the people outside the State.[5] Reference may also be made in this connection to the discussion under sales tax.[6]

There is no general formula defining what territorial connection or *nexus* is sufficient or necessary for application of the law to a particular object. Sufficiency of the territorial connection involves consideration of two elements, *viz.:*

(*a*) the connection must be real and not illusory; and

(*b*) the liability sought to be imposed under the Act must be pertinent or relevant to that connection.[7]

Whether in a given case there is sufficient territorial nexus or not is a question of fact, and it is for the Courts to decide in each case whether "the territorial nexus" being put forward as the basis of the application of the law is "sufficient" or not.

The Bombay State Legislature enacted a law prohibiting a bigamous marriage and made it a criminal offence to enter into such a marriage. Marriages contracted outside the State by people domiciled within the State were also prohibited. The High Court declared the Act *ultra vires* as there was no territorial nexus between the State and the marriage performed or crime committed outside the State, even when it was done by a person domiciled in the State.[8]

Article 245 does not apply when acting under a Central law [S. 68-D(3) of the Motor Vehicles Act], a State Government gives approval to a scheme for inter-State routes for the State Transport Undertaking.[9] Also, under Art. 298, a State is not confined to carrying on business within its own boundaries. It can carry on business outside its territory as well.[10]

Recently the Supreme Court has stated the principle of territorial nexus as follows:[11]

> "It is by reference to the ambit or limits of territory by which the legislative powers vested in Parliament and the State Legislatures are divided in Art. 245. Generally speaking, a legislation having extraterritorial operation can be enacted only by Parliament and not by any State Legislature; possibly the only exception being one where extra-territorial operation of a State legislation is sustainable on the ground of territorial *nexus.* Such territorial *nexus,* when pleaded must be sufficient and real and not illusory."

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5. *Khyerbari Tea Co. v. State of Assam*, AIR 1964 SC 925 : (1964) 5 SCR 975; *infra*, Chapter XV.

6. *Infra*, next Chapter.

7. *Shrikant Bhalchandra Karulkar v. State of Gujarat*, (1994) 5 SCC 459.

8. *State of Bombay v. Narayandas Mangilal*, AIR 1958 Bom. 68.
See, *infra*, under Citizenship, Chapter XVIII.
In the following cases, State laws have been invalidated because of extra-territoriality:
E.R. Samuel v. State of Punjab, AIR 1966 H.P. 59; *K.K. Kochunni v. State of Madras*, AIR 1959 SC 725 : 1959 Supp (2) SCR 316.

9. *Khazan Singh v. State of Uttar Pradesh*, AIR 1974 SC 669 : (1974) 1 SCC 295.

10. See, *infra*, Chapter XII, for Art. 298.

11. *State of Andhra Pradesh v. National Thermal Power Corporation Ltd.*, (2002) 5 SCC 203.

B. DISTRIBUTION OF LEGISLATIVE POWERS

The crux, the pivotal point, of a federal constitution is the division of powers and functions between the Centre and the regions. The distribution of legislative powers between the Centre and the regions is the most important characteristic of a federal constitution. The whole structure of the federal system continues to revolve around this central point.[12]

A study of the federations now extant in the world shows that there is no fixed formula, or a set pattern, for division of powers between the Centre and the regional governments. Usually certain powers are allotted exclusively to the Centre; certain powers are allotted exclusively to the regions, and there may be a common or concurrent area for both to operate simultaneously.

The foundation for a federal set up was laid in the Government of India Act, 1935. Though in every respect the distribution of legislative power between the Union and the States as envisaged in the 1935 Act has not been adopted in the Constitution, but the basic framework is the same.[13]

A basic test applied to decide what subjects should be allotted to the one or the other level of government is that functions of national importance should go to the Centre, and those of local interest should go to the regions. This test is very general, a sort of *ad hoc* formula, and does not lead to any uniform pattern of allocation of powers and functions between the two tiers of government in all federal countries. The reason for this lack of uniformity is that what is of general or national importance, and what is of local importance, cannot be decided on any *a priori* basis. Certain subjects like defence, foreign affairs and currency, are regarded as being of national importance everywhere and are thus given to the Centre. But, beyond this, what other subjects should be allotted to the Centre depends on the exigencies of the situation existing in the country, the attitudes of the people and the philosophy prevailing, at the time of constitution-making, and the future role which the Centre is envisaged to play.

The circumstances and considerations governing the scheme of division of powers in a federation vary from place to place and time to time. The pattern of division of functions in any federal country is largely conditioned by the interaction of two contending and conflicting forces—forces favouring centralisation resulting in a federal union and promoting a strong centre, and the forces supporting decentralisation, local or particularistic tendencies born of such factors as ethnic, religious, cultural, linguistic and economic, which manifest in powers being given to regional governments. The scheme which finally emerges in a federation is the resultant of the balance of these conflicting forces at the time of the constitution making.

C. THE THREE LISTS

The Indian Constitution contains a very elaborate scheme of distribution of powers and functions between the Centre and the States. The framers of the Indian Constitution took note of the developments in the area of Federal-State allo-

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12. In this connection see also *Dharam Dutt v. Union of India*, (2004) 1 SCC 712 : AIR 2004 SC 1295.
13. *Prof. Yashpal v. State of Chhattisgarh*, (2005) 5 SCC 420 : AIR 2005 SC 2026.

cation of powers in other federations. They surveyed the area of the functioning of the modern government. They noted the modern scientific and technological developments as well as the contemporary political philosophies. And, keeping all these factors in mind, they apportioned functions between the Centre and the States in a way so as to suit the peculiar circumstances and exigencies of the country.

The obvious tendency of the Indian Constitution is towards centralisation within a federal pattern and framework. The scheme of the Constitution is to secure a constitutionally strong Centre having adequate powers both in extent and nature so that it can maintain and protect the unity and integrity of the country.

The Indian Constitution seeks to create three functional areas:

(i) an exclusive area for the Centre;

(ii) an exclusive area for the States; and

(iii) a common or concurrent area in which both the Centre and the States may operate simultaneously, subject to the overall supremacy of the Centre.

The scheme of Art. 246 is as follows:

(i) Article 246(1) confers on Parliament an 'exclusive power' to make laws with respect to any of the matters in the Union List (List I in the Seventh Schedule). The entries in this List are such as need a uniform law for the whole country. The States are not entitled to make any law in this area. Art. 246(1) opens with the words: "Notwithstanding anything in clauses (2) and (3)."

This means that if any matter is within the exclusive competence of the Centre *i.e.* List I, it becomes a prohibited field for the States.

(ii) Article 246(3) confers an exclusive power on the States to make laws with respect to the matters enumerated in the State List (List II in the Seventh Schedule). These are matters which admit of local variations and, from an administrative point of view, are best handled at the State level and, therefore, the Centre is debarred from legislating with respect to these matters. Art. 246(3) opens with the words: "subject to clauses (1) and (2)".

Thus, if a particular matter falls within the exclusive competence of the States, *i.e.* List II, that represents the prohibited field for the Centre.

(iii) A unique feature of the Indian scheme of division of powers is the existence of a large concurrent field for the Centre and the States. Art. 246(2) confers a concurrent power of legislation on both the Centre and the States with respect to the matters enumerated in the Concurrent List (List III in the Seventh Schedule).

Article 246(2) runs as follows "Notwithstanding anything in clause (3), Parliament and, subject to clause (1), the Legislature of any State ... also, have power to make laws with respect to any of the matters enumerated in list III in the Seventh Schedule".

Allocation of subjects to the lists is not by way of scientific or logical definition but by way of a mere enumeration of broad categories. The power to tax cannot be deduced from a general legislative entry as an ancillary power.[14]

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14. *State of W. B. v. Kesoram Industries Ltd.*, (2004) 10 SCC 201 : AIR 2005 SC 1646.

The general idea underlying the Concurrent List is that there may be subjects on which Parliament may not feel it necessary or expedient to initiate legislation in the first instance because these matters may not have assumed much national importance. A State may, therefore, make necessary legislation with respect to any matter in the Concurrent List. But, if at any time, any of these matters assumes a national importance, and requires to be dealt with on a uniform all-India basis, then the Centre can step in and enact necessary legislation.

When an entry is in general terms in List II and part of that entry is in specific terms in List I, the entry in List I takes effect notwithstanding the entry in List II.[15]

Certain matters, it was felt, could not be allocated exclusively either to the Centre or the States, and though the States might legislate with respect to them, it was also necessary that the Centre should also have a legislative jurisdiction therein in order to enable it, if necessary, to secure uniformity in the law throughout the country, to guide and encourage State effort, and to provide remedies for mischief arising in the State sphere but whose impact may be felt beyond the boundaries of a single State. Instances of the first are provided by the Indian Codes of Civil and Criminal laws. These laws are at the basis of civil and corporate life of the country and have been placed in the Concurrent List so that the necessary uniformity can be preserved therein. Illustrations of the second are provided by such matters as labour legislation, and of the third by legislation for the prevention and control of epidemic diseases.

Further, even when the Centre makes a law for the whole country on a matter in the Concurrent List, a State may also make, if necessary, supplementary laws on that matter to provide for special circumstances within the State.

On the whole, therefore, the Concurrent List makes the scheme of distribution of powers somewhat flexible. The Centre can intervene in the area without any need to amend the Constitution. It permits of diversity along with a unity of approach.

The phraseology of the various clauses of Art. 246 is such as to secure the principle of Union supremacy. The legislative power conferred on the Centre under Arts. 246(1) [Union List] and 246(2) [Concurrent List] predominate over the power conferred on the State Legislature under Art. 246(3) [State List].

Under Art. 246(4), Parliament is given power to make a law on any matter in any List for any territory not included in a State. Obviously, the reference here is to the Union Territories.[16]

In the three lists of the Seventh Schedule to the Constitution, a taxation entry in a legislative list may be with respect to an object or an event or may be with respect to both. Art. 246 makes it clear that the exclusive powers conferred on Parliament or the States to legislate on a particular matter includes, the power to legislate with respect to that matter. Hence, where the entry describes an object of tax, all taxable events pertaining to the object are within that field of legislation unless the event is specifically provided for elsewhere under a different legislative head. Whatever the terminology, because there can be no overlapping in the field of

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15. *Prof. Yashpal v. State of Chhattisgarh*, (2005) 5 SCC 420 : AIR 2005 SC 2026.
16. For Union Territories see, *supra*, Chs. V and IX.

taxation, such a tax if specifically provided for under one legislative entry effectively narrows the fields of taxation available under other related entries. It is also natural when considering the ambit of an express power in relation to an unspecified residuary power, to give a broad interpretation to the former at the expense of the latter. For example, the State cannot under the garb of Luxury tax under Entry 62 List II impinge on the exclusive power of the union under Entries 83 and 84 of List I by merely describing an article as a luxury. That the entries on taxable events in the legislative lists are not exhaustive is also recognized and provided for in Article 248 (2) which provides for the power of Parliament to make any law imposing a tax not mentioned in either the Concurrent or State Lists.[17]

In *Chanda Devi*[18] the Supreme Court expressed too broadly that *mala fide* cannot be attributed to legislation. Colourable exercise of power or fraud on the Constitution conceptually have the same attributes of *mala fide* in its true legal sense [*e.g.* when the concerned legislature ostensibly acting on a field assigned to it enacts a law by entrenching upon the field assigned to another].

D. THE UNION LIST : LIST I

The Union List has 99 entries. Entries 1 to 81, 93 to 95 and 97 deal with general legislative powers, and entries 82 to 92, 96 and 97 deal with power to levy taxes and fees. The general entries are discussed here while the tax entries are discussed in the next Chapter.

The general non-tax entries may be broadly arranged under the following convenient heads.

(a) DEFENCE

Entries 1 to 7 are very broadly worded and give complete jurisdiction to the Centre over all aspects of defence of India.

In other Federations, only one entry is found regarding defence, but in India, as a matter of abundant caution, several entries are found in List I on this subject.

The Centre's capacity to take effective action for the defence of the country is further buttressed by the emergency provisions which are discussed later.[19]

The entries pertaining to defence run as follows:

(1) Defence of India and every part thereof including preparation for defence and all such acts as may be conducive in times of war to its prosecution, and after its termination, to effective demobilisation.

(2) Naval, military and air forces; any other armed forces of the Union.

The last words in the entry refer to armed forces other than the regular army, like the Assam rifles or the Central Reserve Police Force, the Border Security Force, the Central Industrial Security Force etc.[20] The Army Act has been enacted under this entry.[21]

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17. *Godfrey Phillips India Ltd. v. State of U.P.*, (2005) 2 SCC 515 : AIR 2005 SC 1103.
18. *General Manager, North West Railway v. Chanda Devi*, (2008) 2 SCC 108 : (2007) 14 SCALE 296.
19. *Infra*, Chap. XIII.
20. *Akhilesh Prashad v. Union Territory of Mizoram*, AIR 1981 SC 806 : (1981) 2 SCC 150.
21. *Prithi Pal Singh v. Union of India*, AIR 1982 SC 1413 : (1982) 3 SCC 140.

(2A) Deployment of any armed force of the Union or any other force subject to the control of the Union or any contingent or unit thereof in any State in aid of the civil power, powers, jurisdiction, privileges and liabilities of the members of such forces while on such deployment.

Thus, the Centre has power to deploy its armed forces or any other force under its control in aid of the civil power in a State to maintain public order. The words "any other force" in this entry refer to a force other than an armed force.

The words "in aid of the civil power" in this entry indicate that the Central forces can be deployed to help and supplement the efforts of the State forces in restoring public order. The Central forces and the State authorities have to act in unison for this purpose.

The entry does not say that the Centre can deploy its forces in a State only at the request of the State government. It may so happen that the State Government may be unable or unwilling to request the Centre to deploy its forces to meet a serious disturbance of public order. It does not mean that the Centre should continue to look askance at a grave situation in a State and do nothing. It has a duty to intervene and power to deploy *suo motu* its armed forces if, in its opinion, the public disorder in a State has assumed the magnitude and character on an 'internal disturbance' within the meaning of Art. 355.[22]

(3) Delimitation of cantonment areas, local self-government in such areas, the constitution and powers within such areas of cantonment authorities and the regulation of house accommodation (including the control of rents) in such areas.

Under this entry, Parliament has power to regulate the relationship of landlord and tenant including rent and eviction of tenants in private housing within the cantonments. Parliament has exclusive power to legislate on the subject of relationship between landlord and tenant in respect of housing accommodation situated in the cantonment areas.[23]

(4) Naval, military and air force works.

(5) Arms, firearms, ammunition and explosives.

(6) Atomic energy and mineral resources necessary for its production.

(7) Industries declared by Parliament by law to be necessary for the purpose of defence or for the prosecution of war.

According to this entry, Parliament has to declare by law that the industry is necessary for the purpose of defence or for the prosecution of war. This is an important safeguard as such a declaration cannot be made by the executive alone.

This is a flexible entry. New concepts in defence and prosecution of war emerge all the time. It is a dynamic situation. An industry considered essential today for defence or war may cease to be so tomorrow and *vice-versa*. This entry can take care of this change in perception from time to time.

(b) PREVENTIVE DETENTION

(9) Preventive Detention for reasons connected with Defence, Foreign Affairs, or the security of India : persons subjected to such detention.

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22. For discussion on Art. 355, see, *infra*, Ch. XIII, under "Emergency Provisions".
23. *Indu Bhushan v. Rama Sundari*, AIR 1970 SC 228 : (1969) 2 SCC 289.

Under this entry, Parliament can make law of preventive detention with respect to three heads mentioned.

Reference may also be made to entry 3 in List III in this connection.[24] The present day National Security Act providing for preventive detention made by Parliament is based on both the Entries, *viz.*, entry 9, List I, and Entry 3, List III.[25]

Under entries 9 and 10, Parliament can enact a law providing for preventive detention of a foreigner with a view to making arrangements for his expulsion from India, as this matter falls under foreign affairs.[26]

(c) FOREIGN AFFAIRS

Entries 10 to 21 confer extensive powers on the Centre to conduct the foreign affairs of the country, to enter into treaties with foreign countries and to enact legislation to implement them. These entries are as follows:

(10) Foreign Affairs; all matters which bring the Union into relation with any foreign country.

The Centre can deal with expulsion, restriction of movements of foreigners in the country, prescribe the places of their residence and the ambit of their movement in the land, because all these matters bring India into relation with foreign countries as a country has a very deep interest in what is done to its citizens in a foreign land.

(11) Diplomatic, consular and trade representation.

(12) United Nations Organisation.

(13) Participation in international conferences, associations and other bodies and implementing of decisions made thereat.

(14) Entering into treaties and agreements with foreign countries, and implementing of treaties, agreements and conventions with foreign countries.

This important entry confers plenary powers on the Centre to enter into treaties and agreements and enact necessary legislation to effectuate the same.

Power of entering into a treaty is an inherent part of the sovereign power of the State. Moreover, the Constitution makes no provision making legislation a condition for entry into a treaty in times either of war or peace.[27]

The power of Parliament under entries 13 and 14 is further re-inforced by Art. 253 which confers an overriding power on Parliament to make any law for the whole or any part of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body. This means that if the Central Government enters into any international obligation, Parliament is fully authorised to enact legislation to implement it even if the subject-matter falls

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24. *Infra*, Sec. F.
See Also, *infra*, Ch. XXVII, Secs. B and C, under Fundamental Rights, for a full-fledged discussion on Preventive Detention.

25. *State of Andhra Pradesh v. B. Subbarajamma*, AIR 1989 SC 389 : (1989) 1 SCC 193.

26. *Hans Muller v. Supdt., Presidency Jail, Calcutta*, AIR 1955 SC 367 : (1955) 1 SCR 1284.
See below for entry 10, under "Foreign Affairs".

27. *Union of India v. Azadi Bachao Andolan*, (2004) 10 SCC 1 : AIR 2004 SC 1107.

within the State List. Thus, the treaty-implementing power in India overrides the normal Federal-State jurisdictional lines. No difficulty can arise in the area of external affairs because of the divided jurisdiction between the Centre and the States to make laws. But the obligations arising under the agreement or treaties are not by their own force binding upon Indian nationals. The power to legislate in respect of treaties lies with Parliament under Entries 10 and 14 of List I of the Seventh Schedule. But making of law under that authority is necessary when the treaty or agreement operated to restrict the rights of citizens or others or modifies the law of the State. If the rights of the citizens or others which are justiciable are not affected, no legislative measure is needed to give effect to the agreement or treaty.[28]

In the absence of such provisions, the Centre's capacity in the international field would have been greatly impaired as it could not then pursue a strong and effective foreign policy. Had it entered into a treaty concerning a subject-matter falling within the State sphere, then either the treaty would have remained a dead letter or could be implemented by the cumbersome procedure of all the State Legislatures passing necessary legislation. These difficulties are now avoided as Parliament itself is authorised to pass legislation to implement not only any treaty but even decisions and non-obligatory recommendations of international organisations and conferences (entry 13). This gives an additional dimension to the Centre's power over 'external affairs' which is much broader than that existing in any other federation.

Entering into a treaty with a foreign country is an executive function of the Central Government. A boundary dispute between India and Pakistan in the Rann of Kutch was referred to an arbitral tribunal. The Central Government proceeded to implement the award without any legislation. It was argued on the authority of the *Berubari* case[29] that an amendment of the Constitution was called for. The Supreme Court held that while no cession of Indian territory could take place without a constitutional amendment, settlement of a boundary dispute by an arbitral tribunal could not be regarded as cession of territory. The Central Government could implement the award, treating it as an operative treaty, without any law or constitutional amendment.[30]

It is not necessary to enact a law for implementing each and every treaty. Parliament's power to enforce a treaty is not, however, free from other constitutional restrictions, *e.g.*, Fundamental Rights.[31]

Under entries 10 and 14, the Central Government can take power to okay invitations to Indian Citizens by foreign governments.[32] The legislative power in relation to treaties does not affect the executive power of the Central Government to enter into any treaty.[33]

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28. *Union of India v. Azadi Bachao Andolan,* (2004) 10 SCC 1 : AIR 2004 SC 1107.
29. *In Re Berubari,* AIR 1960 SC 845 : (1960) 3 SCR 250; see, *supra,* Ch. V.
30. *Maganbhai Ishwarbhai Patel v. Union of India,* AIR 1969 SC 783 : (1970) 3 SCC 400; also, *supra,* Ch. III.
For discussion on distribution of Administrative Powers between the Centre and the States, see, *infra,* Ch. XII.
31. See, *infra,* Chs. XX-XXXIII, for discussion on Fundamental Rights.
32. *Lakhanpal v. Union of India,* AIR 1973 Del. 178.
33. *Union of India v. Manmull Jain,* AIR 1954 Cal. 615; *supra,* Ch. III.

(15) War and peace.

(16) Foreign Jurisdiction.

It is the jurisdiction which a country exercises within another country by virtue of international law, treaty or agreement. Sometimes a country also accords exemption by legislation from its jurisdiction to those persons who have no such privilege under International Law.

Under Art. 260, the Indian Government may, by agreement with the government of any territory which is not a part of India, undertake any executive, legislative or judicial functions vested in that government.[34] However, every such agreement is subject to, and governed by, any law relating to the exercise of foreign jurisdiction in force in India, as for example, the Foreign Jurisdiction Act, 1947.

(17) Citizenship, naturalisation and aliens.

For discussion on Citizenship.[35]

(18) Extradition

This entry relates to the surrender by one State to another of persons who are fugitives from justice from that State.

(19) Admission into, and emigration and expulsion from, India : passports and visas.

For passports see under Art. 21.[36]

(20) Pilgrimages to places outside India.

(21) Piracies and crimes committed on the high seas or in the air; offences against the law of nations committed on land or the high seas or in the air.

(d) TRANSPORTATION AND COMMUNICATIONS

Means of communication are the lifeline of the nation to maintain unity and economic prosperity in the country. It is vital for the nation that a national communication network be maintained in the country. To obtain this objective, entries 22 to 31 confer on the Centre power over railways, national highways, airways etc. The relevant entries run as follows:

(22) Railways.

(23) Highways declared by or under law made by Parliamnet to be national highways.

This confers a flexible power on the Centre as Parliament can declare any highway as a national highway under a law made by Parliament.

(24) Shipping and navigation on inland waterways, declared by Parliament by law to be national waterways, as regards mechanically propelled vessels; the rule of the road on such waterways.

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34. For Art. 260, see, *infra*, Ch. XII.
35. See, *infra*, Ch. XVIII, Part V.
36. *Infra*, Ch. XXVI.

Under this entry, only Parliament, and not the executive, can declare by making a law any inland waterways as a national waterway. The scope of this entry is limited to mechanically propelled vessels.

(25) Maritime shipping and navigation, including shipping and navigation on tidal waters; provision of education and training for the mercantile marine and regulation of such education and training provided by the States and other agencies.

Under this entry, States can provide education in mercantile marine subject to regulation by the Centre. The Centre can thus ensure uniformity of syllabi and standards. Also see entry 66 in this list.

(26) Lighthouses, including lightships, beacons and other provision for the safety of shipping and aircraft.

(27) Ports declared by or under law made by Parliament or existing law to be major ports, including their delimitation, and the constitution and powers of port authorities therein.

Under Art. 364(2), a major port is a port declared to be so by or under a Parliamentary law. The Central Government can declare a port as a major port under S. 3(8) of the Indian Ports Act, 1908.

Article 364(1) lays down that the President may by public notification direct that any law made by Parliament or a State Legislature shall not apply to a major port or aerodrome, or shall apply to it subject to the exceptions and modifications mentioned therein. This provision thus makes it possible to apply special provisions to any particular major port or aerodrome necessitated by its special status or importance.

(28) Port quarantine, including hospitals connected therewith; seamen's and marine hospitals.

Also see entry 81 in this List.

(29) Airways; aircraft and air navigation; provision of aerodromes; regulation and organisation of air traffic and of aerodromes; provision for aeronautical education and training and regulation of such education and training provided by States and other agencies.

(30) Carriage of passengers and goods by railway, sea or air, or by national waterways in mechanically propelled vessels.

(31) Posts and telegraphs; telephones, wireless, broadcasting and other like forms of communications.

Amplifiers being instruments of broadcasting and communication fall under this entry.[37] Therefore, manufacture, licensing, ownership, possession, and trade in such apparatus can be regulated by the Centre.

A few modes of communications, not mentioned here, fall within the purview of the States [See State List]. A few entries pertaining to communications are to be found in the Concurrent List as well.[38]

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37. *State of Rajasthan v. Chawla*, AIR 1959 SC 544 : 1959 Supp (1) SCR 904.
38. *Infra*, Sec. F.

(e) PROPERTY OF THE UNION

(32) Property of the Union and the revenue therefrom, but as regards property situated in a State, subject to legislation by the State, save in so far as Parliament by law otherwise provides.

The expression "property of the Union" is wide enough to comprehend all kinds of property, essentially funds and buildings. This entry achieves three things at the same time:

(a) It enables, Parliament to legislate exclusively with respect to all property belonging to the Union.

(b) It subjects the Union property situated within a State to any State legislation.

(c) It, nevertheless, authorises Parliament to provide otherwise by law. If Parliament legislates, the Central law will prevail over the State law applicable to the Union property in the State.[39]

Under this entry, Parliament can legislate even with respect to agricultural land belonging to the Union and this power is not affected by entry 18, List II.[40]

Questions have been raised regarding the validity of the Public Premises (Eviction of Unauthorized Occupants) Act, 1971, enacted by Parliament. The Act provides for eviction of unauthorized occupants of public premises, *i.e.* property belonging to the Union Government as well as the public sector statutory corporation, such as, the nationalised banks. The Act provides for the eviction of those persons who have no authority in law to remain in possession of public premises. The unauthorized persons may be squatters, persons having no rights whatsoever, or persons who were in occupation by virtue of any agreement but whose right under the agreement had come to an end.

The Act does not pertain to any matter relating to rights in relation to landlord and tenants for eviction of tenants from lands which have been leased. The Act is concerned with the eviction of those persons who have no authority in law to remain in possession of the land belonging to the Union of India.

So far as the Act relates to the property of the Union Government, it falls under entry 32 List I.[41] Explaining the matter further, the Supreme Court has said:[42]

> "Entry 32 is wide enough to cover all legislations pertaining to the property of the Union of India including the legislation for eviction of unauthorized occupants from the property belonging to the Union of India".

The Act does not fall under entry 18, List III.[43]

A corporation even though wholly owned and controlled by the Union, has a distinct personality of its own and its property cannot be regarded as the property

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39. See, *infra*, Sec. G, on "Repugnancy".
Also see, Ch. XI, Sec. J(ii)(d), *infra*.

40. *Hari Singh v. Military Estate Officer*, AIR 1964 Punj. 304. For entry 18, List II, see, *infra*, Sec. E.

41. *Accountant & Secretarial Services (P.) Ltd. v. Union of India*, AIR 1988 SC 1708 : (1988) 4 SCC 324.

42. *Saiyada Mossarat v. Hindustan Steel Ltd., Bhilai*, AIR 1989 SC 406, 411 : (1989) 1 SCC 272.

43. See, *infra*, Sec. E.

of the Union. Therefore, the Act in question in its application to public sector corporate bodies does not fall under entry 32. The reason is that entry 32 relates to the "property of the Union" and, therefore, this entry cannot be construed as including within its scope the property of a government company which is a different and distinct entity from the Union Government.

The question of identifying the Public Premises Act in its application to public corporations with an entry in one of the Lists has caused some problems to the Supreme Court. In *Accountant & Secretarial Services*,[44] the Court took the view that the Act in relation to properties other than the properties belonging to the Central Government has been enacted under the Concurrent List. Then, in *Saiyada Mossarat*,[45] the Court took the view that as there is no entry in either List II or List III which would be attracted to the subject matter of speedy eviction of unauthorised occupation from properties belonging to a government company, the matter falls under the residuary power of Parliament.[46] But again in *Ashoka Marketing*,[47] the Supreme Court has reiterated its earlier view and has held that it falls under the Concurrent List, entries 6, 7, 13. So, finally, the Court's view is that the Public Premises Act insofar as it deals with the premises other than that of the Central Government has been enacted in exercise of the legislative powers in respect of matters enumerated in the Concurrent List.

(f) FINANCIAL POWERS

Items 26 to 40 and 76 confer on the Centre important powers of a financial nature. These entries run as follows:

(35) Public Debt of the Union.

(36) Currency, coinage, and legal tender; foreign exchange.

The entry embraces laws not only relating to the control of foreign exchange but also to its acquisition to better the economic stability of the country. Therefore, Parliament is empowered to make a law for promoting export of sugar to earn foreign exchange.[48]

Ss. 489A to 489D, I.P.C., fall within the exclusive legislative competence of the Centre as they relate to entry 36 read with entry 93 in List I.[49]

(37) Foreign loans.

(38) Reserve Bank of India.

(39) Post Office Savings Bank.

(40) Lotteries organised by the Government of India or the Government of a State.

This entry should be read along with entry 34 of List II.

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44. *Supra*, footnote 41.
45. *Supra*, footnote 42.
46. *Infra*, Sec. H.
47. *Ashoka Marketing Ltd. v. Punjab National Bank*, AIR 1991 SC 855, 876 : (1990) 4 SCC 406.
48. *The Lord Krishna Sugar Mills v. Union of India*, AIR 1959 SC 1124 : (1960) 1 SCR 39. For comments on the case, see, I *JILI*, 572.
49. *G.V. Ramanaiah v. Supdt., Central Jail*, AIR 1974 SC 31 : (1974) 3 SCC 531.

Parliament has now passed the Lotteries (Regulation) Act, 1998, under entry 40, to regulate the lotteries run by the States. S. 5 of the Act authorises a State Government within the State, to prohibit the sale of tickets of a lottery organised, conducted or promoted by every other State. The Supreme Court has ruled that even when a lottery is organized by a State under this Act, it still remains *res extra commercium,* i.e. it does not amount to trade and commerce.[50]

(45) Banking

There are many reasons for allocating banking exclusively to Parliament. Operations of the banks do not remain confined within the territorial limits of one State in which a bank is located, the banking activities have nation-wide implications. Further, banking has deep relationship with currency and interstate trade and commerce.

Parliament has enacted the Banking Regulation Act, 1949, to regulate banks. The over-all supervision over the banks vests in the Reserve Bank of India. S. 21A enacts that a transaction between a banking company and its debtor cannot be reopened by a Court on the ground that the rate of interest charged by the banking company is excessive. This means that the Court cannot reduce the rate of interest which the debtor has agreed to pay.

The Supreme Court has ruled that this provision falls under entry 45, List I. S. 21A applies to all types of loans given by a banking company whether to an agriculturist or to a non-agriculturist. It has nothing to do with entry 30, List II.[51]

The Supreme Court has ruled that Banking falls under item 45, List I, and not under item 30, List II.[52] Banking being included in the Union List does not fall within the purview of entry 30, List II. A bank is not a mere money lender; it performs a much broader spectrum of functions besides money lending. Banks do not fall under the scope of the State Money Lenders Act enacted under entry 30, List II, as Banking is covered by entry 45, List I. Banks do not act merely as money-lenders but perform many functions, such as, borrowing, dealing in bills of exchange, leading and advancing money etc.

The Supreme Court has ruled that banking operations include, *inter alia,* acceptance of loans and deposits, granting of loans and recovery of debts due to the Bank. Under entry 45, List I, it is Parliament alone which can enact a law regarding conduct of business by the banks. Recovery of dues is an essential function of any banking institution. Parliament can by law provide the mechanism by which money due to the banks can be recovered. Therefore, the Recovery of Debts due to banks and Financial Institutions Act, 1993, enacted by Parliament squarely falls within the ambit of entry 45, List I.[53]

(46) Bills of Exchange, cheques, promissory notes and other like instruments.

(76) Audit of accounts of the Union and of the States.

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50. *B.R. Enterprises v. State of Uttar Pradesh,* AIR 1999 SC 1867 : (1999) 9 SCC 700.

51. *State Bank of India v. Yasanji Venkateswara Rao,* AIR 1999 SC 896.
For entry 30, List II, see, Sec. E, *infra.*

52. *Associated Timber Industires v. Central Bank of India,* (2000) 7 SCC 93 : AIR 2000 SC 2689.

53. *Union of India v. Delhi High Court Bar Association,* (2002) 4 SCC 275 : AIR 2002 SC 1479.
Also see, Ch. VIII, Sec. I, *supra.*

Articles 148 to 151 of the Constitution deal with the office of the Comptroller and Auditor-General. [54]

(g) ECONOMIC POWERS

Entries 41 to 59 and 61 enable the Centre to control and regulate the economic affairs of the country to a very large extent. In reality these entries give to the Central Government a primacy in the economic sphere. These entries run as follows:

(41) Trade and commerce with foreign countries, import and export across customs frontiers; definition of customs frontiers.

The word 'import' in the entry does not include either sale or possession of the article imported into the country by a person residing in the territory in which it is imported.[55]

The power to define customs frontiers for purposes of export and import vests in Parliament under this entry.[56]

Regulation of imports into India falls under this entry and is within the exclusive jurisdiction of the Centre.[57]

(42) Inter-State trade and commerce.

The matter has been considered later in full.[58] Also see entry 26, List II[59] and entry 33, List III.[60]

(43) Incorporation, regulation and winding up of trading corporations, including banking, insurance and financial corporations but not including co-operative societies.

A law making provisions for the proper management of a mismanaged company, empowering government to appoint directors, and prohibiting proceedings for winding up the company during the period for which the government appointed directors remain in office, would fall within this entry.[61]

The underlying concept of a 'trading corporation' is buying and selling. The hard core of such a corporation is its commercial character.[62]

(44) Incorporation, regulation and winding up of corporations, whether trading or not, with objects not confined to one State, but not including universities.

Entries 43 and 44 apply to such bodies only as are corporations in the full sense of the term and not to any other legal entity, *e.g.*, a registered society.

Under entries 43 and 44, Parliament can pass a law providing for amalgamation or merger of companies.

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54. See 'Comptroller and Auditor-General', *supra*, Ch. II, Sec. J(ii)(s).
55. *State of Bombay v. Balsara,* AIR 1951 SC 318 : 1951 SCR 682.
56. *Burmah Shell Oil v. State of Andhra Pradesh,* AIR 1960 AP 619.
57. *Mount Corporation v. Director of Industries,* AIR 1965 Mys. 143.
58. *Infra,* Chap. XV, under Freedom of Trade & Commerce.
59. *Infra,* Sec. E under "State List".
60. *Infra,* Sec. F, under "Concurrent List".
61. *Charanjit v. Union of India,* AIR 1951 SC 41 : 1950 SCR 869.
62. *Ramtanu C.H. Society v. State of Maharashtra,* AIR 1970 SC 1771 : (1970) 3 SCC 323.

Entries 43 and 44 do not authorise regulation of business of the corporations.[63] According to the Supreme Court, "A law relating to the business of a corporation is not a law with respect to regulation of a corporation."[64]

Entries 43, 44 and 45 enable the Centre to set up financial corporations in the States to provide credit to industrial undertakings therein. The entry does not include non-banking trading activities carried on by banks.[65]

(47) Insurance.

(48) Stock exchanges and futures markets.

Parliament has enacted the Forward Contracts (Regulation) Act, 1952 and the Securities Contracts (Regulation) Act, 1956, to prevent speculation in forward contracts and to regulate forward contracts in certain goods.

The inter-relation of Entry 48, List I, and Entry 26, List II, and Entry 7, List III, is discussed later.[66]

The expression "futures markets" does not mean the place or locality where transactions of sale and purchase of goods take place. As the Supreme Court has observed in *Waverly*:[67]

> "The word 'futures' means 'contracts which consist of a promise to deliver specified quantities of some commodity at a specified future time… Futures are thus a form of security, analogous to a bond or promissory note."

Thus, it means that "futures markets" are commercial activities which are not purely or mainly of local or regional concern. They are essentially interstate in character.

(49) Patents, inventions and designs; copyright, trade-marks and merchandise marks.

The Emblems and Names (Prevention of Improper Use) Act, 1950, has been enacted by Parliament to prevent the improper use of certain emblems and names for professional and commercial purposes. This Act falls under this entry and not under entry 26, List II.[68]

(50) Establishment of standards of weight and measure.

Weights and measure are a State subject (entry 29, List II),[69] but the laying down of their standards is a Central subject.

(51) Establishment of standards of quality of goods to be exported out of India or transported from one State to another.

This entry can be read in the context of Art. 301[70] which envisages free flow of goods across State borders. The idea is to make the whole of India as a single economic unit so that the country can get industrialized as soon as possible. To promote interstate trade and commerce, it is necessary to have uniform standards

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63. *R.C. Cooper v. Union of India,* AIR 1970 SC 564 : (1970) 1 SCC 248; *K.S.E. Board v. Indian Aluminium Co.,* AIR 1976 SC 1031 : (1976) 1 SCC 466.
64. *S.P. Mittal v. Union of India,* AIR 1983 SC 1 : (1983) 1 SCC 51.
65. *R.C. Cooper v. Union of India,* AIR 1970 SC 564 : (1970) 1 SCC 248.
66. *Infra,* Sec. G.
67. *Waverly Jute Mills Co. Ltd. v. Raman & Co.,* AIR 1963 SC 90 : (1963) 3 SCR 209.
68. *Sable Waghire & Co. v. Union of India,* AIR 1975 SC 1172 : (1975) 1 SCC 763.
69. See, *infra,* Sec. E.
70. For discussion on Art.301, see, *infra,* Ch. XV, under "Freedom of Trade and Commerce".

throughout the country. To promote exports it is essential to determine standards as to the quality of goods. This helps in building goodwill for the country in the foreign markets.

(52) Industries, the control of which by the Union is declared by Parliament by law to be expedient in the public interest.

The scope of this entry is quite broad. The Centre can take any industry under its control as and when it likes. The entry is flexible as it enables Parliament to determine by law from time to time as to whether the Central control over a particular industry would be expedient in the public interest.

"Public interest' or 'national interest' are not static, but dynamic, concepts. Central control of any industry may be considered expedient to-day in public interest, but this perception may change in course of time. The entry is flexible enough to accommodate such changes in policy by the centre from time to time.

It has been held that the expression 'industry' in entry 52, List I, bears the same meaning as in entry 24, List II.[71] This means that if an industry does not fall within the purview of entry 24 in List II, it will equally not fall within the purview of entry 52 in List I.[72]

If the Centre wants to regulate any industry, Parliament will first have to declare, by law, that it is necessary for the Union to control that industry in national interest. The Centre has made an extensive use of this entry by taking a large number of industries under its control.[73]

See, in this connection, the Industries (Development and Regulation) Act, 1951, which brings a number of industries under the Central control.

Also refer to entries 24 and 27, List II, and entry 33, List III. These entries also deal with some aspects of industry, The question of interrelation of these various entries in the three Lists has been discussed later.[74]

Whatever falls within the scope of entry 33, List III, does not fall under entry 52, List I. This means that entry 52, List I, which deals with industry does not cover trade and commerce in, or production, supply and distribution of, the products of those industries falling under entry 52 of List I. For the industries falling in entry 52, List I, these subjects are carved out and expressly put in entry 33, List III.[75]

Manufacture of gold ornaments by goldsmiths has been held to be an "industry," as the manufacture of gold ornaments by goldsmiths is a "process of systematic production" for trade or manufacture. The Gold Control Act was validly enacted under this entry read with entry 33 of List III. [76]

The declaration in S. 2 of the Tea Act, 1953 in terms of List I Entry 52 empowers the Central Government to levy a duty or cess upon tea or tea leaves for

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71. For this entry, see, Sec. E, *infra.*
72. *State of Andhra Pradesh v. McDowell & Co.,* AIR 1996 SC at 1639 : (1996) 3 SCC 709.
73. See, for example. The Tea Act, 1953; The Rubber Act, 1947, etc.
For further discussion on this entry see, *infra*, Sec. G(iii), Chs. XV; Ch. XXIV, Sec. H.
74. *Infra,* Sec. G(iii).
75. *SIEL Ltd. v. Union of India,* AIR 1998 SC 3076 : (1998) 7 SCC 26; *Belsund Sugar Co. Ltd. v. State of Bihar,* AIR 1999 SC 3125 : (1999) 9 SCC 620.
76. *Harakchand v. Union of India,* AIR 1970 SC 1453 : (1969) 2 SCC 166.

the purpose of that Act and can in no manner deprive the State Legislature of its power to tax the land comprised in a tea estate.[77]

(53) Regulation and development of oilfields and mineral oil resources, petroleum and petroleum products; other liquids and substances declared by Parliament by law to be dangerously inflammable.

Under this entry, the Centre can take under its control the regulation of oil-fields and development of mineral oil resources in the country.[78] Leases integrally connected with the regulation of oil resources, petroleum and its products fall under this entry.[79] The Supreme Court has elucidated the purpose of reservation of this field to parliament. The people of the entire country have a stake in natural gas and its benefit has to be shared by the whole country. There should be just and reasonable use of natural gas for national development. If one State alone is allowed to extract and use natural gas, then other States will be deprived of its equitable share. This position goes on to fortify the stand adopted by the Union and will be a pointer to the conclusion that natural gas is included in Entry 53 of List I. Thus, the legislative history and the definition of petroleum, petroleum products and mineral oil resources contained in various legislations and books and the national interest involved in the equitable distribution of natural gas amongst the States – all these factors lead to the inescapable conclusion that natural gas in raw and liquefied form is petroleum product and part of mineral oil resources, which needs to be regulated by the Union.[80] However, the power to tax may be exercised for the purpose of regulating an industry, commerce or any other activity, but, the power to regulate, develop or control would not include within its ken a power to levy a tax or fee, except when it is only regulatory. Generally speaking, it may be true that power to regulate would not carry with it the power to impose tax but the principle is not of universal application. Imposition of tax by way of regulatory measures is permissible while enacting a regulatory statute. A regulatory licence fee has also been held to be tax.[81]

(54) Regulation of mines and minerals development to the extent to which such regulation and development under the *control* of the Union is declared by Parliament by law to be expedient in the public interest.

The entry refers to two things, *viz.*:

(1) regulation of mines; and

(2) minerals development.

Conservation of minerals is vital for the development of mines and minerals.[82]

Mines and minerals furnish an important industrial input for economic development of the country.

This entry is purposive as the power to make a law relating to "regulation of mines and mineral development" is qualified by the latter words of a restrictive nature, *viz.* "public interest". Therefore, exercise of power under it has to be guided and governed by public interest.

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77. *State of West Bengal v. Kesoram Industries Ltd.,* (2004) 10 SCC 201 : AIR 2005 SC 1646.
78. *Babubhai Jashbhai Patel v. Union of India,* AIR 1983 Guj. 1.
79. *Mustafa Hussain v. Union of India,* AIR 1981 AP 283.
80. Special Reference No. 1 of 2001 (2004) 4 SCC 489 : AIR 2004 SC 2647.
81. *State of W. B. v. Kesoram Industries Ltd.,* (2004) 10 SCC 201 : AIR 2005 SC 1646.
82. *Tara Prasaad Singh v. Union of India,* AIR 1980 SC 1682 : (1980) 4 SCC 179.

Under Entry 54, control of the Centre can be full or partial. By passing a law, Parliament can impose full Central Control over mines and minerals, leaving no field to the State, under entry 23, List II.

Parliament has enacted the Mines and Minerals (Regulation and Development) Act, 1957, under this entry. This Act contains the following declaration in S. 2 :

> "It is hereby declared that it is expedient in the public interest that the Union should take under its control the regulation of mines and the development of minerals to the extent hereinafter provided."

The Supreme Court has ruled[83] that after passing this Act, the power of the State Legislatures under entry 23, List II[84] has been completely denuded by Parliament.

This declaration and the enactment of the MM (R & D) Act have practically annihilated entries 23 and 50 in List II.[85]

In *Kesoram*,[86] judgment of a smaller bench to the extent it is contrary to the judgment of an earlier larger Bench said that a power to levy tax or fee cannot be spelt out from the said provisions of the Mines and Minerals (Regulation and Development) Act, 1957 and therefore, the MMRD Act, 1957 has not placed any limitation on the power of states to legislate in the field of taxation on mineral rights. The expression other fees and charges must be assigned such meaning as to include therein only such fees and charges as are meant for regulation or development but also taxes and the States had the power to legislate in relation thereto. Four Judges Bench (S.B. SINHA, J. dissenting) proceeded on a basis directly in conflict with the earlier and a larger Bench judgment of the court in India Cement. The majority view cannot be considered as 'law declared' within Art. 141 of the Constitution.

Raw asbestos has been held to be a mineral.[87]

(55) Regulation of labour and safety in mines and oilfields.

Regulation of labour and safety in mines and oil-fields is closely connected with and incidental to the main topics enumerated in entries 53 and 54, List I.

(56) Regulation and development of inter-State rivers and river valleys to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest.

Reference may be made in this connection to the Supreme Court decision *In the matter of Cauvery Water Disputes Tribunal*.[88]

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83. *Baijnath Kedia v. State of Bihar*, AIR 1970 SC 1436 : (1969) 3 SCC 838; *State of Orissa v. M.A. Tulloch & Co.*, AIR 1964 SC 1284 : (1964) 4 SCR 461; *India Cement Ltd. v. State of Tamil Nadu*, AIR 1990 SC 85 : (1990) 1 SCC 12; *State of Madhya Pradesh v. Mahalaxmi Fabric Mills Ltd.*, AIR 1995 SC 2213 : 1995 Supp (1) SCC 642; *Quarry Owners Association v. State of Bihar*, AIR 2000 SC 2870 : (2000) 8 SCC 655; *Saurashtra Cement & Chemical Industries v. Union of India*, AIR 2001 SC 8 : (2001) 1 SCC 91.

84. *Infra*, Sec. E; Ch. XI, Sec. D.

85. *Infra*, Sec. E; Ch. XI, Sec. D.

86. *State of W.B. v. Kesoram Industries Ltd.*, (2004) 10 SCC 201 : AIR 2005 SC 1646.

87. *Hyderabad Industries v. Union of India*, AIR 1999 SC 1847 : (1999) 5 SCC 15.

88. AIR 1992 SC 522 : 1993 Supp (1) SCC 96.
See, *supra*, Ch. IV and *infra*, Ch. XIV.

The Constitution makes a special provision for resolution of water disputes in Art. 262.[89] Parliament has enacted the Inter-State Water Disputes Act, 1956, under Art. 262 and not under this entry. This entry speaks of regulation and development of inter-State rivers and does not relate to the disputes among riparian States and adjudication thereof. Even assuming the expression "regulation and development" are broadly interpreted so as to include adjudication of disputes arising therefrom, the Act in question does not contain the necessary declaration as envisaged by entry 56.

Water resources of inter-State rivers do not belong just to one State. As an inter-State river flows through many States, its waters belong to all these States. It is, therefore, essential that the Centre has jurisdiction to regulate and develop inter-State rivers and river valleys. Under this entry, Union can take over regulation and development of inter-State rivers and river valley. But before doing so, Parliament has to enact an Act declaring that such regulation and development under the control of the Union is expedient in public interest.

(57) Fishing and fisheries beyond territorial waters.

(58) Manufacture, supply and distribution of salt by Union agencies; regulation and control of manufacture, supply and distribution of salt by other agencies.

(59) Cultivation, manufacture, and sale for export, of opium.

This entry is not exhaustive in regard to opium. Possession, storage and sale of opium within the country are governed by entry 19, List III.

(61) Industrial disputes concerning Union employees.

This entry is an exception to entry 22, List III, which deals with labour disputes in general.[90]

(h) CULTURAL AND EDUCATIONAL FUNCTIONS

The relevant entries under this head are:

(60) Sanctioning of cinematograph films for exhibition.

This entry relates to one particular aspect of cinematograph, *viz.*, the sanctioning of films for exhibition. All other matters relating to cinemas are included in entry 33, List II.[91]

Reference may also be made in this connection to Art. 19(1)(a) which guarantees "Freedom of Speech and Expression".[92]

(62) The institutions known at the commencement of this Constitution as the National Library, the Indian Museum, the Imperial War Museum, the Victoria Memorial and the Indian War Memorial, and any other like institution financed by the Government of India wholly or in part and declared by Parliament by law to be an institution of national importance.

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89. See, *infra*, Ch. XIV, Sec. E, under "Inter-State Water Disputes."
90. See, Sec. F, *infra.*
91. See, Sec. E, *infra.*
92. See, Ch. XXIV, *infra.*

This also is a flexible power as Parliament can by law declare any institution as being of national importance. With such a declaration, the institution will fall under the control of the Central Government.

(63) The institution known at the commencement of this Constitution as the Banaras Hindu University, the Aligarh Muslim University and the Delhi University, the University established in pursuance of Art. 371E,[1] and any other institution declared by Parliament by law to be an institution of national importance.

(64) Institutions of scientific or technical education financed by the Government of India wholly or in part and declared by Parliament by law to be institutions of national importance.

(65) Union agencies and institutions for (*a*) professional, vocational or technical training, including the training of police officers; or (*b*) the promotion of special studies or research; or (*c*) scientific or technical assistance in the investigation or detection of crime.

(66) Co-ordination and determination of standards in institutions for higher education or research and scientific and technical institutions.[2]

Education is an area divided between the Centre and the States as is shown by entries 63, 64, 65 and 67, List I, and entry 25, List III.[3] The interrelation between all these entries has been discussed later.[4] After the enactment of National Council for Teacher Education Act, 1993 by Parliament, the field of teacher's education and matters connected therewith stands completely occupied by Parliament and, as such, the State Legislature could not encroach upon that field.[5]

(67) Ancient and historical monuments and records, and archaeological sites and remains, declared by or under law made by Parliament to be of national importance.

Also see entries 12, List II and 40, List III.[6]

Once an institution is declared to be of national importance. Parliament is competent to make any law governing the management, administration and affairs of such an institution.[7]

(68) The Survey of India, the Geological, Zoological and Anthropological Surveys of India; Meteorological Organisations.

(69) Census.

(i) UNION SERVICES

Entries 61, 70 and 71 confer power on the Centre with respect to all aspects of Union Services. The entries are:

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1. See, *supra*, Ch. IX.
2. For a detailed discussion on this entry see, *infra*, this Chapter, Sec. G(c) under "Inter-relation of Lists".
3. See, Sec. F, *infra.*
4. *Infra*, Sec. G.
5. *State of Maharashtra v. Sant Dnyaneshwar Shikshan Shastra Mahavidyalaya*, (2006) 9 SCC 1 : (2006) 4 JT 201.
6. See, Secs. E and F, *infra.*
7. *Dharam Dutt v. Union of India*, (2004) 1 SCC 712 : AIR 2004 SC 1295.

(61) Industrial disputes concerning Union employees.

(70) Union Public Services; All-India Services; Union Public Service Commission.

Also see, Art. 312.[8]

(71) Union pensions, that is to say, pensions payable by the Government of India out of the Consolidated Fund of India.

Under this entry, the Government of India can institute pensions of a contributory character in which case the burden may not be on the tax proceeds but on the person who has already contributed to a Fund.

The entry may even cover people who are not government servants. Accordingly, this entry covers pensions paid to the ex-members of Parliament.[9]

(j) ELECTIONS, PARLIAMENTARY AFFAIRS, ETC.

Entries 72 to 75 confer powers on the Centre regarding elections to Parliament and State Legislatures, matters connected with Parliament, and emoluments, etc., of some high dignitaries in the country. The entries are as follows:

(72) Elections to Parliament, State Legislature and offices of President and Vice-President; the Election Commission.

The Representation of the People Acts, 1950 and 1951, enacted by Parliament, fall under this entry. The Act of 1951 has been held valid even though it incidentally encroaches on entry 1 of List II.[10]

(73) Salaries and allowances of members of Parliament, the Chairman and Deputy Chairman of Rajya Sabha and the Speaker and Deputy Speaker of the Lok Sabha.

(74) Powers, privileges and immunities of each House of Parliament and of the members and the committees of each House, enforcement of attendance of persons for giving evidence or producing documents before committees of Parliament or commissions appointed by Parliament.

(75) Emoluments, allowances, privileges, and rights in respect of leave of absence, of the President and Governors; Salaries and allowances of the Ministers for the Union; the salaries, allowances, and rights in respect of leave of absence and other conditions of service of the Comptroller and Auditor-General.

Also see under "Elections"[11]

(k) JUDICIAL POWERS

Entries 77-79 and 95 confer power on the Centre to make laws with respect to the Supreme Court and the High Courts. These entries run as follows:

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8. *Infra*, Ch. XXXVI, Sec. F.
9. *S.P. Anand v. Union of India*, AIR 2000 MP 137.
10. *Rameshwar Mahton v. State of Bihar*, AIR 1957 Pat. 252, for entry 1, List II, see, Sec. E, *infra.*
11. See, Ch. XIX, *infra.*

(77) Constitution, organisation, jurisdiction and powers of the Supreme Court (including contempt of such Court), and the fees taken therein; persons entitled to practice before the Supreme Court.[12]

(78) Constitution and organisation [including vacations] of the High Courts except provisions as to officers and servants of High Courts; persons entitled to practice before the High Courts.[13]

(79) Extension of the jurisdiction of a High Court to, and exclusion of the jurisdiction of a High Court from, any Union Territory.[14]

From careful reading of Entries 77 and 78 of List I it is clear that Entry 77 not only deals with the Constitution and organization but also with jurisdiction and powers in respect of the Supreme Court. The conscious omissions of the words jurisdiction and powers in Entry 78 and looking to the said words included in Entry 77, it is clear that the jurisdiction and powers of the High Courts are dealt with as a separate topic under the caption administration of justice under Entry 11A of List III which was in Entry 3 of List II prior to the Forty-second Constitution Amendment Act. The exclusion of jurisdiction and powers from Entry 78 is meaningful and intended to serve a definite purpose in relation to bifurcation or division of legislative powers relating to conferment of general jurisdiction of High Courts.

(91) Having regard to Entry 91 of List I, the Supreme Court has pointed out that "if the instrument falls under the categories mentioned in Entry 91 of List I, the power to prescribe the rate will belong to Parliament, and for all other instruments or documents, the power to prescribe the rate belongs to the State Legislature under Entry 63 of List II. Therefore, the meaning of Entry 44 of List III is that excluding the power to prescribe the rate, the charging provisions of a law relating to stamp duty can be made both by the Union and the State Legislature in the concurrent sphere, subject to Article 254 in case of repugnancy.[15]

(93) Offences against laws with respect to any of the matters in this List.

See entry 36 above.

(95) Jurisdiction and power of all Courts except the Supreme Court, with respect to any of the matters in this List; admiralty jurisdiction.

Entry 95 confers on Parliament plenary powers to vest jurisdiction, territorial or otherwise, on any Court (except the Supreme Court) in relation to any matter included in the Union List.[16] Vesting of jurisdiction in the Supreme Court falls under entry 77 above.

Under Art. 247, Parliament is empowered to establish any Courts for the better administration of a Union law with respect to a matter enumerated in the Union List. It may be noted that under Art. 247, Parliament is not entitled to establish Courts for administration of the Central laws in the concurrent area. Administra-

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12. For discussion on this entry, see, *supra*, Ch. IV, Sec. K.
13. For discussion on this entry, see, *supra*, Ch. VIII, Sec. H.
14. For Union Territories, see, Ch. IX, *supra*.
15. *V.V.S.Rama Sharma v. State of Uttar Pradesh*, (2009) 7 SCC 234 : (2009) 6 JT 19.
16. *Hanuman Bank v. Munia*, AIR 1958 Mad. 279. Also see, *infra*, under Sec. F, *Re The Special Courts Bill, 1978*, AIR 1979 SC 471, 499, *supra*, Ch. IV, Sec. K.

tion of State laws, whether they relate to List II or List III are outside the purview of Art. 247.

See entries 3 and 65 in List II, and 46 in List III. The matter has been discussed earlier.[17]

(l) MISCELLANEOUS ENTRIES

Some of the entries in the Union List defy the above classification and are thus grouped under this omnibus head. These entries are:

(8) Central Bureau of Intelligence and Investigation:

The idea behind the entry is that there may be a bureau to collect information with regard to any kind of crime committed by people throughout India and also investigate whether the information supplied to it is correct or not. The State Governments are thus enabled to exercise their police powers in a much more efficient manner than they might be able to do otherwise in the absence of such information.

(34) Courts of wards for the estates of Rulers of Indian States.

(80) Extension of the powers and jurisdiction of members of a police force belonging to any State to any area outside that State, but not so as to enable the police of one State to exercise powers and jurisdiction in any area outside that State without the consent of the State Government in which such area is situated; extension of the powers and jurisdiction of members of police force belonging to any State to railway areas outside the State.

(81) Inter-State migration; inter-State quarantine.

(94) Inquiries, surveys and statistics for the purpose of any of the matters in this List.

Under this entry, Parliament has exclusive power concerning inquiries for purposes of any matter in List I.

(m) RESIDUARY ENTRY

(97) Any other matter not enumerated in Lists II or III, but not including fees taken in any Court.

This entry refers to the Residuary Powers of the Centre. This entry has to be read along with Art. 248. The question of the ambit and scope of the Residuary Power of the Centre is discussed in detail later.[18]

A law enacted by Parliament to provide for pensions to members of Parliament on expiry of their term falls under this entry.[19]

E. STATE LIST : LIST II

The State List contains 61 entries which may be classified as under.

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17. *Supra*, Ch. VIII, Sec. H.
18. See, *infra*, Sec. I.
Also see, Ch. XI, Sec. G, under the heading "Residuary Taxes", *infra.*
19. *Common Cause, A Regd. Society v. Union of India*, (2002) 1 SCC 88 : AIR 2002 SC 199.

(a) LAW AND ORDER, JUSTICE

Entries 1 to 4 and 64-65 may be placed in this class. Maintenance of law and order is regarded primarily a responsibility of the States. The entries run as follows:

(1) Public order (but not including the use of any naval, military or air force or any other armed force of the Union or of any other force subject to the control of the Union or of any contingent or unit thereof in aid of the civil power).

The term 'public order' is of very wide import and includes an impropriety, affront or insult to the orderliness, such as wilful burning, desecrating or insulting a copy of the Constitution of India.[20] The expression 'public order' signifies that state of tranquillity which prevails among the members of a political society as a result of internal regulations enforced by the government. It may thus be equated with public peace and safety.[21]

It might be of interest to note that while for purposes of legislative entries the term 'public order' is given broad meaning, for purposes of preventive detention, it is interpreted somewhat narrowly. In *Ram Manohar Lohia v. State of Bihar*, a case on preventive detention, the Supreme Court distinguished between 'public order' and 'law and order', and held the latter to be broader than the former.[22]

The Armed Forces (Special Powers) Act, 1958, has been validly enacted by Parliament as it falls under entry 2A, List I. Under the Act, the Centre can declare an area as 'disturbed area'. Thereafter, the army can exercise certain powers in the concerned area. The Army does not supplant the civil administration but acts in its aid.

The Act thus deals not with "public order"—a matter falling within the competence of the States under Entry I, List II, but with the "use of armed forces in aid of civil power" which falls under the Central legislative sphere vide entry 2A, List I. On the other hand, the Assam Disturbed Areas Act, 1955, falls in its pith and substance[23] under the State sphere vide entry 1, List II, as the Act deals with the maintenance of public order.

The State Legislature is incompetent to enact a law in relation to the Armed Forces of the Union under entry 1, List II.[24]

(2) Police, (including railway and village police) subject to the provisions of entry 2A of List I.

Railways are a Central subject (entry 22, List I), but the policing of railways is a State Subject. In order that protection of railways does not suffer by State inaction, Art. 257(3) empowers the Centre to give directions to the States as to the measures to be taken for the purpose.[25]

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20. *In Re Natarajan*, AIR 1965 Mad 11.
21. *Romesh Thappar v. State of Madras*, AIR 1950 SC 124 : 1950 SCR 594; *Brij Bhushan v. Delhi*, AIR 1950 SC 129 : 1950 SCR 605; *Supdt., Central Prison v. Ram Manohar Lohia*, AIR 1960 SC 633 : (1960) 2 SCR 821.
22. AIR 1966 SC 740 : (1966) 1 SCR 709.
23. For the doctrine of Pith and Substance, see, *infra*, Sec. G(d).
24. *Naga People's Movement of Human Rights v. Union of India*, AIR 1998 SC 431 : (1998) 2 SCC 109.
25. See 'Administrative Relations', *infra*, Chapter XII.

The word 'police' in this entry is wide enough to include State armed constabulary created to maintain internal peace and order which is not a combatant force like the army.[26]

The police power of the State in respect of any offence committed in a State comes within the legislative competence of the State. The State may exercise some extraterritorial jurisdiction only if a part of the offence is committed in the State and the other part in another State or some other States. In such an event the State, before an investigation to that part of the offence which has been committed in any (*sic* other) State, may have to proceed with the consent of the State concerned or must work with the police of the other State. Its jurisdiction over the investigation into a matter is limited. Keeping in view the various entries contained in List I of the Seventh Schedule, there cannot be any doubt whatsoever that in the matter of investigation of the matter (*sic* offence) committed in a State, the jurisdiction of the Central Government is excluded.[27]

(3) Officers and servants of the High Court; procedure in rent and revenue Courts, fees taken in all Courts except the Supreme Court.

(4) Prisons, reformatories, Borstal institutions and other institutions of a like nature, and persons detained therein; arrangements with other States for the use of prisons and other institutions.

(64) Offences against laws with respect to any of the matters in List II.

Offences created under this entry are excluded from entry 1 of List III.[28]

(65) Jurisdiction and powers of all Courts except the Supreme Court, with respect to any of the matters in this List.

This entry may be read along with entries 77, 78 and 95 in List I and entry 46 in List III.[29]

(b) HEALTH, LOCAL GOVERNMENT, RELIEF OF THE DISABLED, ETC.

Such social welfare activities as health etc., fall within the State purview. The relevant entries are:

(5) Local government, that is to say, the constitution and powers of municipal corporations, improvement trusts, district boards, mining settlement authorities and other local authorities for the purpose of local self-government or village administration.

This entry empowers the States to legislate on any matter relating to local government, *e.g.*, municipal corporations.[30] The State Legislature can confer any of its powers on a local authority, including taxing powers. However, a State Legislature cannot confer upon a local authority which it creates any power larger than what it itself possesses.[31]

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26. *Pooran v. State of Uttar Pradesh*, AIR 1955 All. 370.
27. *Bhavesh Jayanti Lakhani v. State of Maharashtra*, (2009) 9 SCC 551.
28. See, *infra*, Sec. F.
29. For comments on these various entries in List III, see, *supra*, Ch VIII, Sec. H.
30. *Mohd. Maqbool v. State of Maharashtra*, AIR 1982 Bom. 312.
31. *Corpn. of Calcutta v. Liberty Cinema*, AIR 1965 SC 1107, 1120, 1134 : (1965) 2 SCR 477; *Ram Krishna Ram Nath v. Janpad Sabha*, AIR 1962 SC 1073 : 1962 Supp (3) SCR 70.

The Village Panchayat Acts which set up criminal Courts for exercising special jurisdiction can be enacted by a State Legislature under this entry read with entries 64 and 65 in this List and entry 1 in List III.[32]

A State law providing for nomination of members to kshetra samitis,[33] or a law to take over management and control of the aided schools run by the local authorities, would fall under this entry.[34]

(6) Public health and sanitation; hospitals and dispensaries.

Public health demands control of the use of such apparatus as produces loud noise by day or by night. A State can thus control the use of a sound amplifier in a public place under entry 6 as it causes detriment to tranquillity, health and comfort of others.[35]

An Act to regulate the keeping of cattle in urban areas promotes public health and sanitation and thus falls under this entry.[36] This entry which speaks *inter alia* of "public health" is relevant to furnish a ground for prohibiting consumption of intoxicating liquors.

(9) Relief of the disabled and unemployed.

(10) Burials and burial grounds; cremation and cremation grounds.

(c) LIBRARIES

Under entry 12, the States have exclusive control over Libraries, museums and other similar institutions controlled or financed by the State and ancient and historical monuments and records other than those declared by or under law made by Parliament to be of national importance.

(d) COMMUNICATIONS

(13) Communications, that is to say, roads, bridges, ferries, and other means of communication not specified in List I; municipal tramways; roadways; inland waterways and traffic thereon subject to the provisions of List I and List III with regard to such waterways; vehicles other than mechanically propelled vehicles.

The Central List contains several entries relating to communications, *viz.*, 22, 23, 24, 25, 29, 30 and 31. There are entries 31, 32 and 35 in the Concurrent List. The area of communications is thus divided between the Centre and the States.

(e) LAND AND AGRICULTURE

Entries 14 to 21 dealing with land and agriculture run as follows:

(14) Agriculture, including agricultural education and research, protection against pests and prevention of plant diseases.

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32. *State of Mysore v. Gurupadappa*, AIR 1961 Mys. 257. Also, *Ram Naresh v. State of Bihar*, AIR 1979 Pat. 130.
33. *Nagendra Nath Singh v. State of Uttar Pradesh*, AIR 1982 All 226.
34. *Municipal Committee v. State of Punjab*, AIR 1966 Punj. 232.
35. *State of Rajasthan v. G. Chawla*, AIR 1959 SC 544 : 1959 Supp (1) SCR 904; *infra*, under "Rule of Pith and Substance"; *supra*, see, Entry 31, List I.
Also see under Art. 19(1)(a), "Freedom of Speech and Expression, Ch. XXIV, Sec. C.
36. *Kala Miah v. S.C. Roy*, AIR 1964 Cal. 409.

The term 'agriculture' is very wide and may include even 'forestry', but there is a separate entry, *viz*. 17A in List III covering forests.

Agriculture is the largest sector of the Indian economy. A large section of the Indian population directly or indirectly depends on agriculture. Agriculture is a multi-faceted activity. See entries 14, 15, 16, 17, 18, 21, 26, 27, 28, 30, 32, 45, List II. These are matters ancillary to or directly connected with agriculture.

All these entries relate to agriculture. While 'agriculture' has been placed in entry 14, List II, *i.e.* within the legislative competence of the States, there are several agriculture-related items to be found in List I and List III. List I has the following entries: 28, 42, 43, 44, 45, 47, 51, 52, 56, 57, 59, 63, 64, 65, 66, 69, 81, 82 and 97. This enables the Centre to make inroads in the sphere of agriculture.

Some entries in the State List relating to agriculutre have been made subject to entries in List I and List III. e.g. entries 17, 24, 26 and 27 in List II. In List III, there are the following entries having a bearing on agriculture: 9, 17, 17A, 17B, 18, 20, 23, 25, 29, 30, 33, 34, 38 and 45.

Under entry 52, List I, certain agro-industries have been taken by the Centre under its control. Under entry 34, List III, the Centre has power over "Price Control". Under entry 33, List III, the Central Parliament has enacted the Essential Commodities Act, 1955. Under it, the Centre can control production, supply, distribution of several agricultural commodities, such as, sugarcane, foodstuffs, edible oil, raw cotton and raw jute.

In so far as agriculutre depends upon water including river water, the State Legislature while enacting legislation with regard to agriculutre may provide for the regulation and development of the water resources including water supplies; irrigation and canals, drainage and embankments, water storage and water power. However, any such legislation insofar as it relates to inter-State river water and its different uses and the manner of listing it would also be subject to the provisions of entry 56, List I.[37]

(15) Preservation, protection and improvement of stock and prevention of animal diseases; veterinary training and practice.

(16) Pounds and the prevention of cattle trespass.

(17) Water, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage and water power subject to the provisions of entry 56 of List I.

Entry 17 is wider than entry 56 of List I.[38] Unless Parliament declares the extent to which the regulation and development of inter-State rivers and river-valleys are to be centrally controlled, the State Legislature has full power to enact all legislation regarding water. A project for preventing floods is within the competence of a State.[39]

Under this entry, a State cannot pass legislation with respect to, or affecting, any aspect of the waters beyond its own territory. The State can make law with

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37. See, *In the matter of Cauvery Water Disputes Tribunal*, AIR 1992 SC at 545 : 1983 Supp (1) SCC 96, *supra*, Entry 56, List I.
38. *Supra*, Sec. D.
39. *Prasanna v. State of Orissa*, AIR 1956 Ori. 114.

respect to inter-State rivers subject to Parliamentary legislation under entry 54, List I. The Parliamentary law must make the declaration that the control of the regulation and development of inter-state rivers and river valleys is expedient in the public interest. Therefore, if Parliament enacts a law without making the requisite declaration, it will not affect the powers of the State to make legislation under entry 17 in respect of inter-State river water.

(18) Land, that is to say, rights in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of agricultural land; land improvement and agricultural loans; colonization.

The term 'land' in entry 18 is of wide amplitude. The term 'land' covers vacant land. This term takes in land of every description, *i.e.*, agricultural land,[40] non-agricultural land, rural land, urban land or land of any other kind.[41] Land in its widest amplitude and signification would include not only the surface of the ground, cultivable, uncultivable or waste land and also every thing on or under it.[42]

The term 'land' covers 'land and buildings'. The words following 'land' only make it clear that the entry takes in not merely the tangible immovable property but also all kinds of intangible rights or interests, in or over land in the broad sense explained above.[43] Tenancy of buildings, house accommodations or leases in respect of non-agricultural property do not fall under Entry 18 of List II.[44]

Classification of land by West Bengal Primary Education Act, 1993 and West Bengal Rural Employment Act, 1976 as amended by 1992 Act into three categories (i) coal bearing land, (ii) mineral bearing land (other than coal bearing land) or quarry, and (iii) land other than (i) and (ii) are well defined classifications by reference to the user or quality and the nature of products which the land is capable of producing.[45]

The cess is levied on the land. The method of quantifying the tax is by reference to the annual value thereof. It is well known that one of the major factors contributing to the value of the land is what it produces or is capable of producing. Merely because the quantum of coal produced and dispatched or the quantum of mineral produced and dispatched from the land is the factor taken into consideration for determining the value of the land, it does not become a tax on coal or minerals, Being a tax on land it is fully covered by Entry 49 in List II. The W.B. Taxation Laws (Amendment) Act, 1992 must be and is held to be *intra vires* the Constitution.[46] These observation do not take into consideration that there should be uniformity in the matter of levies of tax and fees in relation to coal which is an utilized by major industries of critical importance in different parts of the country including most of the power plants which supply electricity.

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40. *State of Punjab v. Amar Singh*, AIR 1974 SC 994 : (1974) 2 SCC 70.
41. *Accountant and Secretarial Services (P) Ltd. v. Union of India*, AIR 1988 SC 1708 : (1988) 4 SCC 324.
42. *Jagannath Baksh Singh v. State of Uttar Pradesh*, AIR 1962 SC 1563 : (1963) 1 SCR 220; *Jilubhai Nanbhai Khachar v. State of Gujarat*, AIR 1995 SC 142 : 1995 Supp (1) SCC 596.
43. *Accountant and Secretarial Services*, *supra*, footnote 41.
44. *Welfare Assn. ARP v. Ranjit P. Gohil*, (2003) 9 SCC 358 : AIR 2003 SC 1266.
45. *State of W.B. v. Kesoram Industries Ltd.*, (2004) 10 SCC 201 : AIR 2005 SC 1646.
46. *State of W.B. v. Kesoram Industries Ltd.*, (2004) 10 SCC 201 : AIR 2005 SC 1646.

Entry 18 deals with four main topics : land, transfer and alienation of agricultural land, land improvement and agricultural loans and colonisation. The words 'rights in' or "over land" confer very wide power on the State Legislature.[47]

This entry is the source of the legislative power of the States for extensive agrarian reform legislation which has been undertaken in independent India. The words 'collection of rents' empower the State Legislatures to impose any limitation on the power of landlords to collect rents, that it is to say, with respect to the remission of rents.[48] This entry confers plenary powers on the State Legislatures to enact legislation to extinguish, restrict, transfer or convey the rights in lands, or concerning land tenures including the relation of landlord and tenants, or concerning transfer and alienation of agricultural land.

A State Legislature can extinguish or restrict subsisting rights in land, or provide for statutory purchase of land by tenants in occupation, or modify or curtail the rights of landlords in the land and expand the rights of the tenants, or provide for transfer and alienation of agricultural land.[49]

Each of the expressions, 'rights in or over land' and 'land tenures', confers very wide power over land. It is comprehensive enough to take in measures of reforms of land tenures, limiting the extent of land in cultivating possession of the land-owner, and, thus, releasing land for cultivation by the tenants.[50] Therefore, a law limiting the area of land which could be directly held by a proprietor or a land-owner falls within this entry.

Legislation on resumption of jagirs relates to land and land revenue.[51] Legislation for fixing a ceiling on land holdings in the hands of an individual and for acquisition by the State of excess land, would fall under this entry as well as under entry 42 of List III.[52]

An Act to give relief to mortgagors of agricultural land by enabling them to obtain restitution of the mortgaged lands on terms less onerous than the mortgage deed required is valid, for 'rights in land' include such rights as full ownership or lease-hold.

The word "land" in the entry is not confined to agricultural land only but includes every form of land, whether agricultural or not. The expression 'Rights over land' includes general rights like full ownership or leasehold or all such rights. It also includes easements or other collateral rights, whatever form they might take.

"Mortgages" are not specifically mentioned in this entry. Though in certain aspects, mortgage includes elements of transfer of property and of contract, yet they form a "type of transactions which may properly be regarded as *sui generis*, incidental to land" and so included within item 18, except insofar as they fall un-

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47. *Jagannath Baksh Singh v. State of Uttar Pradesh*, *supra*, note 20; *Jilubhai Nanbhai v. State of Gujarat*, *supra*, footnote 42.

48. *United Provinces v. Atiqua Begum*, AIR 1941 FC 16, 25.

49. *Sri Ram Ram Narain v. State of Bombay*, AIR 1959 SC 459; *Raghubir Singh v. Ajmer*, AIR 1959 SC 475 : 1959 Supp (1) SCR 478; *Gayatri Salt Works. v. State of A.P.*, AIR 1975 A.P. 262.

50. *Atma Ram v. State of Punjab*, AIR 1959 SC 519 : 1959 Supp (1) SCR 748; *Kunhikonam v. State of Kerala*, AIR 1962 SC 723; *Krishnaraja v. A.O. Land Reforms*, AIR 1967 Mad. 352; *Mohinder Singh v. State of Punjab*, AIR 1983 P & H 253.

51. *Amarsarjit Singh v. State of Punajb*, AIR 1962 SC 1305 : 1962 Supp (3) SCR 346. For 'land revenue' see entry 45, *infra*, Chap. XI.

52. *Kannan D.H.P. Co. v. State of Kerala*, AIR 1972 SC 2301 : (1972) 2 SCC 218; *L. Jagannath v. A.O., L.R.*, AIR 1972 SC 425.
For entry 42, List III, see, Sec. F, *infra*.

der entries 6 and 7 of List III, which again contain an express exception in the case of agricultural land.[53] "So far as land at least is concerned, item 18 would include mortgages as an incidental and ancillary subject". Mortgages are properly to be classified not under the head of contracts, but as special transactions ancillary to the entry of "land".

A question has been raised whether a law providing for fixation of fair rent of urban property falls within this entry or not. The Supreme Court has ruled that such legislation would fall more appropriately under entries 6 and 7 of List III[54] and not under this entry. Entry 18 does not encompass within its terms legislation on the relationship of landlord and tenant in regard to houses and buildings.

According to the Supreme Court, the relation of landlord and tenant, as mentioned in this entry, is with reference to land tenures which would not cover appropriately tenancy of buildings, or of house accommodation, and that that expression is only used with reference to relationship between landlord and tenant in respect of vacant lands.[55]

Leases in respect of non-agricultural property are dealt with in the Transfer of Property Act and would more appropriately fall within the scope of entry 6 read with entry 7 of List III. Non-agricultural leases of all kinds, and rights governed by such leases, including the termination of leases and eviction from property leased, would be covered by topics of transfer of property and contracts. Thus, the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960, falls under entries 6 and 7 of List III and not under this entry.[56] The Bombay Town Planning Act, 1955, has been held to be validly enacted by the State Legislature under this entry as well as under entry 20 of List III,[57] as the Act deals with land.

An Act passed by a State Legislature to prohibit unauthorized occupation of vacant lands in urban areas and to provide for summary eviction of persons from such lands falls under entries 18, 64 and 65 of List II.[58] A State Legislature can enact a law under entry 18 to impose a ceiling on land.[59]

This entry cannot support a cess based on the royalty derived from mining lands.[60]

The Public Premises (Eviction of Unauthorized Occupants) Act, 1971, passed by Parliament does not fall under this entry and is thus valid.[61]

(21) Fisheries;

Under entry 57, List I, fishing and fisheries beyond territorial waters is a Central subject. The power of the States over fisheries, therefore, extends to fisheries in inland and territorial waters.[62]

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53. *Megh Raj v. Allah Rakhia,* AIR 1947 PC 72.
54. For entries 6 and 7 of List III, see, *infra*, sec. F.
55. *Indu Bhushan v. Rama Sundari,* AIR 1970 SC 228 : (1969) 2 SCC 289; *LS. Nair v. Hindustan Steel Ltd., Bhilai,* AIR 1980 M.P. 106; *Dhanapal v. Yesodai,* AIR 1979 SC 1745 : AIR 1979 SC 1745; *Accountant and Secretarial Services (P) Ltd. v. Union of India,* AIR 1988 SC 1708 : (1988) 4 SCC 325.
56. *V. Dhanpal Chettiar v. Yesodai Ammal,* AIR 1979 SC 1745 : AIR 1979 SC 1745.
57. *Maneklal v. Makwana,* AIR 1967 SC 1373 : (1967) 3 SCR 65.
58. *Maharashtra v. Kamal,* AIR 1985 SC 119 : (1985) 1 SCC 334.
59. *Gurbax Singh v. State of Rajasthan,* AIR 1992 SC 163 : 1992 Supp (3) SCC 24.
60. See, *infra*, Ch. XI.
61. *Supra*, see, under List I, entry 32.
62. *A.M.S.S.V. M.O. & Co. v. State of Madras,* AIR 1954 Mad. 291.
See A Note on Fishing Rights in Territorial Waters', 1 *JILI,* 313 (1959).

(f) TRADE, COMMERCE, INDUSTRY

Speaking generally, matters of intrastate trade and commerce fall within the State purview. The relevant entries are:

(23) Regulation of mines and mineral development subject to the provisions of List I with respect to regulation and development under the control of the Union.

This entry is subject to entries 54 and 55 of List I.

When Parliament passes a law making the necessary declaration under entry 54, List I, and laying down its extent, the subject of Legislation to that extent becomes exclusive for Parliament. A State cannot then make a law trenching upon the field disclosed in the declaration. However, the State power is curtailed only to the extent to which regulation and control has been vested in the Centre, and beyond that the State power remains unimpaired.

In this respect, the Supreme Court has observed :[63]

> "Subject to the provisions of List I, the power of the State to enact legislation on the topic of "mines and minerals development" is plenary. To the extent to which the Union Government had taken under "its control" "the regulation and development of minerals" under Entry 54 of List I so much was withdrawn from the ambit of the power of the State Legislature under entry 23 of List II and legislation of the State which had rested on the existence of power under that entry would, to the extent of the "control", be superseded or be rendered ineffective; for here we have a case not of mere repugnancy[64] between the provisions of the two enactments but of denudation or deprivation of State legislative power by the declaration which Parliament is empowered to make under entry 54 of List I and has made."

Parliament has enacted the Mines and Minerals (Regulations and Development) Act, 1957, "to provide for regulation of mines and the development of minerals under the control of the Union" in public interest. It has been held that the MMRD Act covers the entire field of minerals development. The result of Parliament having occupied the entire field is that the State Legislature lacks legislative competence. As a consequence thereof, where a State Law is attributable in *pith and substance*[65] to entry 23, List II, it would not be valid in as much as Parliament has occupied the entire field.[66]

The jurisdiction of the State Legislature under entry 23 is subject to the limitation imposed by the latter part of entry 52, List I.[67] If Parliament by its law has declared that regulation and development of mines should in public interest be under the control of the Union, to the extent of such declaration the jurisdiction of the State Legislature is excluded.

Levying of cess by several States based on the royalty derived from mining lands could be related to entry 23, List II. But this entry is "subject to the provisions of List I with respect to regulation and development" of mines and minerals

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63. *Hingir Rampur Coal Co. Ltd. v. State of Orissa,* AIR 1961 SC 459 : (1961) 2 SCR 537. Also see, *State of Orissa v. M.A. Tulloch & Co.,* AIR 1964 SC 1284 : (1964) 4 SCR 461; *Orissa Cement Ltd. v. State of Orissa,* AIR 1991 SC 1676 : 1991 Supp (1) SCC 430.
64. On 'Repugnancy', see, *infra,* Sec. H.
65. For discussion on the Doctrine of Pith and Substance, see, *infra,* Sec. G(d).
66. *Baijnath Kadio v. State of Bihar,* AIR 1970 SC 1436 : (1969) 3 SCC 838.
67. For this entry, see, *supra,* Sec. D.

under the control of the Centre. The Centre has enacted the Mines and Minerals Act, 1957. "It therefore, follows that any State Legislation to the extent it encroaches on the field covered by the M.M.R.D. Act, 1957 will be *ultra vires*."[68]

A State can charge royalty with respect to minerals under its control as this is a payment made to an owner for the right to exploit his property.[69]

(24) Industries subject to the provisions of entries 7 and 52 of List I.

The expression 'Industry' has been defined to mean the process of manufacture or production. It does not include 'raw materials' used in the industry or distribution of the products of the industry.

The word 'industry' in this entry must bear the same meaning as in entry 52, List I. This is so because the two entries are interconnected. If different meanings are given to 'industry' in different entries, it would snap the relationship between entry 24, List II and entries 7 and 52 of List I.

Ordinarily industry falls in the State sphere because of the present entry, but Parliament can by making an appropriate declaration, take any industry under its control.

This entry is in the nature of general entry. It speaks of industries but the entry is specifically made subject to entries 7 and 52 in List I.

By making a declaration in terms of entry 52 in List I in S. 2 of the Industries (Development and Regulation) Act, the Parliament has taken control of the several industries mentioned in the Schedule to the Act. Thus, the States have been denuded of their power to legislate with respect to those industries on that account.

The term "Industry" in entry 24 does not take within its scope what is contained in entries 26 and 27.[70]

The Supreme Court has ruled in *State of Andhra Pradesh v. McDowell*[71] that entry 52 in List I overrides only entry 24 in List II and no other entry in List II. Thus, entry 8, List II, is not overridden or overborne by entry 52, List I.

The State can set up a corporation to establish and develop industries within the State.[72] Thus, setting up of an industrial development corporation by a State is valid under this entry as it is a non-trading corporation.[73]

(25) Gas and gas-works.

(26) Trade and commerce within the State subject to the provisions of entry 33 of List III.

Under this entry, the State may regulate the hours, place, date and manner of sale of any particular commodity. The State Legislature can, for example, stipulate that the sale of explosives or other dangerous substances should only be in selected areas, at specified times, or on specified days, when extra precautions for the general safety of the public and those directly concerned could be arranged for. The Legislature could also say that there shall be no sales on a particular day, say a Sunday or a Friday, or on days of religious festivals and so forth.

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68. *Orissa Cement Ltd. v. State of Orissa,* AIR 1991 SC 1676 : 1991 Supp (1) SCC 630.
69. *S.M.S. Industries v. State of Rajasthan,* AIR 1958 Raj. 140. See also next Chapter.
70. *Belsund Sugar Co. Ltd. v. State of Bihar,* AIR 1999 SC 3125, 3159 : (1999) 9 SCC 620.
71. AIR 1996 SC 1561 : (1996) 3 SCC 709. Also see, *infra,* see p. 729 under entry 8.
72. *Manohar v. State,* AIR 1951 SC 315 : 1951 SCR 671. Also see, entry 42, List I.
73. *Ramtanu Co-op. Housing v. State of Maharashtra,* AIR 1970 SC 1771 : (1970) 3 SCC 323.

(27) Production, supply and distribution of goods subject to the provisions of entry 33 of List III.

A State legislation restricting export of goods as anciliary to production and supply of essential commodities within the State would fall within this entry.[74]

(28) Markets and fairs

A law regarding cattle fairs falls under this entry.[75]

(30) Money lending and money lenders; relief of agricultural indebtedness.[76]

(31) Inns and Inn-keepers.

(32) Incorporation, regulation, and winding up of corporations, other than those specified in List I, and universities; unincorporated trading, literary, scientific, religious and other societies and associations; co-operative societies.

The relevant entries in the Central List are 43 and 44. A society registered under the Societies Registration Act is not a corporation and so would fall under this entry and not under entry 44, List I. A corporation whose powers and duties are confined only to one State falls under this entry and not under entries 43 and 44 of List I.[77]

(g) STATE PROPERTY

Entry 35 relates to "Works, lands and buildings vested in or in possession of the State."

(h) INTOXICANTS

Entry 8 relates to intoxicating liquors, that is to say, the production, manufacture, possession, transport, purchase and sale of *intoxicating* liquors.

In a previous case,[78] the Supreme Court had held that the expression "intoxicating liquors" occurring in this entry included within its compass denatured spirit as well (which is non potable), and, thus, the States would have exclusive privilege to deal in denatured spirit. But a larger Bench of the Court reviewing this ruling came to the conclusion that the expression "intoxicating liquors" means and refers to only "potable liquors"[79].

It has been ruled that though the expression "intoxicating liquors" is not qualified by the words "for human consumption", yet the very word "intoxicating" signifies "for human consumption". All aspects, such as, production, manufacture, possession, fall within the exclusive domain of the States[80]. Also, the States have no legislative power over non-potable liquors under entry 8.

A question of some importance remains undecided sofar *viz.*, does entry 8 include within its scope medicinal preparations having alcohol content beyond a

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74. *Darshan v. State of Punjab,* AIR 1953 SC 83 : 1953 SCR 319.
75. *Amritsar Municipality v. State of Punjab,* AIR 1969 SC 1100.
76. See, *infra,* Sec. G.
77. *Board of Trustees, Tibia College v. Delhi,* AIR 1962 SC 458 : 1962 Supp (1) SCR 156.
78. *State of Uttar Pradesh v. Synthetics & Chemicals Ltd.,* AIR 1980 SC 614 : (1980) 2 SCC 441.
79. *Synthetics & Chemicals Ltd. v. State of U.P.,* AIR 1990 SC 1927 : (1990) 1 SCC 109.
80. *State of Andhra Pradesh v. McDowell,* AIR 1996 SC 1561 read along with *Bihar Distillery v. Union of India,* AIR 1997 SC 1208, 1213 : (1997) 2 SCC 727.
Also see, *supra,* under entry 24, List II.

prescribed limit? The Supreme Court answered the question in the affirmative in *State of Bombay v. Balsara.*[81] But, later the Court doubted the accuracy of the above view and has suggested that the question be reconsidered by a larger bench.[82]

It has also been held that this entry cannot support any tax on liquor.[83] Only regulatory powers can be derived from the entry.[84]

The Supreme Court has declared in the instant case that the States are not authorised to impose any impost (such as vend fees) on industrial alcohol. They are entitled to impose imposts only on potable alcohol. The State can impose a levy on industrial alcohol only when there are circumstances to establish that there is *quid pro quo* for the fee imposed.[85]

A State Legislature has power to prohibit the possession, use and sale of intoxicating liquors absolutely whether indigenous or foreign. This power includes the power to impose total or partial prohibition in the State.[86]

The words 'intoxicating liquor' include not only those alcoholic liquids which are generally used for beverage purposes and produce intoxication, but also liquids not containing alcohol which can be used as substitutes for intoxicating drinks.[87]

It is under this entry that a State makes provision to grant by public auction the privilege to sell liquor.[88]

Under this entry, a State can enact a law relating to medicinal and toilet preparations containing alcohol. Any law to regulate manufacture, sale and possession of intoxicating liquors and drugs falls under this entry.

The words "intoxicating liquor" in this entry cannot support a tax on industrial liquor. The expression "intoxicating liquors" means liquor which is consumable by human beings as it is.[89]

Reading entries 8 and 24 in List II together, the Supreme Court has concluded in *State of Andhra Pradesh v. McDowell & Co.*[90] that entry 24 is a general entry relating to industries, while entry 8 is a specific and special entry relating *inter alia* to industries engaged in production and manufacture of intoxicating liquors. Applying the rule of interpretation that "special excludes the general", the Court has held that the industries engaged in production and manufacture of intoxciating liquors do not fall within entry 24 but do fall within entry 8. The State Leg-

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81. AIR 1951 SC 318 : 1951 SCR 682.

82. See, *Synthetics and Chemicals Ltd. v. State of Uttar Pradesh,* AIR 1990 SC 1927 : (1990) 1 SCC 109; *Shri Bileshwar Khand Udyog Khedut Sahakari Mandali Ltd. v. State of Gujarat,* AIR 1992 SC 872 : (1992) 2 SCC 42; *State of Rajasthan v. Vatan Medical & General Store,* AIR 2001 SC 1937 : (2001) 4 SCC 692.
The question has not been reheard and decided by the Supreme Court so far.

83. For powers of taxation, see, Ch. XI, *infra.*

84. *Synthetics & Chemicals, supra,* footnote 79.

85. *Ibid.*
For a difference between 'fee' and 'tax', see, next Chapter.

86. *N.K. Doongaji v. State of Madhya Pradesh,* AIR 1975 M.P. 1; *Khoday Distilleries Ltd. v. State of Karnataka,* (1995) 1 SCC 574; *Sunny Markose v. State of Kerala,* AIR 1966 Ker. 379.

87. *State of Bombay v. Balsara,* AIR 1951 SC 318; *Benudhar Saikia v. Bhattacharya,* AIR 1961 Ass. 16.

88. *Nashirwar v. State of Madhya Pradesh,* AIR 1975 SC 360 : (1975) 1 SCC 29. See *infra*.

89. *Synthetics & Chemicals Ltd. v. State of Uttar Pradesh,* AIR 1990 SC 1927 : (1990) 1 SCC 109.

90. AIR 1996 SC 1627 : (1996) 3 SCC 709.

islature is therefore fully competent to make a law prohibiting the manufacture and production of intoxicating liquors.

Entry 8 is not subject to entry 52, List I. This means that making of a declaration by Parliament as contemplated by entry 52, List I. "does not have the effect of transferring or transplanting... the industries engaged in production and manufacture of intoxicating liquors from the State List to Union List". As a matter of fact, the Parliament cannot take over the control of the industries engaged in the production and manufacture of intoxicating liquors by making a declaration under entry 52 of List I, since the said entry governs only entry 24, List II, but not entry 8 in List II.

It may however be pointed out that the industries based on fermentation and alcohol have been declared by Parliament acting under entry 52, List I, and placed in the First schedule to the Industries (Development and Regulation) Act, 1951.

But control over industries engaged in manufacture or production of potable liquors does not vest in the Centre but falls under the State domain because of entry 8, List II.

(i) ENTERTAINMENTS

The entries falling under this head are as follows:

(33) Theatres and dramatic performances; cinemas subject to the provisions of Entry 60 of List I; sports, 'entertainments and amusements'.

Sanctioning of cinematograph films is excluded from entry 33 as it falls under entry 60, List I.

(34) 'Betting and gambling'.

Prize competitions not requiring a substantial amount of skill have been held to be a gambling transaction falling within entry 34.[91] The Supreme Court has observed in *R.M.D.C.* : "Thus a prize competition for which a solution was prepared before-hand was clearly a gambling prize competition, for the competitors were only invited to guess what the solution prepared before-hand by the promoters might be…"

The game of rummy has been held to be mainly and preponderantly a game of skill.[92] Any competitions involving substantial degree of skill is not gambling. Horse-racing has been held to be "a game where winning depends substantially and preponderantly on skill". Horse-racing is a sport which primarily depends on the special ability acquired by training".[93]

This entry includes lotteries as these are regarded as a form of gambling. In lotteries, there is an element of chance and absence of skill and, therefore, lotteries fall under gambling.[94] A State Legislature is competent under this entry to

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91. *State of Bombay v. R.M.D.C.*, AIR 1957 SC 699 : 1957 SCR 874; *R.M.D.C. v. Union of India*, AIR 1957 SC 628 : 1957 SCR 930; *J.N. Gupta v. State of West Bengal*, AIR 1959 Cal 141.
92. *State of Andhra Pradesh v. K. Satyanarayana*, AIR 1968 SC 825 : (1968) 2 SCR 387.
93. *K.R. Lakshmanan v. State of Tamil Nadu*, AIR 1996 SC 1153 : (1996) 2 SCC 226.
94. *State of Bombay v. RMDC.*, AIR 1957 SC 699 : 1957 SCR 874; *B.R. Enterprises v. State of Uttar Pradesh*, AIR 1999 SC 1867 : (1999) 9 SCC 700.

legislate in respect of sale or distribution within the State, of tickets of lotteries organised by any agency other than the Government of India, or of a State.[1]

Entry 34 is of a very general nature but because of entry 40, List I, "Lotteries organised by the Government of India or the Government of a State" have been taken out from the State Legislative field comprised in entry 34, List II. No State Legislature can therefore make a law touching lotteries organised by the Government of India, or of a State, even though there may be no Parliamentary law made under entry 40, List I.[2] A State can conduct lotteries subject to the Central law.

Parliament has now enacted the Lotteries (Regulation) Act, 1998, to regulate lotteries conducted by the States. For further discussion on this topic, see under Arts. 298, 301 and 19(1)(g) discussed later in the book.[3]

The State 'organised' lotteries are to be distinguished from the State 'authorised' lotteries. While the former fall under the purview of Parliament under entry 40, list I, the latter fall within the purview of the State Legislature under entry 34, list II.[4]

Prize chits fall under entry 7, List III, and not under entry 34, List II.[5]

(j) ELECTIONS AND LEGISLATIVE PRIVILEGES

Entries pertaining to this head are:

(37) Elections to the Legislature of the State subject to the provisions of any law made by Parliament. Reference may be made to entry 72, List I, for Parliament's power in this respect.

(38) Salaries and allowances of members of the Legislature of the State, of the Speaker and Deputy Speaker of the Legislative Assembly and, if there is a Legislative Council, of the Chairman and Deputy Chairman thereof.

(39) Powers, privileges and immunities of the Legislative Assembly and of the members and the committees thereof, and, if there is a Legislative Council, of that Council and of the members and the committees thereof; enforcement of attendance of persons for giving evidence or producing documents before committees of the Legislature of the State.

(40) Salaries and allowances of Ministers for the State.

(k) STATE PUBLIC SERVICES

(41) State Public Services; State Public Service Commission.[6]

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1. *J.K. Bharati v. State of Maharashtra*, AIR 1984 SC 1542 : (1984) 3 SCC 704.
2. *H. Anraj v. State of Maharashtra*, AIR 1984 SC 781 : (1984) 2 SCC 292; *State of Haryana v. Suman Enterprises*, (1994) 4 SCC 217; *Iqbal Chand Khurana v. State of Bihar*, AIR 1994 Pat. 134; *State of Goa v. State of Maharashtra*, AIR 1997 Kant 161; *Girdhari Singh Bapna v. Union of India*, 1997 Raj 24.
3. See, Chs. XII, XV and XXIV, *infra*.
4. *State of Haryana v. Suman Enterprises, supra; Govt. of Manipur v. State of Punjab*, AIR 1997 P&H 28.
5. *Srinivasa Enterprises v. Union of India*, AIR 1981 SC 504 : (1980) 4 SCC 507.
6. For discussion on Public Service Commission, see, Ch. XXXVI under 'Services', *infra*.

Under this entry, the State Legislature has power to abolish and create offices, enhance or reduce emoluments, increase or diminish tenure and prescribe conditions of service for civil services.[7]

An order compulsorily retiring certain government servants was found to be defective and so was invalidated. The State Legislature passed a law to remove the defects in the said order so as to validate it. The law was held valid under entry 41, List II, read with Art. 309.[8]

A State Act providing for reservation of vacancies and posts in public services for socially and educationally backward sections of society is in pith and substance a law in respect of State Public Services and is thus relatable to entry 41, List II.[9]

(42) State pensions, that is to say, pensions payable by the State or out of the Consolidated Fund of the State.

Under entry 42, a State Legislature is entitled to pass a law awarding pensions to ex-members of the Legislature[10]

(l) FINANCE AND TAXATION

Entry 43 relates to the Public debt of the State.

A number of entries, *viz.*, 45 to 63 deal with the taxing powers of the States which are discussed in the next Chapter.

Entry 66 runs as follows : "Fees in respect of any of the matters in this List, but not including fees taken in any Court".

The concept of 'fee' as distinguished from 'tax' is discussed in the next chapter.[11]

(m) MISCELLANEOUS

A few entries which defy the above classification may be noted here.

(7) 'Pilgrimages, other than pilgrimages to places outside India.'

(22) 'Courts of wards subject to the provisions of entry 34 of List I: encumbered and attached estates.'

Entry 44 relates to 'Treasure Trove.'

Entry 64 says : "Offences against laws, with respect to any of the matters in this List.

Entry 65 runs as follows : "Jurisdiction and powers of all Courts, except the Supreme Court, with respect to any of the matters in this List."

For comments on this entry, see, *supra*, Ch. VIII, Sec. F.

(n) COMMENTS

A persual of the entries in List II shows that many of these entries have an inter-face with several entries in List I and III. According to the Sarkaria Commis-

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7. *A.J. Patel v. State of Gujarat,* AIR 1965 Guj. 23; *Narayan v. State of Mysore*, AIR 1968 Mys 73.
8. *I.N. Saxena v. State of Madhya Pradesh*, AIR 1976 SC 2250 : (1976) 4 SCC 750.
9. *K. Kumardhan Singh v. Union of India,* AIR 2000 Gau 50.
10. *Lily Thomas v. State of Tamil Nadu,* AIR 1985 Mad 240.
11. see, *infra*, Ch. XI, Sec. H.

sion, the following different patterns of inter-connection can be discerned in the constitutional scheme.

(1) Certain aspects of a subject being of local concern, have been put in List II, but certain other aspects of the same subject being of national importance have been put in List I. See, for example, entry 13; entry 32, List II read with entry 44, List I.

(2) Some subjects of legislation in List II have been made expressly subject to certain entries in List III.[12] For example, entries 26 and 27 in List II are made subject to entry 33, List III.

(3) Certain entries in List II have been made subject to entries in List I. Thus, entry 2 in List II is subject to entry 2A in List I; entry 33, List II is made subject to entry 60, List I.

(4) Certain entries in List II have been made subject to laws made by Parliament. For example, entry 37, List II is made subject to a law made by Parliament.

(5) Certain matters in List II can become the subject of exclusive Parliamentary legislation when Parliament makes a declaration of "public interest" or "national interest" by law. Thus, entry 17, List II is subject to entry 56, List I; entry 23, List II is subject to entry 54, List I. Entry 24, List II is expressly made subject to entries 7 and 52, List I.

By making appropriate declaration in terms of entries 62, 63, 64 and 67, List I, the Centre can take over wholly or partially the field of such entries as 12 and 32 in List II and entries 25 and 40, List III.[13]

F. CONCURRENT LIST : LIST III

The Concurrent List comprises 52 items. The States are competent to legislate with respect to matters in this List, subject to the rule of repugnancy contained in Art. 254.[14]

The rationale underlying the Concurrent List is that there may be certain matters which are neither of exclusively national interest, nor of purely State or local concern. These matters are such that both the Centre and the States may have common interest therein.

On the one hand, problems and conditions may vary from State to State requiring diverse remedies suited to their local peculiarities. Where diversity is needed, the States know what is best for them. Then, some subject-matters of legislation may be multi-faceted and so they cannot be assigned exclusively either to the Centre or the States. On the other hand, there may be circumstances when a Central law may be needed on a subject in this area.

According to the Sarkaria Commission the need for Central legislation may arise for the following reasons:[15]

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12. For entries in List III, see, Sec. F. *infra.*
13. See below.
14. For discussion on Art. 254, see, *infra*, Sec. H.
15. REPORT OF THE SARKARIA COMMISSION, 65.

(1) Need to secure uniformity in regard to main principles of law throughout the country in the larger interests of the nation.

(2) The subject matter of legislation may have interstate, national and even international, aspects and the 'mischief' emanating in a State may have impact beyond its territorial limits.

(3) It may be important to safeguard a Fundamental Right, or secure implementation of a constitutional directive.

(4) Co-ordination may be necessary between the Union and the States, and among the States, as may be necessary for certain regulatory, preventive or developmental purposes, or to secure certain national objectives.

When Parliament makes a law on a matter in the Concurrent List, there is a corresponding attenuation in the legislative power of the States because a State Law repugnant to a Central Law is invalid. However, subject to any law made by Parliament with respect to any matter in List III, the State Legislature can also make a law in relation to that matter.

(a) BASIC LAWS

The first fourteen entries relate to the basic procedural and substantive laws and administration of justice.

India is a federal country but, unlike other federations, a great amount of uniformity in the basic laws has been achieved over a period of time.[16] These matters have been placed in the Concurrent List so that a uniform texture and framework of laws may be maintained throughout the country, and yet, if necessary, local variations may be taken care of by provisions made by the States. These entries run as follows:

(1) Criminal law including all matters included in the Indian Penal Code at the commencement of the Constitution but excluding offences against laws with respect to any of the matters specified in List I or List II and excluding the use of naval, military or air forces or any other armed forces of the Union in aid of the civil power.

This entry is couched in very broad terms. The words following the expression "Criminal Law" enlarge the scope of the entry to any matter which can validly be considered to be criminal in nature. Use of the expression "including all matters included in the Indian Penal Code" is an unequivocal indication of the comprehensive nature of this entry. The legislature is empowered to make laws not only in respect of the matters covered by the Indian Penal Code but any other matter which could reasonably and justifiably be considered similar in nature.

Any law dealing with crime is criminal law under entry 1. Both the Centre as well as the States can enact criminal law.

Terrorist or disruptive activity is criminal in content, reach and effect. Parliament can enact a law dealing with terrorism under entry I, List III, so long as it does not refer to "public order" falling under entry 1 of List II. "Public Order" in

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16. For a historical account of the development of law in India, see, JAIN, OUTLINES OF INDIAN LEGAL HISTORY, Chs. XXII -XXV (1990).

List II is different from terrorism. Therefore, Parliament is entitled to enact the TADA Act.[17]

According to the Supreme Court, the ambit of "Criminal Law" in this entry has been first enlarged by including the Indian Penal Code and then from this enlarged ambit, all offences against laws with respect to any of the matters specified in List I or List II have been specifically excluded. The reason for inclusion or exclusion is that offences against laws with respect to any matter specified in List I or List II have been given a place in entries 93 of List I and 64 of List II.

A Central law to be valid under this entry must satisfy two conditions:

(1) The law must relate to criminal law;

(2) The offence should not be such as has been, or could be, provided against by laws with respect to any matter specified in List II.

The Indian Penal Code is a compilation of penal laws providing for offences relative to a variety of matters falling under various entries in various Lists. Thus, Ss. 489A to 489D of the I.P.C. deal with offences relating to currency and coinage—a matter falling under entry 36, List I, read with entry 93.[18]

(2) Criminal Procedure, including all matters included in the Code of Criminal Procedure at the commencement of the Constitution.

This entry is abundantly comprehensive to cover legislation making 14 years' imprisonment compulsory for certain categories of offenders.[19]

(3) Preventive Detention for reasons connected with the security of a State, the maintenance of public order, or the maintenance of supplies and services essential to the community; persons subjected to such detention.

This entry is complementary to entry 9, List I dealing with "security of India". The term 'security of a State' includes serious and aggravated forms of public disorder, while the term 'public order' includes relatively minor breaches of peace of a local significance.[20]

This entry does not confer any power to put a person in preventive detention for the maintenance of "law and order". Some significant restrictions are imposed on the institution of preventive detention by Arts. 21 and 22.[21] The power of preventive detention is a drastic power. To avoid the power of preventive detention being abused, it is necessary that Parliament should have power to enact a law for the purpose on a uniform basis providing for necessary safeguards.

The Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA) provides for preventive detention for reasons connected with the security of the State as well as the maintenance of supplies and services essential to the community.[22] This Act can be justified under this entry. The expression "security of State" has been broadly interpreted so as to include "economic security" as well. According to the Supreme Court, "A State with a

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17. *Kartar Singh v. State of Punjab*, (1994) 3 SCC 569, 753-755 : 1994 Cri LJ 3139 (SC).
18. *G.V. Ramanaiah v. Supdt., Central Jail*, AIR 1974 SC 31 : (1974) 3 SCC 351.
19. *Maru Ram v. Union of India*, AIR 1980 SC 2147 : (1981) 1 SCC 107.
20. *Romesh Thappar v. State of Madras*, AIR 1950 SC 124 : 1950 SCR 594; see, *supra*, Sec. E. For further discussion on this point, see Ch. XXVII, Secs. B and C, *infra.*
21. See, Chs. XXVI and XXVII, *infra.*
22. See, Ch. XXVII, Sec. B, *infra*, for this law.

weak and vulnerable economy cannot guard its security well. It will be an easy prey to economic colonisers." The Court has observed further:

> "In the modern world, the security of a State is ensured not so much by physical might but by economic strength—at any rate, by economic strength as much as by armed might. It is, therefore, idle to contend that COFEPOSA is unrelated to the security of the State."[23]

(4) Removal from one State to another State of prisoners, accused persons and persons subjected to preventive detention for reasons specified in entry 3 of this List.

The subject-matter of this entry has an inter-State aspect, and this aspect can be effectively dealt with on a uniform basis by a law passed by Parliament. The law made by a State Legislature do not have operation beyond the State's territorial limits.[24]

(5) Marriage and divorce; infants and minors; adoption; wills, intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of the Constitution subject to their personal law.

The Legislature, under this entry, can modify the personal laws, such as, Hindu Law or Muslim Law.[25] Parliament can enact a law, under this entry, to deal with matters of wills, intestacy and succession of agricultural property in spite of its trenching upon entry 18, List II, *e.g.*, S. 14 of the Hindu Succession Act.[26] A different opinion has been expressed by the Rajasthan High Court which has ruled (reading entries 5 and 6 together) that S. 22 of the Hindu Succession Act does not apply to agricultural land as entry 6 takes such land out of the purview of entry 5.[27]

(6) Transfer of Property other than agricultural land; registration of deeds and documents.

The words 'transfer of property' are wider than the meaning given to them in the Transfer of Property Act. Transfer of agricultural land is a State matter and falls under entry 18, List II, and not under the present entry.

(7) Contracts, including partnership, agency, contracts of carriage; and other special forms of contracts, but not including contracts relating to agricultural land.

Along with this may also be read the comments on entry 18, List II.[28]

The present entry excludes contracts relating to agricultural land, but not contracts relating to non-agricultural land. A contract between a landlord and a tenant for payment of rent in respect of agricultural land, irrespective of the form it might take, is a contract relating to agricultural land and is excluded from the scope of this entry.[29]

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23. *Attorney General for India v. Amratlal Prajivandas*, AIR 1994 SC 2179 : (1994) 5 SCC 54.
24. See, *supra*, Sec. A., on Territorial Nexus.
25. *Ameerunnissa v. Mehboob*, AIR 1953 SC 91 : 1953 SCR 404.
26. *Shakuntala v. Beni Madhav*, AIR 1964 All. 165; *Kashi Nath v. Umapada*, AIR 1968 Cal. 83; *Hari Dass v. Hukmi*, AIR 1965 Punj. 254.
27. *Jeewanram v. Lichmadevi*, AIR 1981 Raj 16.
28. *Supra*, Sec. E.
29. *Supra*, Sec. E.

Prize chits have an element of chance of draw of lot to choose the successful bidder. There is an element of draw of luck in such chits. Nevertheless, a law banning prize chits has been held to fall under this head as dealing with a special species of contracts with sinister features and it does not fall under entry 34, List II.[30] Similarly an Act banning chit funds, in pith and substance, has been held to deal with a special kind of contract and, thus, falls under this entry. Neither prize chits nor chit funds deal with money-lending, the subject-matter of entry 30, List II.[31]

Premises tenancy legislation pertaining to houses and buildings is referrable not to entry 18, List II, but to entries 6, 7, and 13 of List III. The subject of housing accommodation and control thereof falls within these entries. Leases in respect of non-agricultural property are dealt with in the Transfer of Property Act and fall under this entry. Rent control legislation enacted by the State Legislatures falls under entries 6, 7 and 13 of this List.[32]

The Public Premises (Eviction of Unauthorized Occupants) Act, 1971, insofar as it applies to the premises of the corporations, falls under entries 6, 7 and 13 of List III and not under entry 18, List II.[33]

(8) Actionable wrongs

In view of entry 1 above, this entry may be regarded as referring to torts. These are civil wrongs as contra-distinguished from criminal wrongs which are the subject-matter of entry 1. It is necessary to have a uniform law on this subject just as there is a uniform criminal law.

(9) Bankruptcy and insolvency.

(10) Trust and Trustees.

An Act to regulate the administration of public religious and charitable trusts would fall within entry 28 read with entry 10.[34] In case the trust is incorporated, it would fall under entries 43 and 44 of List I (if extending to more than one State), or entry 32 of List II if extending to one State only.[35]

An Act to provide for administration of higher secondary educational institutions registered under the Societies Registration Act was held to fall under entry 11 of List II (now entry 25, List III), and not under entries 10 and 28 of List III, even though it incidentally trenches upon or affects a charitable institution, or the powers of trustees of an institution.[36]

(11) Administrators-general and official trustees.

An Administrator-General may have concern with the properties and assets situated in several States, belonging to the same deceased person. Parliament has enacted the Administrators-General Act, 1963.

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30. *Srinivasa Enterprises v. Union of India,* AIR 1981 SC 504 : (1980) 4 SCC 507.
31. *Shriram Chits & Investments (P.) Ltd. v. Union of India,* AIR 1993 SC 2063 : 1993 Supp (4) SCC 226.
32. *Indu Bhusan Bose v. Rama Sundari Devi,* AIR 1970 SC 228 : (1969) 2 SCC 289; *Jaisingh Jairam Tyagi v. Mamanchand,* AIR 1980 SC 1201 : (1980) 3 SCC 162; *Dhanpal Chettiar v. Yesodai Ammal,* AIR 1979 SC 1745 : (1979) 4 SCC 214; *Accountant and Secretarial Services (P.) Ltd. v. Union of India,* AIR 1988 SC 1708 : (1988) 4 SCC 324.
33. *Accountant and Secretarial Services (P) Ltd. v. Union of India, ibid.*
Also see under entry 32, List I, *supra,* Sec. D.
34. *Servants of India Society v. Charity Commr,* AIR 1962 Bom. 12.
35. *The Tibbia College case,* AIR 1962 SC 458 : 1962 Supp (1) SCR 156; *supra,* Secs. D and E.
36. *Katra Education Society v. State of Uttar Pradesh,* AIR 1966 SC 1307 : (1966) 3 SCR 328.

(11-A) Administration of justice, constitution and organisation of all Courts, except the Supreme Court and the High Courts.

The power conferred by this entry includes the power of creating new Courts, reorganizing the existing Courts and defining, enlarging, altering, amending and diminishing the jurisdiction of the Courts and diminishing their jurisdiction territorially and pecuniarily.

Entry 11A of List III relating to administration of justice, has a wide meaning and includes administration of civil as well as criminal justice. The expression administration of justice has been used without any qualification or limitation, and is wide enough to include the powers and jurisdiction of all the Courts including the High Courts except the Supreme Court. The semicolon (;) after the words administration of justice in Entry 11A has significance and meaning. The other words in the same entry after administration of justice only speak in relation to Constitution and organization of all the Courts except the Supreme Court and High Courts. It follows that under Entry 11A the State Legislature has no power to constitute and organize the Supreme Court and High Courts. It is an accepted principle of construction of a Constitution that everything necessary for the exercise of powers is included in the grant of power. The State Legislature being an appropriate body to legislate in respect of administration of justice and to invest all Courts within the State, including the High Court, with general jurisdiction and powers in all matters, civil and criminal, it must follow that it can invest the High Court with such general jurisdiction and powers including the territorial and pecuniary jurisdiction and also to take away such jurisdiction and powers from the High Court except those, which are specifically conferred under the Constitution on the High Courts. Hence the City Civil Court with unlimited jurisdiction and taking away the same from the High Court, does not fall within constitution and organization of the High Court under Entry 11A of List III, The State Legislature is empowered to constitute and organize City Civil Court and while constituting such Court the State Legislature is also empowered to confer jurisdiction and powers upon such Courts inasmuch as administration of justice of all the Courts including the High Court is covered by Entry 11A of List III, so long as Parliament does not enact a law in that regard under Entry 11A.[37]

The Bombay Legislature created an additional civil Court for Greater Bombay having jurisdiction to try all suits of a civil nature not exceeding a certain value. The law was challenged on the ground that it conferred jurisdiction on the Court not only in respect of matters upon which the State Legislature was competent to legislate but also in regard to matters in respect of which only Parliament could legislate. But the argument was rejected. The Supreme Court argued that under this entry, the State Legislature has the power of investing the Courts with general jurisdiction.[38]

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37. *Jamshed N. Guzdar v. State of Maharashtra*, (2005) 2 SCC 591 : AIR 2005 SC 862.

38. *State of Bombay v. Narottamdas Jethabhai*, AIR 1951 SC 69 : 1951 SCR 51; *Jamshed N. Guzdar v. State of Maharashtra*, AIR 1992 Bom 435; Also see, *State of Tamil Nadu v. G.N. Venkataswamy*, AIR 1995 SC 21 : (1994) 5 SCC 314; *New Laxmi Oil Mills v. Bank of India*, AIR 1998 MP 161; *State of Uttar Pradesh v. Deepchand*, AIR 1980 SC 801 : (1980) 2 SCC 332; see also *M. P. Gangadharan v. State of Kerala*, (2006) 6 SCC 162 : AIR 2006 SC 2360.

The State can confer additional jurisdiction on revenue Courts to recover public debts as arrears of land revenue. A State Act invested the collector with the power of deciding the controversy between the State and the defaulter and to recover the debt as arrears of land revenue. The collector was characterised as a revenue Court.[39]

From the scope of this broad entry, the area covered by Entry 65, List II, must be excluded, otherwise entry 65 would become otiose.[40] By virtue of this entry, Parliament can secure a measure of uniformity in the administration of justice, and constitution and organisation of Courts subordinate to the High Court, in the States.

The subject-matter of this entry is complementary to the subject-matter of entries 1, 2 and 13 in this List.

Parliament can constitute special Courts under this entry.[41] Parliament can confer appellate powers on the Supreme Court from the special Courts under Art. 138(1) read with Art. 246(1) and entry 77 of List I.[42]

The Debt Recovery Tribunal which has been established by the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, passed by Parliament falls under entry 11A read with entry 46, List II. "Administration of justice" is a term of very wide amplitude and connotation. It cannot be marginalised only to organizing Courts.[43]

(12) Evidence and oaths; recognition of laws, public acts and records, and judicial proceedings.

(13) Civil procedure, including all matters included in the Code of Civil Procedure at the commencement of this Constitution; limitation and arbitration.

Legislation regulating landlord-tenant relationship in houses and buildings, according to some High Courts, falls under items, 6, 7 and 13 of this List and not under entry 18 of List II.[44]

(14) Contempt of Court, but not including contempt of the Supreme Court.

See entry 77 in List I.

Under this entry, Parliament has enacted the Contempt of Courts Act, 1971. Contempt of a High Court may be committed beyond the territorial limits of the State in which the High Court exercises its jurisdiction. Such a situation can be dealt with only under a Central law and not under a State law because of the doctrine of territorial *nexus* discussed earlier.[45] Contempt of Court has national

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39. *Director of Industries, U.P. v. Deepchand*, AIR 1980 SC 801; *State of Tamil Nadu v. G.N. Venkataswamy*, AIR 1995 SC 21 : (1994) 5 SCC 314; *New Laxmi Oil Mills v. Union of India*, AIR 1998 MP 161.

40. *State of Bombay v. Narottamdas Jethabhai*, *supra*, footnote 38.

41. *In Re, The Special Courts Bill, 1968*, AIR 1979 SC 478 : (1979) 1 SCC 380.
Also see, Ch. IV, *supra*, Sec. F(g); entry 95, List I, *supra;* Sec. D; Ch. XXI, *infra;* Ch. XXVI, *infra*.

42. *Ibid.*

43. *Mudit Entertainment Industries Pvt. Ltd. v. The Banaras State Bank Ltd.*, AIR 2000 All 181.
Also see, Ch. VIII, Sec. I.

44. *Milap Chand v. Dwarka Das*, AIR 1954 Raj. 252; *Kedarnath v. Nagindra Narayana*, AIR 1954 Pat. 97; *supra*, Sec. E.

45. See, *supra*, Sec. A.

dimensions. S. 11 of the Act provides that a High Court shall have jurisdiction to try a contempt of itself, or of any subordinate Court whether the contempt is committed within the territorial jurisdiction of the High Court or outside it.

Reference may also be made in this connection to the discussion held earlier under Art. 129 and Art. 215 which confer power on the Supreme Court and a High Court to punish for contempt of itself respectively.[46]

(b) PUBLIC WELFARE

Certain public welfare activities, and the inter-State aspects of Public health fall in this List. The relevant entries are:

(15) Vagrancy; nomadic and migratory tribes.

The problems relating to these tribes have national dimensions as these tribes are not confined to a single State but are spread over several states.[47]

(16) Lunacy and mental deficiency including places for the reception or treatment of lunatics and mental deficients.

(17) Prevention of cruelty to animals.

(18) Adulteration of foodstuffs and other foods.

The evil of adulteration has national aspect. Food adulterated in one State may be consumed by the people in some other State. The widespread evil of adulteration can be effectively dealt with only by a national law.

The Prevention of Food Adultertion Act, 1954 has been enacted by Parliament under this entry. The Act has been enacted to curb the widespread evil of food adulteration in the country and avert danger to human life arising out of sale of unwholesome food articles.[48]

(19) Drugs and poisons, subject to the provisions of entry 59 of List I with respect to opium.

Entry 59 of List I, is not exhaustive in regard to opium. Control by licence or otherwise, of the possession, storage and sales of opium falls under the present entry and not under entry 59, List I.[49]

Control of production, trade and use of drugs and poisons is an important component of the subject-matter of this entry. A closely associated aspect of entry 19 is drug-trafficking and drug addiction. This evil has not only local but global dimensions.

(23) Social security and social insurance: employment and unemployment.

The term 'social security' broadly includes insurance against industrial accidents, sickness and the like.

There arises an important question in relation to this entry, viz., when a law is passed to put into effect any welfare scheme for a section of the society, on whom can the liability to contribute for the scheme be placed?

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46. *Supra*, Ch. IV, Sec. C(i) and Ch. VIII, Sec. C(a), *supra*.
47. See, *supra*, Ch. IX, Sec. C.
48. *Gandhi Irwin Salt Manufacturers Ass. v. State of Tamil Nadu*, AIR 1996 Mad. 109.
49. *Laxminarayan Khemhand v. State of Madhya Pradesh*, AIR 1961 MP 13.

The Supreme Court has stated that "the burden of the impost may be placed only when there exists the relationship of employer and employee between the contributor and the beneficiary of the provisions of the Act and the Scheme made thereunder." The state cannot in an Act under entry 23, List III, place the burden of an impost by way of contribution for giving effect to the Act and the scheme made thereunder for the social security and social welfare of a section of the society upon a person who is not a member of such section of society nor an employer of a person who is a member of such section of society.

In the instant case,[50] a scheme for the welfare of the fishermen was introduced. Liability to contribute for the scheme was placed on the purchasers/exporters of fish. This was held to fall outside the ambit of entry 23, List III.

(27) Relief and rehabilitation of persons displaced from their original place of residence by reason of the setting up of the Dominions of India and Pakistan.

This entry specifically covers a situation created by partition of the country into India and Pakistan at the time of Independence. In this connection, entry 41 in this List may also be noted.

The West Bengal Land Development and Planning Act falls under this entry as one of its purposes is to resetttle the immigrants from Pakistan.[51]

(28) Charities and charitable institutions, charitable and religious endowments and religious institutions.

The subject-matter of this entry is not of local interest but of nation-wide interest. These institutions may have their properties and beneficiaries scattered in more than one State. Also, their activities may spread over several States. Only a Central law can effectively cope with such a situation.

This entry includes both public and private religious endowments.

(29) Prevention of the extension from one State to another of infectious or contagious diseases or pests affecting men, animals or plants.

(30) Vital statistics including registration of births and deaths.

(c) FORESTS

Forests (entry 17-A) and 'Protection of wild animals and birds' (entry 17-B) have been transferred from List II to List III because of the importance of conservation of forests and wild life and also because the States were not doing enough in this respect. The process of deforestation has been going on apace in India and it needs to be checked.

The term 'forests' in entry 17A includes 'forest produce' in its primary and natural state lying in the forest.[52] Parliament has enacted the Forest (Conservation) Act, 1980, with a view to check indiscriminate diversion of forest land for non-forestry purposes. Through this Act, the Centre has occupied only one aspect of forests, *viz.*, "conservation of forests". Except to the extent covered by this Act, legislative competence with respect to all other aspects of forests remains with the States.

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50. *Koluthara Exports Ltd. v. State of Kerala*, (2002) 2 SCC 459 : AIR 2002 SC 973.
51. *Benoy v. State of West Bengal*, AIR 1966 Cal. 429.
52. *J.C. Waghmare v. State of Maharashtra*, AIR 1978 Bom. 119.

(d) LABOUR

Certain aspects of labour legislation fall within this List. The relevant entries are:

(22) Trade unions; industrial and labour disputes.

(24) Welfare of labour including conditions of work, provident funds, employers' liability, workmen's compensation, invalidity and old age pensions and maternity benefits.

An Act regulating the hours of employment of persons employed in the business of shops or commercial establishments,[53] the Minimum Wages Act,[54] a law to provide for compulsory saving of a part of bonus payable to an industrial worker,[55] a law fixing minimum bonus,[56] fall under entries 22 and 24 of this List.

Sec. 2(f) of the Industrial Disputes Act defines industry "to mean any business, trade, undertaking, manufacture or calling of employers and includes any calling, service, employment, handicraft or industrial occupation or avocation of workmen". In the *Niemla* case,[57] the Supreme Court rejected the argument that the definition was very broad-based and comprised industrial as well as non-industrial concerns and so fell outside the scope of entry 22. The Court held that the definition was justified under both entries 22 and 24.

A law for bettering conditions of labour engaged in manufacturing beedis and cigars falls under this entry and not under entry 24 in List II, or entries 7 and 52 of list I. It is an Act for labour welfare and not for industries.[58] A law providing for workers' participation in joint management councils of industrial undertakings falls under entries 22 and 24 of List III as it prevents industrial disputes and leads to labour welfare.[59]

The Industrial Disputes Act is enacted as a social security and social insurance measure. The Act relates to entries 22, 23 and 24 of List III.[60]

(e) EDUCATION

This subject has been transferred from List II to List III. There were many reasons for transferring "Education" from the State to the Concurrent List. The desired socio-economic goals can be achieved in the country through education. Parliament can secure uniformity in standards and syllabi of education so very necessary to acheive national integration. Parliament can minimise disparities in the levels and standards of education as between the various States.

Entry 25 now runs as: "Education including technical education, medical education and universities, subject to the provisions of entries 63, 64, 65 and 66 of List I; vocational and technical training of labour.

The use of the expression "subject to" means that out of the general heading "Education", the matters contained in entries 63-66 in List I have been carved

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53. *Manohar v. State,* AIR 1951 SC 315 : 1951 SCR 671.
54. *Narottam Das v. State of Madhya Pradesh,* AIR 1964 MP 45.
55. *Milkhi Ram v. State of Punjab,* AIR 1964 Punj. 513.
56. *Jalan Trading Co. v. Mill Mazdoor Sabha,* AIR 1967 SC 691 : (1967) 1 SCR 15.
57. *Niemla Textile Finishing Mills v. The Second Punjab Tr.,* AIR 1957 SC 329 : 1957 SCR 335.
58. *M.G. Beedi Works v. Union of India,* AIR 1974 SC 1832 : (1974) 4 SCC 43.
59. *Monogram Mills v. State of Gujarat,* AIR 1976 SC 2177 : (1976) 3 SCC 294.
60. *CMCH Employees' Union v. CM College, Vellore Ass.,* AIR 1988 SC 37 : (1987) 4 SCC 691; see also *Hindustan Times v. State of U.P.* (2003) 1 SCC 591 : AIR 2003 SC 250.

out. It means that if a matter is covered by any of the entries 63-66 in List I, the power to legislate on that matter lies exclusively with Parliament, even though that matter may otherwise fall within the broader field of "education". This means that, entry 66, List I, and entry 25, List III, should be read together.

In the absence of any Parliamentary Act, State still has competence to enact a statute laying down reservation for entry in any courses of study including the medical courses.[61]

Under entry 66, List I, the Centre has power to see that a required standard of higher education in India is maintained.

The question of interrelationship of entry 25, List III with the entries in List I is discussed below.[62]

(f) ECONOMIC POWER AND PLANNING

The entries relating to this head run as follows:

20. Economic and social planning.

This is a very vague phrase and its full implications are not clear. There has not been much case-law on the scope of this entry. This is a conspicuous entry and no parallel entry is to be found in any other federal constitution.

The entry denotes the modern trend of political thought that the state is an instrument to promote the socio-economic welfare of the people. This obligation on the various governments has been emphasized in the Preamble to the Constitution[63] as well as in the Directive Principles of State Policy,[64] *e.g.*, Arts. 38 to 42, 43A, 45 to 48A.

Planning cannot be carried on either by the Centre or by the States in isolation. It has to be an inter governmental co-operative effort.[65] Hence the entry has been placed in the Concurrent List.

There are many entries in the three Lists pertaining to Planning as it is a multi-faceted activity. If this entry is interpreted broadly, then its scope may be so pervasive as to eat up many entries in the State List as, at the present time, economic and social planning dominates the total governmental functioning. If, however, the entry is interpreted narrowly, and all specific State entries are taken out of it, then it may not mean much except perhaps co-ordination of various activities.

Planning has emerged as an important activity of the Central and the State Governments. There is the Planning Commission to formulate five year plans and supervise their implementation by the various governments.[66] This entry provides the juristic basis to the formulation of national plans which comprehend the entrie range of developmental activities cutting across the delimitation of powers between the Centre and the States.

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61. *Saurabh Chaudri v. Union of India,* (2003) 11 SCC 146 : AIR 2004 SC 361.
62. See, *infra*, Sec. G(c).
63. See, *supra*, Ch. I. Also see, Ch. XXXIV, under "Directive Principles", *infra.*
64. *Infra*, Ch. XXXIV, for discussion on Directive Principles.
65. See, Ch. XIV, Sec. G, *infra*, under Co-operative Federalism.
66. For Planning Commission, see, *infra*, Ch. XIV, Sec. G.

The entry has been invoked to uphold the Bombay Town Planning Act, 1954, as a measure of social planning.[67]

20-A. Population control and family planning.

21. Commercial and industrial monopolies, combines and Trusts.

The scope of this entry is not curtailed by entry 26, List II.

Monopolies in respect of any commercial or trading venture can be created under this entry in favour of government.[68] Unethical commercial or industrial practices can be effectively regulated by a Central law as such practices have inter-State dimensions, implications and ramifications.

It has been held by the Supreme Court that the Motor Vehicles Act which provides a machinery for the creation of government monopoly in motor transport has been validly enacted by Parliament under entries 21 and 35 of this List.[69]

33. Trade and commerce in, and the production, supply and distribution of:

(a) the products of any industry where the control of such industry by the Union is declared by Parliament by law to be expedient in the public interest, and imported goods of the same kind and such products;

(b) foodstuffs, including edible oilseeds and oils;

(c) cattle fodder, including oilcakes and other concentrates;

(d) raw cotton, whether ginned or unginned, cotton seeds;

(e) raw jute.

Wheat, wheat products, paddy, sugar and sugarcane fall under the term 'foodstuffs'.[70] The term 'foodstuffs' does not mean only the final food product which is consumed but also includes raw food articles which may after processing be used as food by human beings,[71] *e.g.*, turmeric, cashew nuts.

Entry 33 deals with production of "foodstuffs". Seeds are a vital commodity having direct connection with the production of foodstuffs to which it relates. The item of seeds of foodstuffs has direct bearing with the production of foodstuffs. Consequently, it is competent for Parliament as well as the State Legislatures to make laws in relation to seeds of foodstuffs. "Surely seeds of foodcrops and seeds of fruits and vegetables relate to foodstuffs."[72]

This entry is also linked to entries 26 and 27, List II. For a discussion on the inter-relation of this entry with entries 26 and 27 of List II, see later under the 'Pith and Substance' Rule.[73]

There also remains the problem of mutual relationship between entry 33, List III, and entry 14, List II, pertaining to agriculture, as production of foodstuffs

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67. *Maneklal v. Makwana*, *supra*, under entry 18, List II, Sec. E.
68. *H.C. Narayanappa v. State of Mysore*, AIR 1960 SC 1073 : (1960) 3 SCR 742.
Also, *State of Tamil Nadu v. Hind Stone*, AIR 1981 SC 711 : (1981) 2 SCC 205.
69. *Kondala Rao v. A.P.S.R.T. Corp.*, AIR 1961 SC 82 : (1961) 1 SCR 642.
This Act has now been replaced by the Motor Vehicles Act, 1989.
70. *Nathuni v. State of West Bengal*, AIR 1964 Cal. 279; *Bijay Kumar Routrai v. State of Orissa*, AIR 1976 Ori. 138.
71. *K. Janardhan Pillai v. Union of India*, AIR 1981 SC 1485, 1488 : (1981) 2 SCC 45.
72. *Raghu Seeds & Farms v. Union of India*, AIR 1994 SC 533 : (1994) 1 SCC 278.
73. *Infra*, Sec. G(d).

falling under the present entry forms a big slice of agriculture. Agricultural marketing in respect of the agricultural commodities mentioned herein also falls under the present entry. The scope of the entry thus becomes very broad.

A State law providing for a temporary take-over of management of tea units has been held to fall under this entry for in pith and substance,[74] the Act relates to production of tea in the State. The Tea industry has been brought under Central control under entry 52, list I.[75]

Entry 33, List III, provides the Central Government with a mechanism for ensuring that unreasonable restrictions are not imposed on trade, commerce and intercourse thereby adversely affecting the economic unity of the country. The problems regarding production, supply and distribution of essential commodities have national dimension and entry 33 enables the Central Government to efficiently manage essential commodities.[76]

This entry supplements, to some extent, the Central power under entry 52, List I. Under cl. (*a*), even though control of certain industries may be taken over by the Union under entry 52, List I, yet the trade, commerce, production *etc*. of such industry fall in the Concurrent area. This means that insofar as the field is not occupied by the laws made by the Union, the States are free to legislate.

As things stand now, the Centre has great economic potentiality. Under entry 52, List I, it can control any industry; under entry 54, List I, it can control mines and minerals to any extent it likes; under entry 33, List III, it can control the products of the controlled industries, imported goods of the like nature, and important raw materials like cotton, jute and foodstuffs. It can regulate inter-State trade and commerce under entry 42, List I, and can exercise price control under entry 34, List III. Besides, there are a number of other important powers with it, like planning, labour, foreign trade, *etc*.

33A. Weight and measures except establishment of standards.

Fixation of weights and measures directly affects inter-State trade and commerce. Parliament can introduce uniformity in this respect throughout the country.

34. Price Control.

This entry is closely related to entry 33 in this List.

36. Factories.

The Factories Act enacted by Parliament makes provisions for the health, safety and welfare of the workers in factories.

37. Boilers.

The Boilers Act secures uniformity throughout India in all technical matters connected with boilers to prevent accidents.

38. Electricity.

It is necessary to have uniform standards all over India in respect of production, supply and distribution of electricity. Adequate supply of electricity is the key to the rapid industrialisation in the country.

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74. For discussion on the Rule of Pith and Substances, see, Sec. G(d), *infra.*
75. *Tufanialonga Tea Co. v. State of Tripura,* AIR 1999 Gau. 109.
76. Also see in this connection, Ch. XV, *infra,* entitled "Freedom of Trade and Commerce".

The purpose of Electricity (Supply) Act, 1948, is to rationalise the production and supply of electricity. The provision for incorporation of the electricity board is only incidental to production, supply and distribution of electricity. The Act, therefore, falls under this entry and not under entries 43 and 44 of List I.[77]

(g) COMMUNICATIONS

Some forms of communication like ports, shipping, *etc*., fall within this List. The relevant entries are:

(31) Ports other than those declared by or under law made by Parliament or existing law to be major ports

Major ports are included in entry 27, List I. All other ports fall under this entry.

(32) Shipping and navigation on inland waterways as regards mechanically propelled vessels, and the rule of the road on such waterways, and the carriage of passengers and goods on inland waterways subject to the provisions of List I with respect to national waterways.

In this connection, reference may be made to entries 24 and 30 in List I. Regulation of shipping and navigation on inland waterways has a very close and substantial connection with shipping and navigation of interstate waterways. Under entry 24, List I, Parliament can declare by law that a particular inland waterway shall be a national waterway. To the extent of such a declaration, the power of the State Legislatures under entry 32 would be superseded.

(35) Mechanically propelled vehicles including the principles on which taxes on such vehicles are to be levied:[78]

Other corresponding entries are 24 and 30 in List I and 13 in List II. 'Principles of taxation' denote rules of guidance in the matter of taxation. See entry 57 in List II.[79]

The main purpose underlying this entry is to enable Parliament to regulate the exercise of the taxation power of the States with respect to mechanically propelled vehicles.[80] If the principles laid down in a parliamentary law enacted under this entry come in conflict with a law made by a State under entry 57 of list II, the State law will be invalid because of the rule of repugnancy contained in Art. 254(1).[81] If Parliament enacts no law under this entry, then the power of the States to tax such vehicles remains unimpaired.

(h) MISCELLANEOUS

The entries defying the above classification are brought together under this heading. These entries run as follows:

(26) Legal, medical and other professions

The Central enactments such as the Indian Medical Council Act, 1956, the Indian Nursing Council Act, 1947, the Dentists Act, 1948, the Chartered Account-

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77. *K.S.E. Board v. Indian Aluminium Co.*, AIR 1976 SC 1031 : (1976) 1 SCC 466.
78. *State of Assam v. Labanya Probha*, AIR 1967 SC 1575 : (1967) 3 SCR 611.
79. *Sita Ram v. State of Rajasthan*, AIR 1974 SC 1373 : (1974) 2 SCC 301.
80. For taxing powers of the States, see, Ch. XI, Sec. D, *infra.*
81. See, *infra*, Sec. H., for discussion on Art. 254(1).

ants Act, 1949, and the Pharmacy Act, 1948, fall under this entry, or the parallel entry 16 in List III in the Government of India Act, 1935.

(39) Newspapers, books and printing presses.

A law to suppress the printing of objectionable matters in newspapers falls within this entry.[82]

(40) Archaeological sites and remains other than those declared by Parliament by law to be of national importance.

Also see, entry 67, List I, in this connection.

(41) Custody, management and disposal of property (including agricultural land) declared by law to be evacuee property.

The word 'disposal' in the entry is wide enough to cover extinguishment of a mortgage. The term 'management' is broad enough to include allotment and grant of leases, as well as cancelling or varying the terms of leases already effected.[83]

Entry 18, List II, does not control the ambit of the present entry. Evacuee legislation would be valid even if it includes certain provisions relating to relations between landlord and tenant.[84]

(42) Acquisition and Requisitioning of Property.

Before 1956, entries 33, List I and 36, List II, provided for acquisition and requisitioning of property, the former for the purposes of the Union and the latter for the purposes other than those of the Union. Entry 42, List III, provided for "Principles on which compensation for property acquired or requisitioned for the purposes of the Union or of a State, or for any other public purpose, is to be determined, and the form and the manner in which such compensation is to be given".

Legislation in respect of acquisition of property is an independent and separate matter which falls only under Entry 42 of List III and not incidental to any specific head of legislation under any other entry. Property includes an undertaking. Therefore, the argument that acquisition of a sugar undertaking, is beyond the competence of the State Legislature has been rejected. The concept of acquisition of an undertaking is an entirely different matter from the control and regulation of industries.

The further argument that a sugar undertaking is a going concern and cannot constitute property within the meaning of Entry 42 of List III has also been rejected. Power to legislate for acquisition of property in Entry 42 of List III includes the power to legislate for acquisition of an undertaking. The expression "undertaking" means a going concern with all its rights, liabilities and assets as distinct from the various rights and assets which compose it.[85]

These triple entries dealing with the same subject-matter caused problems. To obviate difficulties and simplify constitutional position, the Seventh Amendment was enacted. It deleted entry 33, List I and entry 36 in List II and gave its present

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82. *Shantilal v. State of Bombay*, AIR 1954 Bom 508.
Also see, Ch. XXIV, Sec. C, under "Freedom of Speech and Expression".
83. *Sardara Singh v. Custodian*, AIR 1952 Pepsu 12.
84. *Samsudin v. Asst. Custodian*, AIR 1953 Sau. 73.
85. *Shri Krishan Gyanaday Sugar Ltd. v. State of Bihar*, (2003) 4 SCC 378 : AIR 2003 SC 3436.

shape to entry 42, List III. The existing position is more flexible insofar as a State Government is competent to acquire property for a Union purpose and *vice versa.*

A law to acquire an electrical undertaking falls under entry 38, List III, and the present entry.[1]

Under this entry, Parliament can legislate to acquire coal-bearing land belonging to the States to effectuate its power to regulate and develop mines and minerals under entry 54, List I.[2] An Act treating cash grants as property and providing compensation for their discountinuance falls under this entry. The word 'acquisition' in the entry implies not only vesting of title in the property in question in the State but also 'deprivation' of property.[3] The word 'property' in the entry is to be interpreted broadly and it comprises tangibles as well as intangibles.[4] A State law to acquire road transport undertakings,[5] or some sugar mills,[6] fall under this entry.

Entry 42 is an independent power. It is not incidental to the power to legislate under any other topic. Property can be acquired under entry 42 and not as an incident of the power to legislate in respect of a specific head of legislation in any List.[7] The entry is wide enough to empower the Centre to acquire property even belonging to the States.[8]

The Bihar Private Educational Institutions (Taking Over) Act, 1987, has been held valid as an exercise of power by the State under entry 42, List III. The Act deals with nothing but acquisition of property. Entry 66, List I, does not come into the picture. Entry 25, List III, may also be relevant.[9]

(43) Recovery in a State of claims in respect of the taxes and other public demands, including arrears of land revenue and sums recoverable as such arrears, arising outside that State.

The legislative power extends to recovering all claims in respect of taxes and other public demands.[10]

(45) Inquiries and statistics for the purposes of any of the matters specified in List II or List III.

Under this entry, Parliament is authorised to make a law with respect to inquiries for the purpose of a matter in List II, even though it cannot make law with respect to that matter.[11]

Parliamentary legislation covering Central inquiries against State Ministers can be validly enacted under entry 9, List I, and entry 45, List III, and the residu-

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1. *Bharat Hydro Power Corp. Ltd., Guwahati v. State of Assam,* AIR 1998 Gau. 49.
2. *State of West Bengal v. Union of India,* AIR 1963 SC 1241.
3. *Ranojirao v. State of Madhya Pradesh,* AIR 1965 MP 77.
4. *N.E. Supply Co. v. State of Madras,* AIR 1971 Mad. 351; *Cooper v. Union of India*, AIR 1970 SC 564 : (1970) 1 SCC 248.
5. *Sita Ram v. State of Rajasthan,* AIR 1974 SC 1373 : (1974) 2 SCC 301.
6. *Ishwari Khetan Sugar Mills v. State of Uttar Pradesh,* AIR 1980 SC 1955 : (1980) 4 SCC 136.
7. *Ibid.*
8. *Babubhai Jashbhai Patel v. Union of India,* AIR 1983 Guj 1.
9. *L.N.M. Institute of Economic Development and Social Change v. State of Bihar,* AIR 1988 SC 1136 : (1988) 2 SCC 433.
10. *M.A. Kamath v. Karnataka State Financial Corp.,* AIR 1981 Kant. 193.
11. *Ram Krishna Dalmia v. Justice Tendolkar,* AIR 1958 SC 538 : 1959 SCR 279.

ary power.[12] The language used in entry 45, List III, *viz.*, "any of the matters specified" is broad enough to cover anything reasonably related to any of the enumerated items even if done by holders of Ministerial offices in the States. In the alternative, the Supreme Court has ruled that even if neither entry 94, List I, nor entry 45, List III, would cover inquiries against Ministers in the States relating to acts connected with Ministers' powers, Art. 248, read with entry 97, List I (known as the residuary power), must necessarily cover an inquiry against Ministers on matters of public importance whether the charges include alleged violations of criminal law or not.[13]

Parliament has enacted the Commissions of Inquiry Act, 1952, under this entry.[14]

(46) Jurisdiction and powers of all Courts, except the Supreme Court, with respect to any of the matters in the Concurrent List.

Thus, Parliament as well as a State Legislature may legislate with regard to the jurisdiction and powers of the High Courts in respect of intestacy and succession under this entry read with entry 5.[15]

(i) COMMENTS

From the above enumeration and classification of the entries in the various Lists, it would appear that the Central Government has been vested with vast powers contained in the Union and the Concurrent Lists. In addition, Centre's power has been extended by several devices adopted in the phraseology of the entries.

Firstly, some of the entries in the Union List are so phrased that their scope can be expanded by the Centre itself.[16]

Secondly, some of the entries in the State List are subject to some of the entries in the Union List,[17] or the Concurrent List,[18] or a law made by Parliament.[19]

Thirdly, some entries in the Concurrent List are made subject to the entries in the Union List,[20] or laws made by Parliament.[21]

Thus, the dimensions of several entries in the Union List or the Concurrent List are expansive. Moreover, the residuary power has been left with the Centre.[22]

However, it will be wrong to suppose that the States' powers are insignificant. Like other federal countries, the Constitution of India places the main responsibility for many primary nation-building and social-service activities on the

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12. For discussion on "Residuary Powers", see, *infra*, Sec. I.
13. *State of Karnataka v. Union of India*, AIR 1978 SC 68 : (1977) 4 SCC 608.
For further discussion on this matter, see, *Infra* Ch. XIII, Sec. B.
14. For a detailed disussion on this Act, see, M.P. JAIN, *CASES & MATERIALS ON INDIAN ADM. LAW, III*, 2465-2644 (1999).
15. *In Re, G.F. Muirhead*, AIR 1959 Mys. 83.
16. Entries 52, 53, 54, 56, 62, 63, 64, and 67 in List I.
17. Entries 11, 13, 17, 22, 23, 24, 32 and 54, List II.
18. Entries 11, 13, 26, 27 amd 57, List II.
19. Entries 12, 37 and 50, List II.
20. Entries 19, 32, List III.
21. Entries 31, 33(*a*) and 40, List III.
22. See, *infra*, Sec. I.

States, *e.g.*, public health falls within the State sphere, the Union having only limited powers of an inter-State nature;[23] relief of the disabled and unemployable,[24] housing, agriculture[25] and irrigation are exclusively State functions. Therefore, for many socio-economic services, the Centre has no direct responsibility as these lie within the exclusive legislative sphere of the States. Many matters of social security, social insurance, relief and rehabilitation of displaced persons fall within the Concurrent List,[26] and, therefore, the States share the burden along with the Centre in these areas.

The Centre and the States also share power in some other areas outside the Concurrent List, as for example, communications, economic powers, etc., some aspects of which fall in List I and others in List II. To give an example: Parliament is authorised to legislate with regard to mines and minerals to the extent to which it declares it expedient in public interest to control the area:[27] to the extent there is no such declaration, the matter lies with the States.[28] Similarly with regard to industries, the power is divided between the Centre and the States, although the major responsibility in this area rests with the Centre.

It will also be seen that by the process of interpretation, the Supreme Court has sought to protect State powers from being overridden by the exercise of Central powers.[29]

COMPOSITE LEGISLATION

Many a time, a legislature may enact composite legislation which may be based on more than one legislative entry. There is no bar against Parliament or the State Legislatures enacting a statute, the subject-matter of which calls for exercise of powers under two or more entries in the same List or different Lists.[30] A piece of legislation need not necessarily fall within the scope of one entry alone; more than one entry may overlap to cover the subject-matter of a single piece of legislation.

The Supreme Court has observed in *Ujagar Prints v. Union of India*:[31] "In deciding the validity of a law questioned on the ground of legislature incompetence the State can always show that the law was supportable under any other entry within the competence of the Legislature. Indeed in supporting a legislation sustenace could be drawn and had from a number of entries. The legislation could be composite legislation drawing upon several entries."

Such a rag-bag legislation is particularly familiar in taxation.[32] For example, the Karnataka Tax of Entry of Goods Act, 1979, was held referable to entry 35, List III and entry 52 of List II.[33]

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23. List I, entry 28; List II, entry 6; List III, entry 29.
24. List II, entry 9.
25. List II, entry 14.
26. List III, entres 23, 24, and 27.
27. Entry 54, List I.
28. Entry 23, List II.
29. *Infra*, Sec. G.
30. *Harikrishna Bhargava v. Union of India*, AIR 1966 SC 619; *State of Andhra Pradesh v. NTPC Ltd.*, (2002) 2 SCC 203 : AIR 2002 SC 404.
31. AIR 1989 SC 516 : (1989) 3 SCC 488.
32. See, *infra*, next Chapter.
33. *Arun Manikchand Shah v. State of Karnataka*, AIR 1996 Kant. 386.

G. PRINCIPLES OF INTERPRETATION OF THE LISTS

According to a famous aphorism, federalism connotes a legalistic government. There being a division of powers between the Centre and the States, none of the governments can step out of its assigned field; if it does so, the law passed by it becomes unconstitutional. Questions constantly arise whether a particular matter falls within the ambit of one or the other government. It is for the Courts to decide such matters for it is their function to see that no government exceeds its powers.

The Supreme Court has observed regarding the Centre-State distribution of powers that "the constitutionality of the law becomes essentially a question of power which in a federal constitution... turns upon the construction of the entries in the legislative lists." The ultimate responsibility to interpret the entries lies with the Supreme Court in the scheme of the Indian federal system. Further the Court has reiterated the proposition that "these subjects which in one aspect and for one purpose fall within the power of a particular legislature may in another aspect and for another purpose fall within another legislative power".[34]

If the matter is within the exclusive competence of the State Legislature *i.e.* List II, then the Union Legislature is prohibited from making any law with regard to the same. Similarly, if any matter is within the exclusive competence of the Union, it becomes a prohibited field for the State Legislatures. The concept of occupied field is relevant in the case of laws made with reference to entries in List III has to be applied only to the entries in that list. The express words employed in an entry would necessarily include incidental and ancillary matters so as to make the legislation effective.[35]

Since the inauguration of the Indian Constitution, a large number of cases involving interpretation of the various entries in the three Lists have come before the Courts. Keeping in view the fact that the Constitution has three elaborate Lists enumerating more than 200 entries, questions regarding interpretation of these entries, and their mutual relationship, are bound to arise from time to time. There have been quite a few significant controversies in this area.

A point which deserves to be noted is that, hitherto, most of the disputes regarding division of powers have been raised by private parties. The matter arises when a person raises a plea in a Court that a particular legislation affecting his rights falls outside the legislative ambit of the Legislature which has enacted it, and, therefore, it is unconstitutional. In other federations, inter-governmental legal controversies are quite frequent, but such has not been the case in India so far. There have been only a few inter-governmental controversies.[36]

The entries in the lists give outline of the subject matter of legislation and should, therefore be given widest amplitude.[37]

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34. *Federation of Hotel & Restaurant v. Union of India,* AIR 1990 SC 1637 : (1989) 3 SCC 634.
35. *Hindustan Lever v. State of Maharashtra,* (2004) 9 SCC 438 : AIR 2004 SC 326.
36. *State of West Bengal v. Union of India,* AIR 1963 SC 1241; see, Ch. XI, Sec. J(ii)(d), *infra; State of Rajasthan v. Union of India*, AIR 1977 SC 1361; see, Ch. XIII, Sec. D, *infra*; *State of Karnataka v. Union of India*, AIR 1978 SC 68 : (1977) 4 SCC 608; see, Ch. XIII, Sec. C, *infra*; *In re, Cauvery Water Dispute Tribunal,* AIR 1992 SC 522 : 1993 Supp (1) SCC 96 (11) ; see, Ch. XIV, Sec. E, *infra.*
37. *Karnataka Bank Ltd. v. State of Andhra Pradesh,* (2008) 2 SCC 254 : (2008) 1 SCALE 660.

It needs to be underlined, however, that the judicial interpretative process has been such as to uphold most of the impugned legislation and it is only rarely that Courts declare a law invalid on the ground that the legislature has exceeded its powers. The Courts have developed several norms to interpret the entries in these Lists.

The doctrine of colourable legislation does not involve any question of *bona fides* or *mala fides* on the part of the legislature. The whole doctrine resolves itself into the question of the competency of a particular legislature to enact a particular law. If the legislature is competent to pass a particular law, the motives which impelled it to act are really irrelevant. The court reiterated this statement,[38] and has emphatically pointed out that for invoking the doctrine of "colourable legislation" the legislature must be shown to have transgressed the limits of its constitutional power *patently*, *manifestly* and *directly*.[39] The motive of the legislature is irrelevant to castigate as a "colourable legislation",[40] The question of *bonafide* or *malafide* is irrelevant and hence not involved in considering the charge of "colourable legislation."[41] On the other hand, if the legislature lacks competency the question of motive does not arise at all. If Parliament has the requisite competence to enact the impugned Act, the enquiry into the motive which persuaded Parliament into passing the Act would be of no relevance.[42]

In the *Kerala Scheduled Tribes* case,[43] the Supreme Court has expressed that the 'right question' test which has been applied in many cases as a test to find out whether an administrative Agency has validly exercised its power, namely, whether it has posed to itself the right question should be applicable to find out whether the Courts have exercised their jurisdiction properly or not when the validity of a statute is under attack went on to observe what would be the right question in such cases viz. whether the statute has been enacted to achieve the constitutional course set out not only in Part III of the Constitution but also in Parts IV (Directive Principle) and IV-A (Fundamental Duties). If the question is answered in the affirmative in the facts and circumstances of the particular case, then the statute is safe.

(i) EACH ENTRY TO BE INTERPRETED BROADLY

The entries in the three Lists are not always set out with scientific precision or logical definition. It is practically impossible to define each item in a List in such a way as to make it exclusive of every other item in that List.

The framers of the Constitution wished to take a number of comprehensive categories and describe each of them by a word of broad and general import. For

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38. *State of Kerala v. Peoples Union for Civil Liberties, Kerala State Unit*, (2009) 8 SCC 46 : (2009) 9 JT 579.
39. *Ibid.*
40. *STO v. Ajit Mills Ltd.*, (1977) 4 SCC 98.
41. *K.C.Gajapati Narayan Deo v. State of Orissa*, AIR 1953 SC 375 : 1954 SCR 1.
42. *Dharam Dutt v. Union of India*, (2004) 1 SCC 712 : AIR 2004 SC 1295.
43. *State of Kerala v. Peoples Union for Civil Liberties, Kerala State Unit*, (2009) 8 SCC 46.

example, in matters like 'Local Government', 'Education', 'Water', 'Agriculture', and 'Land', the respective entry opens with a word of general import, followed by a number of examples or illustrations or words having reference to specific sub-heads or aspects of the subject-matter. The effect of the general word, however, is not curtailed, but rather amplified and explained, by what follows thereafter. The legislative entries are, however, not exhaustive, and do not cover, for example, all taxable events. This is recognized and reflected in the residuary powers of taxation saved under Art. 248(2) and List I Entry 97. For instance, a State cannot under the garb of luxury tax under List II Entry 62 impinge on the exclusive power of the Centre under List I Entries 84 and 83 by merely describing an article as a luxury for the same taxable events as covered under Entries 84 and 83.[44]

An important principle to interpret the entries is that none of them should be read in a narrow, pedantic sense; that the 'widest possible' and 'most liberal' construction be put on each entry, and that each general word in an entry should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it.[45]

The first principle in relation to the legislative entries is that they should be liberally interpreted, that is, each general word should be held to extend to ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it. Second principle is that competing entries must be read harmoniously, that is, to read the entries together and to interpret the language of one by that of the other.[46]

The justification for this approach is that the entries set up a 'machinery of government'; they demarcate the area or 'heads' or 'fields' of legislation within which the respective legislature can operate and do not confer legislative power as such. Legislative power on the Centre and the States is conferred by Art. 246 and not by the entries in the three legislative lists.[47] Therefore, these entries must be given the widest scope of which their meaning is fairly capable.[48] The Supreme Court has enunciated this rule in the following words:[49]

> "It is settled law of interpretation that entries in the Seventh Schedule are not powers but fields of legislation. The legislature derives its power by Art. 246 and other related Articles of the Constitution. Therefore, the power to make the amendment Act is derived not from the respective entries but under

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44. *Godfrey Phillips India Ltd. v. State of U.P.*, (2005) 2 SCC 515 : AIR 2005 SC 1103.

45. *Hans Muller v. Superintendent, Presidency Jail, Calcutta*, AIR 1955 SC 367 : (1955) 1 SCR 1284; *Navinchandra Mafatlal v. Commr. of Income-tax, Bombay*, AIR 1955 SC 58 : (1955) 1 SCR 829; See also *Welfare Assn. ARP v. Ranjit P. Gohil*, (2003) 9 SCC 358 : AIR 2003 SC 1266.

46. *Godfrey Phillips India Ltd. v. State of U.P.*, (2005) 2 SCC 515 : AIR 2005 SC 1103.

47. *Premchand Jain v. Chhabra*, AIR 1984 SC 981 : (1984) 2 SCC 302; *J.K. Bharati v. State of Maharashtra*, AIR 1984 SC 1542 : (1984) 3 SCC 704; *Goodyear India Ltd. v. State of Haryana*, AIR 1990 SC 781 : (1990) 2 SCC 71.

48. *United Provinces v Atiqua Begum*, AIR 1941 FC 16; *Calcutta Gas Co. v. State of West Bengal*, AIR 1962 1044; *Waverly Jute Mills v. Raymon and Co.*, AIR 1963 SC 90; *Harakchand Ratanchand Banthia v. Union of India*, AIR 1970 SC 1453 : (1969) 2 SCC 166; *Synthetics and Chemicals v. State of Uttar* Pradesh, AIR 1990 SC 1927; *Indian Aluminium Co. Ltd. v. Karnataka Electricity Board*, (1992) 3 SCC 580, 599; *P.N. Krishan Lal v. Govt. of Kerala*, (1995) Supp. (2) SCC 187.

49. *Jilubhai Nanbhai Khachar v. State of Gujarat*, AIR 1995 SC 142, at 148 : 1995 Supp (1) SCC 596.

> Art. 246 of the Constitution. The language of the respective entries should be given the widest scope of their meaning, fairly capable to meet the machinery of the government settled by the Constitution. Each general word should extend to all ancillary or subsidiary matters which can fairly and reasonably be comprehended in it. When the *vires* of an enactment is impugned, there is an initial presumption of its constitutionality and if there is any difficulty in ascertaining the limits of the legislative power, the difficulty must be resolved, as far as possible in favour of the legislature putting the most liberal construction upon the legislative entry so that it may have the widest amplitude."

The entries in the same List are not mutually exclusive and each entry comprises within its scope all matters incidental thereto. The entries demarcate the area over which the concerned legislature operate. In the words of the Supreme Court, the entries "are to be regarded as *enumeratio simplex* of broad categories" and that "the power to legislate on a topic of legislation carries with it the power to legislate on an ancillary matter which can be said to be reasonably included in the power given."[50] Thus, the main topic in an entry is to be interpreted as comprehending all matters which are necessary, incidental or ancillary to the exercise of power under it.

The Supreme Court has often emphasized that the various entries in the three Lists are not powers but are fields of legislation. The power to legislate is given by Art. 246. The entries demarcate the area over which the concerned legislature can operate, and that the widest import and significance must be given to the language used in these entries. Each general word in an entry should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be comprehended therein.[51]

The Supreme Court has enunciated this principle of interpretation of the entries as follows:[52]

> "The cardinal rule of interpretation is that the entries in the legislative lists are not to be read in a narrow or restricted sense and that each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it. The widest possible construction, according to the ordinary meaning of the words in the entry, must be put upon them ... In construing the words in a constitutional document conferring legislative power the most liberal construction should be put upon the words so that the same may have effect in their widest amplitude."

Thus, power to legislate includes power to legislate retrospectively as well as prospectively.[53] If a law passed by a legislature is struck down by the Courts for one infirmity or another, the legislature can cure the infirmity by passing a law,

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50. *State of Rajasthan v. Chawla*, AIR 1959 SC 544 : 1959 Supp (1) SCR 904.

51. *Baldev Singh v. Commr. of Income-tax*, AIR 1961 SC 736 : (1961) 1 SCR 482; *Balaji v. I.T.O.*, AIR 1962 SC 123 : (1962) 2 SCR 983; *Maru Ram v. Union of India*, AIR 1980 SC 2147 : (1981) 1 SCC 107; *India Cement Ltd. v. State of Tamil Nadu*, AIR 1990 SC 85, at 91; *Synthetics & Chemicals Ltd. v. State of Uttar Pradesh*, AIR 1990 SC 1927, 1951.

52. *The Elel Hotels and Investment Ltd. v. Union of India*, AIR 1990 SC 1664, at 1669 : (1989) 3 SCC 698.

53. *S.T. Swamiar v. Commr., HRE*, AIR 1963 SC 966; *Udai Ram v. Union of India*, AIR 1968 SC 1138 : (1968) 3 SCR 41; *Tirath Ram v. State of U.P.*, AIR 1970 SC 405; *Krishna Chandra v. Union of India*, AIR 1975 SC 1389; *I.N. Saxena v. State of Madhya Pradesh*, AIR 1976 SC 2250; *Misri Lal Jain v. State of Orissa*, AIR 1977 SC 1686 : (1977) 3 SCR 714.

as so to validate the earlier law. Such legislation is necessarily to be regarded as subsidiary or ancillary to the power of legislation on the particular subject.[54]

For example, entry 30, List II, runs as: "Moneylending and money-lenders : relief of agricultural indebtedness". This entry has been broadly interpreted so as to include relief against loans by scaling down, discharging, reducing interest and principal, and staying the realisation of debts. "The whole gamut of moneylending and debt liquidation is thus within the State's legislative competence." Narrowly interpreted, the entry would refer only to agricultural indebtedness. But by giving a broad interpretation, it could include debts by non-agriculturists as well.[55]

The principle has been recently expounded by the Supreme Court as follows:[56]

> "Thus, it is settled principle of interpretation that legislative Entries are required to be interpreted broadly and widely so as to give power to the legislature to enact law with respect to matters enumerated in the legislative entries. Substantive power of the legislature to enact law is under Art. 246 of the Constitution and legislative Entries in the respective Lists 1 to 3 of the Seventh Schedule are of enabling character, designed to define and delimit the respective areas of legislative competence of the respective legislature".

In the same case, the Supreme Court has explained that the widest possible construction must be put upon the words used in a legislative entry. Words should be given their "ordinary, natural and grammatical meaning" subject to the rider that in construing words in a constitutional enactment, conferring legislative power under Art. 246, construction should be put upon the words in the entries in the respective lists so that the same may have effect in their widest amplitude. The rule of widest construction of an entry, however, would not entitle the legislature to make a law relating to a matter which has no rational connection with the subject-matter of the concerned entry.[57]

The reading down of provision to uphold its Constitutionality is applicable in the process of interpretation.[58]

In the context of an entry relating to taxation it has been pointed out that the incidence of tax would be relevant in construing whether a tax is a direct or an indirect one, but irrelevant in determining the subject matter of the tax.[59]

(ii) HARMONIOUS INTERPRETATION OF ENTRIES

The three Lists are very detailed and the constitution-makers have made an attempt to make the entries in one List exclusive of those in other Lists. But, as no drafting can be perfect, at times, some conflict or overlapping between an en-

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54. *Rai Ramkrishna v. State of Bihar*, AIR 1963 SC 1667 : (1964) 1 SCR 897; *Khyerbari Tea Co. v. State of Assam*, AIR 1964 SC 925 : (1964) 5 SCR 975; *Misri Lal Jain v. State of Orissa, supra*.

55. *Fateh Chand Himmat Lal v. State of Maharashtra*, AIR 1977 SC 1825 : (1977) 2 SCC 670; *Pathumma v. State of Kerala*, AIR 1978 SC 771 : (1978) 2 SCC 1; *Saiyedbhai Kadarbhai v. Saiyed Intajam Hussen*, AIR 1981 Guj. 154.

56. *R.S. Rehchand Mohota Spg. & Wvg. Mills Ltd. v. State of Maharashtra*, AIR 1997 SC 2591, 2596 : (1997) 6 SCC 12.

57. *Union of India v. Shah Goverdhan L. Kabra Teachers College*, (2002) 7 SCALE 435.

58. *P. Tulsi Das v. Government of Andhra Pradesh*, (2003) 1 SCC 364 : AIR 2003 SC 43.

59. *Godfrey Phillips India Ltd. v. State of U.P.*, (2005) 2 SCC 515 : AIR 2005 SC 1103.

try in one List and an entry in the other List comes to surface. This gives rise to the question of determining inter-relationship between such entries.

To meet such a situation, the scheme of Art. 246 is to secure the predominance of the Union List over the other two Lists, and that of the Concurrent List over the State List. Thus, in case of overlapping between an entry in the Union List and an entry in the State List, the former prevails to the extent of overlapping; the subject-matter falls exclusively within the Union jurisdiction and the States cannot legislate on it. In case of any overlapping between an entry in the Union List and an entry in the Concurrent List, the former prevails over the latter and the subject-matter again is treated as being exclusively Central, so as to debar the States from legislating on it, to the extent of overlapping. If there is an overlapping between an entry in the Concurrent List and one in the State List, the former prevails and the subject would fall within the Concurrent List, thus, giving both Parliament and the State Legislatures jurisdiction to legislate with respect to it rather than making it exclusively a State matter.

This result is inherent in the wordings of Article 246. Art. 246(1) confers exclusive power on Parliament to legislate relating to matters in List I 'notwithstanding anything in clauses (2) and (3).' This is known as the *non-obstante* clause and its effect is to make the Union power prevail in case the Union and State powers overlap.

The *non-obstante* clause has been further stregthened by clauses (2) and (3) of Article 246. According to Clause (2), 'notwithstanding anything in clause (3)', Parliament is entitled to legislate regarding matters in the Concurrent List, and the State legislatures may legislate in the field 'subject to Cl. (1)'. Thus, in case of overlapping between the Union and the Concurrent Lists, the power of the States is subject to the Union List. Further, Cl. (3) of Art. 246 authorises the States to legislate regarding matters in the State List but 'subject to clauses (1) and (2)', which means subject to the Union List and the Concurrent List.

Some of the entries in the different Lists may overlap or may appear to be in direct conflict with each other. In such a situation, the principle of supremacy of the Union List over the State List, as enunciated above, is not to be applied automatically or mechanically as soon as some conflict of legislative jurisdiction becomes apparent. The *non-obstante* clause is the ultimate rule which is to be invoked only as a last resort, in case of *inevitable* or *irreconcilable* conflict between the entries in different Lists.

Before applying the rule, however, the Court should make an attempt to reasonably and practically construe the entries so as to reconcile the conflict and avoid overlapping. This is the rule of harmonious interpretation of the various entries. An effort is to be made by the Court to reconcile all concerned and relevant entries. To harmonise and reconcile conflicting entries in the Lists, it may be necessary to read and interpret the relevant entries together, and, where necessary, restrict the ambit of the broader entry in favour of the narrower entry so that it is not eaten up by the former. It may be necessary to construe a broad entry in a somewhat restricted sense than it is theoretically capable of. If one entry is general, and the other limited or specific, then the former may be restricted to give sense and efficacy to the latter which may be treated as particularised and something in the nature of an exception to the general entry. It has been held that though scope of List II Entry 54 was widened by insertion of Art. 366(29-A)

powers of States to levy such tax is subjected to a corresponding restriction as a consequence of Constitutional limits imposed on sales tax under Art. 286(3) and S. 3 and Sch. 2 proviso, ADE Act, 1957.[60]

This principle of interpretation was lucidly explained by LORD SALMOND in *Governor-General in Council v. State of Madras*,[61] in relation to the Government of India Act, 1935, but which remains as valid to-day as it was at that time. LORD SALMOND observed:

> "..... it is right first to consider whether a fair reconciliation cannot be effected by giving to the language of the Federal legislative List a meaning which, if less wide than it might in another context bear, is yet one that can properly be given to it, and equally giving to the language of the Provincial [now State] Legislative List a meaning which it can properly bear".

In the words of the Supreme Court:[62]

> "It is well established that the widest amplitude should be given to the language of the entries. But some of the entries in the different lists or in the same list may overlap or may appear to be in direct conflict with each other. It is then the duty of this Court to reconcile the entries and bring about a harmonious construction."

It is only when reconciliation between the conflicting entries should prove impossible, then, and only then, the *non-obstante* clause, in Art. 246, mentioned above, is to be invoked to give primacy to the Federal power over the State or Concurrent power.[63] The *non-obstante* clause "ought to be regarded as a last resource, a witness to the imperfections of human expression and the fallibility of legal draftsmanship". The rationale of such an approach is that the framers of the Constitution could not have intended that there should exist any conflict among the Lists, and, therefore, it is necessary to adopt a process of construction which would give effect to all entries and not nullify or render otiose any entry.

This rule, it may be appreciated, is favourable to the States because List II is subject to both List I as well as List III. This becomes obvious from the following discussion. In this connection, the Supreme Court has stated that the relevant entry in List I, should not be so construed as to rob the relevant entry in List II or List III of all its content and substance. It is only when it proves not possible to reconcile the entries that the *non-obstante* clause "notwithstanding anything in clauses (2) and (3)" occurring in Art. 246(1) has to be resorted to.[64]

An entry in one list cannot be so interpreted as to make it cancel or obliterate another entry or make another entry meaningless. In case of apparent conflict, it is the duty of the Court to iron out the crease and avoid conflict by reconciling the conflict. If any entry overlaps or is in apparent conflict with another entry, every attempt shall be made to harmonise the same. Although Parliament cannot legislate on any of the entries in the State List, it may do so incidentally while

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60. *Godfrey Phillips India Ltd. v. State of U.P.*, (2005) 2 SCC 515 : AIR 2005 SC 1103.
61. AIR 1945 PC 98, at 100.
62. *Harakchand Ratanchand Banthia v. Union of India*, AIR 1970 SC 1453 : (1969) 2 SCC 166. Also see, *Hoechst Pharmaceuticals Ltd. v. State of Bihar*, AIR 1983 SC 1019 : (1983) 4 SCC 45.
63. *Waverly Jute Mills v. Rayman Co.*, AIR 1963 SC 90 : (1963) 3 SCR 209; *K.S.E. Board v. Indian Aluminium Co.*, AIR 1976 SC 1031; *The Elel Hotels and Investment Ltd. v. Union of India*, AIR 1990 SC 1664, 1668 : (1989) 3 SCC 698.
64. *Ajay Kumar Singh v. State of Bihar*, (1994) 4 SCC 401.

essentially dealing with the subject coming within the purview of the entry in the Union List. Conversely, the State Legislature also while making legislation may incidentally trench upon the subject covered in the Union List. Such incidental encroachment in either event need not make the legislation *ultra vires* the Constitution. The doctrine of pith and substance is sometimes invoked to find out the nature and content of the legislation. However, when there is an irreconcilable conflict between the two legislations, the Central legislation shall prevail. But every attempt would be made to reconcile the conflict.[65]

Entry 86 in List I proceeds on the principle of aggregation and tax is imposed on the totality of the value of all the assets. It is quite permissible to separate lands and buildings for the purpose of taxation under Entry 49 in List II. There is no reason for restricting the amplitude of the language used in Entry 49 in List II. The levy of tax, calculated at the rate of a certain per centum of the market value of the urban land has been held to be *intra vires* the powers of the State Legislature and not trenching upon Entry 86 in List I.[66]

(iii) INTER-RELATION OF ENTRIES

The working of the above rule of harmonious interpretation may be illustrated by referring to some well-known relevant cases.

In re the C.P. and Berar Act[67], the leading case in which the principle of harmonious interpretation of the conflicting entries was propounded for the first time, has been discussed below under the 'Taxing Powers'.[68]

In *State of Bombay v. Balsara*,[69] a conflict was sought to be made out between entry 41, List I and entry 8, List II. Arguing for a broader view of the Central entry, it was suggested that 'import' of intoxicating liquors would not end with mere landing of goods on the shore but would also imply that the imported goods reach the hands of the importer who should be able to possess them. Therefore, it was said that the State could not prohibit the possession and sale of intoxicating liquors as that would amount to a power to prohibit their import into the country, as one is a necessary consequence of the other.

To reconcile the two entries, the Supreme Court gave a limited meaning to the word 'import' in the Central entry in order to give effect to the State entry. The Court held that 'import' standing by itself, could not include sale or possession of the article imported into the country by a person residing in the territory in which it was imported. The State entry has no reference to import and export but merely deals with production, manufacture, possession, transport, purchase and sale of intoxicating liquors. The State Legislature could, therefore, prohibit the possession, use and sale of intoxicating liquors. Thus, entry 8 (List II) has been given effect by narrowing down the scope of the Central entry which could otherwise nullify the State power if it were to be broadly interpreted.

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65. Special Reference No. 1 of 2001, In re (2004) 4 SCC 489 : AIR 2004 SC 2647.
66. *State of W.B. v. Kesoram Industries Ltd.*, (2004) 10 SCC 201 : AIR 2005 SC 1646.
67. *Gwyer, C.J., In re C.P. & Berar Act No. XIV of 1938*, AIR 1939 FC 1. Also, *Waverly Jute Mills v. Raymond Co.*, AIR 1963 SC 90 : (1963) 3 SCR 209.
68. *Infra*, next Chapter.
69. AIR 1951 SC 318 : 1951 SCR 682.

Similarly, it has been held that the power conferred by entry 26, List III, is general and that the power conferred by entry 78, List I, is limited to persons entitled to practise before the High Courts, and so the general power must be read subject to the spcific power. Consequently, a State Legislature cannot enact any legislation with respect to "persons entitled to practise before the High Courts". The legislative power relating to persons entitled to practise before the Supreme Court and the High Courts is carved out of the general power relating to professions in entry 26, List III, and given exclusively to Parliament. On a conjoint reading of Entry 66 of List I and Entry 25 of List III of the Seventh Schedule to the Constitution it is clear that although the State has a wide legislative field to cover, the same is subject to Entries 63, 64, 65 and 66 of List I and once it is found that any State legislation does not entrench upon the legislative field set apart by Entry 66 List I, the State Act cannot be faulted.[70]

Apart from the legal practitioners practising before the Supreme Court and the High Courts, the legislative power with respect to other practitioners would fall under entry 26 of List III.[71]

Method of taxing luxury goods invariably has been by subjecting them to the extant fiscal regimes of excise duties, sales tax, customs duties, etc. at heavier rates and not under List II Entry 62 and no distinction is made in Art. 366 or Entries 83 and 84 of list I as to the nature of the goods which may be the subject matter of sale excise or import, even if they are articles of luxury.[72]

(a) INDUSTRY

The inter-relation between entries 52 of List 1, 24 and 27 of List II, and 33 of List III becomes important as all these entries deal with various aspects of industry.

The subject of 'industries' has been enumerated in the general entry 24, List II. This, however, is expressly made subject to entries 7 and 52 in List I. Thus, the States can be denied competence to legislate with respect to industries to the extent Parliament by law makes the requisite declaration under entries 7 and 52 of List I.

Under entry 7, Parliament may by law declare any industry "necessary for the purposes of defence or prosecution of war". Under entry 52, List I, Parliament may by law declare Union control of any industry to be expedient in public interest. When such a declaration is made, Parliament can legislate in respect of that industry to the exclusion of the State Legislatures. The State Legislatures are denuded of their power to legislate under entry 24, List II to the extent Centre assumes control over the concerned industry.[73]

Entry 52, List I deals with industry and does not cover the matters mentioned in Entry 33, List III.

Under entry 52, a declaration in abstract is not enough. Parliament has to pass a law, containing the declaration specifying the industry and indicating the nature

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70. *State of A.P. v. K. Purushotham Reddy*, (2003) 9 SCC 564 : AIR 2003 SC 1956.
71. *In Re Lily Isabel Thomas*, AIR 1964 SC 855 : (1964) 6 SCR 229; *O.N. Mohindroo v. Bar Council*, AIR 1968 SC 888 : (1968) 2 SCR 709.
72. *Godfrey Phillips India Ltd. v. State of U.P.*, (2005) 2 SCC 515 : AIR 2005 SC 1103.
73. *State of Andhra Pradesh v. McDowell & Co.*, AIR 1996 SC 1627 : (1996) 3 SCC 709.

and extent of the Union control over the concerned industry. If this is done, then to the extent covered by the declaration and the concomitant legislation, the State Legislative competence with respect to that industry is curtailed. This becomes clear from the following observation of the Supreme Court in *Ishwari Khaitan*[74] "...the State Legislature can be denied legislative power under entry 24 of List II to the extent Parliament makes declaration under entry 52 and by such declaration, Parliament acquires power to legislate only in respect of those industries in respect of which declaration is made and to the extent as manifested by *legislation incorporating the declaration* and no more."

For this purpose, Parliament has enacted *inter alia* the Industries (Development and Regulation) Act under which many industries have been taken under Central control.

The pith and substance of the IDR Act is to provide the Central Government with the means of implementing their industrial policy. The Act brings under Central control the development and regulation of number of important industries which affect the country as a whole and whose development is governed by economic factors of all-India import.[75]

Parliament has taken the tobacco industry under its control under entry 52, List I, and has enacted the Tobacco Board Act, 1975. Refusing to give a restricted meaning to the term 'industry' in entry 52, the Court upheld the validity of the Act. Accordingly, the State Legislature was denuded of its power to make any law in relation to growing of tobacco or sale or purchase of raw tobacco as such a provision had already been made in the Tobacco Board Act.[76] But, recently, the Court has changed its view. In a 3 : 2 decision, the Court has overruled the earlier ITC decision. The Court has now ruled that the State Legislature is competent to levy market fee on the sale of tobacco in a market area. The majority has interpreted the word 'industry' in entry 52, List I restrictively as excluding pre-manufacture activity. This means that raw materials for an industry do not fall under entry 52, List I. In arriving at this decision, the majority seeks to serve three objectives, *viz.* : (1) the powers of the state ought not be whittled down; (2) the concept of federalism should be preserved; (3) Central supremacy should also be upheld.[77]

The responsibility for development of small scale industries rests with the States under entry 24, List II.

The State power to levy 'vend-fee' on denatured spirit under entry 8, List II, is not excluded by Parliamentary legislation under entry 52, List I, with regard to ethyl alcohol. Had there been only entry 52 in List I and entry 24 in List II, Parliament might have had an exclusive power to legislate in respect of industries notified by it because entry 24 is subject to 52. But there are other entries as well, as

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74. *Ishwari Khetan Sugar Mills v. State of Uttar Pradesh*, AIR 1980 SC 1955 : (1980) 4 SCC 136; see, footnote 85, *infra.*
Also see, *Viswanathiah & Co. v. State of Karnataka*, (1991) 3 SCC 358.
A few other Acts are the Cardomon Act, 1965; The Central Silk Board Act, 1958; The Coffee Act, 1942; The Rubber Act, 1947; The Tea Act, 1953; The Coir Industry Act, 1953; The Coconut Development Board Act, 1979.

75. *Khoday Distilleries Ltd. v. State of Karnataka*, (1995) 1 SCC 574 : AIR 1996 SC 911.
For the doctrine of pith and substance, see, Sec. G(iv), *infra.*

76. *I.T.C. Ltd. v. Agricultural Produce Market Committee*, (1985) Supp SCC 476.

77. *I.T.C. Ltd. v. Agricultural Produce Market Committee*, AIR 2002 SC 852 : (2002) 1 SCALE 327.

for example, entry 26 in List II and entry 33 in List III, which make it clear that the power to regulate the notified industries is not exclusively with Parliament.[78]

Interpreting entries 24 and 25 of List II harmoniously, the Supreme Court has held that 'gas works' being a specific entry (entry 25) would not fall under the general entry 24. If the word 'industry' in entry 24 were to include 'gas and gas works', then entry 25 would become redundant. Therefore, adopting the principle of harmonious interpretation, from the wide field covered by entry 24, *i.e.*, the field of entire industry, the specific industry, *i.e.*, 'gas and gas works' covered by entry 25, should be excluded. On that interpretation, 'gas industry' would not fall under entry 52 of List I either, for the term 'industry' in entries 52 and 24 should be given a uniform interpretation.[79] This means that 'gas and gas works' fall within the exclusive field allotted to the States.

(b) SUGAR

Sugar has been declared to be a "controlled" industry under entry 52, List I. The State of U.P. enacted an Act to regulate the supply of sugarcane to the sugar factories. The U.P. Act was challenged as being *ultra vires* the State on the ground that sugar being a 'controlled' industry, sugarcane also fell within the scope of Parliament. The word 'industry', it was contended, has a very wide import and includes not only the process of manufacture but also all things which are necessarily incidental thereto, *viz.*, acquisition of the raw materials of the industry and the disposal of the finished products thereof and so sugarcane, as the raw material of the sugar industry, fell within the Parliamentary sphere.

Applying the principle of reconciling the entries in the various Lists,[80] the Supreme Court held in *Tika Ramji v. State of Uttar Pradesh*,[81] that the U.P. Act was valid. Entries 52 of List I and 24 of List II indicate that generally industries fall within the exclusive sphere of the States except those industries which are controlled by Parliament. Entries 27 of List II and 33 of List III indicate that the production, supply and distribution of products of the controlled industries fall within the Concurrent jurisdiction under entry 33(*a*) of List III.

Industry in the wide sense comprises of three different aspects:

(*i*) raw materials which are an integral part of the industrial process;

(*ii*) the process of manufacture or production; and

(*iii*) the distribution of the products of the industry.

But, in the context of the various entries, the word 'industry' actually connotes aspect (*ii*) mentioned above, *i.e.*, the process of manufacture or production. The raw materials being goods would be comprised in entry 27 of List II and the products of the industry being goods would also fall under the same entry. The products of the controlled industry however would fall under entry 33, List III.

The sugar industry being controlled, legislation with regard to its process of manufacture falls within the exclusive jurisdiction of Parliament. Distribution, supply and production of the product of this controlled industry, *viz.*, sugar as a

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78. *State of Uttar Pradesh v. Synthetics & Chemicals Ltd.*, AIR 1980 SC 614 : (1980) 2 SCC 441, *supra.* Also see, *State of Haryana v. Jage Ram*, AIR 1980 SC 2018 : (1980) 3 SCC 599.
79. *Calcutta Gas Co. v. State of West Bengal*, AIR 1962 SC 1044 : 1962 Supp (3) SCR 1.
80. *Supra*, Sec. G(iii).
81. AIR 1956 SC 676 : 1956 SCR 393.

finished product, falls within entry 33 of List III. Sugarcane, its raw material, being 'goods' falls within entry 27 of List II, but being food-stuff could also fall within entry 33 of List III, and in either case, the State Legislature may legislate with respect to it. It may be interesting to note that under the Sugarcane Control Order, promulgated by the Central Government, the Centre controls the price of sugarcane at which it is supplied to the sugar mills. Obviously, this is possible because sugarcane being food-stuff is a concurrent matter. The U.P. Act and the Central Order can stand together for while the former regulates only the supply and purchase of sugarcane required by the sugar mills, the latter regulates the price of sugarcane and so they did not overlap. The Supreme Court has not defined 'industry' as such or stated exhaustively all its ingredients.

On the basis of the interpretation of the various entries in the *Tika Ramji* case, the position appears to be as follows. Ordinarily, the States have a comprehensive regulatory power covering all aspects of any industry falling within the State sphere. The States can regulate raw materials for such industries under entry 27, List II, as 'goods', and also the finished products of the same. As regards the Centrally-controlled industries, the process of manufacture falls within the Central domain under entry 52, List I; control over finished products of these industries falls under the Central as well as State jurisdiction under entry 33 in List III. Accordingly, molasses being the product of the sugar industry, which is a controlled industry, falls under entry 33(a) of List III and the State has power to enact a law to regulate the same.[82]

As the raw materials of these industries, power lies mainly with the States under entry 27, List II, except for the commodities specified in entry 33, List III, which the Centre may also regulate. Regulatory power regarding centrally controlled industry would thus appear to be somewhat fragmented insofar as some raw materials pertaining to these industries may fall outside the Central purview which may create problems of Central-State co-ordination. Failure by a State to ensure adequate supply of raw-materials to an industry may hamper the same and the Centre may be unable to take any corrective measures.

The Supreme Court has rejected the argument that Parliament has no competence to enact any law relating to control of sugarcane as that subject falls within the exclusive legislative jurisdiction of the States; the same being part of agriculture. Under entry 33, List III, the Centre can regulate the cultivation and sale of sugarcane as it is a foodstuff.[83]

The proposition that the goods produced by a 'controlled' industry does not fall under entry 52, List I, but under entry 33, List III, has been reiterated by the Courts in several cases. The Courts have argued that to interpret entry 52, List I, too broadly would render entry 33 in List III otiose and meaningless. This means that in respect of products of a 'controlled' industry, both the States as well as the Centre have competence to enact laws subject to Art. 254.[84]

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82. *Sushant Elhence v. State of Uttar Pradesh*, AIR 1998 All. 332.

83. *A.K. Jain v. Union of India*, AIR 1970 SC 267 : (1969) 2 340.

84. *MSCO Pvt. Ltd. v. Union of India*, AIR 1986 SC 76 : (1985) 1 SCC 51; *Viswanathan & Co. v. State of Karnataka*, (1991) 3 SCC 358; *Indian Aluminium Co. Ltd. v. Karnataka Electricity Board*, (1992) 3 SCC 580; *Sita Ram & Bros. v. State of Rajasthan*, JT 1994 (6) SC 629; *Shriram Industrial Enterprises Ltd. v. Union of India*, AIR 1996 All. 135; *New India Sugar Mills v. State of Bihar*, AIR 1996 Pat. 94.
For discussion on Art. 254, see, Sec. H, *infra*.

In order to solve some serious problems created by the owner of certain mills for cane growers and the labour employed in the mills, and with a view to ameliorate the economic situation in the State of Uttar Pradesh, the State Legislature passed an Act acquiring 12 sugar mills. The constitutional validity of the Act was challenged. In *Ishwari Khetan Sugar Mills v. State of Uttar Pradesh*,[85] the Supreme Court held that in spite of sugar being a centrally controlled industry under entry 52, List I, the State of Uttar Pradesh can pass legislation acquiring some sugar mills and vesting them in the State Sugar Corporation. The Supreme Court held that a mere declaration under entry 52, List I, unaccompanied by law is incompatible with the entry. A declaration for assuming control of specified industries coupled with law assuming control is a prerequisite for legislative control under entry 52, List I. "Therefore, the erosion of the power of the State Legislature to legislate in respect of the declared industry would not occur merely by declaration but by the enactment consequent on the declaration prescribing the extent and scope of control."

To demarcate the power of the State Legislature, the scope of the legislation made by the Centre ought to be assessed as that will indicate the extent of the control assumed by the Centre. The extent of Central control over sugar is contained in the Industries (Development and Regulation) Act through which the Centre has made the requisite declaration. To the extent the Centre has acquired control over the sugar industry under this Act, the State Legislature is denuded of its power to legislate under entry 24, but not beyond that.

On the question of inter-relation between entry 52, List I, and entry 24, List II, the Supreme Court observed: "..... legislative power of the States under entry 24, List II, is eroded only to the extent control is assumed by the Union pursuant to a declaration made by Parliament in respect of declared industry as spelt out by legislative enactment and the field occupied by such enactment is the measure of erosion. Subject to such erosion, on the remainder, the State Legislature will have power to legislate in respect of declared industry, without in any way trenching upon the occupied field."[86]

As regards the impugned law, the Court held that in pith and substance it was for acquisition of the scheduled undertakings by transfer of ownership to the corporation and, therefore, does not come in conflict with the said Central Act.[87] The impugned State Act refers to entry 42, List III, under which both the Centre and the States can acquire property. The Central Act (IDRA) is not at all concerned with the ownership of the industrial undertakings in declared industries and it does not occupy the field of acquisition and it can apply effectively even to an undertaking acquired by the State.[88]

The power of the State Legislature to acquire an undertaking declared to be a controlled industry in the Industries (Development and Regulation) Act has been confirmed by the Supreme Court in several cases. The State of Nagaland acquired the ownership of a company manufacturing plywood. The Supreme Court ruled following its ruling in *Ishwari Khetan* that the IDR Act did not prohibit

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85. AIR 1980 SC 1955 : (1980) 4 SCC 136.
Also, *State of Haryana v. Chanan Mal*, AIR 1976 SC 1654 : (1977) 1 SCC 340.
86. *Ibid.*, at 1969.
87. For the Rule of Pith and Substance, see, *infra*.
88. For the Rule of Occupied Field see, *infra*, under "Repugnancy", Sec. H.

acquisition of ownership of any unit in the controlled industry.[89] The Act to acquire a company falls under entry 42, List III, and not under entry 24, List II. Similarly, a State law acquiring shares of a Cement Corporation was held to fall under entry 42, List III, as it related to the acquisition of property.[90]

The point to note is that by the declaration the whole of the industry does not pass under the Central control totally. The Centre gets competence only to the extent mentioned in the provisions of the Central Act. Beyond that, the States retain control over the declared industry. As the declaration by the Centre trenches upon the State legislative competence, it has to be construed strictly.

In *Viswanathiah,*[91] the Supreme Court has further explained the mutual relationship of the various entries in the three lists pertaining to industry. "Industry" comprises three steps (i) raw materials; (ii) the process of manufacture or production; and (iii) the distribution of the products of the industry. The Court has ruled in the instant case, that State legislation with regard to "raw materials" is permissible under entry 27 List II, notwithstanding a declaration by Parliament under entry 52, List I. States can legislate upon the process of manufacture or production under entry 24, List II, subject to any declaration under entry 52, List I. As regards the distribution of the products of the industry is concerned, ordinarily the States are competent to legislate under entry 27, List II, but if it is a controlled industry, the matter falls under entry 33, List III, and both can legislate in regard thereto.[92]

(c) FORWARD CONTRACTS

Parliament can validly enact the Forward Contracts (Regulation) Act, 1952, which seeks to prevent speculation in forward contracts, where the intermediate buyer and seller do not pay the actual price, but only the difference, and where no delivery is required to be given.

The words "futures markets" in entry 48, List I, mean not only the "place of business" but also "business", for in modern commerce, more often bargains are concluded through correspondence. Therefore, the law relating to forward contracts is a legislation on "futures markets".

Entry 26, List II, being general and broad, and entry 48, List I, being specific, therefore, the general entry should be interpreted restrictively so that the specific entry is kept alive. The words 'trade and commerce' in entry 26 could not be interpreted so broadly as to make the words 'futures markets' in entry 48 nugatory or futile. Entry 7 of List III, is also general in its terms and cannot prevail as against a specific entry like entry 48 in List I or entry 26 in List II.[93]

(d) EDUCATION

Education is a divided area between the Centre and the States, the relevant entries being List I, entries 63, 64, 65, 66, and List III, entry 25.

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89. *Mahesh Kumar v. Nagaland,* AIR 1998 SC 1561 : (1997) 8 SCC 176. Also see, *Indian Aluminium Co. v. Karnataka Electricity Board,* AIR 1992 SC 2169 : (1992) 3 SCC 580; *Dalmia Industries Ltd. v. State of Uttar Pradesh,* AIR 1994 SC 2117 : (1994) 2 SCC 583. *Somasundaram Corporation (Pvt.) Ltd. v. State of Tamil Nadu,* AIR 1999 Mad. 192.
90. *Dalmia Industries Ltd. v. State of Uttar Pradesh,* AIR 1994 SC 2117 : (1984) 2 SCC 583.
91. *B. Viswanathiah & Co. v. State of Karnataka,* (1991) 3 SCC 358.
92. *New India Sugar Mills Ltd. v. State of Bihar,* AIR 1996 Pat. 94.
93. *Waverly Jute Mills Ltd. v. Raymond & Co.,* AIR 1963 SC 90 : (1963) 3 SCR 209.

While considering List II Entry 32 and List III Entry 25 the Supreme Court has emphasized the importance of the University in the educational scheme. A university is a whole body of teachers and scholars engaged at a particular place in giving and receiving instruction in higher branches of learning; and as such persons associated together as a society or corporate body, with definite organisation and acknowledged powers and privileges and forming an institution for promotion of education in higher or more important branches of learning and includes the colleges, building and other property belonging to such body.[94]

The word 'education' in entry 25 is of wide import so as to include "all matters relating to imparting and controlling education". Entry 25 is specifically made subject to entries 63-66 in List I. Thus, out of the broad entry 25, List III, the area entrusted to the Centre under entries 63 to 66 in List I, has been carved out. A State Legislature could, therefore, make laws with respect to all matters relating to education except the matters excluded. Under entry 66, List I, Parliament has power to legislate with respect to "co-ordination and determination of standards in institutions for higher education or research."

Entry 25, List III, and item 66, List I, overlap to some extent and, therefore, should be construed harmoniously. To the extent of overlapping, the Central power under item 66 must prevail over the State power under item 25.

Once an institution is declared by Central Govt. as a deemed university under UGC Act, which is an enactment under Entry 66, entire matter relating to admission of students in such university would be determined by UGC under the said Act and all India common entrance test conducted, and States would not have legislative competence to make law under Entry 25 of List III in respect of that matter.[95]

The power of the Centre to legislate in respect of the medium of instruction arises under items 63 to 65 in List I to the extent it has a direct bearing and impact upon 'co-ordination and determination of standards,' that is, to ensure maintenance or improvement of standards, in institutions of higher education. Under entry 66, the Centre has power to ensure that a required standard of higher education is maintained. Further, it is also the exclusive responsibility of the Centre to coordinate and determine the standards for higher education. Such coordinate action in the field of higher education along with maintenance of proper standards is regarded as being of paramount importance to national progress. Parliament has an overriding legislative power to ensure that the syllabi, courses of study, and the medium selected by a State do not impair standards of education or render the co-ordinantion of such standards either on an all-India or other basis difficult.

Even if the Centre refrains from legislation to the full extent of its powers, the States do not become authorised to legislate in respect of a matter assigned to the Union. Parliament has exclusive power to legislate with respect to matters included in List I. The State has no power over these matters. A State legislation on any matter falling in List I will be void, inoperative and unenforceable. Accordingly, the validity of a State law on university education under entry 25 List II would, therefore, depend on whether it prejudicially affects 'co-ordination' and

94. *Prof. Yashpal v. State of Chhattisgarh*, (2005) 5 SCC 420 : AIR 2005 SC 2026.
95. *Bharati Vidyapeeth v. State of Maharashtra*, (2004) 11 SCC 755 : AIR 2004 SC 1943.

'determination' of standards, even though the Centre may not have enacted any legislation to achieve that purpose. If there be a Central law in respect of that matter, it would have paramountcy over the State law, but even when the Centre does not exercise its power, a State law trenching upon the exclusive Union field would still be invalid.[1]

The power to 'co-ordinate' is not merely a power to 'evaluate' standards, but to 'harmonise', and the power could be used to legislate for preventing the occurrence, or for removal, of disparities in standards. The exercise of the Central power to co-ordinate is not conditional upon the existence of unequal standards; it must of necessity imply the power to prevent what would make co-ordination difficult. The power is absolute and unconditional. The validity of a State law fixing a regional language or Hindi as an exclusive medium of instruction and examination in the universities, superseding English to that extent, depends on the question whether it would necessarily result in the falling of standards. If it does, then the legislation would necessarily fall within item 66 and would be excluded, to that extent, from the State power under item 25, List III.

The power under entry 66, List I, is thus preventive as well as curative. It prevents the States from doing anything which may adversely affect, or create a disparity of, standards in higher education. Or else, the Centre can take steps when such a disparity comes into existence. It can lay down conditions subject to which only States may adopt regional languages as media of instruction. If the Centre remains inactive and makes no legislation with respect to these matters, the Courts may still adjudge the State law pertaining to university education to see whether or not it would affect standards adversely.

The interplay of Entry 66 List I and Entry 25 List III shows that norms for admission do have a connection with the standards of education and that they are not covered only by Entry 25 of List III. Any lowering of the norms of admission does have an adverse effect on the standards of education in the institutions of higher education.[2]

The Courts can thus act as the sentinel, in the absence of Central legislation, to keep a watch on State action having a tendency to lower standards of higher education. To judge whether prescription of a regional language as an exclusive medium of instruction will result in falling of standards or not, the Court has applied such tests as existence of adequate text-books, journals, *etc*.; availability of competent instructors in the medium through which instruction is to be imparted ; capacity and ability of the students to receive or imbibe instructions through the medium proposed, etc. A duty has thus been cast on the State seeking to prescribe a regional language as an *exclusive* medium for higher education to see whether there are adequate text books available, whether there are qualified instructors, whether the students have developed a capacity to comprehend the instruction in that medium. The Court held that the university had no power to prescribe Gujarati or Hindi as the exclusive medium of instruction in higher education.

Thus, in the *Gujarat* case,[3] an expansive interpretation has been given to the Central entry so as to contain the linguistic chauvinism of the States,[4] Medium of

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1. *State of Tamil Nadu v. Adhiyaman Educational & Research Institute*, (1995) 4 SCC 104.
2. *Prof. Yashpal v. State of Chhattisgarh*, (2005) 5 SCC 420 : AIR 2005 SC 2026.
3. *Gujarat University v. Sri Krishna*, AIR 1963 SC 707 : 1963 Supp (1) SCR 112.

instruction has been held to have an important bearing on the effectiveness of instruction and resultant standards achieved thereby.

It has been held again in *D.A.V. College v. State of Punjab*[5] that no State has the legislative competence to prescribe any particular medium of instruction in respect of higher education or research and scientific or technical instructions if it interferes with Parliament's power under entry 66, List I, to coordinate and determine the standards in such institutions and also to maintain high standards in university education throughout the country.

The impact of the *Gujarat University* seems to have been diluted somewhat by *Chitralekha v. State of Mysore*.[6] The question was whether giving of a weightage to extra-curricular activities as compared to academic record for admission to medical and engineering colleges would affect the Central power in entry 66 in List I. The crux of the *Gujarat* case was explained to be that if the impact of the State law providing for such standards on entry 66, List I, "is so heavy or devastating as to wipe out or appreciably abridge the Central field, it may be struck down."

Despite incorporation of universities being a legislative head in State List, the whole gamut of the university comes within the purview of List I Entry 66 and Parliament alone is competent therefor. It is the exclusive responsibility of Parliament to determine and maintain standards of higher education or research throughout the country and to ensure uniformity therein, and that the same are not lowerd at hands of any State, as it is of great importance to national progress.[7]

The Court refused to hold that if a State Legislature prescribed a higher percentage of marks for extra-curricular activities in the matter of admission to colleges, it would be directly encroaching on the field covered by entry 66 of List I. Justice SUBBA RAO thus sought to restrict the *ratio* of the *Gujarat University* case. In that case, what the Court had said was that any State law would be bad as "prejudicially affecting" the Union power of "co-ordination and maintenance of standards", if it seeks to lower standards in institutions of higher education. Nowhere in the *Gujarat University* case, has the majority said that a State law would be bad only if it *destroyed* the Union power. It was rightly pointed out by the minority Judge (Mudholkar J.) in *Chitralekha* that admission of less qualified students in preference to more qualified ones was bound to impair academic standards.[8]

The opinion of the Supreme Court has varied over time on the question whether laying down of a minimum standard for admission of students to an engineering/medical college relates to entry 66, List I, or entry 25, List III.

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4. Jain, Constitutional Aspects of the Language Problem in India, (1967-68) *Yearbook of the South Asia Institute*, Heidelberg University, 116.

5. AIR 1971 SC 1731 : (1971) 2 SCC 261.

6. AIR 1964 SC 1823 : (1964) 6 SCR 368.
The Judgment in *Chitralekha* was pronounced by SUBBA RAO, J., who had given a dissenting Judgment in the *Gujarat University* case.
Chitralakha ruling has been followed in several cases, *e.g.*, *Rajendran v. State of Madras*, AIR 1968 SC 1012 : (1968) 2 SCR 786; *State of Andhra Pradesh v. L. Narendra Nath*, AIR 1971 SC 2560.
Also see, *Ambesh Kumar*, footnote 10, *infra*.

7. *Prof. Yashpal v. State of Chhattisgarh*, (2005) 5 SCC 420 : AIR 2005 SC 2026.

8. Also see, Nayak, The Central-State Legislative Relationship in Education, 14, *J.I.L.I.*, 562; *P.K. Tripathi, Legislative Relations between the Union and the States & Educational Planning, Spotlight on Constitutional Interpretation*, 153 (1972).

In *State of Madhya Pradesh v. Kumari Nivedita Jain*,[9] the Supreme Court dealt with the question of admission of students to the M.B.B.S. Course in the State medical colleges. The Government of Madhya Pradesh framed rules providing for a minimum of 50% as qualifying marks for the students of general category for admission to medical colleges but for the students of Scheduled Castes/Scheduled Tribes, the minimum was zero. Upholding the validity of the rule, the Supreme Court opined that entry 66, List I, did not apply to the selection of candidates for admission to the medical colleges because standards would come in after admission of students. The Court ruled that entry 25, List III was wide enough to include within its ambit the question of selection of candidates to medical colleges and there was nothing in entries 63, 64, 65 and 66, List I to suggest the contrary.

The Government of India has made regulations under the Indian Medical Council Act, 1956, prescribing certain conditions for admission to post-graduate medical courses. This has been done under entry 66, List I. The U.P. Government by an order prescribed 55% as minimum marks for admission to post-graduate medical courses under entry 25, List III.

The question arose whether the State could impose qualifications in addition to those laid down by the Medical Council and the Regulations made by the Central Government in this connection. The U.P. order was held not bad as it was not in conflict with the regulations made by the Central Government. The order of the State Government merely provided an additional eligibility qualification. It did not encroach upon the power of the Centre to make laws in regard to matters provided in entry 66, List I.[10] The Court ruled that any additional qualifications which the State may lay down would not be contrary to entry 66, List I, since the additional qualifications were not in conflict with the Central Regulations but were designed to further the objectives of these Regulations which was to promote proper standards. The State order merely provided for an additional eligibility qualification.

In *Ajay Kumar Singh v. State of Bihar*,[11] the Supreme Court observed:

> "Entry 66 in List I does not take in the selection of candidates or regulation of admission to institutes of higher education. Because standards come into the picture after admissions are made".

Further, the Court opined that since all the students appear and pass the same examination at the end of the course, standards are maintained. Thus, the rules for admission do not have any bearing on standards. The quality is guaranteed at the exit stage. Therefore, even if students of lower merit are admitted in the course, this will not cause any detriment to the standards. Similar observations were made by the Court in *Post-Graduate Institute of Medical Education and Research Chandigarh v. K.L. Narasimham.*[12]

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9. AIR 1981 SC 2045 : (1981) 4 SCC 296.
10. *Dr. Ambesh Kumar v. Principal, LLRM Medical College, Meerut,* AIR 1987 SC 400 : (1986) Supp SCC 543.
11. (1994) 4 SCC 401.
12. AIR 1997 SC 3681 : (1997) 6 SCC 283.

The matter came again before the Supreme Court in *Preeti*.[13] The impugned rule in the instant case was similar to the one involved in *Nivedita*.[14] In the State of Madhya Pradesh, a common entrance examination was held for admission to post graduate degree courses. The cut-off point for admission for general category candidates was fixed at 45%, but for reserved category candidates it was fixed at 20%.[15] The Court examined the validity of these rules in *Preeti*. The most significant point which the Court has now insisted upon in the instant case is that standard of education is affected by admitting students with low qualifying marks.

Reading entries 66, List I, and entry 25, List III, the Supreme Court has ruled definitively that while controlling education under entry 25, a State cannot impinge on standards in institutions of higher learning as this matter lies solely and exclusively within the purview of theCentre under entry 66, List I. The Court has also ruled that it is not correct to say that the norms for admission have no connection with the standard of education. Norms of admission to an institution of higher education have a direct impact on the standards of education.

The Court has rightly argued in *Preeti* that if the students of low calibre are admitted to a course, the standard of teaching and instruction has to be lowered. But if the calibre of students is high, the level of teaching can also be high. The level of teaching depends on the calibre of the students. Therefore, the rules for admission have relation with the maintenance of standards and, thus, relates to entry 66, List. I. The Centre can, therefore, prescribe the same under entry 66, List I. A State may however impose some additional qualifications for admission, but it can not lower the norms laid down as it can have an adverse effect on the standards of education in the institutes of higher learning. This approach has vindicated the approach of MUDHOLKAR, J., in *Chitralekha*.[16]

Since medical and university education now falls in the Concurrent List (entry 25, List III), the Centre can legislate on admission criteria and, if it does so, the State cannot legislate in this field except to the extent provided in Art. 254.[17]

The Supreme Court has now overruled *Nivedita* insofar as it was held there that the question of standard arises only after admission and not at the time of admission. The Court has also overruled the earlier observation made by it in *Ajay Kumar Singh* that since all students passed the same common examination, standards are not adversely affected even as a result of admission of students of lower merit. The States can prescribe qualifications in addition to those prescribed under entry 66, List I, in order to raise standard of education, but lower-

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13. *Preeti Srivastava (Dr.) v. State of Madhya Pradesh*, AIR 1999 SC 2894 : (1999) 7 SCC 120. The Court overruled some observations to the contrary in such cases as *State of Madhya Pradesh v. Nivedita Jain*, (1981) 4 SCC 296 : AIR 1981 SC 2045 and *Ajay Kumar Singh v. State of Bihar*, (1994) 4 SCC 401.
The ruling in *Preeti* has been followed by the Supreme Court in *Venterinary Council of India v. Indian Council of Agricultural Research*, (2000) 1 SCC 750 : AIR 2000 SC 545.

14. *Supra*, footnote 9.

15. To begin with, the cut-off point for these candidates was zero. But the Supreme Court struck it down in *Dr. Sadhana Devi v. State of Uttar Pradesh*, AIR 1997 SC 1120 : (1997) 3 SCC 90, saying that if no minimum qualification was fixed for reserved category candidates, merit would be sacrificed altogether. Thereafter, the cut off point was fixed for such candidates as well though it was much lower than that for general candidates.

16. *Supra*, footnote 6.

17. For discussion on Art. 254, see, Sec. H, *infra.*

ing of norms laid down under entry 66 is not permissible as it has an adverse impact on the standard of education in institutes of higher learning. Any power exercised by a State in the area of education under entry 25, List III, is subject to any existing relevant provisions made in that regard by the Central Government. The States must comply with the minimum standards laid down in a Central Statute while making admissions. However, the States may, in addition, prescribe other additional norms for admission under entry 25, List III.

The Court declared both the provisions made by the States of U.P. and Madhya Pradesh as invalid. The Court ruled that the minimum qualifying marks for passing the entrance examination for admission to post-graduate medical course can be prescribed by the Centre under entry 66, List I. Further, the Court left it to the Medical Council of India, the body created by Parliament, to decide the question whether lower minimum qualifying marks for the reserved category candidates can be prescribed at the post-graduate level of medical education. But even if the minimum qualifying marks can be lowered for the reserved category candidates, there cannot be a wide disparity between the minimum qualifying marks for the reserved category and for those of the general category. The percentage of 20% for the reserved category and 45% for the general category (as was done in U.P.) has been held to be not permissible. Further, at the level of admission to the super speciality courses, no special provisions are permissible, they being contrary to national interest. Merit alone can be the basis of selection at that level.[18]

The Supreme Court has ruled[19] that the expression 'coordination' used in entry 66, List I, does not merely mean 'evaluation'. It means harmonisation with a view to forge a uniform pattern for a concerted action according to a certain design, scheme or plan of development. It, therefore, includes the action not only for removal of disparities in standards but also for prevention of occurrence of such disparities. Therefore, it would also include power to do all things which are necessary to prevent what would make 'co-ordination' either impossible or difficult.

The Court has held further that this power of the Centre is absolute and unconditional and in the absence of any valid compelling reasons, it must be given its full effect according to its plain and express intention. Therefore, to the extent that the State legislation is in conflict with the Central legislation even when the State legislation is enacted under entry 25, List III, the State Legislation cannot prevail. One thing, however, is quite clear from these cases. If the Centre were to lay down an all-India basic standard for admission, examination, *etc*., for institu-

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18. This Judgment has been delivered by four Judges.

S. R. MAJMUDAR, J., dissented with the majority view and propagated the view that the State can fix 50% minimum qualifying marks for passing the entrance examination for general category candidates and not less than 25% marks for reserved category of candidates. Basically the dissenting Judge propounded the view that it falls within the domain of the States running the institutions to regulate admissions to them as the matter falls under entry 25, List III.

Reference may also be made in this connection to the discussion on Art. 15(4), see, *infra*, Ch. XXII.

19. *State of Tamil Nadu v. Adhiyaman Educational and Research Institute,* 1995 AIR SCW 2179 : (1995) 4 SCC 104.

Also see, *Ramswarup Meena v. University of Rajasthan,* AIR 1997 Raj 35.

tions of higher education, that law would be good under entry 66, List I, and any State law or practice inconsistent therewith would be invalid.

In *Prem Chand Jain v. R.K. Chhabra,*[20] the Supreme Court has held that the University Grants Commission Act enacted by Parliament falls under entry 66, List I. The Act establishes the University Grants Commission.

The State of Andhra Pradesh passed an Act establishing the Commissionerate of Higher Education. The provisions of the State Act very much corresponded with the provisions of the University Grants Commission Act. With minor differences here and there, the State Act was in the same terms as the Central Act. The Supreme Court declared the State Act void and inoperative as it encroached upon entry 66, List I. The State Act established a corporate body with powers supreme in regard to all matters pertaining to higher education. The State sought to justify the Act under entry 25, List III, but the Supreme Court held the Act to fall under entry 66, List I. The State Act was in *pari materia* with the UGC Act as both the Acts dealt with the same subject-matter. Both dealt with the co-ordination and determination of excellence in the standards of teaching and examination in the universities, but this matter belonged exclusively to the Centre under entry 66, List I. Thus, the State had encroached upon entry 66, List I. Any State legislation on a subject falling in List I is void, inoperative and unenforceable.[21]

A State Act taking over a private educational institution falls not under entry 66, List I, but under entry 42, List III.[22]

Parliament has enacted the All India Council for Technical Education Act, 1987, with a view to the proper planning and co-ordinated development of the technical education system in India. The Act has been enacted under entry 66, List I, and entry 25 of List III. It lays down conditions for establishment of private engineering colleges. Accordingly, a State can not make a law on this subject under entry 25, List III inconsistent with the Central Act. Under s. 10(k) of the Central Act, power to grant approval for starting technical institutions vests in the Council. A law requiring approval of a State Government to start such a college will be repugnant to the Central law. The Central Act occupies the field relating to grant of approvals for establishing technical institutions and the provisions of the Central law alone are to be complied with in this respect.[23]

Conditions for establishment of new medical colleges can be laid down, by Parliament/State Legislatures under entry 25, List III. If, however, Parliament enacts a law and evinces an intention to occupy the entire field, then no space is left for the States to enact any law on the subject.[24]

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20. AIR 1984 SC 981 : (1984) 2 SCC 302.

21. *Osmania University Teachers Association v. State of Andhra Pradesh,* AIR 1987 SC 2034 : (1987) 4 SCC 671.

22. *L.N. Mishra Institute of E.D & Social Change v. State of Bihar,* AIR 1988 SC 1136.

23. *Unnikrishan, J.P. v. State of Andhra Pradesh,* AIR 1993 SC 2178 : (1993) 1 SCC 645; *State of Tamil Nadu v. Adhiyaman Educational & Research Institution,* (1995) 4 SCC 104; *Govt. of A.P. v. J.B. Educational Society Hyderabad,* AIR 1998 AP 400; *Jaya Gokul Educational Trust v. Commr. & Secy. to Govt. Higher Education Dept.,* AIR 2000 SC 1614 : (2000) 5 SCC 231; *Union of India v. Shah Goverdhan L. Kabra Teachers College,* (2002) 7 SCALE 435.

Also see, *Thirumuruga Kirupan & Variyar Thavathiru Sundara Swamigal Medical Education & Charitable Trust v. State of Tamil Nadu,* AIR 1996 SC 2384 : (1996) 3 SCC 15; see, *infra,* Sec. H. "under Repugnancy".

24. For discussion on the Rule of Occupied Field, see, *infra,* under 'Repugnancy', Sec. H(c).

Section 10A of the Indian Medical Council Act, 1956, enacted by Parliament, establishes the Indian Medical Council to prescribe standards of post-graduate medical education. The Act lays down conditions for establishment of new medical colleges. The Supreme Court has ruled that Parliament has made "a complete and exhaustive" provision concerning establishment of new medical colleges. No scope is thus left for any legislation by a State in this field which is fully covered by the law made by Parliament.[25]

Regulation of admission of students to Medical Colleges falls outside entry 66, List I, and inheres in entry 25, List III. While regulation of admission to medical courses may be incidental to the power under entry 66, List I, it is integral to the power conferred by entry 25, List III.[26]

A State law enabling incorporation of such universities which have off campus centres outside the state has been held to be *ultra vires* Art. 245(1).[27]

Referring to List II Entry 32, the Supreme Court has pointed out that incorporation of a company is entirely different from incorporation of a university and they are conceptually different. Sections, 3, 3(1)(i), 12, 13, 26, 33 and 34 of the Companies Act relate to incorporation of a company. It need not have a prior business and a mere statement of a lawful purpose in the memorandum of association is enough. If a company is unable to achieve its objective and is unable to carry on business, the shareholders may suffer some financial loss, but there is absolutely no impact on society at large. However, an university once incorporated gets a right to confer degrees. A university having no infrastructure or teaching facility of any kind would still be in a position to confer degrees and thereby create a complete chaos in the matter of coordination and maintenance of standards in higher studies which would be highly detrimental for the whole nation. A university may, therefore, be established by the State in exercise of its sovereign power which would obviously be through a legislative enactment. In the case of a private university it is necessary that it should be a pre-established institution for higher education with all the infrastructural facilities and qualities which may justify its claim for being conferred with the status of a university and only such an institution can be conferred the legal status and a juristic personality of a university. When the Constitution has conferred power on the State to legislate on incorporation of a university, any Act providing for establishment of a university must make such provisions that only an institution in the sense of university as it is generally understood, with all the infrastructural facilities, where teaching and research on a wide range of subjects and of a particular level are actually done, acquires the status of a university.[28]

(e) LIQUOR

The question of control over manufacture, production *etc*. of rectified spirit has been considered by the Supreme Court in *Bihar Distillery v. Union of India*[29].

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25. *T.K.V.T.S.S. Medical Educational & Charitable Trust v. State of Tamil Nadu,* AIR 1996 SC 2384 : (1986) 3 SCC 15; *Ayurvediya Chikitsa Parishad v. State of Uttar Pradesh,* AIR 1998 All 366.

26. *State of Madhya Pradesh v. Kumari Nivedita Jain,* AIR 1981 SC 2045 : (1981) 4 SCC 296; *Ajay Kumar Singh v. State of Bihar,* (1994) 4 SCC 401; *Nachane Ashwini Shivram v. State of Maharashtra,* AIR 1998 Bom 1; *Dr. Aditya Shrikant Kelkar v. State of Maharashtra,* AIR 1998 Bom. 260.

27. *Prof. Yashpal v. State of Chhattisgarh,* (2005) 5 SCC 420 : AIR 2005 SC 2026.

28. *Prof. Yashpal v. State of Chhattisgarh,* (2005) 5 SCC 420 : AIR 2005 SC 2026.

29. AIR 1997 SC 1208 : (1997) 2 SCC 727.

There has been a lot of confusion on this point. A number of judicial pronouncements have been made earlier[30] and the judicial opinion has been shifting from case to case. Now, in *Bihar Distillery*, the Court has rendered a definitive opinion on the point.

A number of entries become relevant in this connection, *viz.*, entries 7 and 52, List I; entries 8 and 24, List II, and entry 33, List III. There is also the Industries (Development & Regulation) Act, 1951, enacted by Parliament under entry 52, List I, which has taken over fermentation industries under Central control. After a combined reading of all these provisions, the Court has come to the following conclusions.

(a) Rectified spirit is both potable and non-potable. It means that it can be converted into country liquor just by adding water; it is also industrial alcohol as it is used as raw material for many industries. But denatured spirit is non-potable and wholly and exclusively industrial alcohol.

(b) As regards industries manufacturing rectified spirit exclusively for industrial purposes, they fall under the total and exclusive control of the Centre and are governed by the IDR Act. The function of the States is to ensure that rectified spirit is not diverted or misused for potable purposes.[31]

(c) Industries manufacturing rectified spirit exclusively for manufacturing potable liquors are under the total and exclusive control of the States in all respects and at all stages.

(d) The position regarding industries manufacturing rectified spirit for both purposes—potable as well as industrial – is as follows. The power to permit establishment of distillery vests exclusively in the Centre. The States can however take steps to ensure against misuse or diversion of rectified spirit meant for industrial purposes.

The Court has clarified that under entry 8, List II, the power to permit the establishment of any industry engaged in the manufacture of potable liquors (including Indian made foreign liquors), beer, country liquors and other intoxicating drinks is exclusively, vested in the States. The power to prohibit and/or regulate the manufacture, production, sale, transport or consumption of such intoxicating liquors is equally that of the States. It has also been clarified that entry 8, List II, is not overridden by entry 52, List I.[32]

(f) LAW AND ORDER

Parliament has enacted the Armed Forces (Special Powers) Act, 1958, for the suppression of disorder and for restoration and maintenance of public order in the disturbed areas of Assam. The constitutional validity of the Act was challenged before the Supreme Court. To decide the matter, the Supreme Court had to elucidate the relationship between entries 2A of List I and 1 of List II.

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30. *Synthetics & Chemicals v. State of Uttar Pradesh*, AIR 1980 SC 614 : (1980) 2 SCC 441 : AIR 1990 SC 1927 : (1990) 1 SCC 109; *State of Andhra Pradesh. v. McDowell*, AIR 1996 SC 1561 : (1996) 3 SCC 709.

31. *Shri Bileshwarkhana Udyog Khedut Sahakari Mandal Ltd. v. State of Gujarat*, AIR 1992 SC 872 : (1992) 2 SCC 42.

32. *State of Andhra Pradesh v. McDowell*, AIR 1996 SC 1561 : (1996) 3 SCC 709, *Bihar Distillery v. Union of India*, AIR 1997 SC 1208, 1219 : (1997) 3 SCC 727.

The States have power to legislate with respect to "public order" under entry 1, List II. Out of this entry, the field encompassing the use of armed forces in aid of civil power has been carved out and, thus, legislative power with respect to that field has been excluded from the State purview. The States have no power to legislate with respect to the use of the armed forces of the Union in aid of civil power for the purpose of maintaining public order in the State. The legislative competence with respect to that matter vests exclusively in Parliament under entry 2A of List I.

The expression "in the aid of civil power" in entry 2A postulates that the civil authority continues to exist even after the deployment of armed forces. The Centre cannot enact a law enabling the armed forces of the Union "to supplant or act as a substitute for" the civil power of the State.

The Supreme Court has rejected the contention that in the event of deployment of armed forces of the Union in aid of civil power in a State, the supervision and control over the armed forces has to be with the State civil authorities. According to the Court, "The said forces shall operate in the State concerned in cooperation with the civil administration so that the situation which has necessitated the deployment of the Armed Forces is effectively dealt with and normalcy is restored."[33]

The Court has ruled that the impugned Act is not *ultra vires* the legislative power of Parliament conferred on it by entry 2A, List I.

(iv) RULE OF PITH AND SUBSTANCE

Parliament or a State Legislature should keep within the domain assigned to it, and not trespass into the domain reserved to the other. A law made by one which trespasses or encroaches upon the field assigned to the other is invalid. If a subject falls exclusively in List II, and in no other List, then the power to legislate exclusively vests in the State Legislature. But if it also falls in List I as well, then the power belongs to the Centre. Similarly if it falls within List III also, then it is deemed to be excluded from List II. The dominant position of Parliament in List I and List III is thus established.

But before the legislation with respect to a subject in one List, and touching also on a subject in an other List, is declared to be bad, the Courts apply the rule of pith and substance.[34] To adjudge whether any particular enactment is within the purview of one legislature or the other, it is the pith and substance of the legislation in question that has to be looked into. This rule envisages that the legislation as a whole be examined to ascertain its 'true nature and character' in order to determine to what entry in which List it relates. In determining whether the impugned Act is a law with respect to a given power, the Court has to consider whether the Act, in its pith and substance, is a law on the subject in question. To examine whether a legislation has impinged on the field of other legislatures, in

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33. *Naga People's Movement of Human Rights v. Union of India,* AIR 1998 SC 431 at 447 : (1998) 2 SCC 109.

34. The rule has been borrowed from Canada. Some Canadian cases on the rule are: *Citizens Insurance Company v. Parsons*, 7 A.C. 96; *Russell v. The Queen*, 7 A.C. 829; *Att. Gen for Canada v. Att. Gen. for British Columbia*, 1930 A.C. 111; *Att. Gen. for Saskatchewan v. Att. Gen. for Canada*, AIR 1949 P.C. 190.

fact or in substance, or is incidental, keeping in view the true nature of the enactment, the Courts have evolved the doctrine of "pith and substance" for the purpose of determining whether it is legislation with respect to matters in one list or the other. For applying the principle of "pith and substance" regard is to be had (i) to the enactment as a whole, (ii) to its main objects, and (iii) to the scope and effect of its provisions. Where the question for determination is whether a particular law relates to a particular subject mentioned in one list or the other, the Courts look into the substance of the enactment. Thus, if the substance of enactment falls within the Union List then the incidental encroachment by the enactment on the State List would not make it invalid.[35]

To ascertain the true character of the legislation in question, one must have regard to it as a whole, to its objects and to the scope and effect of its provisions. If according to its 'true nature and character', the legislation substantially relates to a topic assigned to the Legislature which has enacted it, then it is not invalid 'merely because it incidentally' trenches or encroaches on matters assigned to another Legislature. The fact of incidental encroachment does not affect the *vires* of the law even as regards the area of encroachment. To put it differently, incidental encroachment is not altogether forbidden.

The Supreme Court has enunciated the principle in *Premchand Jain v. R.K. Chhabra*[36] as follows:

> "As long as the legislation is within the permissible field in pith and substance, objection would not be entertained merely on the ground that while enacting legislation, provision has been made for a matter which though germane for the purpose for which competent legislation is made, it covers an aspect beyond it. In a series of decisions this Court has opined that if an enactment substantially falls within the powers expressly conferred by the Constitution upon the Legislature enacting it, it cannot be held to be invalid merely because it incidentally encroaches on matters assigned to another legislature."[37]

To ascertain the true character of a law, it must be looked into as an organic whole. It would be a wrong approach to view the statute as a mere collection of sections, to disintegrate it into parts and then to examine under which entry each part would fall and then to determine which part of it is valid and which invalid. Instead, the Act should be taken in one piece and then its true character determined. The name given by the legislature to the legislation is immaterial.[38] It is not enough to examine the object of enactment in question.[39]

Wrong reason in the Statement of Objects and Reasons for imposing the tax would not render the Act invalid.

If the State Legislature was competent to pass the Act, the question of motive with which the tax was imposed is immaterial and there can be no plea of a colourable exercise of power to tax if the Government had the power to impose the tax.[40]

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35. *Bharat Hydro Power Corpn. Ltd. v. State of Assam*, (2004) 2 SCC 553 : AIR 2004 SC 3173.
36. AIR 1984 SC 981 : (1984) 2 SCC 302.
37. Also see, *State of Rajasthan v. Vatan Medical & General Store*, AIR 2001 SC 1937 : (2001) 4 SCC 642.
38. *State of W. B. v. Kesoram Industries Ltd.*, (2004) 10 SCC 201 : AIR 2005 SC 1646.
39. *E. V. Chinnaiah v. State A.P.*, (2005) 1 SCC 394 : AIR 2005 SC 162.
40. *State of Gujarat v. Akhil Gujarat Pravasi V.S. Mahamandal*, (2004) 5 SCC 155 : AIR 2004 SC 3894.

The doctrine of pith and substance saves the incidental encroachment if only the law in pith and substance falls within an entry within the legislative field of the particular legislature which has enacted it. The validity of legislation is not determined by the degree of invasion into the field assigned to the other legislature though it is a relevant factor to determine its 'pith and substance', as the legislation in question may advance so far into the other sphere as to show that its true nature and character is not concerned with a matter falling within the domain of the enacting legislature, in which case it will not be valid.

Once it is found that in pith and substance a law falls within the permitted field, any incidental encroachment by it on a forbidden field does not affect the competence of the concerned legislature to enact the law. "Effect is not the same thing as subject-matter. If a State Act, otherwise valid, has effect on a matter in List I it does not cease to be a legislation with respect to an entry in List II or III".[41]

The practical working of the rule can be appreciated by referring to a few decided cases.

The Bengal Money Lenders Act passed to scale down debts owed by the agriculturists, was challenged on the ground that being a provincial (State) law, it affected promissory notes, a Central subject (Entry 46, List I). The Privy Council found that in its true nature and character, the legislation dealt with money-lenders and money-lending (Entry 30, List II), and not with promissory notes. The money-lenders commonly take a promissory note as security for a loan. A legislature would not, in any real sense, be able to deal with money-lending if it cannot limit the liability of a borrower in respect of a promissory note given by him. The Act was held valid even though as an ancillary effect it affected the negotiable instruments—a Central subject.[42]

The Supreme Court has enunciated the rule of pith and substance in *Balsara*[43] as follows:

> "It is well settled that the validity of an Act is not affected if it incidentally trenches on matters outside the authorised field and, therefore, it is necessary to enquire in each case what is the pith and substance of the Act impugned. If the Act, when so viewed, substantially falls within the powers expressly conferred upon the legislature which enacted it then it cannot be held to be invalid merely because it incidentally encroaches on matters which have been assigned to another legislature".

Applying the rule of pith and substance, it has been held that—

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41. *State of Bombay v. Narottamdas*, AIR 1951 SC 69, 96 : 1951 SCR 51; *Atiabari Tea Co. v. State of Assam*, AIR 1961 SC 232 : 1961 (1) SCR 809; *Kannan D.H.P. Co. v. State of Kerala*, AIR 1972 SC 2301. Also, *Sita Ram v. State of Rajasthan*, AIR 1974 SC 1373; *Kerala State Electricity Board v. Indian Aluminium*, AIR 1976 SC 1031; *State of Karnataka v. Ranganatha Reddy*, AIR 1978 SC 251; *Southern Pharmaceuticals and Chemicals v. State of Kerala*, AIR 1981 SC 1863 : (1981) 4 SCC 391; *Hoechst Pharmaceutical Ltd. v. State of Bihar*, AIR 1983 SC 1019 : (1983) 4 SCC 45; *Krishan Bhimrao Deshpande v. Land Tribunal*, AIR 1993 SC 883; *P.N. Krishna Lal v. Govt. of Kerala*, (1995) Supp (2) SCC 187; *Kartar Singh v. State of Punjab*, (1994) 3 SCC 569 : 1994 Cri LJ 3139; *Union of India v. Shah Goverdhan L. Kabra Teachers College*, (2002) 7 SCALE 435.

42. *Prafulla Kumar v. Bank of Commerce, Khulna*, 74 I.A. 23. Also *Subrahmanyan v. Muttuswami*, AIR 1941 FC 47.

43. *State of Bombay v. Balsara*, AIR 1951 SC 318, at 322. Also see, *Atiabari Tea Co. Ltd. v. State of Assam*, AIR 1961 SC 232 : (1961) 1 SCR 809.

(*i*) A State law enforcing prohibition is valid because it prohibits purchase, use, possession, transport and sale of liquor (Entry 8, List II), and it only incidentally encroaches on the Central power on imports (Entry 41, List I).

(*ii*) A State prohibition law is valid even though it also deals with some aspects of evidence and criminal procedure which fall in the Concurrent List, for the law deals, in substance, with intoxicating liquors and only incidentally with evidence and criminal procedure.[44]

(*iii*) The Industrial Disputes Act enacted by Parliament, even though it applies to employees of municipalities, is valid as, in substance, it deals with 'industrial and labour disputes' (Entry 22, List III), and not with 'local government' (Entry 5, List II).[45]

(*iv*) A State law banning use of amplifiers after 10 P.M. is valid as it seeks to control use of amplifiers in the interests of health (Entry 6, List II), and it only incidentally touches upon entry 31, List I.[46]

(*v*) A State law dealing with co-operative societies engaged in the banking business falls under entry 32, List II, and not under Entry 44 or 45, List I.[47]

(*vi*) A State Law dealing with chit funds falls under Entry 7, List III, and not under Entries 26 or 30 of List II. It does not fall under Entry 34, List II, as there is no element of gambling in running chits, nor under Entry 45, List I, as the essence of banking is absent in running chits.[48]

(*vii*) A State law reducing arrears of rent or debts due from agriculturists falls under entries 18 and 30, List II.[49]

(*viii*) The Central Reserve Police Force Act enacted by Parliament falls under Entry 2, List I, and Entries 1 and 2, List III, and not under Entry 2, List II.[50]

(*ix*) The object of the Advocates Act, 1961, is to constitute one common Bar for the whole country and to provide machinery for its regulated functioning. Though the Act relates to legal practitioners, in its pith and substance it concerns itself with the qualifications, enrolment and discipline of the persons entitled to practise as advocates before the Supreme Court or the High Courts. The Act thus falls under items 77 and 78 of List I. The power to legislate in regard to such persons is excluded from entry 26 of List III.[51]

(*x*) In *Krishna v. State of Madras*,[52] applying the rule of pith and substance, the Supreme Court upheld the Madras Prohibition Act, even though it laid down procedure and principles of evidence for trial of offences under the law in question very different from those contained in the Criminal Procedure Code and the In-

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44. *Krishna v. State of Madras*, AIR 1957 SC 297 : 1957 SCR 399.
45. *D.N. Banerji v. P.R. Mukherjee*, AIR 1953 SC 58 : 1953 SCR 302.
46. *State of Rajasthan v. Chawla*, AIR 1959 SC 544 : 1959 Supp (1) SCR 904.
47. *Central Co-op. Bank, Nagpur v. Divisional Jt. Registrar*, AIR 1971 Bom. 365; *Sultan Singh v. Asstt. Registrar*, AIR 1972 All. 159.
48. *C.C. Fund v. Union Territory of Pondicherry*, AIR 1972 Mad. 99.
49. *K.W. Estates v. State of Madras*, AIR 1971 SC 161 : (1970) 3 SCC 894.
50. *State of West Bengal v. Tarun Kumar*, AIR 1975 Cal. 39.
51. *O.N. Mohindroo v. Bar Council*, AIR 1668 SC 888 : (1968) 2 SCR 709; *Bar Council, U.P. v. State of Uttar Pradesh*, AIR 1973 SC 231 : (1973) 1 SCC 261.
52. AIR 1957 SC 297 : 1957 SCR 399.

dian Evidence Act, both Central Acts in the Concurrent field. In this case, the Court appears to have gone rather too far in upholding the State law.

In *Ukha*,[53] the Supreme Court had held that provisions in the State law in question concerning criminal procedure and evidence fell under entries 2 and 12 of List III. The only difference in the situations in the two cases appears to be that, while in *Ukha* the State law had received the Presidential assent, the law involved in *Krishna* had not been so reserved, and this perhaps explains the dichotomy in the judicial attitudes, for to take the same view in *Krishna*, as was done in *Ukha*, would have been to hold the law bad on the ground of repugnancy with a Central law.[54]

The danger in taking the *Krishna* doctrine too far is that the uniformity achieved in the procedural areas may be destroyed; the Cr.P.C. would become limited to offences under the I.P.C., and the States would be free to lay down their own brand of procedure and evidence for trial of offences created by their own laws under List II.

The doctrine of pith and substance introduces a degree of flexibility into the otherwise rigid scheme of distribution of powers. It gives an additional dimension to the powers of the Centre as well as the States. The reason behind the rule is that if every legislation were to be declared invalid, howsoever, slight or incidental the encroachment by it of the other field, then the power of each legislature will be drastically circumscribed to deal effectively with the subjects entrusted to it for legislation.

Though the rule applies to both, the Centre and the States, and helps both to some extent, yet since Parliament is the more dominant legislature and its powers are more generally and broadly worded, the State Legislatures benefit much more by the rule than Parliament, for the rule enables them to incidentally trespass into the much larger, and comparatively more important, Central Area.

The doctrine gives quite a good deal of maneuverability to the Courts. It furnishes them with a tool to uphold legislation, for it is for them to decide its true nature and character and, thus, they have a number of choices open to them and most often the Courts by putting a favorable interpretation on the legislation in question use their power to support the same.[55]

Legislation made under the power of regulation and control of one legislature, in respect of a particular subject of legislation, does not *ipso facto* deprive another legislature of the power of taxation in respect of the same subject of legislation. Power to tax or impose a levy for augmenting revenue shall continue to be exercisable by the legislature in whom it vests, in spite of regulation or control having been assumed by another legislature, unless the tax legislation concerned levies a tax in such a manner or of such magnitude as can be demonstrated to be tampering or intermeddling with the other legislature's power of regulation and control. Further it has been held that the primary object and the essential purpose of legislation must be distinguished from its ultimate or incidental results or consequences, for determining the character of the levy. A levy essentially in the

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53. *Ukha Kolhe v. State of Maharashtra*, AIR 1963 SC 1531 : (1964) 1 SCR 926.
54. See, Sec. H, *infra*, on this aspect.
55. Also see, *Kannan D.H.P. Co. v. State of Kerala*, AIR 1972 SC 2301 : (1972) 2 SCC 218; *supra*, footnote 41.

nature of a tax and within the power of taxation of the legislature concerned cannot be annulled as unconstitutional merely because it may have an effect on the price of the commodity by reason of the incidence of the levy being permitted to be passed on to the buyer.[56]

(v) DOCTRINE OF COLOURABLE LEGISLATION

The doctrine of colourable legislation is based on the maxim that what cannot be done directly cannot also be done indirectly. The doctrine becomes applicable when a legislature seeks to do something in an indirect manner what it cannot do directly. The doctrine thus refers to the question of competency of the legislature to enact a particular law. If the impugned legislation falls within the competence of the legislature, the question of doing something indirectly which cannot be done directly does not arise.

The doctrine of colourable legislation does not involve any question of *bona fides* or *mala fides* on the part of the legislature. If the legislature is competent to pass a particular law, the motives which impelled it to act are irrelevant. On the other hand, if the legislature lacks the competency, the question of motive does not arise at all; the legislation will be invalid even if enacted with the best of motives. Whether a statute is constitutional or not is thus a question of power. "Malice or motive is beside the point, and it is not permissible to suggest parliamentary incompetence on the score of *mala fides*."[57]

The Constitution distributes legislative powers between the State Legislatures and Parliament, and each has to act within its sphere. In respect of a particular legislation, the question may arise whether the legislature has transgressed the limits imposed on it by the Constitution. Such transgression may be patent, manifest or direct, or may be disguised, covert or indirect. It is to the latter class of cases that the expression 'colourable legislation' is applied. The underlying idea is that although, apparently, a legislature in passing a statute purports to act within the limits of its powers, yet, in substance and reality, it has transgressed these limits on its powers by taking resort to a mere pretence or disguise. If that is so, the legislation in question is invalid.

The legislation enacted may be regarded on colourable legislation. It is only when a legislature having no power to legislate frames a legislation so camouflaging the same as to make it appear to fall within its competence, the legislation enacted may be regarded as colourable legislation. The extent of encroachment in the field reserved for the other legislature is an element for determining whether the impugned Act is a colourable piece of legislation.

The essence of the matter is that a legislature having restrictive power cannot seek to do something indirectly which it cannot accomplish directly within the scope of its power. A legislature cannot overstep the field of competency indirectly. It is also characterised as a fraud on the Constitution because no legislature can violate the Constitution by employing an indirect method. The Supreme

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56. *State of W. B. v. Kesoram Industries Ltd.*, (2004) 10 SCC 201 : AIR 2005 SC 1646.
57. *R.S. Joshi v. Ajit Mills, Ahmedabad*, AIR 1977 SC 2279 : (1977) 4 SCC 98. Also see, Ch. II, Sec. M, *supra.*

Court has explained the doctrine of colourable legislation as follows in *Gajapati*:[58]

> "If the constitution of a State distributes the legislative powers amongst different bodies, which have to act within their respective spheres marked out by specific legislative entries... questions do arise as to whether the legislature in a particular case has or has not, in respect to the subject matter of the statute or in the method of enacting it, transgressed the limits of its constitutional powers. Such transgression may be patent, manifest or direct, but it may also be disguised, covert or indirect, and it is to this latter class of cases that the expression colourable legislation has been applied... The idea conveyed by the expression is that although apparently a legislature in passing a statute purported to act within the limits of its powers, yet, in substance and in reality it transgressed these powers, the transgression being veiled by what appears, on proper examination, to be mere pretence or disguise."

To the same effect is the following observation of the Supreme Court in *R.S. Joshi*:[59]

> "In the jurisprudence of power, colourable exercise of or fraud on legislative power or, more frightfully, fraud on the Constitution, are expressions which merely mean that the legislature is incompetent to enact a particular law, although the label of competency is stuck on it, and then it is colourable legislation. It is very important to notice that if the legislature is competent to pass the particular law, the motives which impel it to pass the law are really irrelevant…. if a legislation, apparently enacted under one Entry in the List, falls in plain truth and fact, within the content, not of that Entry but of one assigned to another legislature, it can be struck down as colourable even if the motives were most commendable."

To decide whether or not the legislature has transgressed the sphere assigned to it, what is material is the pith and substance; the true nature and character, of the legislation in question and not its outward or formal appearance. If the subject-matter of the legislation, in substance, is beyond the powers of the legislature, the form in which the legislation is clothed would not save it from condemnation.[60] As the Supreme Court has observed in *Gajapati:* "The legislature cannot violate the constitutional prohibitions by employing an indirect method. In cases like these the inquiry must always be as to the true nature and character of the challenged legislation and it is the result of such investigation and not the form alone that will determine as to whether or not it relates to a subject which is within the power of the legislative authority."[61]

The doctrine of colourable legislation has no application if the legislature concerned has constitutional authority to pass a law in regard to a particular subject, whatever the reasons behind it may be. The whole doctrine resolves itself into the question of competency of the enacting legislature to enact the law in question.

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58. *K.C. Gajapati Narayana Deo v. State of Orissa*, AIR 1953 SC 375 : 1954 SCR 1. Also see, *Gullapalli Negeswara Rao v. A.P. State R.T.C.*, AIR 1959 SC 308, 316 : 1959 Supp (1) SCR 319; *K. Kunhikoman v. State of Kerala*, AIR 1962 SC 723 : 1962 Supp (1) SCR 829; *Jayvantsinghji v. State of Gujarat*, AIR 1962 SC 821 : 1962 Supp (2) SCR 411; *Jalan Trading Co v. Mill Mazdoor Sabha*, AIR 1967 SC 691 : (1967) 1 SCR 15; *Jabalpur Bus Operators' Ass. v. Union of India*, AIR 1994 MP 62.

59. *Supra*, footnote 57.

60. *Ashok Kumar v. Union of India,* AIR 1991 SC 1792 : (1991) 3 SCC 498. For the Rule of Pith and Substance, see, *supra.*

61. *Supra*, footnote 58.

If the legislature is competent to pass the particular law, the motives which impel it to make the law are irrelevant.[62] As the Supreme Court has stated[63]: "The doctrine of colourable legislation is relevant only in connection with the question of legislative competency". Also, if the legislature is competent to do a thing directly then the mere fact that it is attempting to do it indirectly cannot make the Act invalid.

In a recent case,[64] the Supreme Court rejecting the argument that the Armed Forces (Special Powers) Act, 1958, enacted by Parliament is colourable legislation and a fraud on the Constitution, has observed in this connection:

> "The use of the expression 'colourable legislation' seeks to convey that by enacting the legislation in question the legislature is seeking to do indirectly what it cannot do directly. But ultimately the issue boils down to the question whether the legislature had the competence to enact the legislation because if the impugned legislation falls within the competence of the legislature the question of doing something indirectly which cannot be done directly does not arise".

The real purpose of a legislation may be different from what appears on its face, but it would be colourable legislation only if the real object is not attainable by the Legislature because it lies beyond its ambit. The impugned Act has been held to relate to entry 2 of List I as well as the residuary power of Parliament under Art. 248 read with entry 97 of List I.[65]

The doctrine of colourable legislation has reference to the competence and not to the motives, *bona fides* or *mala fides* of the legislature. The motives of a legislature in making a law are irrelevant.

It is not for the Courts to divine and scrutinise the policy which led to the enactment of a law falling within the ambit of the legislature concerned. As the Supreme Court has observed:[66] "The motive of the legislature in passing a statute is beyond the scrutiny of the Courts....The propriety, expediency and necessity of a legislative act are for the determination of the legislative authority and are not for determination by the Courts."[67]

It is rare that a law is declared bad on the ground of colourable legislation. A State law dealing with the abolition of the landlord system, provided for payment of compensation on the basis of income accruing to the landlord by way of rent. Arrears of the rent due to the landlord prior to the date of acquisition were to vest in the State, and half of these arrears were to be given to the landlord as compensation. The provision was held to be a piece of colourable legislation and hence void[68] under entry 42,

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62. *Shankaranarayana, infra,* footnote 66.
63. *Bhairebendra Narayan v. State of Assam,* AIR 1956 SC 503 : 1956 SCR 303.
64. *Naga People's Movement for Human Rights v. Union of India,* AIR 1998 SC 431, 451 : (1998) 2 SCC 109. For this Act, see, *supra,* Sec. E.
65. For Residuary Power of Parliament, see, Sec. I.
66. *B.R. Shankaranarayana v. State of Mysore,* AIR 1966 SC 1571 : (1967) 2 LLJ 751; *T.G. Venkataraman v. State of Madras,* AIR 1970 SC 508 : (1969) 2 SCC 299; *Laxmi Narayan v. State of Orissa,* AIR 1983 Ori. 210; *R.S. Joshi v. Ajit Mills,* 1977 SC 2279 : (1977) 4 SCC 98.
67. *T. Venkata Reddy v. State of Andhra Pradesh,* AIR 1985 SC 724, 733 : 1985 (3) SCC 198.
68. *State of Bihar v. Kameshwar,* AIR 1952 SC 252, 289 : 1952 SCR 889.

List III,[69] as "the taking of the whole and returning a half means nothing more or less than taking half without any return and this is naked confiscation, no matter in whatever specious form it may be clothed or disguised. The impugned provision, therefore, in reality does not lay down any principle for determining the compensation to be paid for acquiring the arrears of rent".

If a statute is found to be invalid on the ground of legislative competence, it does not permanently inhibit the legislature from re-enacting the same if the power to do so is properly traced and established. In such a situation, it cannot be said that the subsequent legislation is merely a colourable legislation or a camouflage to re-enact the invalidated previous legislation.[70]

Recently the Supreme Court has further elucidated the doctrine of colourable exercise of power in *S.S. Bola v. B.D. Sardana.*[71] The question whether it is colourable legislation, and as such void, does not depend on the motive or *bona fides* of the legislature to pass that particular law. What the Court has to determine in such a case is whether the legislature has purported to act within the limits of the power. There is in reality and substance a transgression of the powers, but the same is veiled by what appears on proper examination to be a mere pretence or disguise. If the legislature enacts a law on the pretext of the exercise of its legislative power, though actually it does not possess such power, the legislation to that extent is void as the legislature makes its Act only in pretence of, and in purported colourable exercise of, its power. It has been held that an university cannot be established only to provide consultancy work to industry and public organizations. Chhattisgarh Adhniyam of 2002 permitting creation of such universities was a colourable piece of legislation.[72]

H. REPUGNANCY BETWEEN A CENTRAL AND STATE LAW

(a) ARTICLE 254(1)

The constitutional provision relevant for solving questions of repugnancy between a Central law and a State law is to be found in Art 254.

According to Art. 254(1), if any provision of a State law is repugnant to a provision in a law made by Parliament which it is competent to enact, or to any existing law with respect to one of the matters in the Concurrent List, then the Parliamentary or the existing law prevails over the State law, and it does not matter whether the Parliamentary law has been enacted before or after the State law. To the extent of repugnancy, the State law is void.

The most common application of this provision arises when both the Central law and the State law happen to be with respect to the same matter in the Concurrent List and there is repugnancy between them. Repugnancy between two statutes—Central and State—arises if there is direct conflict, *i.e.* these laws are fully inconsistent and have absolutely irreconcilable provisions and if the laws made

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69. At this time, entry 42, List III, spoke of "principles on which compensation for property acquired or requisitioned for the purpose of the Union or of a State or any other public purpose is to be determined, and the form and the manner in which such compensation is to be given."

The entry has since been substantially modified, *supra*, Sec. F.

70. *S. Sat Pal & Co. v. Lt. Gov. of Delhi*, AIR 1979 SC 1550, 1555 : (1979) 4 SCC 232.

71. AIR 1997 SC at 3183, 3190 : (1997) 8 SCC 522.

72. *Prof. Yashpal v. State of Chhattisgarh*, (2005) 5 SCC 420 : AIR 2005 SC 2026.

by Parliament and the State Legislature occupy the same field.[73] The Supreme Court has said that every effort should be made to reconcile the two enactments and construe both so as to avoid they being repugnant to each other. Repugnancy has to be there in fact and not based on a mere possibility. If the two enactments operate in different fields without encroaching upon each other then there would be no repugnancy.[74]

The repugnancy has to exist in fact and it must be shown clearly and sufficiently that the State law is repugnant to the Union law. There is no such repugnancy between Ss. 13 to 16 of State Act i.e. Maharashtra Control of Organised Crime Act, 1999 and provisions of Central Act i.e., Telegraph Act, 1885, S. 5(2) read with Telegraph Rules, 1951.[75]

Because of Art. 254(1), the power of Parliament to legislate in regard to matters in List III is supreme. Art. 254(1) gives overriding effect to the provisions of a law made by Parliament which Parliament is competent to enact. A law made by the State is void if it is repugnant to the Central law.

The phraseology of the provision on a plain reading suggests that it would apply to all cases of repugnancy between a Central law and a State law. It does not say that the State law and the Central law should belong to the Concurrent List only. The words 'in the Concurrent List' appear to qualify only the 'existing' law which means that an existing law in relation to a matter in the Concurrent List prevails over a State law in that area in case of repugnancy. So far as the post-Constitution laws are concerned, the words used are "which Parliament is competent to enact" which are quite broad and would comprise laws made by the Centre both in the Central as well as the Concurrent Lists. This will mean that if there is repugnancy between a State law falling in the State List and a Central law falling in the Central List, the latter should prevail over the former. But the judicial interpretation of Art. 254(1) has so far been otherwise. The judicial decisions have consistently ruled that repugnancy arises, and Art. 254(1) applies, only when both the laws—Central and the State—pertain to a matter in the Concurrent List, and not otherwise.[76] The Supreme Court has explained the purport of Art. 254(1) as follows in *Hoechst*:[77]

> "Cl. (1) lays down that if a State law relating to a concurrent subject is 'repugnant' to a Union Law relating to that subject, whether the Union law is prior or later in time, the Union Law will prevail and the State law shall, to the extent of such repugnancy, be void."

If a State makes a law with respect to a matter in the State List, then there is no question of repugnancy between it and a Central law pertaining to a matter in the Central or Concurrent List. This view is based on the rule of pith and substance. If a State law is enacted with respect to a matter in List I, it is void, but if it falls

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73. *Deep Chand v. State of Uttar Pradesh*, AIR 1959 SC 648 : 1959 Supp (2) SCR 8; *Vijay Kumar Sharma v. State of Karnataka*, AIR 1990 SC 2072, 2080 : (1990) 2 SCC 562. Also see, *infra.*

74. *Bharat Hydro Power Corpn. Ltd. v. State of Assam*, (2004) 2 SCC 553 : AIR 2004 SC 3173. See also *Central Bank of India v. State of Kerala*, (2009) 4 SCC 94 : (2009) 3 JT 216.

75. *State of Maharashtra v. Bharat Shanti Lal Shah*, (2008) 13 SCC 5 : (2008) 10 JT 77.

76. *State of Jammu & Kashmir v. M.S. Farooqi*, AIR 1972 SC 1738 : 1972 (1) SCC 872; *Bar Council of Uttar Pradesh v. State of Uttar Pradesh*, AIR 1973 SC 231 : (1973) 1 SCC 261; *K.S.E. Board v. Indian Aluminium Co.*, AIR 1976 SC 1031.

77. *Hoechst Pharm. Ltd. v. State of Bihar*, AIR 1983 SC 1019, 1041 : (1983) 4 SCC 45.

within the State List then its incidental encroachment into the Concurrent List will not render it invalid.[78]

A word of comment on this judicial approach to Art. 254(1) is called for at this stage. When an impugned statute appears to touch two different entries in two lists, then the rule of pith and substance helps in characterising the law as belonging to this or that entry. But, under Art. 254(1), questions of a different nature arise. Here the question is not whether a statute falls under this entry or that, but whether a State law comes into conflict with a Central law or not. It has been elucidated by the Supreme Court that for application of this article, firstly, there must be repugnancy between the State law and the law made by the Parliament. Secondly, if there is repugnancy, the State legislation would be void only to the extent of repugnancy. If there is no repugnancy between the two laws, there is no question of application of Article 254(1) and both the Acts would operate. Repugnancy between two statutes may be ascertained by considering whether Parliament intended to lay down an exhaustive code in respect of the subject matter replacing the Act of the State Legislature. Where the paramount legislation does not purport to be exhaustive or unqualified there is no inconsistency and it cannot be said that any qualification or restriction introduced by another law is repugnant to the provision in the main or paramount law. Before coming to the conclusion that there is a repeal by implication, the Court must be satisfied that the two enactments are so inconsistent that it becomes impossible for them to stand together.[79]

It does not appear to be a sound proposition to confine Art. 254(1) only to the situation where the Central-State laws fall in the Concurrent List rather than when they fall in different Lists and yet are inconsistent to some extent. It is true that situations of repugnancy arise most commonly when the two laws fall in the same List, but it is not inconceivable that similar difficulty may arise when the two statutes fall in two different Lists.

The inconvenience which may arise by discarding the broader meaning of Art. 254(1) may be appreciated by the following example under Art. 253. Parliament can legislate even on a State matter to effectuate a treaty. It is quite possible that when Parliament passes such a law, it may come in conflict with an already existing State law on that subject. There appears to be no doubt that in such a situation the Central law would prevail over the State law but this result can be achieved only by invoking the wider meaning of Art. 254(1). In the *Kannan* case,[80] the Supreme Court envisaged the possibility of repugnancy between a Central Act (List I) and a State law falling under Lists II and III, though, in the instant case, no conflict between the two Acts was found.

Earlier in *Hingir Rampur Coal Co. v. State of Orissa*,[81] the Court went into the question of repugnancy between the State law (Entry 23, List II) and a Central law (Entry 52, List I) in two different Lists. Without referring to Art. 254, the Court held that there was no repugnancy between the two different Acts as they

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78. *Krishna v. State of Madras*, AIR 1957 SC 297 : 1957 SCR 399; *State of Madras v. Dunkerley*, AIR 1958 SC 560.

79. *Kanaka Gruha Nirmana Sahakara Sangha v. Narayanamma*, (2003) 1 SCC 228 : AIR 2002 SC 3659.

80. *Kannan D.H.P. Co. v. State of Kerala*, AIR 1972 SC 2301 : (1972) 2 SCC 218.

81. AIR 1961 SC 459 : (1961) 2 SCR 537.
Also, *M. Karunanidhi v. Union of India*, AIR 1979 SC 898 : (1979) 3 SCC 431.

covered different fields. These cases do show that there is a possibility of repugnancy between a Central law and a State law enacted under the entries in Lists I and II.

Reference may also be made in this connection to *Srinivasa Raghavachar v. State of Karnataka*[82]. The Advocates Act, 1961, has been enacted by Parliament under entries 77 and 78 of List I. A State law prohibited legal practitioners from appearing before the land tribunal. The State law was held invalid as it was repugnant to the Central law. Here there was repugnancy between a Central Law enacted under an entry in List I and a State Law enacted under an entry in List II.

The interpretation put on Art. 254(1) by and large helps the States, and adds an additional dimension to their legislative power in the State List, as they can legislate with respect to a matter in List II without being unduly trammelled by the existence of a Central law in the Concurrent List or even in the Central List. The Indian Medical Council Act, 1956, has been enacted by Parliament under entry 26, List III. S. 27 of the Act provides that every person who is enrolled as a medical practitioner on the Indian Medical Register shall be entitled, according to his qualifications, to practise in any part of the country. A West Bengal Act prohibited members of the State Health Service from carrying on any private practice. The Supreme Court has ruled that the State Act is not repugnant to the Central Act because those who join the service voluntarily give up their right to practise. The State Act does not regulate the rights and privileges of the members of the medical profession in general. The State Act has been enacted under entry 41, List II. There is no conflict between the provisions of the two Acts and hence there is no repugnancy between the two under Art. 254.

The Court distinguished *Srinivasa* because there the restriction on practice was imposed by law, not undertaken voluntarily. The legal practitioners seeking to appear before the land tribunal were not members of any service and they had not given up their right to practice voluntarily in lieu of accepting the benefits of service. In the instant case, the doctors in question have voluntarily joined the State service and have subjected themselves to its terms and conditions, one of the terms being that they will have no right of private practice.[83]

The question of repugnancy between a Central law and a State law has been elaborately discussed by a three Judge Bench of the Supreme Court in *Vijay Kumar Sharma v. State of Karnataka*[84]. The State of Karnataka enacted the Karnataka Contract Carriages (Acquisition) Act, 1976, under entry 42, List III, providing for acquisition of contract carriages. Thereafter, Parliament enacted the Motor Vehicles Act, 1988, falling under entry 35 of List III, providing for grant of contract carriage permits. The question was, whether S. 20 of the Karnataka Act was repugnant to Ss. 73, 74 and 80 of the Central Act.

A majority and minority opinions were delivered by the Court in the instant case. The majority opined that, under Art. 254, the question of repugnancy can arise only in the Concurrent field. In Art. 254(1), it is clearly indicated that the competing legislations must be in respect of "one of the matters" enumerated in the Concurrent List. In the instant case, the two legislations did not relate to one common head of legislation in the Concurrent List; the two laws dealt with dif-

82. AIR 1987 SC 1518 : (1987) 2 SCC 692.
83. *Sukumar Mukherjee v. State of West Bengal*, AIR 1993 SC 2335 : (1993) 3 SCC 723.
84. AIR 1990 SC 2072 : (1990) 2 SCC 562.

ferent matters of legislation and, therefore, Art. 254(1) would not apply in such a situation. In the instant case, "the subject-matters of both the statutes and the object of the two sets of provisions" being different, "both statutes can stand together."

One of the majority Judges (SAWANT, J.) asserted that whenever, the question of repugnancy between the State and Central legislation is raised, the first thing to examine is whether the two Acts in question cover or relate to the same subject-matter and to determine this the rule of pith and substance ought to be applied[85] so as to find out the dominant intention of the two Acts. Both the Acts must be substantially on the same subject to attract Art. 254(1).

On the other hand, the minority Judge (K. RAMASWAMY, J.) found a direct conflict between the two statutes in the same occupied field. According to him, "the two sets of provisions run on collision course... Thereby, there exists the operational incompatibility and irreconcilability of the two sets of provisions". According to him, Art. 254(1) "posits as a rule that in case of repugnancy or inconsistency between the State law and the Union law relating *to the same matter* in the Concurrent List occupying the same field, the Union law shall prevail...."

He also denied that the rule of pith and substance would have any application when the matter in question is covered by an entry or entries in the Concurrent List and occupied the same field both in the Union and the State laws. It would not matter as to in which entry or entries in the Concurrent List the subject matter falls, or in exercise whereof the provisions therein were made. According to him, the doctrine of pith and substance would apply to questions of legislative competence of the respective legislatures in the federal system under Arts. 246(1) and 246(3) and to resolve the conflict of jurisdiction. The doctrine solves the problem of overlapping of "any two entries of two different lists *vis-a-vis* the Act".

Accordingly, the majority held the State Act valid, while the minority Judge held this Act to be void. It would appear from the above that the majority approach favoured the States while the minority approach supported the Centre.

But the overwhelming majority of the decided cases insist that the inconsistency must be in relation to the concurrent list and that is also the court's upto-date pronouncement declaring firmly and clearly that when one of the two Acts of Parliament is enacted in a field in List I Entry 66 and the other under List III Entry 25, the question of repugnancy does not arise. Repugnancy needs consideration when one Act is enacted by the Parliament and the other the State and the fields of both must be in relation to List III.[86]

(b) ARTICLE 254(2)

Article 254(1) lays down the general rule while Art. 254(2) is an exception to the general rule laid down in Art. 254(1).[87]

Article 254(2) provides an expedient to save a State law repugnant to a Central law on a matter in the Concurrent List, and, thus, relaxes the rigidity of the rule of repugnancy contained in Art. 254(1) as mentioned above. Ordinarily, under

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85. See, *supra*, Sec. G.(iv), for the Rule of Pith and Substance.

86. Annamalai University represented by *Registrar v. Secretary to Government, Information and Tourism Department*, (2009) 4 SCC 590 : (2009) 4 JT 43.

87. *T. Barai v. Henry & Hoe*, AIR 1983 SC 150 : (1983) 1 SCC 177.

Art. 254(1), in such a situation, the supremacy is in favour of the Centre, and a State law is void to the extent of repugnancy. There may, however, be some peculiar local circumstances prevailing in a State making some special provision, and not the uniform Central law, desirable on the matter. To introduce an element of flexibility, and to make it possible to have a State law suitable to the local circumstances kept alive in the face of a Central law to the contrary on a matter in the Concurrent List, Art. 254(2) has been incorporated in the Constitution.

Article 254(2) provides that where a State law with respect to a matter in the Concurrent List contains any provision repugnant to the provisions of a previous Central law *with respect to that matter*, the State law prevails in the State concerned if, having been reserved for the consideration of the President, it has received his assent. The result of obtaining the assent of the President would be that so far as the State Act is concerned, it will prevail in the State and overrule the provisions of the Central Act in its application to that State only. Both laws deal with a Concurrent subject. The Supreme Court has explained the effect of Art. 254(2) thus:[88]

> "In short, the result of obtaining the assent of the President to a State Act which is inconsistent with a previous Union law relating to a concurrent subject would be that the State Act will prevail in that State and override the provisions of the Central Act in their applicability to that State only".

The final say rests with the Centre which decides ultimately whether or not the Central law should give way to the State law. The State law so assented to by the Centre would however prevail in the State to the extent of inconsistency with the Central law; the State law would not override the whole of the Central law.[89]

In Art. 254(2), the words "with respect to that matter" are very relevant. As the Supreme Court has observed in *Zaverbhai.*:[90]

> "The important thing to consider with reference to this provision is whether the legislation is "in respect of the same matter". If the later legislation deals not with the matters which formed the subject of the earlier legislation but with other and distinct matters though of a cognate and allied character, then Art. 254(2) will have no application".

The Tamil Nadu Legislature passed the Public Men (Criminal Misconduct) Act, 1974, which received the presidential assent under Art. 254(2). Action was initiated under the Act against the ex-Chief Minister of Tamil Nadu, M. Karunanidhi. The Act was then repealed. The question arose whether action could be taken against him under the relevant Central legislation.[91] Argument against this course of action was that, as there was repugnancy between the Central law and the State law, and the State law was kept alive because of the presidential assent under Art. 254(2), the Central law was repealed *pro tanto* and so when the State law was repealed, the Central laws could not be revived in the State unless re-enacted.

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88. *Hoechst Pharm. Ltd. v. State of Bihar*, AIR 1983 SC 1019 : (1983) 4 SCC 45.
89. *Deep Chand v. State of U.P.*, AIR 1959 SC 648; *Ukha Kolhe v. State of Maharashtra*, AIR 1963 SC 1531 : (1964) 1 SCR 926; *V.D.M. Coop. Society v. State of Andhra Pradesh*, AIR 1977 A.P. 241; *T. Barai v. Henry & Hoe*, AIR 1983 SC 150 : (1983) 1 SCC 177.
90. *Zaverbhai Amaidas v. State of Bombay*, AIR 1954 SC 752, at 757 : (1955) 1 SCR 799.
91. Ss. 161, 471 of the Indian Penal Code, 1865, and S. 5(2) read with S. 5(5)(*d*) of the Prevention of Corruption Act.

Accepting this contention, the Supreme Court said that when a State law inconsistent with a Central law on a matter in the Concurrent List is kept alive under Art. 254(2), the State law would then prevail in the State and the Central law will be overruled in its applicability to that State. The doctrine of eclipse will not apply to the constitutionality of the Central law in such a situation.[1] In the instant case, however, the Court found no inconsistency between the Central and the State laws, as the State law merely created a new and distinct offence with different ingredients which was in its nature and purport essentially different from the offences contemplated under the Central law. The State Act was in effect complimentary to the Central law. Therefore, the Central law was not repealed by the State law in the State and the ex-Chief Minister could be tried under the Central law after the repeal of the State law.[2]

Article 254(2) does not operate when the two Acts operate in different fields, *e.g.* the Central Act pertains to Insolvency (entry 9, List III) and the State Act relates to Stamp duties (entry 44, List III). Therefore, no stamp fees are payable on the sale deed executed by the Official Assignee.[3]

Article 254(2) has been conceived with a view to save State laws falling in the Concurrent List from being superseded by Central Laws because of the operation of the rule of repugnancy. Art. 254(2) operates when the following two conditions are satisfied:

(a) There is a valid Central law on the same subject-matter occupying the same field in the Concurrent List to which the State law relates;

(b) The State legislation is repugnant to the Central law.

It means that if there is no Central law with respect to the subject-matter in the Concurrent List to which the State law relates, Art. 254(2) does not operate. The State law in such a situation prevails *proprio vigore.*

A State law made under entry 22, List III, received the assent of the President under Art. 254(2). There already existed a Central law—The Industrial Disputes Act, also passed under the same entry. The question was whether the later State Act would prevail over the earlier Central law. The Court ruled that the State law could prevail over the earlier Central law if there was repugnancy, express or implied, between the two laws. But, in the absence of any such repugnancy between the two laws, both could co-exist.[4]

Article 254(2), it has been held by the Supreme Court, becomes applicable only when the State law is repugnant to an earlier law enacted by Parliament. When a State Act becomes repugnant to a Parliamentary law enacted thereafter, Art. 254(2) does not apply. When repugnancy arises later in point of time than the State Act, Art. 254(2) does not apply, and, in such a situation, Parliamentary

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1. For discussion on the Doctrine of Eclipse, see, *infra*, Ch. XX, Sec. C.
2. *M. Karunanidhi v. Union of India*, AIR 1979 SC 898 : (1979) 3 SCC 431.
See, Ch. XIII, Sec. C, *infra.*
3. *Official Assignee, Madras v. Inspector General of Registration*, AIR 1981 Mad. 54.
Also see, *Chandramohan v. Florence Indravathi*, AIR 1982 Kant. 242.
4. *Krishna Dist. Co-op. Marketing Soc. Ltd. v. N.V.P. Rao*, AIR 1987 SC 1960 : (1987) 4 SCC 99.

law would prevail over the State law.[5] The Supreme Court has stated the position in this respect as follows:[6]

> "The fact that the State Act has received the assent of the President would be of no avail because repugnancy is with the Central Act which was enacted by the Parliament *after* the enactment of the State Act."[7]

When Parliament has already enacted a law earlier than the enactment of the State law, and the State law has received Presidential assent, and thereafter the Parliamentary law is brought into effect, the State law will prevail because the law made by Parliament was the earlier law.[8]

A State law was repugnant to a Central law. Both laws had been enacted under entry 41, List III. The State law had received the President's assent under Arts. 31 and 31A.[9] The Supreme Court refused to treat this Presidential assent as having been given under Art. 254(2) insofar as its repugnancy with the Central Act was concerned.[10] The Court emphasized that the assent of the President under Art. 254(2) is not a matter of idle formality. The President is to be apprised of the reason as to why his assent is sought. When the assent of the President is given for a specific purpose, as in the present case, the efficacy of the assent would be limited to that purpose and cannot be extended beyond it. In the instant case, President's assent was not sought because of the repugnancy between the State and the Central Acts, but for a different specific purpose. Therefore, such assent cannot avail the State under Art. 254(2).

PROVISO TO ART. 254(2)

Similarly, when the State seeks President's assent under Art. 254(2) to a State law specifically because of its repugnancy with a specific central law, the State law is not protected if it is repugnant to any other law. In the instant case, the state reserved the State Rent Act under Art. 254(2) for President's assent, and received it, qua its repugnancy with the Transfer of Property Act, a central law. The Supreme Court ruled that such a President's assent could not save the State Act when it was found to be repugnant to another Central Act, viz., the Public Premises Act, 1977. This aspect was neither brought to the notice of the President nor did the President give any consideration to it. The Court has emphasized that President's assent is not an empty formality. The efficacy of the President's assent would be limited to that purpose only for which it was sought and given.[11]

Again in *Grand Kakatiya*,[12] it was held that both the Central and the impugned State Act operated in the same field in as much as the phrase "for this compensation" in the State Act was nothing but "gratuity", though called by a different name and was repugnant to the Central Act (The Payment of Gratuity Act) and would be void unless it was shown that while obtaining the Presidential assent

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5. *M.P. Shikshak Congress v. R.P.F. Commissioner, Jabalpur*, AIR 1999 SC 443 : (1999) 1 SCC 396.
6. *Thirumuruga K.V.T.S., S. Medical & Educational Trust v. State of Tamil Nadu*, AIR 1996 SC 2384.
7. Also see, *S.M.C. Students, Parents Ass. v. Union of India*, AIR 2001 Kant, 457, 465.
8. *Pt. Rishikesh v. Salma Begum*, (1995) 4 SCC 718.
9. See, *infra*, Chs. XXXI, Sec. C, and XXXII, Secs. A and B, for Arts. 31 and 31A.
10. *Jamalpur Gram Panchayat v. Malwinder Singh*, AIR 1985 SC 1394 : (1985) 3 SCC 661.
11. *Kaisari Hind v. National Textile Corporation*, (2002) 7 SCALE 95.
12. (2009) 5 SCC 342 : AIR 2009 SC 2337.

for the State Act the conflict between the two Acts were *specifically brought to the notice of the President* before obtaining such assent.[13]

The President's assent to the State law under Art. 254(2), as mentioned above, does not confer irrevocable immunity on the State legislation from the operation of the rule of repugnancy. The proviso to Art. 254(2) somewhat curtails the ambit of Art. 254(2).

Under the proviso to Art. 254(2), Parliament is not prevented from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the State Legislature which relates to a matter in the Concurrent List.

The proviso qualifies the exception contained in Art. 254(2) to Art. 254(1). The proviso thus enlarges the power of Parliament, as acting under the proviso, the Parliament can enact a provision repugnant to the earlier State law. Thus, the Presidential assent to the State law gives protection to it against a Central law only so long as Parliament does not thereafter legislate again with respect to that matter making a provision conflicting with the State law. If it does, the State law would be void to the extent of repugnancy with the later Parliamentary law. The later Parliamentary law should however be on the same matter as the earlier State law. If the two legislations deal with separate and distinct matters, though of a cognate and allied character, then the State law is not abrogated.

A salient feature of this provision is that it not only enables Parliament to make subsequently a provision repugnant to the earlier State law and thus impliedly repeal that State law,[14] but even to declare expressly the earlier State law repealed. Thus, even though the subsequent law made by Parliament does not expressly repeal the earlier State law, yet the State law becomes void as soon as the subsequent law of Parliament creating repugnancy is made on the same matter.[15]

The working of the principle can be illustrated with reference to *Zaverbhai v. State of Bombay*.[16] The Central Legislature enacted the Essential Supplies Act in 1946 conferring power on the Central Government to issue orders to regulate production, supply and distribution of essential commodities. Under S. 7(1), a contravention of any of the orders was to be punishable with imprisonment up to three years or fine or with both. Considering these punishments inadequate, the Bombay Legislature enacted an Act in 1947 to enhance the punishments provided under the Central law. Both laws were referable to the Concurrent List. As there was avowed repugnancy between the Central and the Bombay laws, the Bombay law received the assent of the Centre and became operative in Bombay. In 1950, Parliament modified its Act of 1946 and enhanced the punishments. The Supreme Court held that the Bombay Act of 1947 and the Central Act of 1950

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13. *Grand Kakatiya Sheraton Hotel and Towers Employees & Workers Union v. Srinivasa Resorts Ltd*., (2009) 5 SCC 342 : AIR 2009 SC 2337.

14. *T. Barai v. Henry Ah Hoe*, AIR 1983 SC 150 : (1983) 1 SCC 177.

15. *Thirumurga Kirupananda Variyar Thavathiru Sundara Swamigal Medical Education & Charitable Trust v. State of Tamil Nadu*, (1996) 3 SCC 15.

16. AIR 1954 SC 752 : (1955) 1 SCR 799. Also see, *Deepchand v. State of Uttar Pradesh*, AIR 1959 SC 648 : 1959 Supp (2) SCR 8; *T. Barai v. Henry Ah Hoe*, AIR 1983 SC 150 : (1983) 1 SCC 177; *Lalbhai Talsibhai Patel, Ahmedabad v. Addl. Special Land Acquisition Officer, Ahmedabad*, AIR 1986 Guj. 24; *Shakuntalabai v. State of Maharashtra*, AIR 1986 Bom. 308.

dealt with the same subject of 'enhanced punishment', and that under the proviso to Art. 254(2), the State law became void because it was repugnant to the later Central law.

The Supreme Court stated that under the proviso to Art. 254(2), Parliament can repeal a State law. But where Parliament does not expressly do so, even then, the State law will be void under that provision if it conflicts with a later law "with respect to the same matter" that may be enacted by Parliament.

The Supreme Court has enunciated the principle of implied repeal thus : "If the subject-matter of the later legislation is identical with that of the earlier, so that they cannot both stand together, then the earlier is repealed by the later enactment". This principle is equally applicable to a question under Art. 254(2) whether further legislation by Parliament is in respect of the same matter as that of the State law.[17]

The U.P. Legislature enacted an Act to regulate supply and purchase of sugarcane. Parliament later enacted the Essential Commodities Act, S. 16(1)(b) of which laid down that any law in force in a State would be repealed "in so far as such law controls or authorises the control of the production, supply and distribution of, and trade and commerce in, any essential commodity".

The Supreme Court held in *Tika Ramji v. State of Uttar Pradesh*[18] that this provision did not repeal the earlier State law, as there was no repugnancy between the two laws, and both could co-exist, although they both related to entry 33(b) in List III.

The proviso to Art. 254(2) confers on Parliament the power to repeal a State law only when—

(1) there was already a Central law on a matter in the Concurrent List;

(2) a State then made a law on the same matter inconsistent with the Central law; and

(3) this State law received the Presidential assent under Art. 254(2).

Such a State law could then be repealed, amended or altered by Parliament by later making a law with respect to the same matter as the State law. If there was no Parliamentary law already in existence prior to the enactment of the State law on the matter, then the later Parliamentary law cannot expressly repeal the earlier State law; though, in case of repugnancy between the two, the Parliamentary law shall prevail to the extent of repugnancy. In the *Tika Ramji* case, there was no Central law in the field when the State law was enacted, and so S. 16(1)(b) could not operate to repeal the U.P. Act.

The Supreme Court also pointed out that under the proviso to Art. 254(2), power to repeal an earlier law is conferred on Parliament and the same cannot be delegated by it to any executive authority. *Tikaramji* is a significant pronouncement in the area of Indian Federalism, as it removes the idea that Parliament can specifically repeal any State law in the Concurrent area even if not repugnant to the Central law on the matter. The Supreme Court by literally interpreting the

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17. Also see, *Hoechst Pharmaceuticals v. State of Bihar*, AIR 1983 SC 1019 : (1983) 4 SCC 45.
18. AIR 1956 SC 676 : 1956 SCR 393; *supra*, Sec. H.

proviso to Art. 254(2), ruled that Parliament can repeal a State law only when the conditions above-mentioned are fulfilled.[19]

(c) REPUGNANCY

Repugnancy between two pieces of legislation, generally speaking, means that conflicting results are produced when both the laws are applied to the same facts. Repugnancy arises when the provisions of the two laws are fully inconsistent and are absolutely irreconcilable, and that it is impossible to obey one without disobeying the other, *e.g.* when one statute says 'do' while the other says 'don't' in the same set of facts.[20] In this case, there is a contradiction in the actual terms of the statutes and this can easily be detected.

Such a situation arose in *ITC*[21] where the Supreme Court found direct collision between an Act enacted by Parliament and a State Act. The Court ruled that the "question of allowing both of them to operate would not arise." In such a situation, the Central legislation would prevail over the State Law.

The Central Act in question was the Tobacco Board Act enacted under entry 52, List I. The State Act was the Agricultural Produce Markets Act enacted under entry 27, List II. The Court observed:

> "... we hold that the Tobacco Board Act and the Agricultural Produce Markets Act, collide with each other and cannot be operated simultaneously. Necessarily, therefore, the Tobacco Board Act would prevail and the Agricultural Produce Markets Act, so far as it relates to levy of fee for sale and purchase of tobacco within the market area must be held to go out of the purview of the said Act."

But not all cases are so obvious. Contradiction may appear not so much in the phraseology as when they are applied to a given set of facts. When both statutes cover the same field and they produce conflicting legal results in a given set of facts, repugnancy arises between them. For example, when the penalty prescribed for an offence by one Act is altered in degree by the other Act, repugnancy arises. Also, when a statute describes again an offence created by another statute, and imposes a different punishment, or varies the procedure, repugnancy arises between the two.[22]

The U.P. Legislature enacted an Act in 1955 authorizing the government to frame a scheme of nationalization of motor transport. Thereafter, Parliament, with a view to introduce a uniform law, amended the Motor Vehicles Act in 1956. The Supreme Court found in *Deep Chand v. State of U.P.*,[23] that both the Acts operate in respect of the subject-matter in the same field, and that they differed from each other in many important details, *e.g.*, authority to initiate the scheme, manner of doing it, authority to hear objections, principles regarding payment of compensation *etc*., and so the U.P. Act would have to give way to the Central Act.

There would be no repugnancy if the provisions made by one law do not exist in the other law; the provisions made by Parliament and the State are mutually

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19. M.P. JAIN, Justice Bhagwati and Indian Constitutional Law, 2 *JILI*, 31, 44 (1959-60).
20. *Deep Chand v. State of Uttar Pradesh*, AIR 1959 SC 648 : 1959 Supp (2) SCR 8.
21. *I.T.C. Ltd. v. Agricultural Produce Market Committee*, AIR 2002 SC 852, 894; *supra*, Sec. G(iii)(a).
22. *Zaverbhai v. State of Bombay*, *supra*,
23. AIR 1959 SC 648 : 1959 Supp (2) SCR 8, *supra*,

exclusive, do not impinge upon each other and there is no overlapping between them.[24] When the Central Act and the State Act can co-exist and their spheres of operation are different, there is no inconsistency between them. Thus, the Criminal Procedure Code and the Haryana Children Act are not inconsistent. A child accused of murder is to be tried under the Children Act and not the Cr.P. Code.[25] Similarly, in *M. Karunanidhi*[26] the State law and the Central law although occupying the same field were found to be complimentary and not inconsistent. Both could co-exist without coming into collision with each other.

When repugnancy arises, an effort is made to reconcile the two statutes and to avoid their being repugnant to each other.[27] At times, by interpreting the language of a State law narrowly, it may be possible to remove the incompatibility between the Central and State laws and thus to keep alive the State law.[28]

The repugnancy between two statutes should exist in fact and not depend merely on a possibility.[29] Under Art. 254(1), the State law is void only 'to the extent' of its repugnancy with the Central law. Therefore the whole of the State law need not be declared bad if the repugnant portion may be severed from it. If, however, the invalid portion cannot be severed then the whole Act falls through. The doctrine of severability has been discussed later.[30] Further, the portion of the State law repugnant to the Central law is not dead; it does not become *ultra vires* in whole or in part; it is eclipsed and if the Central law were to be repealed at any time, it would again become operative.[31]

A more subtle case of repugnancy arises when two statutes pertain to the same subject-matter, but when Parliament intends to make its enactment a complete code and evinces an intention to cover the entire field. This is the rule of occupied field. In such a case, the State law whether passed before or after would be overborne on the ground of repugnancy.[32] As the Supreme Court has observed in a recent case:[33]

> "It cannot, therefore, be said that the test of two legislations containing contradictory provisions is the only criterion of repugnance. Repugnancy may arise between two enactments even though obedience to each of them is possible

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24. *The Tika Ramji* case, AIR 1956 SC 676 : 1956 SCR 393; *supra*,

25. *Raghbir v. State of Haryana*, AIR 1981 SC 2037. Also, *Fatehchand Himmatlal v. State of Maharashtra*, AIR 1977 SC 1825 : (1977) 2 SCC 670.

26. *Supra*, footnote 2.

27. *Shyamakant v. Rambhajan*, AIR 1939 FC 74; *Tika Ramji v. State of U.P.*, *supra*; *A.K. Sabhapathy v. State of Kerala*, AIR 1983 Ker 24.

28. *Tansukh Rai v. Nilratan*, AIR 1966 SC 1780 : (1966) 2 SCR 6.

29. *Shyamakant v. Rambhajan*, *supra*, footnote 27.

30. *Infra*, Ch. XX. Sec. C; *R.M.D.C. v. Union of India*, AIR 1957 SC 628, 633; *B&G Exchange v. State of Punjab*, AIR 1961 SC 268 : (1961) 1 SCR 668.

31. *Bhikaji v. State of M.P.*, AIR 1955 SC 781; *Deep Chand v. State of U.P.*, *supra; Dularey v. Dist. Judge*, AIR 1984 SC 1260 : (1984) 3 SCC 99.
Also see further on the point of eclipse under Fundamental Rights, Ch. XX. Sec. C.

32. *State of Orissa v. M.A. Tulloch & Co.*, AIR 1964 SC 1284 : (1964) 4 SCR 461; *Ratan Lal Adukia v. Union of India*, AIR 1990 SC 104 : (1989) 3 SCC 537, *Govt. of A.P. v. J.B. Educational Society, Hyderabad*, AIR 1998 AP 400, 412; *Kulwant Kaur v. Gurdial Singh Mann*, AIR 2001 SC 1273, at 1280 : (2001) 4 SCC 262.

33. *Thirumurga Kirupananda Variyar Thavathiru Sundara Swamigal Medical Education & Charitable Trust v. State of Tamil Nadu*, AIR 1996 SC 2384 at 2391 : (1996) 3 SCC 15.
Also see, *Jaya Gokul Educational Trust v. Commissioner & Secretary to Govt. Higher Education Dept., Thiruvananthapuram*, AIR 2000 SC 1614 : (2000) 5 SCC 231; *supra*, Sec. G(c), footnote 23 at p. 772.

without disobeying the other if a competent legislature with a superior efficacy expressly or implied evinces by its legislation an intention to cover the whole field."

In the instant case, s. 10A of the Indian Medical Council Act was held to prevail over the Tamil Nadu law dealing with affiliation of medical colleges in the State. Both the Acts were enacted under entry 25 of List III. The Court refused to accept the contention that there was no repugnance between the two Acts as both can be complied with. The Court ruled that Parliament has evinced an intention to occupy the whole field relating to establishment of medical colleges in the country. Parliament has made a "complete and exhaustive provision" covering the entire field for establishing of new medical colleges in the country. No further scope is left for the operation of the State legislation in the said field which is fully covered by the law made by Parliament.

The Orissa Legislature enacted an Act levying a cess on all extracted minerals for the better development of mining areas. Later, Parliament enacted the Mines and Minerals Act, 1957, requiring the Central Government to ensure conservation and development of country's mineral resources. The Supreme Court held that the State Act was superseded as a whole because Parliament had clearly evinced an intention to cover the entire field of minerals.[34]

A Kashmir law concerning infliction of disciplinary punishments on civil servants was held not applicable to the members of the All India Service as Parliament has occupied the field and that the Central enactments give clear indication that this was the only manner in which any disciplinary action can be taken against these persons.[35] In such a case, the inconsistency between the two laws is of such a nature that they come into direct collision with each other and it is impossible to obey the one without disobeying the other.

I. RESIDUARY POWER

The three Lists are drawn very elaborately and presumably all subject-matters identifiable at the time of the constitution-making, and regarding which a government could conceivably be called upon to make laws in modern times, have been assigned to one of the Lists. But it is humanly not possible to foresee every possible activity and assign it to one List or the other.

The framers of the Constitution were conscious of the fact that human knowledge is limited and human perception imperfect and no one could foresee what contingency may arise in future needing legislation. Therefore, the residuary power is intended to take care of such matters as could not be identified at the time of the constitution-making. Further, the framers of the Constitution were

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34. *State of Orissa v. M.A. Tulloch & Co.*, AIR 1964 SC 1284 : (1964) 4 SCR 461 ; *Baijnath Kadia v. State of Bihar*, AIR 1970 SC 1436 : (1969) 3 SCC 838.

But see, *State of Haryana v. Chaman Lal*, AIR 1977 SC 1654. Parliament made certain changes in 1972 in the Mines Act of 1957. The Court now ruled that the State could enact a law for vesting of lands containing mineral deposits in the State. Parliament did not want to encroach on State power under entries 18 in List II and 42 in III. After 1972, the Central Act does not cover ownership of minerals which are part of land. The States have now a sphere of their own powers under the amended Central Act. Also see, *Fatehchand v. State of Maharashtra*, AIR 1977 SC 1825 : (1977) 2 SCC 670.

35. *State of Jammu & Kashmir v. Farooqi*, AIR 1972 SC 1738 : (1972) 1 SCC 872.

designedly devising for a strong Centre. Moreover, the present is an era of fast technological advancement, and no one can visualize future developments and exigencies of government. Something unforeseen may happen and some new matter may arise calling for governmental action. A question may then arise as to which government, Central or State, is entitled to legislate with respect to that matter. To meet this difficulty, the Constitution provides that the residue will belong exclusively to the Centre. This is provided for in Art. 248 read with entry 97, List I. These provisions take care of any unforeseen eventuality.

Entry 97, List I, runs as : "Any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists."

Article 248(1) says : "Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List."

Residuary powers have been vested in the Centre so as to make the Centre strong. As was stated in the Constituent Assembly by Jawahar Lal Nehru, Chairman of the Union Powers Committee:

> "We think that residuary powers should remain with the Centre. In view however of the exhaustive nature of the three Lists drawn up by us, the residuary subjects could only relate to matters which, while they may claim recognition in the future, are not at present identifiable and cannot therefore be included now in the Lists."[36]

If the law does not fall in the State List, the Parliament has legislative competence to enact the law by virtue of its residuary power and it would not be necessary to go into the question whether it falls under any entry in the Union List or the Concurrent List.[37] The basic question thus required to be examined is whether the subject-matter of the Central Act falls in any of the entries in the State List. The question of residuary power is discussed further in detail in the next Chapter under the heading "Residuary Taxes".[38]

S. 3 of the Commissions of Inquiry Act has been held to be fully covered by the Centre's residuary power. The Central Government can appoint an inquiry commission to inquire into charges against State Ministers under its residuary power as this subject is not mentioned in any List.[39] Support for such a power can also be found in entry 94, List I, and entry 45, List III. It is an accepted principle that Parliament can supplement any of its powers under any entry in Lists I and III with its residuary power.[40]

A law taking over of management of Auroville by the Centre is covered by the Centre's residuary power. Shree Aurobindo Society established a cultural township where people from different countries could live in harmony as one community and engage in cultural, educational, scientific and other activities seeking to promote human unity. In course of time, serious irregularities in the management of the society and mis-utilisation of funds were detected. Accordingly, Parliament passed an Act taking over the management of Auroville in public interest. It

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36. Rao, B. Shiva, *The Framing of India's Constitution*, II, 777.
37. See, *Union of India v. H.S. Dhillon*, AIR 1972 SC 1061, 1074-75 : (1971) 2 SCC 729; *S.P. Mittal v. Union of India*, AIR 1983 SC 1 : (1983) 1 SCC 51, 18-19; *Kartar Singh v. State of Punjab*, (1994) 3 SCC 569, 629-630.
38. *Infra*, Ch. XI, Sec. G.
39. *State of Karnataka v. Union of India*, AIR 1978 SC 68 : (1977) 4 SCC 608.
40. See *Dhillon*, *supra*, note 2; *infra*, Ch. XI, Sec. B.

was held that Parliament had competence to enact such a law under its residuary power.[41]

As regards legislation for the Union Territories, Parliament can rely on Art. 246(4) read with any topic in any of the three Lists or on its residuary power.[42]

The scope of the residuary power is very wide. For example, under entry 3 in List III, Parliament can legislate with respect to preventive detention on grounds mentioned therein.[43] Further, Parliament can legislate with respect to preventive detention under entry 9, List I, on grounds mentioned therein.[44] But these two entries do not exhaust the entire field of preventive detention. Parliament can legislate under its residuary power with respect to preventive detention on any ground not mentioned in these two entries. Preventive detention on certain grounds is covered by these entries, but, on other grounds, Parliament can act under its residuary power. Thus, Parliament has enacted the Conservation of Foreign Exchange and Prevention of Smuggling Act [COFEPOSA] providing for preventive detention in connection with smuggling and foreign exchange racketeering. This Act can find support from entry 36, List I (foreign exchange) and Parliament's residuary power.[45]

In the famous *Golak Nath* case,[46] a judicial view was expressed by a majority of the Supreme Court that Art. 368 (as it then stood) merely provided for procedure to amend the Constitution and did not by itself confer a substantive power to amend and that such power was to be found in the residuary power of Parliament. In *Kesavnanda*,[47] the Supreme Court repudiated this view, and read the power to amend the Constitution in Art. 368 itself and not in the residuary power of Parliament. As explained by HEDGE and MUKHERJEA, JJ:[48]

> "Entry 97 in List I was included to meet some unexpected and unforeseen contingencies. It is difficult to believe that our Constitution-makers who were keenly conscious of the importance of the provision relating to the amendment of the Constitution..... would have left the important power hidden in entry 97 of List I leaving to the off chance of the Courts locating that power in that entry."

From the above, a principle was sought to be implied with a view to limit the breadth of the residuary power that if a subject was prominently present to the minds of the constitution-makers, then that matter ought not to be read in the residuary but should be located in one of the entries.[49] But the Supreme Court has refused to accept any such limitation on the residuary power saying that it is not proper to unduly circumscribe, erode or whittle down the residuary by a process of interpretation as new developments may demand new laws not covered by any

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41. *S.P. Mittal v. Union of India*, AIR 1983 SC 1 : (1983) 1 SCC 51.
42. *Sat Pal & Co. v. Lt. Governor of Delhi*, AIR 1979 SC 1550 : (1979) 4 SCC 232. Also see, *supra*, Ch. IX.
43. *Supra*, Sec. F.
44. *Supra*, Sec. D.
45. See, *infra*, Ch. XXVII, Sec. B, for discussion on Preventive Detention.
46. AIR 1967 SC 1643 : (1967) 2 SCR 762.
For a detailed discussion on this case, See Ch. XLI, *infra.*
47. AIR 1973 SC 1461 : (1973) 4 SCC 225.
48. *Ibid*, at 1614.
49. SEERVAI, CONSTITUTIONAL LAW OF INDIA, 1264 (2nd Ed.)

of the three Lists and these Lists cannot be regarded as exhaustive of governmental action and activity.[50]

Parliament can enact an Act to prevent the improper use of certain emblems and names for professional and commercial purposes either under entry 49, List I, or its residuary power, as the matter does not fall under entry 26, List II.[51] However, recourse could be had to the residuary only if the matter is found to be outside the State purview. As the Supreme Court has emphasized:[52]

> "Before exclusive legislative competence can be claimed for Parliament by resort to the residuary power, the legislative incompetence of the State Legislature must be clearly established....."

Parliament's residuary power is not to be interpreted so expansively as to whittle down the power of the State Legislatures. "Residuary should not be so interpreted as to destroy or belittle State autonomy." It has been emphasized that in a Constitution like ours "where there is a division of legislative subjects but the residuary power is vested in Parliament, such residuary power cannot be so expansively interpreted as to whittle down the power of the State Legislatures". To do so would be to affect the federal principle adversely. If there is competition between an entry in List II and the residuary power of the Centre, the former may be given a broad and plentiful interpretation.[53]

An important question of interpretation of the residuary power has given rise to difference of opinion among the Judges of the Supreme Court. The question is : should the residuary power be invoked when the subject-matter of legislation in question is not found in any of the *three* Lists, or when it is not found in List II and List III only; List I being irrelevant for the purpose as the residuary power belongs to the Centre?

Prior to *Dhillon,*[54] the judicial view was that recourse to entry 97, List I, ought to be had only when the impugned legislation did not fall in any of the three Lists. The argument was that if the impugned legislation fell under any entry in List II, residuary power could not be invoked. Further, if the impugned legislation fell under an entry in List I or List III, then recourse to the residuary would be unnecessary.

It was said that entry 97, List I, was not the first step in the discussion of such problems, but the last resort.[55] But *Dhillon* seems to have changed this position. The Supreme Court has ruled in this case by majority that once it is found that the subject-matter of the impugned legislation does not fall under any entry in List II or III then Parliament can take recourse to the residuary power, or it can be combined with any other entry in List I. This question is fully discussed in the next Chapter under the heading "Residuary Taxes".[56]

In *Amratlal Prajivandas,*[57] following *Dhillon,* the Supreme Court has observed that the test to determine the legislative competence of Parliament is this : when-

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50. *Satpal & Co., supra,* note, 42, at 1554.
51. *Sable Waghire & Co. v. Union of India,* AIR 1975 SC 1172 : (1975) 1 SCC 763; *supra.*
52. *International Tourist Corp. v. State of Haryana,* AIR 1981 SC 774 , 778 : (1981) 2 SCC 318.
53. *Jaora Sugar Mills v. State of Madhya Pradesh,* AIR 1966 SC 416, 421 : (1966) 1 SCR 523.
54. *Union of India v. H.S. Dhillon,* AIR 1972 SC 1061 : (1971) 2 SCC 779; *supra,* footnote 37.
55. *Hari Krishna Bhargava v. Union of India,* AIR 1966 SC 619 : (1966) 2 SCR 22.
56. See, *infra,* Ch. XI, Sec. G.
57. *Att. Gen. for India v. Amratlal Prajivandas,* AIR 1994 SC 2179 : (1994) 5 SCC 54.

ever the competence of Parliament to enact a specific statute is questioned one must look to the entries in List II. If the said statute is not relatable to any of the entries in List II, no further inquiry is necessary as Parliament will be competent to enact the said statute either by virtue of the entries in List I and List III, or by virtue of the residuary power contained in Art. 248 read with entry 97, List I.

The Consumer Protection Act, 1986, creates *quasi*-judicial bodies to render inexpensive and speedy remedies to consumers. The Act provides an additional forum providing inexpensive and speedy resolution of disputes arising between consumers and suppliers of goods and services. These bodies are not supposed to supplant but supplement the existing judicial system. The agencies created by the Act are in no way parallel hierarchy to the judicial Courts. The Act would fall under the Parliament's residuary power and not under entry 11A, List III.[58]

The Constitutional status of and the competence of Parliament to impose service tax on practising chartered accountants and architects was raised before the Supreme Court by the practioners.[59] The Supreme Court repelled the challenge fundamentally on the view that service tax was tax on service and not a tax on service providers having taken into consideration that services constitute a heterogeneous spectrum of economic activities covering a wide range such as management, banking, insurance, communication, entertainment etc. and that the service sector is now occupying the centre stage of the Indian economy and an "Industry by itself". Since consumption of goods and consumption of services both satisfy the human needs, there is hardly any distinction between the two.[60]

VALIDATION OF INVALID STATE LAWS

When States lack legislative competence with respect to a subject-matter, Parliament will have such competence. At times, when a State law is declared invalid because of the State's legislative incompetence, Parliament may come to the rescue of the State by way of validating the law in question.

Here the principle is that Parliament cannot merely pass an Act saying that such and such State Act is hereby declared as valid. This amounts to delegation of legislative power on the State Legislature on a topic which the Constitution has kept outside the State jurisdiction and this Parliament is not competent to do. As the Supreme Court has explained:

> "Where a topic is not included within the relevant list dealing with the legislative competence of the State Legislatures, Parliament by making a law cannot attempt to confer such legislative competence on the State Legislatures."

It is for the Constitution and not Parliament to confer competence on State Legislatures. Parliament cannot arrogate to itself any omnipotence to redraw legislative Lists so as to confer competence on the State to legislate on a topic which is outside its purview. Instead, since Parliament can legislate on a topic within its power, it can re-enact the invalid State law. As a convenient legislative device, Parliament can, instead of repeating the whole of the State Act, legislate referentially. For example, when a State Act is held invalid, Parliament may enact a law putting the State Act in a schedule and saying that the Act "shall be

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58. *Vishwabharathi House Building Co-op. Soc. Ltd. v. Union of India,* AIR 1999 Kant. 210.
59. *All India Federation of Tax Practioners v. Union of India,* (2007) 7 SCC 527 : (2007) 9 JT 1.
60. *Ibid.*

deemed always to have been as valid as if the provisions contained therein had been enacted by Parliament."

The Supreme Court has treated this strategy as valid because Parliament has legislated and not merely declared valid an invalid statute. As an abbreviation of drafting, Parliament has borrowed into its statute by reference the words of a State Act not *qua* State Act but as a "convenient shorthand", "as against a long-hand writing of all the sections into the Central Act." When Parliament has power to legislate on a topic, it can make an Act on the topic by any drafting means including referential legislation.

In *Baijnath Kedia v. State of Bihar*[61], the Supreme Court held a statutory provision made by a State Legislature unconstitutional on the ground that the State Legislature had no power to enact it and that only Parliament was competent to legislate in that behalf. Thereafter, Parliament enacted a Validation Act. The act was upheld as valid by the Supreme Court.[62] The Court ruled that Parliament could validate retrospectively what a State Legislature had no power to enact.

But the validating act cannot be considered as remedying the defects pointed out by the judicial verdict by making a "cosmetic change" in the original Act.[63]

Most of these validating Acts have been enacted by Parliament under its residuary power. A number of validating Acts have been passed by Parliament to validate judicially invalidated State taxing measures.[64]

In *Shree Vinod Kumar v. State of Himachal Pradesh,*[65] the Supreme Court invalidated an Act passed by the Himachal Pradesh Assembly on the ground that the Assembly was not validly constituted and, as such, it was incompetent to pass the law in question. Parliament then passed a validating Act validating the constitution and proceedings of the Legislative Assembly of Himachal Pradesh. The Courts were prohibited from questioning the validity of any Act or proceeding of the Assembly on the ground of defect in its constitution. The Supreme Court upheld the competence of Parliament to enact the validating Act under its residuary power.[66]

J. PARLIAMENTARY LEGISLATION IN THE STATE FIELD

Proverbially, federalism has been characterised as a rigid form of government. Constituted as it is of a dual polity, there is a rigid distribution of the functions between the Centre and the States supported by no less a sanction than that of the Constitution. The balance thus drawn between the Centre and the States cannot be disturbed by one of them unilaterally. Neither the Centre nor the States can trench upon the jurisdiction assigned to the other.

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61. (1969) 3 SCC 838 : AIR 1970 SC 1436.
62. *Krishna Chandra Gangopadhyaya v. Union of India*, AIR 1975 SC 1389 : (1975) 2 SCC 302. Also see, *Shetkari Sahakari Sakhar Karkhana v. Collector of Sangli*, AIR 1979 SC 1972 : (1980) 1 SCC 381.
63. *Grand Kakatiya Sheraton Hotel and Towers Employees & Workers Union v. Srinivasa Resorts Ltd*., (2009) 5 SCC 342, 365 : AIR 2009 SC 2337.
64. See, *infra*, next Chapter.
65. AIR 1959 SC 223 : (1959) Supp 1 SCR 160.
66. *Jadab Singh v. Himachal Pradesh Administration*, (1960) 3 SCR 75 : AIR 1960 SC 1008.

A change in the scheme of distribution of powers can be effected only by an amendment of the Constitution which is not always easy to effectuate, as the process of constitutional amendment in a federation is always more rigid than the ordinary legislative process.[67]

There are disadvantages in having a rigid scheme of distribution of functions. A scheme which may be appropriate in the context of the times when the Constitution was adopted, may need re-adjustment when circumstances may have changed. There may arise an emergency in the country when a Central law on a matter in the State List may be a desideratum; and if this cannot be done without amending the Constitution, difficulties may be felt in taking effective steps to meet the situation.

Gradual adjustments may be effected in the balance of power by the process of judicial interpretation, but there may be times when this technique fails to rise to the occasion and make the needed adjustments to meet situations at hand. To some extent, rigidity of federalism has been mitigated by the newly arising concept of co-operative federalism,[68] but even this concept has its own limitations in practice, and it is a product of non-availability of better and more effective methods of effecting the needed adjustments in the Central-State relationship. There have been occasions in other federations when lack of necessary powers in the Centre has been keenly felt as pressing problems have demanded urgent solutions.[69]

The Constitution of India, however, breaks new ground in this respect. It contains several provisions to create a mechanism for effecting temporary adjustments in the frame of the distribution of powers and thus introduce an element of flexibility in an otherwise inherently rigid federal structure, and some of these methods are original insofar as these expedients are not to be found elsewhere. Learning by the difficulties faced in other federations by a too rigid distribution of powers, which often denied power to the Centre to take effective measures to meet a given situation, the framers of the Indian Constitution took adequate care to create a federal structure which could be easily moulded to respond to the needs of the situation, without resorting to the tedious and elaborate procedure of amending the Constitution.

First, the sizeable Concurrent List represents an attempt to break down, to some extent, the unpassable barriers between the Centre and the States which arise when there are two exclusive areas allotted to them. The Concurrent List makes it possible for either the Centre or the States or both to operate on a matter according to the demands of the situation at a given time. A further flexibility has been introduced in this area by providing for an expedient to keep a State law alive in the face of a Central law.[70]

Secondly, a number of constitutional provisions enable Parliament to legislate in the State sphere from time to time. These constitutional provisions are discussed below.

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67. For the process of Amendment of the Constitution in India, see, *infra*, Ch. XLI.
68. On Co-operative Federalism in India, see, *infra*, Ch. XIV.
69. *Infra*, Sec. L, this Chapter.
70. *Supra*, Sec. H, this Chapter.

(a) ARTICLE 249

According to Article 249, if the Rajya Sabha declares, by a resolution supported by two thirds of the members present and voting, that it is necessary or expedient in the national interest that Parliament should make laws with respect to a matter in the State List specified in the resolution, it becomes lawful for Parliament to make laws for the whole or any part of India with respect to that matter so long as the resolution stands.

Such a resolution may remain in force for such period as is mentioned therein but not exceeding one year; it can be renewed as many times as may be necessary but not exceeding a year at a time. The law made by Parliament in the State List under this provision would cease to have effect six months after the resolution passed by Rajya Sabha comes to an end.

The procedure is of strictly temporary efficacy as the life of the resolution is limited to one year at a time. If Central power is required to be continued beyond one year, a fresh resolution will have to be passed by the Rajya Sabha for another year and so on.

The function entrusted to the Rajya Sabha under this Article emanates from the theory that this House contains representatives of the States who are elected by the State Legislative Assemblies.[71]

The strategy contained in Art. 249 can be used when national interest so demands and to tide over a temporary situation. For this unique feature of the Indian Constitution, no parallelism is to be found in any other federal constitution.

Article 249 has been used so far very sparingly. For example, in 1950, due to the Korean War, prices of imported goods began to soar. There was great need to effectively control black marketing. No action could be taken to control imported goods under entry 33, List III, as it stood before its amendment in 1955 because it did not then cover imported goods. Therefore, under Art. 249, Rajya Sabha passed a resolution to enable Parliament to make laws for a period of one year with respect to entries 26 and 27 of List II. Parliament then enacted the Essential Supplies (Temporary Powers) Amendment Act, 1950, and the Supply and Prices of Goods Act, 1950, for controlling supply, distribution and price of certain goods.

Again, in 1951, pursuant to another resolution of the Rajya Sabha under Art. 249, Parliament passed the Evacuee Interest (Separation) Act, 1951, applicable to all evacuee property including agricultural land.

Because of the menace of terrorism in Punjab, on August 13, 1986, the Rajya Sabha passed a resolution authorising Parliament to make laws for one year with respect to six entries in the State List, *viz.* : 1, 2, 4, 64, 65 and 66. However, no law in pursuance of this resolution was ever passed by Parliament.

It may be underlined that there are four in-built safeguards against misuse of power conferred by Art. 249, *viz.*:

(1) Parliament can assume jurisdiction to legislate only if two-thirds of the members of the *Rajya Sabha* present and voting pass the necessary resolution;

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71. *Supra*, Ch. II, Sec. B.

(2) the resolution must specify the matter enumerated in the State List with respect to which Parliament is being authorised to legislate in the national interest;

(3) the resolution passed by the *Rajya Sabha* remains in force for one year; and

(4) the law enacted by Parliament in pursuance of this resolution remains in force only for six months after the resolution ceases to remain in force.

The State Legislature continues to enjoy power to make laws which it is empowered to make under the Constitution, even after the Rajya Sabha passes a resolution under Art. 249. This is however subject to the rule of repugnancy. This rule has been specifically laid down in Art. 251, which is mentioned below.

Article 249 provides a simple and quick method to cope with extraordinary situations which temporarily assume national importance. The Article may also be availed of when speed is of the essence of the matter, and it is not considered necessary or expedient to invoke the emergency provisions contained in Arts. 352 and 356.[72]

(b) ARTICLE 250

While a proclamation of emergency is in operation in the country under Art. 352, Parliament is empowered under Art. 250 to legislate with respect to any matter in the State List.[73]

Article 250 does not restrict the power of a State Legislature to make a law which it is entitled to make under the Constitution. However, because of Art. 251, in case of repugnancy between a State law and a Parliamentary law enacted under Art. 250, the latter is to prevail and the State law, to the extent of repugnancy, and so long as the Parliamentary law continues, is to be inoperative.

(c) ARTICLE 252

Article 252(1) provides for delegation of powers by two or more States to Parliament so as to enable it to legislate with respect to a matter in the State List in relation to such States.

If it appears to two or more State Legislatures to be desirable that any matter in the State List should be regulated in such States by Parliament by law, and if resolutions to that effect are passed by the Houses of those State Legislatures, Parliament can then pass an Act for regulating that matter so far as those States are concerned.

Any law so enacted by Parliament can apply to any other State by which it is adopted afterwards by a resolution passed to that effect in its Legislature. While enacting a law under Art. 252(1), Parliament can so structure the law as to be capable of being effectively adopted by any other State later on by passing a resolution to that effect. A State can adopt the Central law, after it has been enacted, under Art. 252(2), even if it had not passed the resolution originally under Art. 252(1).

In the context of Art. 252(1), the term 'State Legislature' means only the House or Houses of the Legislature without including the Governor. Therefore,

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72. See below under Art. 250.
73. *Infra*, Chap. XIII, under Emergency Provisions.

Governor's assent is not necessary to the resolution passed by the House or Houses.[74]

When the State Legislature passes a resolution under Art. 252(1), Parliament becomes entitled to legislate, and the State Legislature ceases to share the power to make law, with respect to that matter. The resolution operates as "abdication or surrender" of the State power with respect to that matter which is the subject-matter of the resolution, and it is placed solely in the hands of Parliament which alone can then legislate with respect to it. "It is as if such matter is lifted out of List II and placed in List I of the Seventh Schedule to the Constitution."[75] Only so much power is conferred on Parliament as is resolved by the State Legislature to be entrusted to Parliament. By passing a resolution under Art. 252(1), the State Legislature surrendered to Parliament the right to pass legislation imposing a ceiling on the holding of urban immovable property. The Supreme Court ruled that the State had not surrendered the subject of Town planning and development to Parliament.[76]

Under Art. 252, power to legislate is vested in Parliament only when two or more States pass a resolution authorising Parliament to make a law on a matter in List II which is not within the legislative domain of Parliament. The passing of the resolutions by the States is a condition precedent for vesting the Parliament with such power by the State Legislatures.

The effect of Art. 252(1) is that Parliament becomes competent to legislate with respect to a matter for which it has no power to make a law. There are many subjects in the State List such as, public health, agriculture, forests, fisheries *etc*., which may, at times, demand common legislation for two or more States. Article 252(1) prescribes a method by which Parliament may be enabled to do so. This Article becomes applicable when at least two States join and pass the necessary resolutions invoking the aid of Parliament.

Notionally speaking, the specific subject is out of the legislative domain of the States passing the resolution under Art. 252(1). The Supreme Court has held in *RMDC*[77] that any Act of the State Legislature will be subject to the rule of repugnancy, though Art. 254, in terms, may not supply.[78] If any State Act relating to the same matter, occupying the same field as the law made by Parliament under cl. (1), is repugnant to the latter, it will be rendered inoperative to the extent of repugnancy.[79]

The Karnataka Legislature resolved to entrust to Parliament the subject-matter of imposing a ceiling on urban immovable property and acquisition of such property in excess of the ceiling. So much subject-matter was thus carved out of entry 18, List II, *viz.*, 'land', but the rest of the legislative area comprised in the entry continued to fall within the State legislative domain.[80]

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74. *Union of India v. Basavaiah Choudhary,* AIR 1979 SC 1415 : (1979) 3 SCC 324.
75. *Thumati Venkaiah v. State of Andhra Pradesh,* AIR 1980 SC 1568 : (1980) 4 SCC 295.
76. *H.H.M. Shanti Devi P. Gaikwad v. Sarjibhai H. Patel,* AIR 2001 SC 1462 : (2001) 5 SCC 101.
77. *R.M.D.C. v. State of Mysore,* AIR 1962 SC 594 : (1962) 3 SCR 230.
78. For discussion on Art. 254, see, *supra,* Sec. H.
79. Also see, on this point : *Jamati Rangayya v. State of Andhra Pradesh,* AIR 1978 AP 106; T. *Khande Rao v. State of Karnataka,* AIR 1979 Kant. 71; *Birajananda Das v. Competent Authority,* AIR 1986 Cal. 8.
80. *Krishna Bhimrao Deshpande v. Land Tribunal, Dharwad,* AIR 1993 SC 883 : (1993) 1 SCC 287.

Article 252 has been used a few times. For example, in order to have a uniform law for the control and regulation of prize competitions, several States passed resolutions authorising Parliament to enact the requisite legislation. The need for a Central law was felt because these competitions were run by out-of-State journals which a State law could not effectively control. Parliament then enacted the Prize Competitions Act, 1955.[81]

The States of Bengal and Bihar have authorised Parliament to legislate for the setting up of the Damodar Valley Corporation to control the Damodar River which constantly ravaged the two States.

Parliament enacted the Urban Land (Ceiling and Regulation) Act, 1976, after resolutions under Art. 252(1) were adopted by eleven State Legislatures.[82]

Article 252(2) provides:

> "Any Act so passed by Parliament may be amended or repealed by an Act of Parliament passed or adopted in like manner but shall not, as respects any State to which it applies, be amended or repealed by an Act of the Legislature of that State."

Because of Art. 252(2), the State Legislatures have no power to repeal or amend an Act passed by Parliament under Art. 252(1). Only Parliament can amend or repeal it in the manner laid down in Art. 252(2). The effect of Art. 252, therefore, is that the State Legislature loses its power to make laws on the subject to the extent its field is covered by the resolution under Art. 252(1) although the matter continues to be remain in List II. For applicability of the repealing Act a State must adopt the repeal by resolution passed by legislature in that behalf. Since the legislature of the State of West Bengal did not do so, the Urban Land (Ceiling and Regulation) Act would not applicable in that State.[83]

The parliamentary law passed under Art. 252(1) may be amended or repealed by an Act of Parliament passed or adopted in like manner and not by the State Legislature.[84] The Speaker of the Lok Sabha has held that the previous permission of the States would be necessary to amend the Central Act because, according to Art. 252(2), amending legislation was to be passed in 'like manner' as the original legislation which meant that authorisation from the States for the amendment was also necessary. The Speaker overruled the Government's view that once the State Legislatures authorised Parliament to legislate on a subject, and a law was passed by Parliament, it was authorised to amend the law without seeking States' authority again. The Speaker held that the jurisdiction vested in Parliament expired when once the Act was passed in pursuance of the State authorisation, and fresh consent of the States would be necessary for amending the original Act. This means that if the State Legislatures do not give the necessary consent to amend or repeal the earlier Act in the same manner laid down in clause (1), neither Parliament nor the State Legislatures have the power to amend or repeal the Act under cl. (2).

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81. *R.M.D.C. v. Union of India*, AIR 1957 SC 628 : 1957 SCR 930; *R.M.D.C. v. State of Mysore*, AIR 1962 SC 594 : (1962) 3 SCR 230.

82. Other Acts passed by Parliament under Art. 252(1) are : The Estate Duty Act, 1953, in its application to agricultural land; The Seeds Act, 1966; The Water Preservation and Control of Pollution Act, 1974; The National Capital Region Planning Board Act, 1985.

83. *State of W.B. v. Pronab Kumar Sur*, (2003) 9 SCC 490 : AIR 2003 SC 2313.

84. See, Art. 252(2) given above.

When Parliament passes an Act under Art. 252, it would not be categorized as the State Act. By passing resolutions, the States surrender their legislative power to Parliament. Parliament does not act as a delegate of the States because the initial enacting of the Act as well as its subsequent amending or repealing rests with Parliament alone and not with the States.[85]

Article 252 denotes flexibility woven into the fabric of the Indian federalism. The scheme of distribution of powers under the Indian Constitution becomes somewhat less rigid because of Art. 252. There is, however, one flaw in the phrasesology of Art. 252(2). As it stands now, it menas that after Parliament has passed the law under Art. 252(1), it can amend the law in *like manner*. This means that the States must again pass resolutions authorising Parliament to amend the law. If the State Legislatures fail to pass such resolutions, Parliament cannot amend the law.

The procedure laid down in Art. 252 has been the subject of a controversy. In *Union of India v. Valluri B. Chaudhary,*[86] a question was raised about the validity of the Urban Land (Ceiling and Regulation) Act, 1976. The Legislatures of 11 States considered it desirable to have a uniform legislation enacted by Parliament for imposing a ceiling on urban immovable property. Accordingly, these Legislatures passed resolutions under Art. 252(1) authorising Parliament to legislate on this topic. In pursuance of these resolutions, Parliament enacted the Urban Land (Ceiling and Regulation) Act, 1976.

Initially, the Act applied to the eleven States which had originally passed the requisite resolutions, but later it was adopted by resolutions passed by the Legislatures of six more States. The primary object of the Act was to impose a ceiling on vacant land in urban areas. The pith and substance of the Act was with regard to urban vacant lands – a matter falling under entry 18, List II.

The validity of the Act was challenged *inter alia* on the ground that while the resolutions of the States had authorised Parliament to enact a law to impose a ceiling on urban immovable property, actually the Act as enacted imposed a ceiling on urban vacant land which was a different subject and, thus, contrary to the resolutions. The Supreme Court rejected the contention arguing that since 'urban immovable property' was a wider expression which also included 'land', there was no contradiction between the resolution passed by the States and the legislation enacted by Parliament.

No such provision authorising the States to delegate power to the Centre exists in the U.S.A. The Australian Constitution, however, in sec. 51(*xxxviii*) authorises the Central Parliament to enact laws with respect to matters referred to it by the Parliament or Parliaments of any State or States, 'so that the law shall extend only to States by whose Parliaments the matter is referred, or which otherwise adopt the law." The Indian provision is a close replica of the Australian model, but the interesting fact is that while it has not been used at all in Australia so far, in India, the provision has been used quite a few times as stated above.

The Canadian Constitution has no such provision. A straight delegation of legislative powers by a Province to the Centre (or *vice versa*) has been held to be *ultra vires* on the ground that such a delegation would constitute a breach of the

85. *Rajendra Kumar v. State of Madhya Pradesh*, AIR 1979 MP 108.
86. AIR 1979 SC 1415 : (1979) 3 SCC 324.

"watertight compartments", between the Centre and the Provinces as envisaged in the Canadian Constitution and would permit the Dominion and Provinces to enlarge and contract each other's jurisdiction at will.[87] But, on the other hand, a delegation of power by the Centre to a board functioning under a Provincial law has been upheld.[88] The present position in Canada thus is that a delegation of legislative power by a Province to the Dominion or *vice versa* is invalid, but delegation of power by one on a body created by the other is valid.[89]

(d) IMPLEMENTATION OF A TREATY

Article 253 confers on Parliament the capacity to legislate, irrespective of the scheme of distribution of powers, to implement a treaty or a decision made at an international conference.[90]

(e) EMERGENCY

Parliament becomes empowered to make laws with respect to any matter in the State List in relation to the State whose administration is taken over by the Centre under Art. 356.[91]

(f) EXPANSIVE NATURE OF SOME UNION ENTRIES

Lastly, it may also be noted that certain entries, *viz.*, 7, 23, 27, 52, 53, 54, 56, 62, 63, 67 in the Union List are so worded as to make their ambit expansive. For example, under entry 52, Parliament can take any industry under Central control by declaring that its control by the Union is 'expedient in the public interest.'[92] This is a flexible provision because an industry can stay in the State sphere until need is felt to bring it under Central control.

K. CENTRAL CONTROL OVER STATE LEGISLATION

There are a few provisions in the Constitution as stated below which prescribe assent of the President, *i.e.*, the Central Executive before a Bill passed by a State Legislature can become legally effective. This mechanism is part of the scheme of checks and balances insofar as the Centre is able to keep under its control certain types of State legislation.

(a) Article 31A(1) provides that a law regarding acquisition of estates will not be invalid even if it is inconsistent with Art. 14 or 19.[93] However, under the first proviso to Art. 31 A(1), the exemptions granted to some categories of acquisitorial law from Arts. 14 and 19 cannot be available unless the relevant State law has been reserved for the consideration of the President and has received his assent. In this way, the Centre can ensure that the States make only justifiable use of their power to deviate from the Fundamental Rights.

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87. *Att. Gen. of Nova Scotia v. Att. Gen. of Canada*, (1951) SCR 31.
88. *P.E.I. Potato Marketing Board v. Willis*, (1952) 4 DLR 146; *Coughlin v. Ontario Highway Transport Board*, (1968) S.C.R. 569.
89. *Scott*, Delegation by Parliament to Provincial Legislatures and vice versa, 1948 *Can. BR* 984.
90. *Supra*, Sec. D.
91. For a detailed discussion on the Emergency Provisions, see, *infra*, Ch. XIII.
92. *Supra*, Sec. D.
93. *Infra*, Ch XXXII, Sec. B.

The proviso enables the Central Executive to keep some check on State laws falling under Art. 31A(1), so that there is some uniformity among the State laws and that there is no undue curtailment of the Fundamental Rights guaranteed by Arts. 14 and 19.[1] The Centre can also ensure that the State does not use its legislative power for a purpose extraneous or collateral to the purposes mentioned in Art. 31A(1). This is a safeguard against undue, excessive and indiscriminate abridgement of Fundamental Rights by State legislation.

(b) Article 31C gives overriding effect to the Directive Principles over Fundamental Rights granted by Art. 14 or Art. 19, but a State law can claim this effect only if the President gives his assent to it.[2] This is also a safeguard against undue abridgment of Fundamental Rights in the name of implementation of Directive Principles. It may be appreciated that Art. 31C confers very drastic power on State Legislatures and so some safeguard is necessary against unwise or inappropriate laws being enacted and claiming exemption from Fundamental Rights guaranteed by Art. 14 or Art. 19.

(c) Under the Second Proviso to Art. 200, a State Governor has been ordained not to assent to, but to reserve for the consideration of the President, any Bill passed by a State Legislature which, in his opinion, would, if it became law, so derogate from the powers of the High Court as to endanger the position which that Court is by the Constitution designed to fill.[3]

For the proper functioning of a democratic system, governed by Rule of Law, an independent judiciary is an integral and indispensable part of the constitutional system.[4] This provision is intended to preserve the integrity of the High Courts which are designed to be strong instruments of justice. It is a safeguard against a State passing any law which may adversely affect the powers, jurisdiction or status of the High Court. The Centre can intervene in a fit case and preserve the High Court's constitutional status.

(d) Under Art. 288(2), a State law imposing, or authorising imposition of, a tax in respect of any water or electricity stored, generated, consumed, distributed or sold by any authority established by law made by Parliament for regulating or developing any inter-State river or river-valley, has no effect unless it has received the assent of the President.[5]

(e) Article 301 declares that trade, commerce and intercourse shall be free throughout India. However, under Art. 304(b), a State Legislature may impose reasonable restriction in public interest on the freedom of trade, commerce or intercourse with or within the State, but no such Bill is to be moved in the State Legislature without the previous sanction of the President.[6] This proviso is also a safeguard to ensure that State laws do not unduly disrupt the economic unity of the country. The Centre can ensure that States do not make laws to unnecessarily curtail freedom of trade and commerce.

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1. For discussion on Arts. 14 and 19, see, *infra*, Chs. XXI and XXIV.
2. See, *infra*, Ch. XXXII, Sec. D. Also see, Chs. XXXIV, Secs. A and B; XLI, Sec. D, *infra.*
3. *Supra*, Chs. VI and VIII.
4. See, on this theme, Ch. IV, Sec. K; Ch. VIII, Sec. F.
5. *Infra*, Ch. XI, Sec. J(ii).
6. *Infra*, Ch. XV, entitled "Freedom of Trade and Commerce".

It may however be mentioned that in the absence of prior sanction of the President, the defect can be cured under Art. 255 by subsequent assent of the President to the State law in question.[7]

(f) Then, there is Art. 254(2) under which repugnancy between a State law and a Central law with respect to a matter in the Concurrent List may be cured by the assent of the President to the State legislation.[8]

(g) When a proclamation of financial emergency is in operation under Art. 360(1), the President, *i.e.*, the Central Executive can direct the States to reserve all Money Bills or Financial Bills for the President's consideration after they are passed by the State Legislature. [Art. 360(4)(a)(ii)].[9]

(h) Besides the above specific situations where State legislation compulsorily needs Central assent for its validity, there is Art. 200 which makes a general provision enabling the State Governor to reserve a Bill passed by the State Legislature for Presidential consideration and assent.[10]

The implications of this provision appear to be that the Governor may also reserve a Bill, in situations other than those mentioned above, but it is not clear in what situations and circumstances the Governor may do so. No norms have been laid down in the Constitution as to when the Governor can exercise this power, or when the President can refuse to give his assent to a State Bill. On its face, it appears to give a blank cheque to the Governor and, as already discussed, he would exercise this power in his discretion.[11]

It needs to be said that the Governor should exercise his discretionary power to reserve a Bill for President's assent not liberally but exceptionally, *i.e.*, only in rare and exceptional cases. The reason for taking this view is that if the Governor interprets his power too liberally, it will result in too many State Bills being reserved for the Centre's assent and this will jeopardise the system of parliamentary democrary in the State.

Some of the situations when the Governor may be justified in reserving a State Bill are :

(i) when the State Bill suffers from patent unconstitutionality;
(ii) when the State Bill derogates from the scheme and framework of the Constitution so as to endanger the soveregnty, unity and integrity of the country;
(iii) when the State Bill *ex facie* comes in conflict with a Central law;
(iv) when the legitimate interests of another State or its people are being adversely affected.

Mere policy differences between the Governor and the State Government do not justify reservation of the State Bills by the Governor for President's assent. It may also be stated that unconstitutionality can arise in several situations, *e.g.*, the State Legislature may exceed its legislative competence which may happen when the Bill in question relates to a matter in List I and not to List II or List III; when

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7. For Art. 255, See, footnote 18, *infra*.
8. *Supra*, Sec. H.
9. *Infra*, Ch. XIII, Sec. F.
10. *Supra*, Chs. VI, Sec. F(i); Ch. VII, Sec. C.
11. *Ibid.*

the Bill infringes a Fundamental Right or it infringes some other constitutional provision or limitation.[12]

It may also be noted that Arts. 200 and 201[13] provide the necessary mechanism for making operational the various constitutional provisions, noted above, which require certain types of State Bills to be reserved for the President's consideration and assent.[14]

There is the corresponding question that once the State Bill is referred to the President under Art. 200, what are the considerations which the Central Government applies to examine the Bill. The formal powers of the President are laid down in this connection in Art. 201, but what tests should the Central Government apply to assess the State law is not laid down in Art. 201. *Prima facie,* Art. 201 confers an unrestricted power on the Central Government to examine the reserved State laws. The Central Executive is entitled to examine the State law from all angles, such as, whether or not it is in conformity with the Constitution, or the Central policies; whether it is inconsistent with any Central law *etc*.

A few illustrations to show the practical working of these provisions may be noted here. Punjab passed the Temporary Tax Bill levying a surcharge of 1 per cent on sales tax and an increased passenger and freight tax. The Centre refused its assent to the Bill as its effect was to levy 8 per cent tax on luxury goods as against the ceiling of 7 per cent fixed by the Chief Ministers' Conference. Another objection was that the Bill levied a tax of 3 per cent on goods declared essential on which only a 2 per cent sales tax was permissible under the Central Sales Tax Act, 1956. The Centre also sought an assurance from Punjab that it would share the enhanced revenue from the passenger tax with the Union Territory of Himachal Pradesh. The Centre signified its assent to the Bill when all these lacunae were removed.

In 1961, the Centre refused to assent to the Madhya Pradesh Panchayat Raj Bill, 1960, because it provided for nominated village panchayats to be set up for a year, and the Centre took the view that the system of nominations was a negation of the concept of panchayats.

The most typical case in this area is *In re Kerala Education Bill.*[15] The Kerala Legislature passed a Bill in 1957 to provide for the better organisation and development of educational institutions in the State. Its provisions raised a bitter public controversy in the State. The Governor reserved the Bill under Art. 200 for consideration of the President who sought the advisory opinion of the Supreme Court under Art. 143.[16] The Supreme Court held that some of the provisions of the Bill offended Art. 30(1), pertaining to the right of minorities to establish and administer educational institutions.[17] The President returned the Bill to the State for necessary amendments therein in the light of the Supreme Court's opinion. It is clear that the Centre sought the advice of the Supreme Court so as to keep it-

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12. On Fundamental Rights, see, Chs. XX—XXXIII, *infra.*

13. According to Art. 201, when a Bill is reserved for the President's consideration, the President may assent or withhold his assent therefrom.
See, Ch. VI, Sec. F(i) and Ch. VII, Sec. C, *supra.*

14. See, STUDY TEAM, ADMINISTRATIVE REFORMS COMM., REPORT ON CENTRE-STATE RELATIONSHIP, I, 277; *Report of the Sarkaria Comm.,* Ch. V, 143-159.

15. AIR 1958 SC 956 : 1959 SCR 995; *supra,* Ch. IV, Sec. F(c).

16. *Supra,* Ch. IV, Sec. C.

17. *Infra,* Ch. XXX, Sec. B.

self above the accusation of partisan politics as the Central and State Governments belonged to different political parties.

According to Art. 255, no Act of Parliament or of a State Legislature is to be invalid by reason only that the recommendation or previous sanction of the President required by the Constitution was not given, if assent is given to it by the President subsequently.[18] An interesting case in the area is *Jawaharmal v. State of Rajasthan*.[19] Rajasthan enacted a law levying a tax. The law needed Presidential assent but it was not secured. Later Rajasthan enacted another law declaring that the earlier law would not be deemed to be invalid by reason of the fact that Presidential assent had not been secured. This later law secured Presidential assent. The Supreme Court held that it could not cure the infirmity of the earlier law. That infirmity could be cured only by Presidential assent and not by any legislative fiat. Even the Presidential assent to the later law cannot cure the defect of the earlier law.

From the above discussion, it is clear that even in the sphere allotted to the States, the Centre exercises appreciable control over their legislation. Every year a large number of State Bills come to the Centre for assent under various provisions of the Constitution mentioned above. According to the Report of the Sarkaria Commission, during the period from 1977 to 1985, 1130 State Bills were reserved for the consideration of the President. Most of these originate under Art. 254(2) so as to validate an inconsistency between a State law and a Central law in the Concurrent List. The President assented to most of these bills; the assent was withheld only in 31 cases.[20] The norms on which the Centre acts in exercising its powers are not clear. However, on the whole, it appears that the Centre is circumspect in exercising its controlling powers over the State legislation. It is only in a very few cases that Presidential assent is refused to State laws. Some of the grounds on which such assent has been refused are: there was already a Central law in existence (in the Concurrent List); the matter lies within the exclusive jurisdiction of the Centre; the Centre is contemplating action itself; exclusion of Union property from State taxation; non-conformity with the policies of the Central Government; unconstitutionality; lack of procedural sagefuards etc.[21]

Commenting on the constitutional scheme of reserving State laws for the President's assent, the Sarkaria Commission has stated that it is "intended to subserve the broad purpose of co-operative federalism in the realm of Union-State legislative relations"; it is "designed to make our system strong, viable, effective and responsive to the challenges of a changing social order;" it is a necessary means and tool for evolving cohesive, integrated policies on basic issues of national significance. But, for the system to be effective, it is necessary that it is used sparingly and only in proper cases.

It may also be appreciated that the constitutional provisions regarding Central control over State legislation existing in India do undoubtedly detract to some extent from State autonomy. There is also inherent in these provisions a seed of

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18. If the previous sanction needed is that of the Governor, the Act will not be invalid if it has been subsequently assented to by the Governor or the President.

19. AIR 1966 SC 764 : (1966) 1 SCR 890.
For a comment on the case, see, 8 *JILI*, 637.

20. REPORT, 152.

21. S.N. JAIN, Freedom of Trade & Commerce *X J.I.L.I.*, 558-61 (1968); Alice Jacob, Presidential Assent to State Bills—A Case Study, XII, *J.I.L.I.* 151 (1970).

Centre-State conflict, for with various political parties in office, there may be a difference of policies amongst the various governments. A party controlling a State may pass a Bill within its competence to effectuate its political and economic ideologies and the political party in control at the Centre may not approve of the approach of the State Government. Thus, a deadlock may ensue between the Centre and the State concerned which can be broken only by a process of discussion and compromise between the two, as the Constitution prescribes no method to override a Central veto over State legislation where Central assent is necessary for effectuation of the State law.

However, the Central control over State legislation is justified in some situations. There are considerations of uniformity of law and uniformity of approach in certain basic matters. If, for instance, a State Government were to embark on a large scale indiscriminate nationalisation, its impact may be felt not merely within the State, but the national economic interests as a whole may be affected; it may drive away foreign investors from the country and so the Cente may not remain a passive spectator for long. Then there are cases of State laws prevailing against Central laws in the Concurrent sphere. This is a matter which the Centre can decide keeping in view the considerations of uniformity as against local exigencies. Centre's assent in certain cases confers an immunity on the State laws from being challenged under the Fundamental Rights.[22] This matter raises questions of individual rights as against social control. On the whole, however, if past practice is any guide, the Centre is wary of controlling State legislation unless it is demonstrably against national interests, or is unconstitutional, or is against well established national policies, and, perhaps, mere difference of approach is not the determining factor.

In the U.S.A. and Australia, the Centre exercises no control over the State legislation. In Canada, however, the Lt. Governor of a Province may reserve a Provincial Bill for the consideration of the Governor-General, a provision analogous to Art. 200 in India. Also, the Centre in Canada has power to disallow a Provincial law (after it has been assented to by the Lt.Governor and has thus come into operation) within a year of its enactment. Intervention through disallowance or reservation is exceptional. The whole trend in Canada has been towards lessening use of this power and that from the very beginning it has been recognised that the power should be used with circumspection and according to some principles. Legally, however, there are no limitations on the use of the device of reservation or disallowance in Canada. There is no power in the Central Government in India to disallow a State Act after it has come into operation as there is in Canada.

L. DISTRIBUTION OF POWERS IN OTHER FEDERATIONS

(i) CANADA

The scheme of distribution of powers in Canada between the Centre and the Provinces makes a threefold enumeration of powers.[23]

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22. See, *Supra.*

23. BORA LASKIN, CANADIAN CONSTITUTIONAL LAW, 202-900 (1975). Also see, D.J. Smiley, *The Canadian Political Nationality,* (1967) : G. Hawkins (ed.), *Concepts of Federalism,* (1965); Reports of the Rowell-Sirois Commission.

The Centre is empowered by S. 91 of the British North America Act, 1867, to make laws for the 'peace, order, and good government of Canada with respect to subjects not exclusively assigned to the Provinces'; but 'for greater certainty', and not 'so as to restrict the generality' of the foregoing provision, 30 specific heads of powers have been mentioned in the section itself; it is further laid down that whatever falls within this enumeration cannot be regarded as coming within the subjects falling in the Provincial List. Some of these heads are: defence, postal service, currency and coinage, taxation, criminal law, regulation of trade and commerce, unemployment insurance. S. 92 empowers the Provinces to legislate exclusively with respect to sixteen subjects. One of the heads in the Provincial list is 'property and civil rights'. 'Education' is an exclusive Provincial matter. Under s. 95, 'Agriculture' and 'immigration' are concurrent subjects with supremacy in favour of the Centre in case of conflict between a Central and a Provincial law. S. 94A makes 'Old age pension' a concurrent subject, but, curiously enough, in this area the supremacy lies with the Provinces and the Central law is subject to the Provincial law.

The British North America Act was intended to establish a strong Centre, but the constitutional developments in the country belied the hopes of the makers of the BNA Act. The growth of the Canadian Federation has been too much influenced by the existence of bi-racialism and bi-linguism in the country. The English-speaking people, in a majority in the country, want a strong Centre. On the other hand, the French-speaking minority, concentrated in the Province of Quebec, have always desired a weak Centre and strong Provinces so that their language and culture may be preserved. The framers devised the scheme in such a way as to leave matters of a local nature to the Provinces and to transfer matters of 'general' or 'national' concern to the Centre and thus given primacy to it. Literally, Section 91 is so designed as to make the general power—power to legislate for the peace, order and good government of Canada—as the main grant and to make the enumerations therein as the 'illustrations' of the general grant.

This view was substantially upheld by the Privy Council in *Russell v. The Queen*,[24] where it was held that all federal laws would be valid if they dealt with national or general aspects of any subject-matter even though that subject-matter in its local aspect might appear to come within S. 92. Had this view been applied consistently, the Centre in Canada would have become extremely powerful. But, in course of time, the Privy Council which acted for long as the highest and ultimate interpretative judicial organ from Canada, being influenced with the aspirations of the French minority so interpreted the scheme of distribution of powers as to shift the balance of power in favour of the Provinces at the cost of the Centre. The Central power became confined to the subject matters enumerated in S. 91. The efficacy of the 'general' power was very much diluted as a peace-time power and came to be used by the Centre only in cases of emergency like war and not in normal times.[25] This happened because the exercise of general power

24. 7 A.C. 829.

25. See on this point, Bora Laskin, Peace, Order and Good Government Re-examined, 25 *Can. B.R.* 1054 (1947); also his note in 35 *Can. B.R.*, 101; Scott, Centralisation And Decentralisation, 29 *Can B.R.*, 1095 (1951): SCOTT, French Canada and Canadian Federalism in EVOLVING CANADIAN FEDERALISM, 54-61; Smiley, The Two Themes of Canadian Federalism, 31 *Can. JI. of Eco. & Pol. Sc.* 80. *Cf.* L.P. Pigeon, The Meaning of Provincial Autonomy, 29 *Can. B.R.* 1126 (1951).

invariably came in conflict with the Provincial power on 'property and civil rights,' and the Privy Council instead of interpreting the latter narrowly, interpreted the Dominion's power narrowly.

Not only this, the Provincial power over "property and civil rights" was interpreted by the Privy Council so broadly as to affect adversely some of the Centre's enumerated powers in s. 91, *e.g*., the scope of trade and commerce power has been very much curtailed. While the general rule is that in case of conflict between the Dominion's enumerated power in Sec. 91 and the Provincial head in S. 92, the Dominion's power prevails, yet the conflict between 'trade and commerce' and 'property and civil rights' has been an exception to this rule as in such a case the judicial view has invariably leaned in favour of the latter.

The Privy Council took the view that, if taken literally the phrase "trade and commerce" would extend over the whole range of economic life but that such a construction would ignore and render meaningless the Provincial power over property and civil rights.[26] Thus, by excluding "property and civil rights" from "trade and commerce", and interpreting 'property and civil rights' broadly, much of the Dominion Government's power has been neutralized.

This judicial approach can be illustrated by reference to a few decided cases. In 1937 in the *Weekly Rest case*,[27] the Privy Council held that legislation regarding labour fell under the Provincial power over 'property and civil rights' and that the general power could be used only under 'abnormal' or 'exceptional circumstances'. In peace time, therefore, the 'residue' came to belong to the Provinces instead of the Dominion. 'Property and civil rights' being a term of very general nature comprised so much that little was left as a 'residue' in the peace time.[28]

The Centre has been denied power to regulate the supply and price of necessities of life.[29] *In Att. Gen. for British Columbia v. Att. Gen. for Canada*,[30] while invalidating the Central agricultural marketing legislation, the Privy Council declared that 'regulation of trade and commerce does not permit the regulation of individual forms of trade or commerce confined to the Province'. In the words of Bora Laskin, "The story of the trade and commerce power ..... is ..... the saddest legacy of Privy Council adjudication."[31] This is the position in normal times. The position however changes in favour of the Dominion in an emergency when 'property and civil rights' is restrictively interpreted; and, consequently, the 'general power' is broadly interpreted.[32] In war-time the general power becomes very potent and the Dominion Parliament can enact many socio-economic laws which it cannot do during peace-time.[33]

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26. *Bank of Toronto v. Lamb*, (1887) 12 A.C. 575.
27. *Att. Gen. for Canada v. Att. Gen. for Ontario*, 1937 A.C. 326.
28. *Snider's case*, 1925 A.C. 396; MacDonald, Constitution in the Changing World, 1948 *Can, B.R. 2*; *Canadian Federation of Agriculture v. Att. Gen. of Quebec*, 1951 A.C. 179.
29. *In Re Board of Commerce Act*, 1919, 1922 AC 191.
30. 1937 A.C. 377.
31. Also see, *Citizens Insurance v. Parsons*, 7 A.C. 96; *Att. Gen. for Ontario v. Att. Gen. for Canada*, [1896] A.C. 348; *In Re Dairy Industry Act (1950)*, [1951] A.C. 179.
32. An application of the emergency doctrine is to be found in the *Anti-Inflation Reference* (1976) 52. SCR 373. The Anti-Inflation Act was justified on the basis of economic crisis in Canada.
33. *Fort Frances Pulp & Paper Co. v. Manitoba Free Press*, [1923] A.C. 695.

A limited interpretation has been given to the Centre's spending power. It has been held that spending accompanied by a regulatory scheme would be classified by reference to the latter. In the instant case, the Act was held invalid.[34]

With the disappearance of the Privy Council's jurisdiction over Canada, and the emergence of the Canadian Supreme Court as the final Court of appeal, some judicial efforts have been made to restore the balance in favour of the Centre by reclaiming to some extent the 'general power' as well as the 'trade and commerce' power and to restrict the scope of the Provincial power on 'property and civil rights'.[35]

The Central Government in Canada faces a great difficulty in the area of foreign relations. Under S. 132 of the B.N.A. Act, the Canadian Parliament has 'necessary and proper' power to perform the obligations of Canada, 'as a part of the British Empire', towards foreign countries arising under treaties between the Empire and such foreign countries. In 1876, when the B.N.A. Act was passed, Canada was a British colony with no international status of its own and so S. 132 was sufficient to meet its needs. If Canada enters into a treaty as a part of the British Empire, it can implement it irrespective of the scheme of distribution of powers. But, today, Canada enters into treaties as a sovereign country, and not as a part of the British Empire, and to these treaties S. 132 does not apply. Such treaties can be implemented by Parliament to the extent it is possible to do so within the limits of the subjects assigned to it under S. 91. It cannot encroach upon the Provincial field.[36] If a treaty concerns a matter falling in the provincial sphere, then comparable legislation by the various Provinces may be needed to implement the treaty, and this, at times, may prove to be very difficult. The power of the Central Government is thus very much circumscribed in the international field.[37]

The development of Canadian Federalism has been in striking contrast with that of the American Federalism. In the U.S.A., the Centre designed to have limited powers has grown into a colossus. On the other hand, in Canada, the Centre designed to be strong has turned out to be restricted in dealing with the socio-economic problems of a fast developing economy.

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34. *Re Employment and Social Insurance Act (1937),* [1937] A.C. 355.

35. See, for example, *Johannesson v. West St. Paul* (1952) 1 S.C.R. 292; *Munro v. National Capital Commission*, (1966) S.C.R. 663; *A.G. for Manitoba v. Manitoba Egg & Poultry Association* (1971) SCR 689; Bora Laskin, *Canadian Constitutional Cases*, 122-130 (1975).

36. *Att. Gen. for Canada. v. Att. Gen. for Ontario*, 1937 AC 326.
According to this judgment, a distinction has to be drawn between the "legislative powers given to the Dominion to perfom obligations imposed upon Canada as part of the empire by an Imperial executive responsible to and controlled by the.. Imperial Parliament, and the legislative power of the Dominion to perform obligations created by the Dominion executive responsible to and controlled by the Dominion Parliament." These latter obligations are not obligations of Canada as part of the British Empire, but of Canada by virtue of her new status as an international person, and do not arise under a treaty between the British Empire and foreign countries." Consequently, they are not covered by S. 132 as given above.

37. Szablowski, Creation and Implementation of Treaties in Canada, 1956 *Can. B.R.* 28; Hendry, *Treaties and Federal Constitutions;* Scott, Centralisation and Decentralisation in Canadian Federalism, 1951 *Can B.R.* 1095; Nettl, 'The Treaty Enforcement Power in Federal Constitutions, 1950 *Can B.R.* 1051; Matas, Treaty making power in Canada, 1947 *Can B.R.* 458; McWhinney, *Comparative Federalism*, 43(1962); Laskin, Some International Legal Aspects of Federalism; The Experience of Canada in Currie (ed.), *Federalism and the New Nations of Africa*, 389 (1964).

Comparing the Indian and Canadian schemes of distribution of powers, a number of resemblances and contrasts are found to exist. The Centre in Canada has an exclusive field enumerated in S. 91 of the B.N.A. Act. So has the Centre in India although the Union List is more elaborate and detailed than its Canadian counterpart. The Canadian Provinces have an exclusive field. So have the States in India though here again the State List is more detailed. In Canada, there is a small concurrent field consisting of three subjects only; the Concurrent area in India is, however, much larger. In both countries, the residuary belongs to the Centre, but there is not much left by way of residuary in Canada because of the judicial interpretation of the Provincial 'property and civil rights' clause in peace-time.

The emergency view of the Centre's 'general power' in Canada can be compared with the 'emergency' provisions of the Indian Constitution. In Canada, during an emergency, the Centre's general power becomes much more meaningful due to a restrictive interpretation put on the Provincial power over 'property and civil rights'.[38] How much scope the general power would have during an emergency is, however, a matter for the Courts to determine as and when controversies are presented to them for adjudication. In India, on the other hand, when an emergency is declared, the Cenrre becomes entitled to legislate with respect to any matter in the State List. Another very important point of contrast between the two countries is that while the Centre in India has a comprehensive power to give effect to a treaty, and it may legislate even though the subject-matter falls within the State List,[39] in Canada the Centre is restricted to some extent in this area.

(ii) U.S.A.

In the U.S.A., the federation came into existence as a result of the voluntary compact between 13 sovereign States. These States surrendered a part of their sovereign powers to a federal entity and retained with themselves the unsurrendered residue.

The Constitution of the United States of America was brought into being in 1787. It is, therefore, the oldest and the most respected member of the family of modern federal constitutions and is regarded as a precursor of the modern federalism. Experiences derived from its working have profoundly influenced the growth of federalism elsewhere.

The U.S. Constitution adopts a very simple method for Centre-State distribution of powers. It has only one List specifically enumerating the powers of the Centre. A few enumerated and specified powers have thus been allocated to the Centre, and the unenumerated residue of powers have been left to the States.

The powers entrusted to the Federal Government are thus specific and fall under eighteen heads but Central powers have expanded a great deal over time through judicial creativity and activism so much so that, in the words of U.S. Supreme Court as early as 1920, "it is not lightly to be assumed that in matters requiring national action, a power which must belong to and somewhere reside in

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38. *Fort Frances Pulp and Power Co. v. Manitoba Free Press Co.*, 1923 A.C. 695. Also, Murphy, The War Power of the Dominion, 30 *Can. B.R.*, 791 (1952).

39. *Supra*, Sec. D(c).

every civilized government is not to be found".[40] Moreover, "even constitutional power may be established by usage".[41] The Congress is given power to make all laws which may be 'necessary and proper' to give effect to its enumerated powers.

The Centre may enter into treaties with foreign countries, which on being confirmed by 2/3rds of the senators present, are placed in the same category as an Act of Congress and override State legislation. A self-executing treaty becomes operative automatically when approved by the Senate, but a non-self-executing treaty can be effectuated only by passing a law. A treaty is self-executing if its framers intended to prescribe a rule which, standing alone, would be enforceable in the Courts.[42] Under its treaty making power, the Centre has full control over foreign affairs and is authorised to give effect to a treaty entered into by it with a foreign country irrespective of the Centre-State division of functions. In an early case[43], the Supreme Court declared : "It is the declared will of the people of the United States that every treaty made by the authority of the United States shall be superior to the constitution and laws of any individual State, and their will alone is to decide'. 'If this were not so', said the Court, 'The will of a small part of the United States may control or defeat the will of the whole." The Supreme Court has even asserted that the Central Government's power over external affairs does not depend upon the affirmative grant of power in the Constitution but is a necessary concomitant of nationality. Without an extensive foregin affairs power, the U.S.A. would not have gained primacy in international sphere.[44]

Most of the powers granted to the Centre are couched in very general language. A liberal interpretation of these powers has made the Centre very powerful, and has helped in the transformation of an agricultural country into the modern industrial giant of today. The commerce power has become the source of the Centre's extensive power to regulate the economic life of the country, to deal with national economic problems, to prevent or restrict disfavoured local activities like gambling, prostitution, *etc*., and to restrict the States from interfering with the flow of trade and traffic over State boundaries.[45] The commerce power has been interpreted so as to cover almost every aspect of national economy including production as well as distributive activities. Had this not been so, big

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40. *Missouri v. Holland*, 252 U.S. 416, 433 (1920).

41. *Inland Waterways Corp. v. Young*, 309 US 517 (1940).
See, for a discussion on the Congress's powers, CORWIN, THE CONSTITUION : WHAT IT MEANS TO-DAY, 32-93.

42. Looper, Limitations on the Treaty Power in the Federal States, 34 *N.Y.U.L.R.*, 1045, 1055: McLaughlin, The Scope of the Treaty Power, 43 *Minnesota L.R.*, 651 (1959): Sutherland, Restricting the Treaty Power, 65 *Harv. L.R.* 1305 (1952); *Heuenstein v. Lynham*, 100 U.S. 483.

43. *Ware v. Hylton*, 3 Dall. 199.

44. *Missouri v. Holland*, 262 U.S. 416; *U.S. v. Curtiss-Wright Export Corporation*, 299 U.S. 304 (1936); *Perez v. Brownell*, 356 U.S. 44 (1958): *Zschering v. Miller*, 389 C.S. 429 (1968).

45. *N.L.R.B. v. Jones*, 301 U.S. 1: *U.S. v. Darby*, 312 U.S. 100; *Wickard v. Filburn*, 317 U.S. 111: *N.L.R.B. v. Denver Building & Construction Trades Council*, 341 U.S. 675. Stern, The Scope of the Phrase Inter-State Commerce, *Selected Essays in Constutional Law*, 298 (1963).
Marphy J. said in *American Power & Light Co. v. Securities & Exchange Comm*., 329 U.S. 60, 104: "The federal commerce power is as broad as the economic needs of the nation."

corporations having operations throughout the country could not have grown and the country could not have industrialized itself in such a phenomenal manner.[46]

Responsibility for defence lies solely on the Centre and its war power is interpreted very broadly during the war crisis. The war power "staggers the imagination by its scope and variety", and "in short, what is necessary to win the war Congress may do."[47] The War power includes not only power to wage war but also power to prevent it as well as to remedy the evils which have arisen from its rise and progress.[48]

The Supreme Court has developed the doctrine of "incidental and ancillary powers." The 'necessary and proper' clause has also been liberally interpreted so as to confer a greater dimension to its enumerated powers. Under this power, the Courts have sustained means chosen by Congress which, although not themselves within the granted power', are 'nevertheless deemed appropriate aids to the accomplishment of some purpose within an admitted power of the national government.'[49] Thus, the Congress enjoys a good deal of discretion to decide what means need be adopted to achieve the purposes implicit in its powers. Justice STONE, speaking for the Supreme Court, asserted that Congress's powers under the necessary and proper clause are no more limited by the reserved powers of the States than are its necessary powers.[50] The "necessary and proper" clause which is known as the "co-efficient clause" furnishes each of the "enumerated" powers of Congress with its second dimension, so to speak.[51]

Under its taxing power, the Centre has been enabled to raise vast sums of revenue in peace as well as in war.[52] And, the taxing power has been used not only to raise money but also for regulatory purpose.[53] Its power to spend for general welfare has been interpreted broadly so as to enable the Centre to spend money not only for an activity falling within its constitutional ambit, but even for a purpose which falls under the States' jurisdiction. Congress can spend money on any activity which it identifies as a matter of 'general' welfare.[54]

Congress has come to exercise enormous power with the acquiescence of the Supreme Court. Over time, the Centre has grown into a colossus and has dwarfed the States. Though the States still remain important administrative units performing many useful functions—education, public health, highways, law and order, are some of the activities in the large miscellany of the State functions in the modern times—yet the fact remains that their relative constitutional position

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46. "The Commerce clause forms the keystone of the arch on which the commercial prosperity of the nation is made to rest." M. RAMASWAMY, THE COMMERCE CLAUSE IN THE CONSTITUTION OF THE UNITED STATES, 7.

47. CUSHMAN, CASES IN CONST. LAW, 463 (1968).

48. *Yakus v. U.S.*, 321 U.S. 414: *Bowles v. Willingham*, 321 *U.S.* 503: *Woods v. Miller*, 333 U.S. 138; *Corwin, Total War and the Constitution* (1947).

49. *U.S. v. Darby*, 312 U.S. 100; *McCulloch v. Maryland*, 4 Wheat. 316; *U.S. v. Oregon*, 366 U.S. 643.

50. *U.S. v. Darby*, *supra.*

51. CORWIN, *supra*, 33 (1973).

52. *Infra*, next Chapter.

53. Robert Cushman, The National Police Power under the taxing clause of the Constitution, *4 Minn. L Rev.*, 247, and Social and Economic Control through Federal Taxation, 18 *Minn, L.R., 759*; *Carter v. Carter Coal Co.*, 298 U.S. 238; *U.S. v. Kahriger*, 345 U.S. 22.

54. *U.S. v. Butler*, 291 U.S.I; *Steward Machine Co. v. Davis*, 301 U.S. 548; *Helvering v. Davis*, 301 U.S. 619; *Cleveland v. U.S.*, 323 US 329; see, M.P. Jain, Federal Grants-in-Aid in the U.S.A., 1946 *Vyavahara Nirnaya*, 245: *infra*, next Chapter.

is inferior to the Central Government whose primacy is an established fact. New areas of national concern have been emerging. National policies have been extending into new fields which were once the preserve of the States. The fact remains that in the U.S.A. which was once regarded as the home of classical federalism, strong centripetal tendencies have emerged in course of time and today the functional reality does not accord with the classical federal theory. In the U.S.A., there has been a continuous expansion of the functions of the Central Government and this has completely altered the federal balance of powers in favour of the Central Government. Correspondingly the residual powers of the State Governments have been attenuated. This transformation has been achieved without any amendment of the Constitution. In this process, the Supreme Court has played a crucial role. Much of the constitutional transformation has taken place through judicial activism. By the process of liberal interpretation of the Constitution, the Court has expanded the scope of many heads of power to cover a variety of legislative fields.

Comparing the scheme of distribution of powers in the U.S.A. with that in India, we find that in America there is only one List while there are three Lists in India. In America only the exclusive powers of the Centre are defined; there is no concurrent field and the residue vests with the States. In India, the exclusive powers of the Centre as well as of the States are defined: there is a large concurrent area and the residue vests in the Centre and not the States. Functions assigned to the Centre in India are much more numerous and broader in ambit than those assigned to the Centre in the U.S.A.

Defence and external affairs are Central subjects in both the countries but the Centre's external affairs power appears to be broader in India than in the U.S.A., for whereas in India it extends to treaty obligations as well as to non-obligatory international conferences,[55] in the U.S.A. it extends only to treaty obligations. All treaties in India need legislation for implementation as, unlike the U.S.A., there is no concept of self-executing treaties. In both places, the Centre is not hindered by the distribution of powers in the implementation of its treaty obligations. The Supreme Court in the U.S.A. has helped in the growth of the Centre as a powerful entity; in India, the Centre has been conceded a powerful status by the Constitution itself which is more pervasive than that of the Centre in the U.S.A.[56] The Supreme Court has further expanded the Centre's powers by its creative interpretation.[57]

(iii) AUSTRALIA

The Commonwealth of Australia joined the family of federations in 1900 when the British Parliament enacted the Commonwealth of Australia Constitution Act. It follows the American model to the extent of giving only specific powers to the Centre but, in effect, there are some interesting differences between Australia and America in the scheme of distribution of powers between the Centre and the States.

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55. *Supra*, sec. D.
56. See CORWIN, THE CONSTITUTION AND WHAT IT MEANS TO-DAY, 38-124(1978); GUNTHER, CONSTITUTIONAL LAW: CASES & MATERIALS 81-372 (1975).
57. On Constitutional Interpretation, see, Ch. XL, *infra.*

Section 51 of the Commonwealth Act enumerates 40 heads with respect to which the Central Parliament has power to legislate. S. 51 does not make the power of the Centre exclusive and the States are also authorised to legislate in this area concurrently. But some heads either by their nature, or by virtue of other constitutional provisions, are such that only the Central Parliament can make laws with respect to them, as for example, borrowing money on the public credit of the Commonwealth, defence, external affairs, *etc*. Besides, a few *exclusive* powers have also been assigned to the Centre.[58] All the rest of the functions, lying beyond the concurrent and the Centre's exclusive fields, fall within the exclusive State jurisdiction. The States thus have to look after such functions as education, health, roads, railways and other various developmental activities.[59] In case of an inconsistency between a Central law and a State law, the Central law prevails and the State law is invalid to the extent of inconsistency.

Though the powers of the Centre are defined and specific, yet they have been couched in such terms as have, on the whole, proved to be capable of expansion by judicial interpretation. The High Court has persistently read Commonwealth powers liberally and generously. The defence power has been interpreted in such a way as to enable the Centre to regulate practically all aspects of people's life during war-time with a view to military preparedness of the nation. This power has been used to support regulation of substantial areas of the national economy to enable a smooth transition from war to peace or in preparation for war.[60] It has been stated by an authority that the defence power in Australia is "so simply and largely conferred that in time of war the Parliament could itself make any laws whatever, unless they could be plainly shown to have no possible bearing on the military preparedness of the nation".[61]

The Centre has full control over external affairs: it can make a law to give effect to a treaty even if its subject-matter falls under the States' jurisdiction.[62] This is potentially important because of the rapid expansion in the scope of international agreements. By signing such an agreement, the Centre can acquire many powers which it may lack otherwise.

The Centre has found in its powers on 'inter-state commerce' and 'arbitration of industrial disputes' a great potential capacity to regulate economic affairs in the country because progressively trade and commerce is becoming more national in character and less confined within the limits of any one State.[63]

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58. These powers are: (*a*) the seat of the Central Government (S. 92): (*b*) places acquired by the Centre for public purposes (S. 52); (*c*) territory surrendered to the Commonwealth by any State (Ss. 122 and 111); (*d*) the public services of the Centre (S. 52); (*e*) duties of customs and excise (S. 90 with S. 52(iii);) (*f*) naval and military forces (S. 52 and S. 114); (*g*) bounties in the production or export of goods (Ss. 90 and 91); (*h*) coinage of money or legal tender (Ss. 51 and 115).

59. SAWER, AUSTRALIAN CONSTITUTIONAL Cases (1982).

60. *Farey v. Burvett*, 21 CLR 433; *Marcus Clark & Co. v. Commonwealth*, 87 CLR 177; *King v. Foster*, 79 CLR 43; Bailey, *Fifty Years of Australian Constitution*, 25 ALJ 319; *Australian Communist Party v. Commonwealth*, 83 CLR 1; Cower, 33 *JI. Comp. Leg.*, 83; Else-Mitchell, *Essays on the Australian Constitution*, 157-191 (1961); COLIN HOWARD, AUSTRALIAN FEDERAL CONSTITUTIONAL LAW, 422-441 (1972).

61. K.H. BAILEY, STUDIES IN THE AUSTRALIAN CONSTITUTION, 32 (ed. Portus).

62. *R. v. Burgess, ex parte Henry*, 55 CLR 608; *Airlines of N.S.W. v. State of N.S.W.*, 113 CLR 54 (1965); *New South Wales v. Commonwealth*, 135 C.L.R. 337; ELSE-MITCHELL, *op. cit.*, 374; COLIN HOWARD, *op. cit.*, 441-457.

63. *Australian National Airways v. The Commonwealth*, 71 CLR 29.

The extent of the spending power of the Centre is broad. It is not definitely established yet the Centre can spend for any purpose it likes. In the *Pharmaceutical Act* case,[64] Commonwealth appropriations for granting pharmaceutical benefits were held invalid suggesting that, unlike the U.S., the Australian Central Government does not have general power to spend its funds on such social services as it pleases. The decision also suggested that a spending scheme connected with public health and having extensive coercive regulation as incidental to the spending is to be treated as a law about public health, and so beyond the Central power. This decision led to amending the Constitution so as to enable the Centre to provide a number of welfare services. However, in *Victoria v. Commonwealth & Hayden*[65] by a majority, the High Court has sustained the liberal view of the spending power and has ruled that Parliament can appropriate money for such purposes as it may determine.

In spite of the expansion over time in the powers of the Centre, there is a feeling that it lacks adequate power to deal with peace-time socio-economic problems facing the country and efforts made to amend the Constitution to rectify the lacunae therein have not succeded because of an extremely rigid process to amend the Constitution.[66]

There are several interesting points of comparison and contrast between the Australian and Indian schemes of distribution of powers. Both in Australia and India, certain powers have been assigned exclusively to the Centre, though, in India, the enumeration of powers in the Union List is much more exhaustive and much larger than in Australia. Both countries have Concurrent Lists with primacy being vested in the Centre, though in India, unlike Australia, it is possible to keep alive a State law inconsistent with the Central law while there is no such provision in Australia. In Australia, the powers of the States are unenumerated and undefined. In India, it is not so; the powers of the States are enumerated and defined as contained in the State and the Concurrent Lists. In India, the residue vests in the Centre; in Australia, the residue vests in the States. In both countries, the Centre has been clothed with a comprehensive defence power. The Centre's power over external affairs also is comprehensive and broad in both countries.

64. *Att. Gen. (Vic.) v. Commonwealth*, 71 CLR 237 (1945).
Also see, FAJGENBAUM & HANKS, AUSTRALIAN CONSTITUTIONAL LAW, 629 (1980).

65. (1975) 134 CLR 338.

66. EVATT, POST-WAR RECONSTRUCTION AND THE CONSTITUTION; CAMPBELL, POST-WAR RECONSTRUCTION IN AUSTRALIA, 238-262.
In 1959, a Jt. Parliamentary Committee suggested some constitutional amendments but nothing came out of it.
For Constitutional Amendment, see, *infra*, Ch. XLI.

CHAPTER XI

FINANCIAL RELATIONS

SYNOPSIS

A. INTRODUCTORY

Intergovernmental financial relationship in a federation is a vital, or one may say, even a critical matter. It touches the very heart of modern federalism, as the way in which this relationship functions, affects the whole content and working of a federal polity. It is, however, an arduous exercise to create a viable scheme of intergovernmental financial relationship in a federal polity as federalism has its own special and peculiar problems. Finance is an essential pre-requisite of good government.[1]

There being in a federation two sets of governments having functions to discharge, it is essential for the effective working of each government that it be endowed with powers to raise financial resources of its own. This necessitates an apportionment of taxing powers between the Centre and the States. In a federation, therefore, along with division of functions there is also a division of taxing powers between the Central and the State Governments.

But the problems of ordering an inter-governmental financial relationship in a federation does not end with allocating taxing powers between the two levels of government. To enable a government to function effectively, it is not enough that it raises some money to carry on its functions, but what is necessary is that its financial resources match its needs, demands and responsibilities. A balance ought to exist between the financial resources of the government and its allotted responsibilities and functions. If a government is starved of resources necessary

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1. M.P. JAIN, *Taxing Powers in Canada*, 1955 *Vyavahara Nirnaya*, 125-167; M.P. JAIN, *Federal Grants-in-Aid in the U.S.A.*, 1956 *Vyavahara Nirnaya*, 252; M.P. JAIN, *Central-State Fiscal Relationship in India* (1950-1967): A Study of an aspect of Indian Federalism, *Jahrbuch des Offenlichen Rechts Der Gegenwart*, 456-511 [Neue Folge/Band 16 (1968), ed., G. LEIBHOLZ, pub. J.C.B. MOHAIR (Tubingen)]; AUSTIN, THE INDIAN CONSTITUTION, 217-234 (1966); ASOKA CHANDA, FEDERALISM IN INDIA, 134-259.

to carry out its assigned functions, then its powers and autonomy would be no more than a myth.

A sound federal system would, therefore, envisage that financial resources between the Centre and the States are allocated in such a way that there exists a balance, an equilibrium, between the functions and resources at each governmental level. Absence of balance in the function-resource equation at any governmental level is bound to lead to bad government and create tensions, strains and stresses within the federal polity, make it unstable, and *jeopardise* its smooth functioning.

A viable scheme of Centre-State financial relationship is the *sine qua non* for the proper functioning of a federal polity as a whole. But it is a very difficult objective to achieve because of *inter alia* economic disparities among the several States.

It is the universal experience of working of federations that no scheme of allocation of taxing powers results in creating a finance-function balance at each level. It is extremely difficult to create a balance between needs and resources at each level. Some sort of maladjustment always arises.

Usually, the Centre in spite of its own heavy commitments on defence and other services, does emerge with a much stronger financial capacity than the units which always find their resources inadequate to match their responsibilities. Therefore, it becomes necessary to devise expedients to transfer revenue from the Centre to the units so that a balance is created at that level between resources and responsibilities and they become effective instruments of government. A mosaic of intergovernmental financial relations thus arises in a federation.

The Indian Constitution incorporates a very elaborate scheme of Centre-State financial relations. In drawing this scheme, the framers of the Indian Constitution sought to adopt some of the techniques developed in other federations, but at the same time they tried to avoid some of the pitfalls and difficulties which had developed there. The two most conspicuous features of this scheme are: (i) a complete separation of Central-State taxing powers, and (ii) massive transfer of funds from the Centre to the States.

DOUBLE TAXATION

There is no rule against double taxation, as such, *i.e.* the same tax being levied twice on the same tax base either under the same name or under different names. If the legislature so wants it can enact necessary legislation for the purpose.[2] The Constitution has no provision prohibiting double taxation. As the Supreme Court has observed:[3]

> "There is nothing in Art. 265 of the Constitution[4] from which one can spin out the constitutional vice called double taxation."[5]

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2. *Jain Bros v. Union of India,* AIR 1970 SC 778 : (1969) 3 SCC 311.
3. *Avinder Singh v. State of Punjab,* AIR 1979 SC 321 : (1979) 1 SCC 137.
4. See, *supra*, Ch. II, Sec. J(ii)(b).
5. Also see, *Radhakishan Rathi v. Addl. Collector, Durg,* AIR 1995 SC 1540 : (1995) 4 SCC 309; *Municipal Council, Kota v. Delhi Cloth & General Mills Co. Ltd.,* AIR 2001 SC 1060 : (2001) 3 SCC 654. See also *Union of India v. Azadi Bachao Andolan,* (2004) 10 SCC 1 : AIR 2004 SC 1107.
Reference may also be made in this connection to Art. 14 : Ch. XXI, *infra.*

B. ALLOCATION OF TAXING POWERS

Taxing powers are divided between the Centre and the States. The Constitution allots separate legislative heads of taxation to the Centre and the States. The taxes enumerated in the Union List [List I] are leviable by the Centre exclusively while those mentioned in the State List [List II] are leviable by the States exclusively. Not many tax entries are contained in the Concurrent List. This has been done to avoid problems of overlapping and multiple taxation between the Centre and the States.

The scheme of allocation of taxing powers between the Centre and the States is based on the broad principle that the taxes of a local nature have been allotted to the States while taxes which having a tax base extending over more than one State, or which should be levied on a uniform basis throughout the country and not vary from State to State, or which can be collected more conveniently by the Centre rather than the States have been allotted to the Centre. A beneficial result of adopting such a methodology of allocation of taxing powers has been to eliminate all problems of multiple and overlapping taxation which have arisen in an acute form in other federations because of concurrent taxing powers of the Centre and the States. This created manifold complications both for the tax-payer and the tax-collector.[6]

The rules which apply to the interpretation of the non-tax entries apply *mutatis mutandis* to the interpretation of the tax entries as well,[7] *e.g.*, each entry is to be interpreted liberally; in case of any conflict between two or more entries, they should be reconciled; an entry includes all incidental and ancillary matters.

A tax entry, like a non-tax entry, has to be interpreted broadly and liberally.[8] Applying the principle of broad interpretation of the tax entries, it has been held that under a tax-entry, it is possible for a legislature to levy a tax not only prospectively but even retrospectively.[9] The rule of pith and substance is to be applied as and when it becomes necessary to find whether a law is with respect to a given entry. The same rule applies with respect to tax laws. What is relevant is not the consequences of the law on the subject-matter or whether it affects it, but whether, in its pith and substance, it is a law upon the subject-matter in question.[10] If the taxing power is within a particular legislative field, other fields in the legislative lists must be construed to exclude this field so that there is no possibility of legislative trespass.[11]

Since an entry includes all subsidiary or auxiliary matters, therefore, a legislature may make provisions for validating a law declared bad by the courts because of some infirmity, by enacting a validating law by removing the infirmity in question, and making the provisions of the earlier law effective from the date it

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6. See, *infra*, Sec. E.
7. *Supra*, Ch. X, Sec. G.
8. *Supra*, Ch. X, Sec. G(a).
9. *Tata Iron & Steel Co. v. State of Bihar*, AIR 1958 SC 452 : 1958 SCR 1355; *Chhotabhai Jethabhai Patel v. Union of India*, AIR 1962 SC 1006 : 1962 Supp (2) SCR 1; *Jawaharmal v. State of Rajasthan*, AIR 1966 SC 764 : 1966 (1) SCR 890; *Misri Lal Jain v. State of Orissa*, AIR 1977 SC 1686 : (1977) 3 SCC 212.
10. *Supra*, Ch. X, Sec. G(d).
Also see, *Southern Pharm. & Chem. v. State of Kerala*, AIR 1981 SC 1863 : (1981) 4 SCC 391.
11. *Godfrey Phillips India Ltd. v. State of U.P.*, (2005) 2 SCC 515 : AIR 2005 SC 1103.

was passed, and retain the collections made under the original law as being made under the validating law. The most important condition however is that the legislature must have the power to impose the tax, for, if it does not, the action must ever remain ineffective and illegal.[12]

Further, validation of a tax declared illegal may be done only by removing the grounds of illegality or invalidity.[13] However, the Legislature cannot reverse, disobey or disregard a court decision but can remove the basis on which the court decision was based.[14]

While levying a tax, it is competent to the legislature to devise a machinery for effective collection of the tax, to determine procedure for assessing the tax liability and devise and make necessary provisions for preventing its evasion.[15] A provision to seize and confiscate, and levy penalty in respect of, goods carried in a vehicle from one State to another, whether the goods are sold or not, is not incidental to the power to levy sales tax.[16]

When a challenge is made to the levy of a tax, its validity may have to be adjudged mainly by reference to the legislative competence or power to levy the same. In adjudging this issue, the nature and character of the tax has to be determined at the threshold. If the legislature has power to levy the tax, its motive in imposing the same are immaterial and irrelevant. The fact that a wrong reason for exercising the power has been given also would not derogate from the validity of the tax.

When the legislature possesses the competence to levy the tax, the limits of that competence cannot be adjudged further by the form or manner in which that power is exercised. It is not the nomenclature of the tax which is decisive of its nature for the purpose of adjudging its real character or nature to adjudge the competence of the power and authority to legislate or impose the levy. What really has to be seen is the 'pith and substance' or "the real nature and character" of the levy which has to be adjudged with reference to the taxable event and the incidence of the levy.[17] It cannot be argued that a tax under a particular entry must be levied in a particular manner. The legislature is free to adopt such method of levy as it chooses so long as the character of the levy falls within the four corners of the relevant entry.[18]

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12. *M.P. Cement Manufacturers Assocn. v. State of M.P.*, (2004) 2 SCC 249 : (2005) 11 JT 342.

13. *Rai Ram Krishna v. State of Bihar*, AIR 1963 SC 1967; *Shri Prithvi Cotton Mills v. Broach Municipality*, AIR 1970 SC 192 : (1969) 2 SCC 283; *Janapada Sabha, Chhindwara v. C.P. Syndicate Ltd.*, AIR 1971 SC 57 : (1970) 1 SCC 509; *Govt. of Andhra Pradesh v. H.M.T.*, AIR 1975 SC 2037 : (1975) 2 SCC 274; *Hindustan Gum & Chemicals Ltd. v. State of Haryana*, AIR 1985 SC 1683 : (1985) 4 SCC 124; *Central Coal Fields v. State of Orissa*, AIR 1992 SC 1371 : 1992 Supp (3) SCC 133.

14. *Ahmedabad Municipality v. New Shrock Spn. & Weav. Co.*, AIR 1970 SC 1292 : (1970) 2 SCC 280; *State of Tamil Nadu v. M. Rayappa*, AIR 1971 SC 231 : (1971) 3 SCC 1; *Tirath Ram Rajendra Nath v. State of Uttar Pradesh*, AIR 1973 SC 405 : (1973) 3 SCC 585.

15. *Orient Paper Mills v. State of Orissa*, AIR 1961 SC 1438 : (1962) 1 SCR 549 ; *Khyerbari Tea Co. v. State of Assam*, AIR 1964 SC 925 : (1964) 5 SCR 975; *Board of Revenue v. R.S. Jhaver*, AIR 1968 SC 59 : (1968) 1 SCR 148.
Also see, *infra*.

16. *C.P. Officer v. K.P. Abdulla*, AIR 1971 SC 792 : (1970) 3 SCC 355.

17. *Jullunder Rubber Goods Manufacture's Ass. v. Union of India*, AIR 1970 SC 1589 : (1969) 2 SCC 644; *Goodyear India Ltd. v. State of Haryana*, AIR 1990 SC 781 : (1990) 2 SCC 71; *Municipal Council, Kota v. Delhi Cloth & General Mills Co. Ltd.*, AIR 2001 SC 1060.

18. *Goodricke Group Ltd. v. State of West Bengal*,, 1995 Supp. (1) SCC 707; *Twyford Tea Co. v. State of Kerala*,AIR 1970 SC 1133 : (1970) 1 SCC 189.

As the Supreme Court has observed in *Ramakrishna*:[19]

> "The objects to be taxed so long as they happen to be within the legislative competence of the legislature can be taxed by the legislature according to the exigencies of its needs… The quantum of tax levied by the taxing statute, the conditions subject to which it is levied, the manner in which it is sought to be recovered are all matters within the competence of the legislature…"

Once it is found that there is a nexus between the legislative competence and the subject of taxation, the levy will be justified and valid.[20]

The Constitution does not contain any prohibition against double taxation. A subject can be taxed twice over if the legislature evinces a clear intention to do so. There is nothing in Art. 265 from which one can spin out the constitutional vice called double taxation.[21]

VALIDATION OF AN INVALID TAX LEGISLATION

It has been mentioned earlier that if a law is declared invalid by the court, the concerned legislature, provided it has competence to enact the law, can remove the flaws in the law and revalidate it. The same is the position as regards a tax law as well. When a tax law is invalidated by the court, the legislature can, provided it has the competence to enact the law in question, remove the lacunae in the law as pointed by the court and revalidate the tax law. Courts cannot direct the State Legislature to amend the law nor to direct that such amendment shall not be retrospective. It is the exclusive prerogative of the State Legislatures, particularly in tax matters, to enact validation laws which may be directed to apply retrospectively.[22]

But what the legislature cannot do is to declare that in spite of the court verdict to the contrary, the law will be deemed to be valid. This amounts to overriding the court decision by the Legislature, and in consonance with the doctrine of Separation of Powers, a Legislature cannot directly nullify a court decision.

In *Krishna*,[23] the High Court specifically ruled that the power to levy under the law in question could be legal only if the concerned authority collecting the tax rendered services to the tax payers and as no services had been rendered, the collection of the tax was illegal. As this finding was not challenged, it became

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19. *Rai Ramakrishna v. State of Bihar*, AIR 1963 SC 1667 : 1964 (1) SCR 897.

20. *State of Karnataka v. Drive-in Enterprises*, AIR 2001 SC 1328.

21. *Avinder Singh v. State of Punajb*, AIR 1979 SC 321 : (1979) 1 SCC 137; *Sri Krishna Das v. Town Area Council, Chirgaon*, AIR 1991 SC 2096 : (1990) 3 SCC 645; *Radhakishan Rathi v. Addl. Collector, Durg*, AIR 1995 SC 1540 : (1995) 4 SCC 309; *Municipal Council, Kota v. D.C.M.*, AIR 2001 SC at 1070.

22. *Municipal Committee, Patiala v. Model Town Residents Assn.*, (2007) 8 SCC 669, at page 683 : AIR 2007 SC 2844; See also *National Agricultural Coop. Marketing Federation of India Ltd. v. Union of India*, (2003) 5 SCC 23 : AIR 2003 SC 1329; *Widia (India) Ltd. State of Karnataka*, (2003) 8 SCC 22 : AIR 2003 SC 3095; *State of H.P. v. Yash Pal Garg*, (2003) 9 SCC 92 : (2003) 4 JT 413; *Mycon Construction Ltd. v. State of Karnataka*, (2003) 9 SCC 583 : AIR 2002 SC 2089; *M.P. Cement Manufacturers' Assn. v. State of M.P.*, (2004) 2 SCC 249 : (2005) 11 JT 342; *Gujarat Ambuja Cements Ltd v. Union of India* (2005) 4 SCC 214 : AIR 2005 SC 3020*; R.C Tobacco (P) Ltd v. Union of India*, (2005) 7 SCC 725 : AIR 2005 SC 4203.

23. *B. Krishna Bhat v. State of Karnataka*, AIR 2001 SC 1885 : (2001) 4 SCC 227; *Gujarat Ambuja Cements v. Union of India* (2005) 4 SCC 214 : AIR 2005 SC 3020.

Also see, *Hindustan Gum & Chemicals Ltd. v. State of Haryana*, AIR 1985 SC 1683 : (1985) 4 SCC 124.

final. Thereafter, the Legislature passed an amending Act declaring that the tax would be deemed to be valid in spite of the verdict of the High Court. The Supreme Court ruled that the State Legislature could do no such thing. The Legislature had not cured the lacuna pointed out by the High Court. The Legislature had no power to reverse the ruling of the High Court. When the Legislature seeks to validate a tax law declared invalid by a court, the Legislature must remove the cause for its ineffectiveness or invalidity before its validation can take place effectively. It is not sufficient to declare that the court declaration would not be binding. A Legislature has no power to directly overrule a judicial decision.

C. CENTRAL TAXES

Entries 1 to 81 in this List confer general legislative powers on Parliament, while entries 82 to 92B enumerate the taxes which, Parliament is entitled to levy exclusively.

The tax entries mentioned in the Union List are as follows:

82. Taxes on income other than agricultural income

The power to levy income-tax is divided between the Centre and the States. The Centre can levy a tax on non-agricultural income, while tax on agricultural income is assigned to the States (entry 46, List II). Under Article 366(1), the expression "agricultural income", for the purpose of abovementioned entries, means agricultural income as defined for the purposes in enactments relating to Indian income tax. This mechanism has been devised to avoid a conflict with the legislative power of States in respect of agricultural income.[24] Income tax enactments in force from time to time can define the term "agricultural income" in any particular manner and that would be the meaning not only for the tax enactments but also for the Constitution. For example, in the case of income derived from sale of tea grown and manufactured by the seller, 40% thereof would be liable to income tax and only the balance 60% would be deemed to be "agricultural income" which could be subjected to agricultural income tax by the State Legislature.[25]

In accordance with the judicial policy of interpreting the legislative entries broadly and liberally[26], the courts have interpreted the term "income" in entry 82 in a very liberal manner. Thus, the Supreme Court has ruled that the word 'income' in that entry is of elastic import as it is used in a wide and comprehensive connotation.

The word 'income' embraces within it every kind of receipt or gain either of a capital nature or of a revenue nature. The Court has insisted that in understanding the amplitude and scope of the expression 'income' in this entry, any meaning which fails to accord with the plenitude of the concept of 'income' in all its width and comprehensiveness should be avoided. Accordingly, the Court has ruled that a tax on gross receipts of certain categories of hotels does not fall outside entry

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24. *CIT v. Willamson Financial Services*, (2008) 2 SCC 202, at page 213 : (2007) 13 JT 581.
25. *Commissioner of Income Tax v. Willamson Financial Services*, (2008) 2 SCC 202 : (2007) 13 JT 581.
26. See, *supra*, Ch. X, Sec. G(a).

82, List I, and the Hotel Receipts Tax Act, 1980, has been held as not falling out of the entry and hence valid.[27]

The term, 'income' has been held to embrace any profit or gain which is actually received and, therefore, a tax on capital gains,[28] or pension,[29] is permissible under this entry. Parliament can tax what can rationally be considered as 'income' and thus a loan advanced to a shareholder of a company can be treated as his income and taxed as such.[30] The entry authorises not only the imposition of a tax but also the enactment of a law preventing evasion of the tax imposed.[31] A tax on income includes an excess profits tax.[32] The word 'income' in this entry is to be interpreted in its widest amplitude.

The computation of income of the assessee from any property (even in case of self-occupied house) in the income for purposes of income-tax is valid under this entry and it does not fall under entry 49, List II. The tax is on income from house property and not on property.[33] In case of self-occupied property, income is computed in an artificial way. See also entry 60, List II.[34]

In accordance with the judicial view that the entries are not 'powers' but 'fields of legislation', it has been held that entry 82 does not only authorise the imposition of income-tax but also authorises making of a law to present evasion of the tax imposed. If it were not so, then the power to impose income-tax could be nullified by tax payers adopting ingenious contrivances to evade the tax.[35] Each entry extends to all ancillary and sundry matters which can fairly and reasonably be said to be comprehended in it. Thus, the power to levy surcharge on income tax is traceable to this entry.[36]

The Income Tax Act, 1961, is a law made under this entry.

83. Duties of customs including export duties

The Centre can levy duties on imports into, and exports from, the country. Storage or stocking of imported goods is also covered by this Entry.[37]

84. Duties of excise on tobacco and other goods manufactured or produced in India except—(a) alcoholic liquors for human consumption; (b) opium, Indian hemp and other narcotic drugs and narcotics, but including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry

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27. *The Elel Hotels & Investments Ltd. v. Union of India*, AIR 1990 SC 1664, 1668 : (1989) 3 SCC 698.
28. *Navinchandra Mafatlal v. Commr. of Income-tax*, AIR 1955 SC 58 : (1955) 1 SCR 829.
29. *Rajagopalachari v. Corp. of Madras*, AIR 1964 SC 1172 : (1964) 6 SCR 962.
30. *Navnit Lal v. I.T. Asst. Commr*., AIR 1965 SC 1375 : (1965) 1 SCR 909.
31. *Baldeo Singh v. I.T.O.,* AIR 1961 SC 736; *Balaji v. I.T.O.,* AIR 1962 SC 123 : (1962) 2 SCR 983.
32. Art. 366(29).
33. *Bhagwan Dass Jain v. Union of India*, AIR 1981 SC 907 : (1981) 2 SCC 135; *Chelmsford Club v. C.I.T.*, (2000) 3 SCC 214 : AIR 2000 SC 1092.
34. *Infra*, Sec. D.
35. *Sardar Baldeo Singh v. CIT*, AIR 1961 SC 736 : (1961) 1 SCR 482; *Balaji v. Income-tax Officer, Special Investigation Circle, Akola,* AIR 1962 SC 123 : 1962 (2) SCR 983; *Union of India v. A. Sanyasi Rao,* AIR 1996 SC 1219 : (1996) 3 SCC 465; *Union of India v. M.V. Valliappan,* AIR 1999 SC 2526 : (1999) 6 SCC 259.
36. *CIT v. Suresh N. Gupta*, (2008) 4 SCC 362 : AIR 2008 SC 572.
37. *Godfrey Philips India Ltd v. State of U.P*., (2005) 2 SCC 515 at page 546 : AIR 2005 SC 1103.

The term 'goods' in this entry refers to such goods which are capable of being sold to consumers.[38]

The area of excise duties is divided between the Centre and the States. The items excluded from the Central sphere under this entry fall within the State sphere under entry 51, List II.[39] Under this entry, all duties of excise save the ones excepted specifically, are generally within the taxing power of the Centre.

The term 'duties of excise' is of a very general and flexible import and is often used to cover a variety of taxes on commodities. Because the term 'excise' may cover a 'sales tax' also, a question arose as to how to reconcile the entry 'duties of excise' in the Central List with the entry 'sales tax' in the State List.[40]

In *In re the Central Provinces and Berar Act No. XIV of 1938*,[41] a provincial tax on retail sales of petrol and lubricants was challenged by the Centre on the ground that it was a 'duty of excise' and not a 'sales tax'. The Federal Court negativing the contention held the tax valid. It pointed out that the primary and fundamental meaning of excise is that of a tax on articles produced or manufactured in the country. Taken alone by itself, the Central power to levy excise duties could have been interpreted broadly so as to include sales-tax, but here the question was of reconciling the two entries which should be interpreted together and the language of one modified by that of the other. The general power should be interpreted restrictively so that effect might be given to the narrower power of the Provinces.[42] The term 'excise' has thus come to be restricted to a duty on manufacture or production of goods.

The definition of the word 'manufacture' in this entry has raised some controversy. The taxable event under excise law is 'manufacture' of goods. The Supreme Court has defined 'manufacture' as follows: "The moment there is transformation into a new commodity commercially known as a distinct and separate commodity having its own character, use and name, whether be it the result of one process or several processes, 'manufacture' takes place and liability to excise duty is attracted.

Conversion of raw ground-nut and til oil into refined oil after deodorisation is manufacture. 'Manufacture' is not equal to 'processing'. 'Manufacture' means "bringing into existence a new substance" and does not mean merely "to produce some change in a substance", however minor in consequence the change may be.[43] The "test of irreversibility" is also an important criterion to ascertain as to when a given process amounts to manufacture. So when sandal-wood oil produced from red oil can be reconverted into red oil there is no manufacture.[44]

In *Empire Industries Ltd. v. Union of India*,[45] the Supreme Court has ruled that bleaching, dyeing, printing and finishing of man-made/cotton fabrics constitute

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38. *Union Carbide India Ltd. v. Union of India,* AIR 1986 SC 1097 : (1986) 2 SCC 547.
39. See, Sec. D, *infra.*
40. *Infra,* Sec. D.
41. AIR 1939 FC 1.
42. *Supra,* Ch. X, Sec. D.
43. *Union of India v. Delhi Cloth & General Mills,* AIR 1963 SC 791 : 1963 Supp (1) SCR 586. Also see, *Union of India v. Ramlal Mansukhrai,* AIR 1971 SC 2333 : (1970) 2 SCC 472.
44. *Punjab Aromatics v. State of Kerala,* (2008) 11 SCC 482.
45. AIR 1986 SC 662. Also see, *Ujagar Prints v. Union of India,* AIR 1987 SC 874 : AIR 1989 SC 516.

manufacture as commercially a different article is produced after these processes from the cloth which undergoes these processes. Human skills and materials are used in the processing of fabrics.

Excise duty is levied on the manufacture or production of goods, though for the sake of convenience, it may be collected at the stage of removal of goods from the factory. If no excise duty was leviable at the time of manufacture of goods, it cannot be levied at the stage of removal of the said goods.[46]

A tax on the first sales of his products by a manufacturer is a sales tax and not an excise, because it is a tax levied on him *qua* seller and not *qua* manufacturer. There is no bar in a manufacturer or producer being required to pay excise duty to the Centre and sales tax to a State in respect of sale of goods produced by him.[47] An excise can be collected at any stage. It may be collected even from the consumers of goods so long as it remains a tax on its manufacture.[48]

A duty on coal raised at the collieries is a duty of excise. Though coal is a natural product, yet the operations required to bring it up to the surface, and make it usable, are so elaborate and expensive that coal may be regarded as covered by entry 84, as goods produced.[49] 'Mritsanjibini", an ayurvedic medicine, is a medicinal preparation containing alcohol and falls under this entry.[50]

A duty of excise can be imposed on production of rubber.[51] A tax on purchase of raw materials for manufacture of some commodity is not an excise but sales tax as the taxable event is not production but sale.[52]

The Central Excises and Salt Act, 1944, introduces a licensing system for production, manufacture, wholesale purchase or sale of any excisable goods. These provisions were challenged as going beyond entry 84 of List I, and falling under entries 26 and 27 of List II as regulating trade and commerce. The Supreme Court held that the Act 'is a fiscal measure to levy and realise duty on tobacco" and that Parliament's "powers of taxation should not be restricted so as to exclude the raising of revenue by imposing licence fees." The Act thus fell under entry 84 and trenching upon the State field would not affect its validity because of the rule of pith and substance.[53]

Being a tax on goods manufactured or produced, ordinarily excise is computed on the manufacturer's price, *i.e.*, manufacturing cost plus manufacturer's profit. This was the basis adopted until 1973 in India. But in 1973, the Central Excise and Salt Act was amended so as to expand the concept of assessable value of excisable goods by including therein the post-manufacturing expenses as well, such as, expenses incurred on advertisements, publicity, sales organisation, storage, packing, to determine the tax liability of the manufacturer. The Supreme Court has ruled in favour of the broader concept. Thus the Court has augmented

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46. *CCE v. Vazier Sultan Tobacco Co. Ltd.*, (1996) 3 SCC 434 : AIR 1996 SC 3025.
47. *Governor-General-in-Council v. State of Madras*, AIR 1945 PC 98.
48. *J.R.G. Mfg. Ass. v. Union of India*, AIR 1970 SC 1589 : (1969) 2 SCC 644.
49. *Aluminium Corp. v. Coal Board*, AIR 1959 Cal. 222.
50. *M.B.S. Oushadhalaya v. Union of India*, AIR 1963 SC 622 : 1963 (3) SCR 957.
51. *Rubber Chappal Mfg. Ass. v. Union of India*, AIR 1964 Punj. 465.
52. *N.R. Mills v. State of Punjab*, AIR 1963 Punj. 549.
53. *Chaturbhai v. Union of India*, AIR 1960 SC 424 : (1960) 2 SCR 362; also, *Abdul Kadir v. State of Kerala*, AIR 1962 SC 922 : 1962 Supp (2) SCR 741.
See, *supra*, Ch. X, Sec. G(d).

the tax resources of the Centre which can now collect much larger amount of excise revenue.[54] Thus, it was held that the levy of excise duty on the production of electricity falls within the phrase "other goods manufactured" in Entry 84 of List I and within the exclusive jurisdiction of Parliament, the State having the competence only to levy tax only on the sale and consumption of electricity.[55]

The term 'excise' has been interpreted very broadly in Australia and the U.S.A. In the U.S.A., the Central Government's power to levy direct taxes is very much restricted and, therefore, it was enabled to levy succession tax, corporate income-tax and even general income-tax, by characterising these taxes as 'excise'[56]. In Australia, the States are debarred from levying 'excises'. By interpreting 'excise' broadly as a tax on goods, many State taxes on sale, use, consumption or production have been characterised as 'excises' and thus placed beyond the State purview.[57]

In Canada, the problem is entirely different. There the Provinces are debarred from levying 'indirect' taxes. The Provinces, however, in order to augment their resources started levying taxes on consumption, the most important of which was the sales tax. The Privy Council held that if a tax was paid by the person on whom it was levied and if its incidence was not passed on to someone else, it would not be an 'indirect' tax. Thus, it became possible for the Provinces to levy sales tax by placing the tax liability on the purchaser and making the seller a tax collector.[58]

In India, on the other hand, courts have refused to interpret entry 84 in the Light of these foreign precedents and have restricted the concept of 'excise' to a tax on production and manufacture.

As far as the levy of excise duties on liquor is concerned, the duties on rectified spirit removed/cleared for supply to industries (other than industries engaged in obtaining or manufacturing potable liquors) can be levied by the Centre and not by the States.[59]

85. Corporation Tax

A 'corporation tax' is a tax on income payable by companies, in case of which the following conditions are fulfilled:—(1) it is not chargeable in respect of agricultural income; (2) the companies paying the tax are not authorised to deduct the same from dividends payable by the companies to individuals; (3) no provision exists for taking

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54. *Union of India v. Bombay Tyre Int. Ltd.*, AIR 1984 SC 420 : (1983) 4 SCC 210.
The Gujarat High Court had ruled in favour of the broader concept of assessable value of goods in *Union of India v. Tata Chemicals*, 1983 Tax LR 2837. But the Madras High Court's view was negative: *Kanph Labs v. Union of India*, 1983 Tax L R 2845.

55. *M.P. Cement Manufacturers' Assn. v. State of M.P.*, (2004) 2 SCC 249, at page 256 : (2005) 11 JT 342.

56. *Scholey v. Rew*, 23 Wall. 331 (1874): *Knowlton v. Moore*, 178 U.S. 41; *Flint v. Stone Tracy Co.*, 220 U.S. 107; *Pacific Insurance Co. v. Soule*, 7 Wall 433; *Springer v. U.S.*, 102 U.S. 586.

57. *Parton v. Milk Board*, 80 CLR 229; *Dennis Hotels Pty. Ltd. v. Victoria*, 104 CLR 529.

58. *Atlantic Smoke Shops Ltd. v. Conlon*, 1943 A.C. 550; *Cairns Construction Ltd. v. Government of Saskatchewan*, 1960 S.C.R. 619; BORA LASKIN, CANADIAN CONSTITUTIONAL LAW, 671 (1975); JAIN, *Taxing Powers in Canada*, note 1, at 495, *supra*.

59. *Synthetics & Chemicals Ltd. v. State of Uttar Pradesh*, AIR 1990 SC 1927 : (1990) 1 SCC 109; *Bihar Distillery v. Union of India*, AIR 1997 SC 1208, 1218 : (1997) 2 SCC 727; *State of U.P. v. Vam Organic Chemicals Ltd.*, (2004) 1 SCC 225 : AIR 2003 SC 4650.

the tax so paid into account in computing for the purposes of income-tax the total income of individuals receiving such dividends or in computing the income-tax payable by or refundable to, such individuals.[60]

86. Taxes on capital values of assets exclusive of agricultural land, of individuals and companies; taxes on the capital of companies

The Centre can levy wealth-tax under this entry. It is a tax on the total capital value of assets (including lands and buildings) minus the debts and liabilities and so falls under this entry.

The Wealth Tax Act enacted by Parliament was challenged on the ground that the expression 'net wealth' in that Act included non-agricultural lands and buildings and so the tax fell within the domain of the State Legislatures under entry 49, List II.

The Supreme Court rejected the contention and ruled that wealth-tax is not levied directly on land and building, it is levied on the total assets of a person of which land building may be a component and so wealth tax does not fall under entry 49, List II which envisages the levy of tax on lands and buildings or both as units. Tax on lands and buildings is directly imposed on lands and buildings and bears a definite relation to it. Entry 49 is more general in nature, while entry 86 is more specific in nature. Therefore, in case of conflict between entry 86, List I, and entry 49, List II, entry 86 prevails. [61]

Applying the rule that an entry must receive wide, and not a narrow or restrictive, interpretation, it has been held that the expression 'individuals' in this entry includes a Hindu undivided family as well.[62]

87. Estate duty in respect of property other than agricultural land

88. Duties in respect of succession of property other than agricultural land

Entries 87 and 88 may be read together. 'Estate duty' means a duty to be assessed with reference to the principal value of all property passing upon death or deemed to pass under the said law [Art. 366(9)]. A common element of succession and estate duties is that the occasion for their levy is the death of a person. The succession duty is levied in respect of succession to property; the estate duty is levied on the property itself, has relevance to its value, and is independent of the question as to who takes it.[63]

In India, the area of succession and estate duties is divided between the Centre and the States according as whether the property is 'non-agricultural' or 'agricultural'. The former falls within the Central sphere, while the latter falls within the State sphere (Entries 47 and 48 in List II).[64]

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60. *Art. 366(6).*
61. *Sudhir Chandra Nawn v. W.T.O.*, AIR 1969 SC 59 : 1969 (1) SCR 108; *Asst. Commr. of Urban Land Tax v. B & C Co.*, AIR 1970 SC 169 : (1969) 2 SCC 55; *CWT v. Karan Singh*, 1993 Supp (4) SCC 500; *Lt. Colonel Sawai Bhawani Singh v. State of Rajasthan*, (1996) 3 SCC 105.
62. *Banarsi Das v. Wealth Tax Officer, Spl. Circle, Meerut*, AIR 1965 SC 1387, 1389 : (1965) 2 SCR 355.
63. *In re Estate Duty*, AIR 1944 FC 73.
64. *Infra*, Sec. D.

When the question of levying an estate duty was considered, it was felt that it would be inequitable to levy it only in respect of non-agricultural property and leave agricultural land untaxed. There were also problems of aggregation of the assessee's entire property when it might be interspersed over more than one State.

In order to have uniformity in the area it was thought desirable to have recourse to Art. 252.[65] A number of States authorised Parliament to legislate for levying estate duty in respect of agricultural land. In this way it became possible for Parliament to enact the Estate Duty Act applying to all properties.[66]

89. Terminal taxes on goods or passengers carried by railway, sea or air; taxes on railway fares and freights:

The nature of 'terminal tax' has been discussed under entry 52, List II.[67] Also see, entry 56, List II.[68]

90. Taxes other than stamp duties on transactions in stock exchanges and futures markets:

Entry 48, List I, relates to stock exchanges and futures markets.[69] Thus, the whole area of stock exchanges falls to the Centre. This has been done in view of the far reaching effects on public credit and finance of stock exchange transactions.

91. Rates of stamp duty in respect of bills of exchange, cheques, promissory notes, bills of lading, letters of credit, policies of insurance, transfer of shares, debentures, proxies and receipts.

See Entry 63 of List II.

92. Taxes on the sale or purchase of newspapers and on advertisements published therein:

The general sales tax falls in the State List under entries 54 and 55.[70] But sales tax on newspapers has been made a Central subject. This has been done so as to protect newspapers, which have an intimate connection with the fundamental right of speech and expression, from indiscriminate taxation.

92-A. Taxes on the sale or purchase of goods other than newspapers where such sale or purchase takes place in the course of inter-State trade or commerce

See under "Restrictions on the States' Power to levy Sales Tax" discussed later in this Chapter.[71]

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65. *Supra*, Ch. X, Sec. J.
66. The Estate Duty Act, 1953 was repealed by Act 20 of 2000.
67. *Infra*, Sec. D.
68. *Ibid.*
69. *Supra*, Ch. X, Sec. D.
70. *Infra*, Sec. D.
71. *Infra*, Sec. J(i).

92-B Taxes on the consignment of goods (whether the consignment is to the person making it or to any other person) where such consignment takes place in the course of inter-State trade or commerce.

This entry has been added to the Constitution by the Constitution (Forty-Sixth Amendment) Act, 1982.[72] The taxable event is despatch/consignment of goods.

It was held that the mere consignment of goods by a manufacturer to his own branches outside the State does not in any way amount to a sale or disposal of goods as such.[73] Accordingly, the 46th Constitution Amendment was enacted. It was felt that leakage of tax leviable under the Central Sales Tax Act on interstate sales of goods occurred through the device of consignment of goods from one State to another.

Reference may also be made to Art. 269[74] in this connection.

The effect of the various amendments made by the 46th Amendment is to expressly bring within the legislative competence of Parliament the field of taxation on the consignment/despatch of goods in the course of interstate trade or commerce. Under Art. 269(3), Parliament may by law formulate principles for determining when a consignment of goods takes place in the course of inter-state trade and commerce. A State law imposing such a tax was declared to be invalid.[75]

92-C. Taxes on Services

This Entry was introduced in 2003 by a Constitutional Amendment.[76] Previously service tax was levied under Entry 97 having been introduced by Parliament under Chapter V of the Finance Act, 1994. The 1994 Act was amended from time to time by extending the meaning of taxable service. By 2003, there were about 100 taxable services. Apart from the legislative categories, the courts have upheld levies under this entry with relation to other activities.

Thus, a tax on services rendered by mandap-keepers and outdoor caterers was held to be in pith and substance, a tax on services and not a tax on sale of goods or on hire-purchase activities.[77] Service provided to a subscriber by the telegraph authority in relation to a telephone connection with effect from the coming into force of the 1994 Act is also a taxable service.[78]

The ambit of the Entry was succinctly laid down in *All-India Federation of Tax Practitioners v. Union of India*[79] while upholding Parliament's legislative competence to levy service tax on chartered accountants, cost accountants and architects:

> "Broadly 'services' fall into two categories, namely, property based services and performance based services. Property based services cover service provid-

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72. Also, see, *infra,* under Sec. D.
For the 46th Constitution Amendment, see, *infra*, Ch. XLII.
73. *Goodyear India v. State of Haryana,* (1983) 53 STC 163. See also *Karya Palak Engineer v. Rajasthan Taxation Board,* (2004) 7 SCC 195 : AIR 2004 SC 4499.
74. *Infra,* Sec. K.
75. *Goodyear India Ltd. v. State of Haryana,* AIR 1990 SC 781 : (1990) 2 SCC 71.
76. Constitution (Eighty-eighth Amendment) Act, 2003**.**
77. *T.N. Kalyana Mandapam Assn. v. Union of India,* (2004) 5 SCC 632, at page 651 : AIR 2004 SC 3757.
78. *Bharat Sanchar Nigam Ltd. v. Union of India,*(2006) 3 SCC 1 : AIR 2006 SC 1383.
79. (2007) 7 SCC 527, at page 537 : AIR 2007 SC 2990.

ers such as architects, interior designers, real estate agents, construction services, mandapwalas, etc. Performance based services are services provided by service providers like stockbrokers, practising chartered accountants, practising cost accountants, security agencies, tour operators, event managers, travel agents, etc."

96. Fees in respect of any of the matters in the Union List, but not including fees taken in any court, except the Supreme Court.

Fees taken in the Supreme Court is a Central subject under entry 77, List I.[80] Fees taken in all other courts is a State matter under entry 3, List II.[81] Fees taken elsewhere in respect of all matters in the Union List fall within the Central sphere.

The nature and scope of the term 'fee' have been discussed later.[82]

97. Any other tax not enumerated in Lists II and III

This is known as 'residuary taxes'. This topic is discussed later.[83]

COMMENTS

An examination of the two groups of entries in this list (legislative entries 1-81; taxing entries 82 to 97) indicate that while the main subject of legislation falls in the first group, a tax in relation thereto is separately mentioned in the second group. For example, entry 22 in List I is "Railway", and entry 89 is "Terminal Taxes on goods or passengers carried by railway, sea or air; taxes on railway fares and freights". Such examples can be multiplied, *e.g.* see entries 41 and 83; entries 43, 44 and 85.

This means that if the general entry were to be interpreted so broadly as to include the taxing power as well, then the taxing entry would become superfluous. Thus, for legislative purposes, a general legislative entry does not comprise taxing powers. Taxation is treated as a separate and distinct matter for purposes of legislative competence.[84]

D. STATE TAXES

Entries 1 to 44 in this List confer general legislative powers on the State Legislatures while entries 45 to 63 confer taxing powers on them. The following taxes are mentioned in the State List and are therefore leviable exclusively by the States.

45. Land revenue including its assessment and collection

This entry may be read along with entry 18 in this List concerning land.[85] Land revenue is a tax and not a rent for land.[86]

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80. *Supra*, Sec. H.
81. *Supra*, Ch. VIII; *infra*, Sec. H.
82. *Infra*, Sec. H.
83. *Infra*, Sec. G.
84. See *All India Federation of Tax Practitioness v. Union of India*, (2007) 7 SCC 527 : AIR 2007 SC 2990.
85. *Supra*, Ch X, Sec. E.
86. *Sesha Sarma v. State of A.P.*, AIR 1960 A.P. 461.

A cess based on the royalty derived from mining lands has been held as not falling under this entry as it cannot be regarded as land revenue. In the instant case, no tax was leviable if no mining activities were carried on. Thus, the tax was not related to land as a unit which is the only method of valuation of land under entry 49. The tax was relatable to minerals extracted.[1]

In a very interesting ruling,[2] the Supreme Court has held that a State can levy cess on the use of flowing water in a river under this entry. A factory owner was drawing water for industrial purpose from a river by installing water pumps at its bank. The State Government levied a cess on the use of the river water for industrial purpose under the State Land Revenue Code. The Court came to this conclusion by giving a very broad interpretation to the term 'land' in this entry. The Court pointed out that the code in question clearly included "flowing water, as investing title thereof in the State as integral part of land. The definition of 'land' includes the right to the water flowing therefrom as in the definition in the Transfer of Property Act".

46. Taxes on agricultural income

Taxes on non-agricultural income fall in the Central sphere, entry 82, List I.[3] 'Agricultural income' means agricultural income as defined for the purposes of the enactments relating to the Indian income-tax.[4] Therefore, the definition of agricultural income as given in the Indian Income-tax Act is controlling for the States which cannot extend their own jurisdiction by adopting a wider definition of the term agricultural income."[5]

According to Art. 274(1), a Bill to modify the meaning of agricultural income in the Income-tax Act cannot be moved in Parliament without the President's recommendation. There exists a demarcation between 'agriculture' and 'forestry' for legislative purposes,[6] but the term 'agricultural income' may include, for purposes of taxation, income from forestry.[7]

47. Duties in respect of succession to agricultural land.

48. Estate duty in respect of agricultural land.

These entries refer to passing of property to another on the death of a person and do not apply to transfers *inter vivos* and, therefore, a gift-tax would not fall within any of these entries. Also see entries 87 and 88 in List I.[8]

49. Taxes on lands and buildings.

This entry contemplates a levy of tax on lands and buildings or both as units. Such tax is directly imposed on lands and buildings and bears a definite relation

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1. *India Cement Ltd. v. State of Tamil Nadu*, AIR 1990 SC 85 : (1990) 1 SCC 12; *Orissa Cement Ltd. v. State of Orissa*, AIR 1991 SC 1676 : 1991 Supp (1) SCC 430.
2. *R.S. Rekchand Mohote Spg. & Wvg. Mills Ltd. v. State of Maharashtra,,* AIR 1997 SC 2590 : (1997) 5 SCC 511.
3. *Supra*, Sec. C.
4. Art. 366(1).
5. *Commr. of Income Tax v. Benoy Kumar Sahas Roy*, AIR 1957 SC 768 : 1958 SCR 101; *CIT v. Williamson Financial Services*, (2008) 2 SCC 202 : (2007) 13 JT 581.
6. See, entry 14, List II and entry 17A in List III, *supra*.
7. *CIT v. Benoy Kumar Sahas Roy*, AIR 1957 SC 768 : 1958 SCR 101. See also *Union of India v. Belgachi Tea Co. Ltd.*, (2008) 12 SCC 450 : (2008) 7 JT 114.
8. *Supra*, Sec. C.

to it. The expression 'lands' in this entry is wide enough to include agricultural land as well as non-agricultural land.[9] The word 'land' includes not only the face of the earth, but everything under or over it. Land remains land though it may be subjected to different user. Thus, a cesson mines and quarries, tea estates, and on mineral rights has been held to fall within this entry.[10]

Entry 49 contemplates a levy on land as a unit and the levy must be directly imposed on land and must bear a definite relationship to it. Land means the land on surface and also below the surface.

There is a clear distinction between tax directly on land and tax on income arising from land. [11] Wealth tax has been held to fall under entry 86, List I, and not under this entry.[12]

Gift tax is a tax on the *gift* of land; it is not a tax imposed directly on land but only on a particular user thereof, namely, transfer of land by way of gift.[13]

There is a difference between the levy on income from house property which is an "income-tax", and levy on house property itself which would be referable to this entry.[14]

An annual tax levied by a State on 'buildings and lands' on their annual value, payable by the owner, the annual value being determined by estimating the expected gross annual rent of the 'lands and buildings' less allowances and deductions for repairs and taxes, falls under this entry. Although the State tax adopts the same basis—'annual value'—for determining income from property, as is done by the Income-tax Act, yet in pith and substance the tax is on 'lands and buildings' and not on 'income.' "The method of arriving at the quantum of tax should not be mixed up with the nature of the tax itself."[15]

The Supreme Court has held that the annual rent actually received by a landlord can be taken as the annual rateable value of the property for the assessment of property tax under entry 49 in respect of a property not subject to rent control.[16] The tax remains property tax and cannot be regarded as a tax on income.

A tax on land or building can be imposed with reference to the income or yield therefrom. The income or yield of the land/building is taken merely as a measure of the tax; it does not change the nature or character of the levy; it still remains a tax on land or building. There is no set pattern of levy of tax on lands or build-

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9. *Raja Jagannath Baksh Singh v. State of Uttar Pradesh,* AIR 1962 SC 1563 : (1963) 1 SCR 220.

10. *State of W.B. v. Kesoram Industries Ltd.,* (2004) 10 SCC 201 : AIR 2005 SC 1646. See *infra* under Entry 50.

11. *Raja Jagannath, supra.* Also see, *Sudhir Chandra Nawn v. W.T.O.,* AIR 1969 SC 59 : 1969 (1) SCR 108; *New Manek Chowk Spinning & Weaving Mills Co. Ltd. v. Municipal Corp., Ahmedabad,* AIR 1967 SC 1801 : 1967 (2) SCR 679.

12. See, *supra*

13. *Second Gift Tax Officer v. D.H. Nazareth,* AIR 1970 SC 999 : (1970) 1 SCC 749; also see, *infra,* Sec. under Residuary Taxes.

14. *Bhagwan Dass Jain v. Union of India,* AIR 1981 SC 907 : (1981) 2 SCC 135.

15. *Ralla Ram v. East Punjab,* AIR 1949 FC 81; *D. Kasturchandji v. State of Madhya Pradesh,,* AIR 1967 MP 268; *Bhagwan Dass Jain v. Union of India,* AIR 1981 SC 907; *Union of India Cement Ltd. v. State of Tamil Nadu,* AIR 1990 SC 85 : (1990) 1 SCC 12.

16. *Govt. Servant Co-op. Building Socy. Ltd. v. Union of India,* AIR 1998 SC 2636 : (1998) 6 SCC 381.

ings. In *Goodricke*,[17] the Supreme Court upheld a cess levied by the State on tea estates, the cess being measured by the quantum of tea leaves produced in the estate. The cess was held as being a tax on land falling under entry 49. The Court observed:

> "A tax imposed on land measured with reference to or on the basis of its yield, is certainly a tax directly on the land. Apart from income, yield or produce, there can perhaps be no other basis for levy… There cannot be uniform levy unrelated to the quality, character or income/yield of the land. Any such levy has been held to be arbitrary and discriminatory".[18]

There is nothing in entry 49 to suggest that the tax on lands and buildings is to be paid only by the occupier and not by the owner. A tax on the use of land as a market falls under entry 49, as the incidence of the tax falls on land and the tax is to be levied only if land is used for particular purpose.[19] A cess was imposed on occupied land, based on its annual rent value. A tax can be levied on land used for extraction of minerals.[20]

This entry is not controlled by entry 54, List I. In case of tax on land held on a mining lease, royalty payable to the government may also be taken into account. It is a tax on 'land' falling within the present entry.[21]

A tax on property is based either on the capital value or on the annual letting value of the land and building and such a tax on the percentage of their capital value is valid.[22] If disregarding this basis, an impost is made merely on the basis of floor area of the building then such a tax may be bad being unequal or discriminatory.[23] No property tax could be levied on plant and machinery under this entry, for the taxing power extends only to lands and buildings.[24]

The word 'land' in the entry is broad enough to include all lands whether agricultural or not.[25] Though entry 49 refers to 'lands and buildings', it may not mean that a tax merely on "land" could not be imposed. The Supreme Court has said that the amplitude of the entry should not be curtailed; it should be construed as 'taxes on land' and 'taxes on buildings' and, therefore, a tax on 'land' alone can be levied.[26] Thus, a tax on a percentage basis of the market value of urban land falls under this entry and not under entry 86, List I .

The Municipal Corporation imposed a rate on vacant land within the municipal limits. The rate was the percentage of the valuation based upon capital. It was argued that this was a tax on capital and not a tax on property and was, therefore, beyond the legislative competence of the State. Holding the tax on land, the court

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17. *Goodricke Group Ltd. v. State of West Bengal*,, 1995 AIR SCW 123; *State of West Bengal v. Kesoram Industries Ltd.*, (2004) 10 SCC 201 : AIR 2005 SC 1646.
18. See, *K.T. Moopil Nair v. State of Kerala*, AIR 1961 SC 552 : (1961) 3 SCR 77; see Ch. XXI, *infra;* Ch. XXIV, *infra;* Ch. XXXI, *Infra*.
19. *Ajoy v. Local Board*, AIR 1965 SC 1561 : (1965) 3 SCR 47.
20. *Associated Cement Companies Ltd. v. State of Andhra Pradesh*, AIR 1983 AP 234.
21. *H.R.S. Murthy v. Collector of Chittoor*, AIR 1967 SC 177; *Western Coalfields v. Special Area Development Authority*, AIR 1982 SC 697 : (1982) 1 SCC 125; *Laxmi Narayan v. State of Orissa*, AIR 1983 Ori. 210.
22. *Sri Prithvi C. Mills v. Broach Municipality*, AIR 1970 SC 192 : (1969) 2 SCC 283.
23. *State of Kerala v. Haji Kutty*, AIR 1969 SC 378 : (1969) 1 SCR 645; *infra*, Ch. XXI.
24. *N.M.C.S. & W. Mills v. Ahmedabad Municipality*, AIR 1967 SC 1801 : (1967) 2 SCR 679; *Govt. of Andhra Pradesh v. H.M.T.*, AIR 1975 SC 2037 : (1975) 2 SCC 274.
25. *Jagannath v. State of Uttar Pradesh*, AIR 1962 SC 1563 : 1963 (1) SCR 220.
26. *Asst. Commr. v. B & C. Co.*, AIR 1970 SC 169 : (1969) 2 SCC 55.

emphasized the importance of the distinction between the levy of a tax and the machinery of its calculation including the method of calculation. The subject-matter of the tax was held to be something other than the measure provided to quantify tax by levying the tax on percentage of the capital value of the land taxed.[27]

In *D.G. Gouse & Co. v. State of Kerala*,[28] a question was raised about the validity of a tax on buildings levied by the State of Kerala. The tax was based on the 'capital value' of a building which was to be measured by its annual value. The argument was that it was 'wealth-tax' and so it could be levied only by the Centre and not the State. The Supreme Court rejected the argument saying that a tax levied on 'all that one owns', or on one's total assets, would fall within the purview of entry 86, List I[29] and so would be outside the purview of a State Legislature.

But a tax directly on one's buildings will be a tax, not under entry 86, List I, but under entry 49, List II. The Court also ruled that the method for determining the capital value of a building on the basis of its annual value cannot be regarded as hypothetical and arbitrary. There is no illegality in capitalising the gross income of the property for the purpose of determining the value of the property. It is not invalid to treat the 'expected gross annual rent' as the 'annual value' of a property. It is not wrong to multiply the annual value of a building by 16 to arrive at its capital value for tax purposes, for the quantum of the tax levied by the taxing statute, and the conditions subject to which it is levied, are matters within the competence of the legislature. So long as a tax is not confiscatory or extortionate, the reasonableness of the tax cannot be questioned in a court.'[30]

A cess based on royalty derived from mining land is not a tax on land within the meaning of entry 49, List II.[31] A tax on royalty could not be said to be a tax directly imposed on land. A tax on income derived from land cannot be regarded as a tax on land.[32] Similarly, wealth tax which is a tax on the capital value of the assets of an individual is not a tax directly on land under entry 49. Wealth tax falls under entry 86, List I, and not under entry 49, List II.[33]

The Supreme Court has explained the scope of entry 49 in *Union of India v. H.S. Dhillon*[34]. The Court has laid down the following incidents of a tax under entry 49, List II:

(1) It must be a tax on units that is lands and buildings separately as units.

(2) The tax cannot be a tax on totality, *i.e.* it is not a composite tax on the value of all lands and buildings.

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27. *Patel Gordhandas Hargovindas v. Municipal Commissioner, Ahmedabad,* AIR 1963 SC 1742 : (1964) 2 SCR 608.
28. AIR 1980 SC 271 : (1980) 2 SCC 410.
29. *Supra*, Sec. C.
30. *Infra,* Arts. 14, 19, Chs. XXI and XXIV.
31. *Orissa Cement Ltd. v. State of Orissa,* AIR 1991 SC 1676 : 1991 Supp (1) SCC 430; *India Cement Ltd. v. State of Tamil Nadu,* AIR 1990 SC 85 : (1990) 1 SCC 12.
Also see, *infra,* under entry 50, List II.
32. *India Cement Ltd., ibid.*
33. *S.C. Nawn v. W.T.O.,* AIR 1969 SC 59 : (1969) 1 SCR 108; *Lt. Col. Sawai Bhawani Singh v. State of Rajasthan,* (1996) 3 SCC 105.
Also see, *supra,* Sec. C.
34. AIR 1972 SC 106. Also see, *infra,* Sec. G, under "Residuary Taxes".

(3) The tax is not concerned with the division of interest in the building or land. In other words, the tax is not concerned with the division of interest in the building or land; in other words, the tax is not concerned whether one person owns or occupies it or two or more persons own or occupy it.

In pith and substance, the tax under entry 49 is not a personal tax but it is a tax on property.

A tax on excavation of land and use of forest land for non-forest use, and not on the forest land, as such, is not valid under entry 49. What is sought to be taxed in the instant case is not land but the tax is on absence of land. The forest land which is being used is not subjected to tax. The assessment of tax is on excavation and use of forest land for non-forest purpose. "The tax is levied in effect on the activity of the removal or excavation of land". Such a tax does not fall under entry 49 which envisages the levy of tax directly on land as a unit. "The land has been regarded as meaning the land on surface and also below the surface". Therefore, in order that a tax can be levied under entry 49, "it is essential that 'land' as a unit must exist on which the tax is imposed".[35]

Water charges levied by a municipality as a percentage of annual rateable value of building constitute a tax on lands and buildings falling under entry 49, List II.[36]

50. Taxes on mineral rights subject to any limitations imposed by Parliament by law relating to mineral development.

There has been a difference of opinion amongst the High Courts as regards the nature of royalty payable on minerals extracted from the mines. Some High Courts regard royalty as a tax under this entry,[37] while others treat it not as a tax but as the price paid for the privilege of exercising the right to explore the minerals, or as the payment made for the minerals won from the lands.[38]

The Supreme Court had earlier in *India Cement* expressed the view that royalty is a tax.[39]

However, in *State of W.B. v. Kesoram Industries Ltd*.,[40] it was clarified that royalty is not a tax, having corrected what was perceived as a typographical error in the majority view in *India Cement*.[41]

Subject to the provision of List I the power of the States to enact legislation on the topic of mines and mineral development is plenary. Legislation by the Union in the field covered by List I, Entries 52 and 54 would not like a magic touch or taboo denude the entire field forming the subject matter of the declarations required to be made under List I, Entries 52 & 54.[42]

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35. *State of Bihar v. Indian Aluminium Company*, AIR 1997 SC 3592, 3599 : (1997) 8 SCC 360.
36. *Kendriya Nagrik Samiti, Kanpur v. Jal Sansthan,* AIR 1982 All. 406.
Also, *Raza Buland Sugar Co. v. Rampur Minicipality*, AIR 1965 SC 895 : 1965 (1) SCR 970.
37. *Laddu Mal v. State of Bihar*, AIR 1965 Pat. 491; *Laxminarayan Mining Co. v. Taluk Development Board*, AIR 1972 Mys. 299.
38. *H.R.S. Murthy v. Collector of Chittoor*, AIR 1965 SC 177 : (1964) 6 SCR 666; *Saurashtra Cement & Chemical Industries Ltd. v. Union of India*, AIR 1976 Guj. 180; *Laxmi Narayan v. State*, AIR 1983 Ori. 210; *Dr Shanti Saroop Sharma v. State of Punjab*, AIR 1969 P&H 79.
39. *India Cement Ltd. v. State of Tamil Nadu*, AIR 1990 SC 85 : (1990) 1 SCC 12; also see, *infra.*
40. (2004) 10 SCC 201 : AIR 2005 SC 1646.
41. (*Ibid* at p. 297).
42. *State of W.B. v. Kesoram Industries Ltd.*, (2004) 10 SCC 201 : AIR 2005 SC 1646.

A reasonable tax or fee levied by State legislation can not be construed as trenching upon the Union's power and freedom to regulate and control mines and minerals. Moreover, the States power to tax under List II Entries 49 and 50 is not taken away by the residuary power of legislation of the Union in the field of taxation under Art. 248(2) read List I Entry 97.[43]

A tax on mineral rights would be different from tax on minerals extracted, as the latter tax amounts to excise duty. The tax on mineral rights is a tax on the right to extract minerals.[44]

The competence of the State Legislature under this entry is circumscribed by "any limitations imposed by Parliament by law relating to mineral development".

The State of Orissa levied a tax on mineral or coal bearing lands. The tax was based on "average annual income". The Supreme Court ruled in *Mahanadi*[45] that the tax in question was not a tax on land as it had nothing to do with the surface characteristic of the land and so it did not fall under entry 49, List II. It was, in substance, a tax on minerals and mineral rights and so it fell under entry 50, List II.

The State power to levy a tax under this entry was subject to limitations imposed by Parliament by law relating to mineral development. As Parliament had enacted the Mines and Minerals (Dev. & Reg.) Act under entry 54, List I, making exhaustive provisions covering all kinds of taxation on minerals and mineral rights—tax, royalty, fee, dead rent *etc*., the State Legislature was deprived or denuded of the power to enact any law imposing any tax or levy under entry 50, List II. Accordingly, the tax in question was held to be beyond the competence of, and *ultra vires* the legislature.

It was held that by virtue of the Mines and Minerals Regulation and Development Act, enacted by Parliament under entry 54, List I, the State Legislatures are denuded of their power to levy any tax on minerals. Entry 50 had practically become a dead letter.[46]

Mahanadi was overruled by *Kesoram* which held that a tax or fee on mineral rights which remains in pith and substance a tax for augmenting the revenue resources of the State or a fee for rendering services by the State and does not impinge upon regulation of mines and mineral development or upon control of industry by the Central Government is not unconstitutional.[47]

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43. *State of W.B. v. Kesoram Industries Ltd.,* (2004) 10 SCC 201 : AIR 2005 SC 1646.

44. WANCHOO, J., in *Hingir Rampur Coal Co. v. State of Orissa,* AIR 1961 SC 459 : (1961) 2 SCR 537.

45. *State of Orissa v. Mahanadi Coalfields Ltd.,* AIR 1995 SC 1868; *State of Madhya Pradesh v. Mahalaxmi Fabric Mills Ltd.,* AIR 1995 SC 2213 : 1995 Supp (1) SCC 642; *Saurashtra Cement and Chemical Industries v. Union of India*, AIR 2001 SC 8.

46. *P. Kannadasan v. State of Tamil Nadu,* AIR 1996 SC 2560 : (1996) 5 SCC 670.

47. **Ed.:** The strained interpretation on the statutes which were the subject matter of challenge in the decision was the outcome of a perception of the majority that the Centre was consuming the lion's share of revenue and therefore in case of conflict, the "flexible" provisions of the Constitution should be interpreted in favour of the States who were the weaker and more needy and that "Any conscious whittling down of the powers of the State can be guarded against by the courts".

This propounds the long since discredited State rights doctrine which has the potential of weakening the federalist structure envisaged in the Indian Constitution. (infra p 741). See also the dissenting view of Sinha J in Kesoram at page 361.

Several States levied a 'cess' based on the royalty payable by a lessee on the extraction of minerals from the mining lands. The question of constitutional validity of the cess came before the Supreme Court in *Orissa Cement Ltd. v. State of Orissa.*[48] The States argued that in pith and substance the tax was a tax on land. The Court rejected the contention and ruled against the validity of the cess in question.[49]

The Court ruled that the cess could not be regarded as land revenue and thus it would not fall under entry 45, List II. The cess could also not be considered as a tax on mineral rights and would thus not fall under entry 50, List II. The cess could not also be considered as a tax on land within the meaning of entry 49, List II. Royalty is payable on the extraction from land and cess is an additional charge on that royalty. The impact of the cess in question would be on the royalties derived from land and not on land.

Entry 49, List II contemplates a levy on land as a unit and the levy must be directly imposed *on land* and must bear a definite relationship to it. There is a clear distinction between tax directly on land and tax on income arising from the land.[50] Royalty being indirectly connected with land can not be said to be a tax directly on land. Cess is relatable to minerals extracted from land. Under the State Act in question, no tax could be levied if no mining activities were carried on. "Hence, it is manifest that it is not related to land as a unit which is the only method of valuation of land under Entry 49 of List II, but is relatable to minerals extracted."

The cess could not also be regarded as a fee so as to fall under entry 66, List II.[51] The reason is that the levy could not be correlated to any services rendered by the State to the class of persons from whom the levy was collected. Entry 23 to which the levy of the fee could be related is "subject to the provisions of List I with respect to regulation and development" of mines and minerals under the control of the Centre. The Centre has enacted the Mines and Minerals Development Act, 1957. "It, therefore, follows that any State Legislation to the extent it encroaches on the field covered by the M.M.D. Act, 1957, will be *ultra vires*".[52] The cess could not also be regarded as covered by entry 18, List II, *viz.*, land.[53]

An outstanding feature of the judgment in *Orissa Cement* is that after holding the cess in question as unconstitutional, the Court made a ruling that no refund of cess already collected need be made. The cess was being collected since 1964 and a direction to refund all the cess collected would work hardship and injustice. In

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48. AIR 1991 SC 1676 : 1991 Supp (1) SCC 430.

49. Reference was made to the following earlier cases: *Hingir Rampur* case, AIR 1961 SC 459 : (1961) 2 SCR 537; *supra, Tulloch,* AIR 1964 SC 1284 : (1964) 4 SCR 461, *supra; Murthy* case, AIR 1965 SC 177 : (1964) 6 SCR 666; *supra,* footnote 38.

50. *Orissa Cement Ltd. v. State of Orissa,* AIR 1991 SC 1676 : 1991 Supp (1) SCC 430; *India Cement Ltd. v. State of Tamil Nadu,* AIR 1990 SC 85 : (1990) 1 SCC 12.
Also see, *infra.*

51. For discussion on 'Fee', see, *infra,* Sec. H.

52. AIR 1991 SC at 1701. For the various entries mentioned here, see, *supra.* Also see, *India Cement Ltd. v. State of Tamil Nadu,* AIR 1990 SC 85 : (1990) 1 SCC 12; *State of Madhya Pradesh v. Mahalaxmi Fabric Mills Ltd.,* AIR 1995 SC 2213 : 1995 Supp (1) SCC 642.

53. *Supra,* Ch. X, Sec. E.

granting relief, the Court exercises certain amount of discretion. The Court observed on this point:[54]

> "It is a well-settled proposition that it is open to the Court to grant, mould or restrict the relief in a manner most appropriate to the situation before it in such a way as to advance the interests of justice.

In entry 49, the term land may, in certain circumstances, include minerals under the earth. But, as tax on mineral rights is expressly covered by entry 50, if it is brought under entry 49, it would render entry 50 redundant. Entries cannot be interpreted in such a manner so as to render any entry redundant.

51. Duties of excise on the following goods manufactured or produced in the State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India: (a) alcoholic liquors for human consumption; (b) opium, Indian hemp, and other narcotic drugs and narcotics, but not including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry.

The nature of an 'excise duty' has already been discussed earlier.[55] The area of excise duties has been divided between the Centre and the States.[56] The power of the State Legislatures to levy duties of excise is circumscribed under entry 51, List II. Levying of excise by Parliament under entry 84, List I, on medicinal and toilet preparations containing alcohol, does not debar the States from levying excise under this entry on alcoholic requirements for human consumption.[57]

The Constitution distributes the power to levy excise duties on alcoholic liquors between the Centre and the States. Entry 81, List I, and entry 51, List II, compliment each other. Both provide for levy of excise duties. States have no power to levy excise on alcohol which is not for human consumption. Such a tax can be levied only by the Centre.

The States cannot levy a tax or charge or impost on industrial alcohol, *i.e.* alcohol used and usable for industrial purposes as the States have no authority to levy duty or tax on alcohol which is not fit for human consumption. Such an impost can only be levied by the Centre under entry 84, List I. Entry 51 has been held to be limited to potable liquors. Thus, duties of excise on rectified spirit cleared/removed for the purposes of obtaining or manufacturing potable liquors is leviable by the State Governments.[58]

Since entry 51 is separate from entry 54, a State Legislature may impose simultaneously an excise tax as well as a sales tax on the same commodity. The word '*countervailing*' in this entry is significant as it means that countervailing duties can only be levied on goods entering the State from outside if similar

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54. AIR 1991 SC at 1717.
Also see, *India Cement Ltd. v. State of Tamil Nadu*, AIR 1990 SC 85 : (1990) 1 SCC 12.

55. *Supra*, see, under entry 84, List I, Sec C.

56. See entry 84, List I, *supra*.

57. *Southern Pharmaceuticals & Chemicals v. State of Kerala*, AIR 1981 SC 1863 : (1981) 4 SCC 391.

58. *Synthetics & Chemicals Ltd. v. State of Uttar Pradesh*, AIR 1990 SC 1927 : (1990) 1 SCC 109; *State of UP v. Vam Organic Chemicals Ltd.*, (2004) 1 SCC 225 : AIR 2003 SC 4650. *Mohan Meakin Ltd. v. State of H.P.*, (2009) 3 SCC 157 : (2009) 1 JT 599; see, *supra*, under Entry 8, List II; *Bihar Distillery v. Union of India*, AIR 1997 SC 727 : AIR 1997 SC 1208.

goods are being manufactured within the State and excise duties are being levied thereon.[59] The underlying idea is to equalize the tax burden on home production and imports so that the local manufacturer is not at a disadvantage.

Under this entry tax is leviable on 'entry' of goods and not on goods being taken out. The tax under this entry has nothing to do with consumption of the commodity brought from outside the State.[60]

It will be seen from the perusal of the various entries in the three Lists that a substance may fall under several entries for various purposes. Thus, for purposes of cultivation and manufacture, opium falls under entry 59 of List I and it is exclusively a Central subject. For purposes of levy of excise, and for such control as may be necessary to collect the duty, opium falls under the present entry. Intoxicating liquor falls under entries 8 and 51 of List II, but may fall under entry 19 of List III if it is a drug.

'Narcotic' is a substance which relieves pain, produces sleep and in large doses brings on stupor, coma, and even death, as opium does. Chloral hydrate being hypnotic and sedative would be a narcotic and so an excise duty may be levied on it under the present entry.[61]

The Opium Act permits the States to levy duty as a condition for granting permission to possess, transport, import, export or sell opium. The Act has been enacted by Parliament. The Supreme Court has ruled in *Organon*[62] that the Act does not levy an excise duty on opium which can be levied only by a State Legislature and not by Parliament. Parliament can make a law under entry 59, List I, relating to cultivation, manufacture and sale for export of opium, or under entry 19, List III, with respect to opium generally.

Section 5 of the Opium Act enacted by Parliament empowers State Governments to make rules regulating the possession, transport, import, export and sale of opium subject to payment of duty or subject to such other conditions as it may impose. S. 5 is not a taxing provision. What S. 5 does is to authorise the State collect "amount" as a condition for granting the permission to possess, transport, import or sell opium. It does not amount to levying an excise duty on opium. S. 5 is, thus, constitutionally valid.

The Kerala General Sales Tax Act authorised the levy of turnover tax on the amounts of excise duty paid by the Kerala State Beverages Corporation on the distillers The duty on liquor was imposed under Section 17 of the Abkari Act in which it was described as a "duty of excise". The Supreme Court in *State of Kerala v. Maharashtra Distilleries Ltd.*,[63] held that the levy was not related to the manufacture of goods and could not be characterised as levy of excise duty even though it is so described in the Act but was relatable to Entry 8 of List II.

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59. *Kalyani Stores v. State of Orissa,* AIR 1966 SC 1686 : (1966) 1 SCR 865; *M.M. Breweries v. E.T. Commr. Chandigarh,* AIR 1976 SC 2020; *State of Orissa v. Niranjan Sen* (2004) 13 SCC 712; also see, *infra,* Ch. XV.
60. *M.M. Breweries, supra,* footnote 59.
61. *Indian C & P. Works v. State of Andhra,* AIR 1966 SC 713 : 1966 (2) SCR 110.
62. *Organon (India) Ltd. v. Collector of Excise,* AIR 1991 SC 2489.
63. (2005) 11 SCC 1 : AIR 2005 SC 2594.

A cess on shop-rent payable by the toddy-sellers to the State is not an excise as it has nothing to do with the production or manufacture of toddy.[64] The licence-fee stipulated to be paid to the State by licensed liquor vendors is neither a fee, nor a tax nor excise. This duty represents nothing but contractual sums payable to the State as the price or consideration or rental for the State parting with its privilege. This is on the theory that the State has exclusive right to manufacture and sell liquor and sell the said right to raise revenue. It is consideration for the privilege granted by the government for manufacturing or vending liquor.[65]

In *Sheopat Rai*,[66] the factual situation was as follows: the Excise Commissioner could grant a licence to a person for exclusive privilege of selling foreign liquor in retail in a locality against payment of fee for grant of the licence. The licence fee could be decided through an auction, the licence to be granted to the highest bidder. The Supreme Court ruled that the licence-fee is not a 'fee' and does not fall under entry 66, List II. It can also not be regarded as a tax and so it does not fall under entries 51 or 62, List II. The licence fee in the instant case connotes the idea of payment of a sum by a person to the grantor of a licence as consideration for conferring on him, by licence, the exclusive privilege or right to carry on certain activities in respect of foreign liquor, the carrying of which activities would have been otherwise the exclusive privilege or right of the grantor, *viz.*, the government. It is the consideration receivable by the State Government for parting with its exclusive privilege of vending foreign liquor in favour of a private party under a licence. It falls under entry 8, List II. The concepts of licence fee and excise duty are also entirely different.[67] No one has a Fundamental Right to carry on trade in any noxious and dangerous goods.[68]

52. Taxes on the entry of goods into a local area for consumption, use or sale therein

This duty is sometimes known as octroi duty. For this tax to become leviable, mere physical entry of the goods into the octroi area is not sufficient. The goods must not only enter the local area, but it must be "for the purpose of consumption, sale or use therein." The words 'consumption' and 'use' in the entry do not mean that the commodity must be destroyed or used up in the process, as a motor car. But when the commodity is converted into a different commercial commodity by subjecting it to some processing, it amounts to use and consumption of the commodity.[69] A municipal tax on wheat imported into the municipal limits by flour mills for converting it into flour by grinding, falls under this entry as conversion into flour involves user of wheat.

Even if the goods are sold within the local area, it must be for the purposes of consumption or use within that local area to be a sale for the purpose of entry

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64. *State of Mysore v. D. Cawasji & Co.*, AIR 1971 SC 152 : (1971) 2 SCR 799 : (1970) 3 SCC 710.

65. *Har Shankar v. Dy. Excise & Taxation Commr.*, AIR 1975 SC 1121 : (1975) 1 SCC 737; *State of Punjab v. Balbir Singh*, AIR 1977 SC 1717; *State of Punjab v. Ajudhia Nath*, AIR 1981 SC 1374 : (1981) 3 SCC 251.

66. *State of Uttar Pradesh v. Sheopat Rai*, AIR 1994 SC 813 : (1994) Supp (1) SCC 8; *State of Punjab v. Devans Breweries*, (2004) 11 SCC 26 : (2003) 10 JT 485.

67. *State of M.P. v. Lalit Jaggi*, (2008) 10 SCC 607 : (2008) 10 JT 510.

68. *Infra*, Art. 19(1)(g); Ch. XXIV, Sec. H.

69. *Travancore-Cochin v. Shanmugha Vilas Cashew Nut Factory*, AIR 1953 SC 333 : 1954 SCR 53; *HMM Ltd. v. Administrator, I Bangalore City Corp.*, AIR 1990 SC 47 : (1989) 4 SCC 595; *Mafatlal Industries Ltd. v. Nadiad Nagar Palika*, AIR 2000 SC 1223 : (2000) 3 SCC 1.

52.[70] If goods are sold within a local area for being taken out, and are actually taken out of that local area, such sale is not covered by entry 52.[71]

As the Supreme Court has explained, the levy of tax under entry 52 is "upon the entry of goods into a local area; *i.e.* upon entry of goods for the purpose of consumption, use or sale therein. Neither mere entry of goods is enough to attract the levy nor the mere sale thereof within the local area. What attracts the levy under entry 52 is the entry of goods into a local area for consumption or for use or for sale within that local area for the purpose of consumption or use within that local area."[72] The Supreme Court has observed in *Burmah Shell*:[73]

> "That concept (of octroi) included the bringing in of goods in a local area so that the goods comes to a repose there".

If the goods are not consumed, used or sold within the local area, no tax can be levied under this entry. Thus, where the goods merely pass through a local area to a destination beyond, no tax can be levied thereon. But, where goods are brought into a local area, stored or kept there for a sufficient length of time, and then re-exported, questions of identity and quantity of goods may arise.

A rule saying that if goods are not re-exported within six months, no refund will be allowed even if the goods are exported as a fact, has been held valid in *Telco*[74]. The Supreme Court observed : "The export cannot be put in perpetual doubt and the goods may be considered to have come to a repose if they were not exported within a particular period provided in the rules".

The State of Rajasthan imposed an entry tax on motor vehicles, purchased outside the State and brought into the State for use or sale. The tax has been held valid as falling under entry 52, List I, as the taxation event is the entry of the vehicle into a local area. The basis of the levy of the tax may be the purchase value of the vehicle, but it is not a tax on purchase of goods. The State is divided into local areas, *i.e.* municipalities/panchayats and, therefore, if the vehicle is brought within the local limits of any local area, the tax can be levied on such vehicle.[75]

A terminal tax leviable by Parliament under entry 89, List 1,[76] must be: (*a*) terminal, (*b*) confined to goods and passengers carried by railway, sea or air, (*c*) chargeable at a rail, sea or air terminus and be referable to services (whether of carriage or otherwise) rendered by some rail, sea or air transport organisation. On the other hand, the essential features of octroi duties under entry 52, List II, are—(*a*) the entry of goods into a definite local area, and (*b*) the requirement that the goods should enter for the purposes of consumption, use or sale therein.

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70. *Tata Engineering & Locomotive Co. v. Municipal Corporation, Thane,* AIR 1992 SC 645 : 1993 Supp (1) SCC 361.

71. *Entry Tax Officer v. Chandanmal Champalal & Co.,* (1994) 4 SCC 463; *Hindustan Petroleum Corp. Ltd. v. Okha Gram Panchayat,* (1994) Supp (1) SCC 296, 300 : AIR 1954 SC 916.

72. *State of Bihar v. Bihar Chamber of Commerce,* AIR 1996 SC 2344, at 2354 : (1996) 9 SCC 136 (overruled on another point in *Jindal Stainless Ltd. (2) v. State of Haryana,* (2006) 7 SCC 241 : AIR 2006 SC 2550).

73. *Infra,* footnote 79.

74. *Supra,* footnote 70.

75. *Rashid Mohd. v. State of Rajasthan,* AIR 1994 Raj 167.
Also see, *Jaika Automobile Pvt. Ltd. v. State of Maharashtra,,* AIR 1993 Bom. 124.

76. *Supra,* Sec. C.

A terminal tax and octroi have several common features. Both are interlinked—(*i*) destination of the goods; (*ii*) the user in the local area on arrival of goods. Where the goods merely pass through a local area without being consumed therein, none of these taxes may be levied. There is only a very little margin of difference between octroi and terminal tax. In case of terminal tax, the goods reach their final destination and their entry into the area of destination immediately attracts payment of terminal tax irrespective of their user. Octroi is levied on goods for their use and consumption. Cotton was being brought within the municipal limits not for sale but for processing into yarn. It was held that octroi was leviable on cotton as used by the mill.[77]

Under entry 52, tax is not leviable on entry of goods for any purpose other than consumption, use or sale.[78] No octroi can be levied on goods received in a local area if they are exported out.[79] Terminal tax, on the other hand, signifies that there must be terminus for the journey of the goods. Thus, where goods enter into a local area which is also the destination of the goods either temporarily or otherwise, the terminal tax would be leviable. When goods pass through a local area without being consumed there, to a destination beyond, the mere fact that the transport carrying the goods halts within the local area for transhipment or allied purposes would not justify the levy of octroi. It is necessary, however, that the goods leave for their destination within a reasonable time.[80]

Octroi refers to goods and not to passengers; it can be imposed only at the point of entry of goods; there is no limitation on the manner by which the goods enter whether by rail, air, road or waterway. Octroi cannot be collected at the point of exit of goods.[81] The terminal tax may be imposed both on entry or exit, and may refer to both passengers or goods.[82] Rail-borne goods may be subject to a terminal tax under entry 89, List I, and to an octroi under this entry.

What is the significance of the expression 'local area' in the present entry. The State of U.P. declared each sugar factory in the State as a 'local area' and imposed a cess on entry of sugarcane for consumption therein. The Supreme Court held in *Diamond Sugar Mills v. State of Uttar Pradesh*[83] that the cess was not validly levied under this entry as the term 'local area' signifies "an area administered by a local body like a municipality, a district board, a local board, a union board, a panchayat or some body constituted under the law for the governance of the local affairs of any part of the State. The premises of a factory can not regarded as a 'local area'.

A municipality can levy octroi duty on tobacco imported for manufacturing bidis. It does not matter if the Centre levies excise duty on tobacco, for these are two independent imposts arising from different sets of circumstances imposed by

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77. *Bhaskar Textile Mills v. Jharsuguda Municipality*, AIR 1984 SC 583 : (1984) 2 SCC 25.
78. *Jothi Timber Mart v. Calicut Municipality*, AIR 1970 SC 264; *Kunwar Ram Nath v. M.B., Pilibhit*, AIR 1983 SC 930 : (1983) 3 SCC 357.
79. *Burmah Shell v. Belgaum Municipality*, AIR 1963 SC 906 : 1963 Supp (2) SCR 216; *Hiralal Thakerlal Dalal v. Broach Municipality*, AIR 1976 SC 1446; *Indian Oil Corporation v. Union of India*, AIR 1982 Goa 26.
80. *Man Mohan Tuli v. Municipal Corp., Delhi*, AIR 1981 SC 991 : (1981) 2 SCC 467; *State of Karnataka v. Hansa Corporation*, AIR 1981 SC 463 : (1980) 4 SCC 697.
81. *Puri Fish Merchants Association v. Puri Municipal Council*, AIR 1988 Ori. 207.
82. *Punjab Flour Mills v. Lahore Corp.*, AIR 1947 FC 14; *Emperess Mills v. Municipal Committee*, AIR 1958 SC 341 : 1958 SCR 1102.
83. AIR 1961 SC 652 : (1961) 3 SCR 242; *infra*.

two governments.[84] Octroi can be levied on the commodity 'sold' for it can be regarded as 'consumed', although the purchaser may not consume the whole of it within the municipal limits but consume a part of it outside.

The Burmah Shell Company used to bring petrol within Belgaum municipal limits, consume a part of it, sell a part of it to consumers within the municipal limits for consumption outside, and export the rest outside the municipal limits. The Supreme Court held in *Burmah Shell v. Belgaum Municipality*[85] that except for the petrol exported, all petrol brought into the municipal limits was subject to the octroi tax. So long as the goods are brought inside the area for sale within the area to an ultimate consumer, it makes no difference that the consumer does not consume them in the area but takes them out for consumption elsewhere. All the act of consumption need not take place within the area of the municipality. "It is sufficient if the goods are brought inside the area to be delivered to the ultimate consumer in that area because the taxable event is the entry of goods which are meant to reach an ultimate user or consumer in the area"[86]

A municipal corporation levied an octroi duty on goods imported within its limits, but refunded only 90 per cent of the duty when goods were exported out within a specified period. It was held that the 10 per cent deduction amounted to a tax on octroi refund and such a tax could not be imposed under any entry in the State List.[87]

A municipality deriving its power to tax from the State Legislature obviously cannot have any authority more extensive than the authority of the State Legislature. Accordingly, a municipality cannot levy a tax in respect of goods brought into the local area for purposes other than consumption, use or sale.[88]

Under entry 52, List II, a State Legislature can levy a tax on the entry of goods for 'consumption, use or sale' into a local area.[89] Under entry 52, List II, not only a municipality or a local body can impose an octroi duty but even the State can impose a tax on goods entering a local area.

Both octroi and entry tax can be levied simultaneously as there is no constitutional bar against double taxation. Upon the same object and person separate taxes can be levied for different purposes by the same authority or different authorities.[90]

53. Taxes on the consumption or sale of electricity.

Under this entry, a State Legislature is competent to tax 'consumption' of electricity, whether produced by the consumer himself, or purchased from somebody else.[91] A levy of duty upon *consumption* of electrical energy is not a duty

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84. *Ram Krishna v. Municipal Committee, Kamptee*, AIR 1950 SC 11 : 1950 SCR 15.
85. AIR 1963 SC 906 : 1963 Supp (2) SCR 216.
86. *Ibid*, at 912.
87. *Poona Municipality v. Dattatraya*, AIR 1965 SC 555 : (1964) 8 SCR 178.
88. *Indian Oil Corporation v. Municipal Corporation, Jullundhar*, AIR 1993 SC 844 : (1993) 1 SCC 333.
89. See, *Associated Cement Companies Ltd. v. State of Madhya Pradesh*, AIR 1996 MP 116.
90. *Jaika Automobiles Pvt. Ltd., Nagpur v. State of Maharashtra,*, AIR 1993 Bom 124.
91. *Jiyajeerao Cotton Mills v. State of Madhya Pradesh,*, AIR 1963 SC 414 : 1962 Supp (1) SCR 282.

of excise falling in entry 84, List I, because excise is a duty on 'production' and not 'consumption'.[1]

Electricity is goods which can be sold. As electricity cannot be stored, it can only be sold for consumption. Therefore, the word 'sale' in entry 53, List II must be read as 'sale for consumption' of electricity. Taxes on the consumption or sale for consumption of electricity within the meaning of entry 53 must be consumption within the State and not beyond its territory.[2]

According to a Constitution Bench of the Supreme Court because electricity is goods, it is covered in Entry 54 also. Therefore, Entries 53 and 54 must be read together and to the extent of sale of electricity for consumption is outside the State, the sale is subject to provisions of Entry 92-A of List I.[3]

Restrictions have been placed on the levy of this tax by Arts. 287 and 288. Art. 287 lays down that except in so far as Parliament may by law otherwise provide, a State cannot impose a tax on the consumption by, or sale of electricity (whether produced by a government or other persons) to, the Government of India; or electricity consumed in the construction, maintenance or operation of a railway by, or electricity sold for the purpose to, the Government of India or a railway company.

Even when Parliament authorises the imposition of such a tax, the law imposing or authorising it 'shall secure' that the price of electricity sold to the Government of India for consumption by it, or to railway company, is less by the amount of the tax than the price charged to other consumers of a substantial quantity of electricity. In other words, the incidence of the tax is to be on the producer of the electricity and not on the Government of India or the railway company.

The tenor of Art. 288 is that a State may by law impose a tax in respect of any water or electricity stored, generated, consumed, distributed or sold by any authority established by a law of Parliament for regulating or developing any inter-State river or river valley. Such a law to be effective should be reserved for the President's consideration and receive his assent. If the State law provides for the fixation of the rates and other incidents of such tax by means of rules or orders to be made under the law by any authority, the law must make provision for the previous consent of the President being obtained to the making of any such rule or order.

The purpose of the provision evidently is to protect the public utility services like railways and river valley projects from indiscriminate State taxation as these services have a national importance. Art. 288 does not stipulate Presidential assent for imposition of a fee for supply or use of water.

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1. See, *supra*, Sec. C.

2. *State of Andhra Pradesh v. NTPC Ltd.*, (2002) 5 SCC 203, 222 : AIR 2002 SC 1895; *State of A.P. v. National Thermal Power Corpn. Ltd.*, (2002) 5 SCC 203 : AIR 2002 SC 1895; *M.P. Cement Manufacturers Assocn. v. State of MP*, (2004) 2 SCC 249 : (2005) 11 JT 342. Observations to the contrary in *Southern Petrochemical Industries Co. Ltd. v. Electricity Inspector & ETIO*, (2007) 5 SCC 447 : AIR 2007 SC 1984 and *Karnataka Power Transmission Corpn. v. Ashok Iron Works (P) Ltd.*, (2009) 3 SCC 240 : AIR 2009 SC 1905 appear to be incorrect.

3. *State of A.P. v. National Thermal Power Corpn. Ltd.*, (2002) 5 SCC 203 : AIR 2002 SC 1895.

Article 288 is a corollary of the doctrine of "intergovernmental tax immunities", which is discussed later in this Chapter.[4] The subject of taxation under this clause is a matter of interstate utility and hence of national concern. The Presidential assent ensures that the State legislation does not injure interstate interests by imposing unduly high taxation on generation, storage *etc*. of electricity. The Presidential assent is a condition precedent for the validity of the State legislation imposing tax under Art. 288. It serves a very beneficial interest by way of protection of intergovernmental interests.

54. Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of entry 92A of list I

The power of the States to levy sales tax under entry 54 is subject to two limitations. One arises out of the entry itself, *viz*., the entry itself is subject to entry 92A of List I. Under entry 92-A, taxation of inter-State sales are subject to Central Laws. The other limitation flows from the restrictions embodied in Article 286.[5]

The power of the States to levy sales tax under entry 54 has generated massive case law.

Under entry 92, List I, only Parliament, and not a State Legislature, can levy a tax on "sale or purchase of newspapers". A newspaper is a paper containing a report of recent events. A paper which mainly gives astrological and numerological predictions is not a newspaper even though it may contain a stray news item, and, therefore, its sale can be taxed under the present entry.[6]

The term 'goods' for the purposes of this entry has been given a very wide connotation. According to Art. 366(12), "goods" includes "all materials, commodities, and articles." In *H. Anraj v. Govt. of Tamil Nadu*,[7] levy of sales tax on the sale of lottery tickets has been held to be valid. A lottery ticket has been held to be "goods". Electricity is goods. Tax on the sale and consumption of electricity falls both within entries 53 and 54. This means that tax on sale for consumption of electricity outside the taxing State would be subject to entry 92A, List I.[8]

In *Vikas Sales Corporation v. Commissioner, Commercial Taxes*,[9] REP licences have been held to be goods and transfer of such a licence by its holder to another person constitutes a sale of goods and sales tax can be levied thereon. REP licences are import licences issued to the exporters to enable them to import the necessary inputs required for the manufacture of products exported. REP licences have an inherent value of their own and are bought and sold as such. In the commercial world, these licences are treated and dealt with as merchandise.

The expression 'sale of goods' in the entry has been given the same meaning as in the Sale of Goods Act. Therefore, an attempt by a State Legislature to im-

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4. *Infra*, Sec. J(ii), under Immunity of Instrumentalities.
5. For discussion on Art. 286, see, *infra*, Sec. J(i).
Also see, *20th Century Finance Corp. Ltd. v. State of Maharashtra*,, AIR 2000 SC 2436 : (2000) 6 SCC 1.
6. *Commissioner of Sales Tax v. Express Printing Press M/s*, AIR 1983 Bom 190.
7. AIR 1986 SC 63 : (1986) 1 SCC 414.
8. *State of Andhra Pradesh v. NTPC Ltd.*, (2002) 5 SCC 203 : AIR 2002 SC 1895.
9. AIR 1996 SC 2082 : (1996) 4 SCC 433.

pose tax on a transaction which was not a sale according to this Act was held to be unconstitutional.[10]

To constitute a sale, therefore, (a) there should be an agreement between the parties for transferring title to goods, (b) supported by money consideration, and as a result of the transaction, (c) property must actually pass in the goods. There can be no sale without all these three ingredients being present.

There is a well defined distinction between 'sale' and an "agreement to sell". It was held in the instant case [*Dunkerley*] that in a building contract which was one, entire and indivisible, there was no sale of goods and was not within the competence of the State Legislatures under entry 54. A sale by auction is a 'sale' and sales tax can be imposed on auctioneers.[11] Forward contracts are not subject to taxation under this entry as no property in goods passes under such an agreement and, therefore, it is merely an agreement to sell and not a completed sale.[12]

The term 'goods' in this entry means all kinds of movable property. Electricity is 'goods' and thus can be subjected to sales tax.[13] Sales tax on petroleum and petroleum goods falls under this entry and not under entry 53 of List I.[14] It had been initially held in *State of U.P. v. Union of India*'[15] that providing telephone service by the Department of Telecommunications which comprises allotment of number, installation of an instrument/apparatus and other appliances at the premises of a subscriber, which are connected with a telephone line to the area exchange for access to the whole system, to dial and to receive calls, in effect falls within the meaning of the extended definition of "sale" for the purpose of imposition of a State tax under this Entry. The view was overruled in *Bharat Sanchar Nigam Ltd. v. Union of India,*[16] which dealt with taxation of mobile phone connections. The sale of handsets and SIM cards were disaggregated and the argument that the "goods" element in telecommunication was theelectromagnetic waves by which data generated by the subscriber was transmitted to the desired destination, was negatived.

A State tax on purchase of sugarcane at a rate regulated by weight and not value falls under this entry.[17] It is a pragmatic novelty in the sales tax pattern. It is not an excise (which falls under entry 84, List I)[18] as the tax is levied on the purchase of cane and not on its conversion into sugar. Although, usually, purchase tax is levied with reference to the price of goods, the legislature can levy such a tax with reference to the weight of the goods purchased.

The sugar industry is a 'controlled' industry (entry 52, List I),[19] and a tax on raw materials for sugar may be a tax with respect to that industry, yet such a tax does not fall outside the purview of the State Legislature[20] under entry 54, List II. It was held that the subject matter of sales tax covered by entry 54, List II, cannot

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10. *State of Madras v. Gannon Dunkerley*, AIR 1958 SC 560 : 1959 SCR 379.
11. *C.S. Bureau v. I.T. Commr.*, AIR 1973 SC 376 : (1973) 1 SCC 46.
12. *Sales Tax Officer v. Budh Prakash*, AIR 1954 SC 459 : (1955) 1 SCR 243.
13. *S.T. Commr., Indore v. M.P.E. Board*, AIR 1970 SC 732 : (1969) 1 SCC 200.
14. *Supra*, Ch. X, Sec. D.
15. (2003) 3 SCC 239 : AIR 2003 SC 1147.
16. (2006) 3 SCC 1 : AIR 2006 SC 1383; See also *supra* under Central Taxes: Entry 92-C.
17. *Ganga Sugar Corporation v. State of Uttar Pradesh*, AIR 1980 SC 286 : (1980) 1 SCC 223.
18. *Supra*, Sec. C.
19. *Supra*, Ch. X, Sec. D.
20. See, *Tikaramji, supra; Kannan Devan, supra.*

be included in entry 52, List I, as entry 54, List II, is a "separate and independent field."[21]

A State levy at the point of first purchase of alcohol has been held to be valid under this entry.[22] 'Industry' as a legislative topic is of large and liberal import, but "what peripherally affects cannot be confused with what goes to the heart". Sales tax on raw materials may affect costing process of manufacture but it is not legislation on industrial process or allied matters.[23] This calls for application of the rule of pith and substance.[24]

Entry 54 uses two terms 'sale' and 'purchase'. Both are two sides of the same coin. Sale and purchase are merely two sides of the same transaction. From the point of view of the seller, the transaction is a 'sale'; looked at from the point of view of the buyer, the same transaction is a purchase. Under entry 54, the State Legislature may levy both—'sales tax' as well as 'purchase tax'. A tax on the purchase of bamboo is valid under this entry.[25]

The characteristics of a 'sale' have been mentioned above. Before 1982, a number of transactions were held as not being 'sale' and, thus, not subject to sales tax under this entry. A contract of sale of goods was distinguished from a contract for works and labour. In the former case, the main object is transfer of property; in the latter, the main object is not transfer of property but to provide work and labour. For instance—

(a) Supply of materials in execution of works contract was held to be not sale of goods by the contractor as a building contract was held to be one entire and indivisible contract.[26]

(b) Supply of steam by the electricity board to Nepa Mills on actual cost basis was held to be more akin to a labour contract than to sale.[27]

(c) When the assessee redried raw tobacco, packed it in waterproof packing material, and charged one inclusive rate for drying and packing, there was no sale of packing material in such a case as the material was used in execution of a work contract and thus the packing material could not be subjected to sales tax.[28]

(d) When a hotel made one consolidated charge for residence, services and food, without separating charges for food from charges for service, it was held that there was no sale of food, but it was a service rendered to the guests and so no sales tax could be levied on the food supplied.[29]

(e) Supply of refreshments to its members by a club on a no-profit basis was held to be not a sale and hence not subject to sales-tax.[30]

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21. *State of Uttar Pradesh v. Synthetics and Chemicals Ltd.*, (1991) 4 SCC 139.
22. *Ibid.*
23. *Supra*, Ch. X, Sec. D.
24. *Supra*, Ch. X, Sec. G(d).
25. *State of Orissa v. Titaghur Paper Mills Co. Ltd.*, AIR 1985 SC 1394 : (1985) 3 SCC 661.
26. *State of Madras v. Dunkerley, supra*, note 72; *Banarsi v. State of Madhya Pradesh,*, AIR 1958 SC 909 : 1959 SCR 427.
27. *S.T. Commr. v. M.P.E. Board*, AIR 1970 SC 732 : (1969) 1 SCC 200.
28. *State of Andhra Pradesh v. Guntur Tobaccos*, AIR 1965 SC 1396 : (1965) 2 SCR 167.
29. *Associated Hotels v. Excise & Tax Officer*, AIR 1966 Punj. 449.
30. *J.C. Tax Officer, Madras v. Y.M.A., Madras*, AIR 1970 SC 1212 : (1970) 1 SCC 462.
This ruling went contrary to an earlier ruling in which sales tax was held leviable on supply of refreshments by a co-operative society to its members on a no-profit basis: *Dy C.T.O. v. Enfield India*, AIR 1968 SC 838 : (1968) 2 SCR 421.

A tax was levied on the purchase of sugarcane required for "use, consumption or sale in a factory." It was argued that the tax was not on every purchase of sugarcane but only "on the purchase of cane required for use, consumption or sale in a factory", the tax was not a purchase tax falling under entry 54, II, but a 'use' tax. It was also argued that since the tax was levied on the entry of cane into a factory for being used and consumed in the manufacture of sugar, the tax was, in the nature of an 'entry' tax but since the factory was not a 'local area' within the meaning of entry 52, List II, the levy was incompetent. But the Supreme Court rejected these arguments and held that the taxable event in the instant case was 'purchase of cane' and neither on "use or enjoyment of what is purchased" nor on "entry of cane into a factory", and, therefore it fell under entry 54, List II.[31]

Levy of a tax by a State on the purchaser in respect of the last sale of the goods in question, if otherwise the sale of the goods had not borne the tax earlier, has been held valid as being a tax on "purchase, pure and simple" and, as such, falling under entry 54, List II, as interpreted in "the widest possible manner". The Court refused to accept the argument that the tax was levied on "consumption, production or consignment".[32]

Despatch of sugar by the assessee to the authorised agent of a State under direction issued by the Sugar Controller under the Sugar and Sugar Products Control Order, 1946, was held not subject to sales tax as there was no sale since the contractual element was lacking in the transaction.[33] But there was some change in this judicial view later for in a similar situation the transaction was held subject to sales tax as, on facts, the Court found that the contractual element was not completely absent.[34]

Again, it was held that supply of wheat to the Food Controller under the Levy order was not a sale as there was no contract but only a legal obligation. There was not enough volition left to the parties to make the transaction contractual.[35] But this view has now undergone a change.[36] The view is now propounded that so long as mutual assent, express or implied, is not totally excluded, the transaction would amount to sale. The latest case in the series is *Food Corporation of India v. State of Kerala*[37] where levy procurement by the FCI under orders issued under the Essential Commodities Act have been held to be sale for purposes of entry 54 as some area of consensual arrangement and some field for volition is still left untouched by the law. "The disputed transactions are sales, may be, under the compulsion of a statute. Nevertheless, they are sales exigible to tax."[38]

Under the State law, the Cane Commissioner could declare any area as the factory zone for supply of sugarcane to a sugar mill. The factory was bound to purchase all sugarcane offered to it from the zone and the sugarcane producers in

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31. *Andhra Sugars v. State of Andhra Pradesh*, AIR 1968 SC 599 : (1968) 1 SCR 705.
32. *Hotel Balaji v. State of Andhra Pradesh*, AIR 1993 SC 1048, overruling *Goodyear Ltd. v. State of Haryana*, AIR 1990 SC 781 : (1990) 2 SCC 71.
33. *New India Sugar Mills v. S.T. Commr.*, AIR 1963 SC 1207 : 1963 Supp (2) SCR 459.
34. *I.S.W. Products v. State of Madras*, AIR 1968 SC 478 : (1968) 1 SCR 479.
35. *Chitter Mal v. S.T. Commr.*, AIR 1970 SC 2000 : (1970) 3 SCC 809.
36. *Vishnu Agencies (Pvt.) Ltd. v. Commercial Tax Officer*, AIR 1978 SC 449 : (1978) 1 SCC 520; *State of Punjab v. Dewan's Modern Breweries*, AIR 1979 SC 1158 : (1979) 2 SCC 210; *Coffee Board, Bangalore v. Commr. of Commercial Taxes, Karnataka*, AIR 1988 SC 1487 : (1988) 3 SCC 263.
37. AIR1997 SC 1252 : (1997) 3 SCC 410.
38. *Ibid* at 1263.

the zone could not sell sugarcane to any other factory. The purchase of sugarcane by the factory was held liable to sales tax on the ground that the sugarcane producer enjoyed some freedom of contract as he was free to sell or not to sell his sugarcane to the concerned mill, although the mill was bound to purchase all the sugarcane offered to it.[39]

A hire-purchase agreement, it was held, was not an agreement of sale and so could not be subject to sales tax. No transaction in which no property passes from the seller to the buyer could be subject to sales tax. Only when such an agreement ripens into a sale it could be liable to sales tax.[40]

THE CONSTITUTION (FORTY-SIXTH AMENDMENT) ACT, 1982

Thus, various interpretations of the entry very much restricted the scope of the State taxing power. Sales tax constitutes a major source of revenue for the States. With a view to enhance their taxing capacity under this entry, the Constitution (Forty-Sixth Amendment) Act, 1982, has been enacted.[41] Cl. 29A has been added to Art. 366 so as to clarify the position in certain respects, to remove certain judicially imposed restrictions and to include the following transactions within the expression "a tax on the sale or purchase of goods":

(a) a tax on the transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;[42]

(b) a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;[43]

(c) a tax on the delivery of goods on hire-purchase or any system of payment by instalments;[44]

(d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

(e) a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;

(f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration.[45]

Any of the above-mentioned supply, transfer or delivery of any goods is to be deemed to be a sale of those goods by the person making the transfer, delivery or

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39. *Andhra Sugars Ltd. v. State of Andhra Pradesh*, AIR 1968 SC 599 : (1968) 1 SCR 705.
40. *K.L. Johar & Co. v. Dy. C.T.O.*, AIR 1965 SC 1082 : (1965) 2 SCR 112.
41. See, *infra*, Ch. XLII, for this Amendment.
42. This overrides *New India Sugar Mills'* ruling, *supra*, footnote 33.
The Supreme Court had itself overridden this ruling in *Oil & Natural Gas Commission v. Bihar*, AIR 1976 SC 2478 : (1977) 1 SCR 354 and *Vishnu Agencies v. Commercial Tax Officer*, AIR 1978 SC 449 : (1978) 1 SCC 520.
43. This limits the ruling in *Dunkerley*, *supra*, notes 72 and 1. See *Bharat Sanchar Nigam Ltd. v. Union of India* (2006) 3 SCC 1 : AIR 2006 SC 1383.
44. This overrides the *Johar* ruling, *supra*, footnote 40.
45. This overrides the ruling in *Associated Hotels* case, *supra*.

supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made.

Cl. 29A of Art. 366 defines expansively the expression "tax on the sale or purchase" so as to include *inter alia* non-contractual transfer of property for valuable consideration, transfer of property in goods in execution of a works contract; delivery of goods on hire-purchase; and transfer of the right to use any goods for consideration. The purpose of these amendments is to augment the State revenue through sales taxation. The State Legislatures have thus become competent to levy sales tax on 'deemed sales' as envisaged in the above clauses from (a) to (f) even though such transactions were not sales within the meaning of 'sale' as contained in the Sale of Goods Act.[46] But the power of the States to tax sales mentioned in sub Cls. (b), (c) and (d) of Art. 366 (29A), mentioned above, is not unrestricted. According to Art. 286 (3)(b), a law of a State imposing tax on such sales is to be subject to such restrictions and conditions in regard to the system of levy, rates and other incidents of the tax as Parliament may by law specify. The Supreme Court has also ruled that all transfers of goods mentioned in Cls. (a) to (b) above are subject to the restrictions contained in Art. 286.[47]

As regards Cl. (d), mentioned above, a question has arisen whether a State can levy sales tax on the transfer of the right to use any goods on the premise that the goods put to use are located there irrespective of the place where the agreement of such transfer of the right to use such goods is made. The Court has ruled that where a party enters into a formal contract and the goods are available for delivery irrespective of the place where the goods are located, the *situs* of such sale would be where the property in the goods passes, namely, where the contract is entered into. The Court has formulated the proposition as follows:[48]

> "Where the goods are in existence, the taxable event on the transfer of the right to use goods occurs when a contract is executed between the lessor and the lessee and *situs* of sale of such a deemed sale would be the place where the contract in respect thereof is executed".

EVASION OF SALES TAX

Provision to check evasion of sales tax are within the legislative competence of the States under entry 54, List II. This being so, the provisions to make imposition of tax efficacious, or to prevent evasion of tax, are within the legislative competence of the State Legislature.[49]

Another problem which the legislature has been called upon to tackle in this area is that of unauthorised collection of sales tax by the dealers. When sales tax had been assessed and paid, but in pursuance of the *United Motors case*,[50] a part of it became refundable by the State as no tax could be levied on goods despatched for consumption outside the State, the legislature laid down that the refund could be claimed from the government by the purchaser from whom the dealer had actually collected the tax. This provision, therefore, deprived the as-

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46. For further discussion see *Bharat Sanchar Nigam Ltd v. Union of India* (supra)
47. *Builders Association of India v. Union of India*, AIR 1989 SC 1370 : (1989) 3 SCC 98.
48. *20th Century Finance Corp. Ltd. v. State of Maharashtra*, AIR 2000 SC 2436 : (2000) 6 SCC 12; *Goa Carbon Ltd. v. CTT*, (2008) 11 SCC 176 : (2008) 3 JT 316.
49. *State of Rajasthan v. D.P. Metals*, AIR 2001 SC 3076 : (2002) 1 SCC 279.
50. *Infra*, Sec. J(i).

sessees of the common law right to claim refund of the amounts paid as tax under an error of law.

This was a strategy adopted by the State to refund as little as possible as small consumers could hardly be expected to claim small amounts paid by them as sales tax. The State refused to refund the money to the dealers from whom it had collected. Nevertheless, the law was held valid as being covered by the *incidental* and *ancillary* power[51] relating to the levy and collection of sales tax.[52]

According to the Supreme Court, the various entries denote diverse heads of legislation demarcating the periphery of legislative competence and include all matters which are ancillary or subsidiary to the primary head.[53] The State Legislature is therefore competent to exercise power in respect of the subsidiary or ancillary matter of granting refund of tax improperly or illegally collected. This view was reiterated by the Court in *Burmah Construction*.[54]

A State law authorised the government to recover from any person any amount collected by him as sales tax otherwise than in accordance with the provisions of the relevant law. In substance, the provision meant that whatever had been collected by a dealer as sales tax, even though it was not exigible as tax under the law, had to be paid over to the government. The provision provided for recovery of the amount collected as sales tax even though the amount was not due as tax under the law.

The law was held to be not valid as the State could levy sales tax, but any other collection without the authority of law could not be regarded as sales tax and the State could not recover the same. Such a law did not fall within the 'incidental or ancillary' powers as these can be exercised only in aid of the main topic of *legislation i.e.* sales tax. The Supreme Court observed that there must be a limit to the incidental or ancillary power flowing from the legislative entries in the various lists. The Court refused to accept that "the ambit of ancillary or incidental power goes to the extent of permitting the legislature to provide that though the amount collected—may be wrongly—by way of tax is not exigible under the law as made under the relevant taxing entry, it shall still be paid over to Government, as if it were a tax".

The Court distinguished the provision from that held valid in *Orient Paper*.[55] That provision dealt with the matter of refund of what had already been deposited with the government and the question of refund of a tax collected "is always covered by incidental and ancillary powers relating to levy and collection of tax". But the provision in the instant case required payment to the government of something collected by way of tax, though not really due as a tax under the law enacted under entry 54, List II.[56]

Later, in *Ashoka Marketing*,[57] the Supreme Court declared invalid a provision similar to the one involved in *Abdul Quadir* but which was coupled with a provi-

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51. *Supra*, Ch. X, Sec. G(a).
52. *Orient Paper Mills v. State of Orissa*, AIR 1961 SC 1438 : (1962) 1 SCR 549.
53. *Supra*, Ch. X, Sec. G(a).
54. *Burmah Const. Co. v. State of Orissa*, AIR 1962 SC 1320 : 1962 Supp (1) SCR 242.
Also see, *Tripura Goods Transport Association v. Commr. of Taxes*, AIR 1999 SC 719.
55. *Supra*, footnote 52.
56. *Abdul Quader & Co. v. S.T. Officer*, AIR 1964 SC 922 at 922, 923 : (1964) 6 SCR 867.
57. *Ashoka Marketing v. State of Bihar*, AIR 1971 SC 946 : (1970) 1 SCC 354.

sion to refund the amount actually to the person from whom the dealer had collected the amount as tax. The Court observed: "the State has no power to legislate for recovering amount which is collected by the taxpayer in order to recoup himself for payment of tax which under the law he is not bound to pay".

But then to meet the problems, the State changed its strategy. A law was enacted prohibiting collection of sales tax by any one on sale of goods on which no such tax was payable under the law. Unauthorised collection was made punishable with fine and imprisonment and, above all, any unauthorised collection was to be forfeited to the State. The Supreme Court now validated the forfeiture clause in *R.S. Joshi v. Ajit Mills*[58] as imposing a penalty for breach of law and thus falling under entry 54, List II. The earlier cases were distinguished on the ground that there the Legislature had sought to grab the tax money even though not exigible under the law while here a penalty was imposed for infringing the sales tax. As a "punitive measure to protect public interest in the enforcement of the fiscal legislation, it falls squarely within the area of implied power."

The problem presented by *Joshi* was that a dealer had collected tax outside the law and that he should not stand to benefit thereby. The best solution to the problem was to return the amount to those who paid it, but it was not practical to return small amounts to numerous people. The next best solution could be to make the State as the beneficiary, but the State could not collect any tax without the authority of law as was held in the earlier cases. Now a way was found to achieve the same result, *viz.*, to forfeit the money which was conceptually a penal sanction for enforcement of law and was different from collecting tax money. To impose a sanction for enforcement of the sales tax law fell within the scope of entry 54, List II, as an ancillary matter.[59] Thus, a change in phraseology and concept enabled the State to achieve the same result which it had failed to achieve in the earlier cases.

The Orissa Legislature passed a law requiring a dealer collecting sales tax to deposit the same with the government "notwithstanding that the dealer is not liable to pay such amount as tax.' The Government would hold the amount so deposited in trust and would return the same on application. The Act was held valid in *State of Orissa v. Orissa Cement*[60] following *Joshi* 'and overruling *Ashoka Marketing.*[61] The *Orissa* ruling has been reiterated in *Kasturi Lal Harlal v. State of Uttar Pradesh*.[62] The Court ruled that the taking over of sums collected by dealers from the public under guise of tax solely with a view to return the same to the buyers so deprived "is necessarily incidental to 'tax on the sale and purchase of goods'. The Court has further observed:[63]

> "It is now well settled that an entry in a legislative List must be read in its widest amplitude and the legislature must be held to have power not only to legislate with respect to the subject-matter of the entry but also to make ancillary or incidental provision in aid of the main topic of legislation."

Usually, sales tax is passed on by the seller to the buyer. But it is not an essential characteristic of this tax. It is a matter of policy for the legislature whether the

58. AIR 1977 SC 2279 : (1977) 4 SCC 98.
59. *Supra*, Sec. B.
60. *State of Orissa v. Orissa Cement,* AIR 1986 SC 178 : 1985 Supp SCC 608.
61. *Supra*, footnote 57.
62. AIR 1987 SC 27 : (1986) 4 SCC 704.
63. *Ibid,* at 28.

law should provide for passing on the sales tax to the consumer. When a State levied a surcharge of 10% on the sales tax payable by the dealers, and prohibited the surcharge from being passed on to the purchasers, it was held to be valid under this entry.[64]

CONSIGNMENT TAX

In *Goodyear India Ltd. v. State of Haryana,*[65] the Supreme Court declared invalid what is known as the consignment tax. The Company purchased some raw materials in the State (without paying any sales tax), used the same in the manufacture of tyres and despatched a good portion of the manufactured goods to its several depots outside the State (otherwise than by way of sale) while retaining both title and possession thereof. Under the State law, the purchase of raw materials then became subject to the purchase tax. The Court ruled that in such a situation, the liability to pay tax arises only when the goods are despatched or consigned out of the State and, thus, the tax event was not 'purchase' but 'despatch' of goods outside the State in the course of interstate trade and commerce and such a tax would lie outside the State power to tax.[66] The mere consignment of goods by a manufacturer to his own branches outside the State does not in any way amount to a sale of goods. The Court emphasized that the nomenclature of the tax is not conclusive. To determine the true character and nature of a particular tax, with reference to the legislative competence of a particular legislature, the court looks to its pith and substance. The power to levy consignment tax vests in Parliament in view of Art. 269[67] and Entry 92B, List I.[68]

A tax on "expenditure" has been held to be not a tax on "sale". The expenditure tax does not thus fall under this entry.[69]

55. Taxes on advertisements other than those published in the newspapers.

This would include for example taxes on hoardings. A tax on advertisements published in the newspapers falls under entry 92, List I.[70]

56. Taxes on goods and passengers carried by road or on inland waterways:

See entry 89, List I.[71] This tax is known as terminal tax. A tax on the transport of kendu leaves can be validly levied under this entry as it is a tax on the transport of goods by road.[72]

A tax payable by operators in respect of passengers carried and goods transported by motor vehicles, the tax being measured by the value of fare and freight charged, falls under this entry, as it is a tax on passengers and goods and not on fares and freights although it is measured by fares and freights. It is only on such

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64. *Kodar v. State of Kerala,* AIR 1974 SC 2272 : (1974) 4 SCC 422; *Hoechst Pharmaceuticals v. State of Bihar,* AIR 1983 SC 1019, 1047 : (1983) 4 SCC 45.
65. AIR 1990 SC 781. Also see, *Hotel Balaji v. State of Andhra Pradesh,* AIR 1993 SC 1048.
66. See, *infra.* Ch. XV.
Also, entry 92A, List I, Sec. C. *supra.*
67. See, *infra,* Sec. K(a).
68. *Supra,* Sec. C.
69. *Federation of Hotel and Restaurant v. Union of India,* AIR 1990 SC 1637 : (1990) 3 SCC 619.
70. *Supra,* Sec. C.
71. *Supra,* Sec. C.
72. *State of Uttar Pradesh v. Mohanlal Hargovind Das,* (2000) 10 SCC 356.

goods and passengers as are carried by road or on inland waterways that a tax can be levied under this entry. The Court ruled that the incidence of the tax is upon passengers and goods, though the amount of the tax is measured by fares and freights.[73] A levy of service tax on carriage of goods by transport operators is a levy distinct from the levy envisaged under Entry 56.[74] Though incidence of tax is on goods and passengers but law can be enacted to recover the tax from the owners of operators of the vehicle.[75]

The Allahabad High Court has ruled[76] that a tax on passengers under entry 56 must be a tax directly imposed on passengers, though it need not be directly collected by the State from the passengers. In other words, the impact of the tax must be on the passengers. A levy to be valid under this entry is a tax paid by the passengers although it is collected by the State through the agency of the operators who collect the tax as well as the fare from the passengers.[77] The Allahabad High Court has explained the nature of the tax on passengers in these words:

> "A tax on passengers must be a tax directly imposed on passengers, though it need not be directly collected by the State from the passengers. In other words, the impact of the tax must be on passengers."[78]

A tax on goods which enter or leave the municipal limits but having no relation to their transport cannot fall under this entry.[79] Keeping in view the theory that the legislative entries should be interpreted broadly, it has been held that a State can validly levy a tax on goods carried and make it payable by the producer of goods instead of the carrier.[80] The competence of the States to tax goods carried is not affected whether the goods are carried for a long or short distance. It is the physical carriage of goods through a State which is the taxing event.

Levy of terminal tax on goods meant for destination beyond Delhi but passing through Delhi is not invalid. In the instant case,[81] there were two separate transactions, one by which the goods were meant for Delhi, and the other by which after having reached and having been unloaded at Delhi, the goods were rebooked and reloaded for some other destination and this, therefore, was a fresh and different transaction. In such a case, terminal tax would be leviable at the entry point in the territory of Delhi. The Delhi Municipal Corporation levied a terminal tax on goods and animals carried by road which were imported into, or exported from, the municipal limits. The tax was held valid under entry 56, List II.[82]

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73. *Sainik Motors v. State of Rajasthan*, AIR 1961 SC 1480; *A.S. Karthikeyan v. State of Kerala*, AIR 1974 SC 436 : (1974) 1 SCC 258. See also *State of H.P. v. Yash Pal Garg*, (2003) 9 SCC 92 : (2003) 4 JT 413; *State of Gujarat v. Akhil Gujarat Pravasi V.S. Mahamandal*, (2004) 5 SCC 155 : AIR 2004 SC 3894.

74. *Gujarat Ambuja Cements Ltd. v. Union of India*, (2005) 4 SCC 214, at page 228.

75. *State of Gujarat v. Akhil Gujarat Pravasi* (2004) 5 SCC 155 : AIR 2004 SC 3894.

76. *Jagdish Prasad v. Passenger Tax Officer, Mathura*, AIR 2000 All 205 (FB).

77. Also see, *A.S. Karthikeyan v. State of Kerala*, AIR 1974 SC 436 : (1974) 1 SCC 258.

78. *Jagdish Prasad, supra*, footnote 76, at. 208.
Also see, *A.S. Karthikeyan v. State of Kerala*, AIR 1974 SC 436 : (1974) 1 SCC 258.

79. *Achalpur Municipality v. Nandkishore*, AIR 1967 Bom 413.

80. *Khyerbari Tea Co. v. Assam*, AIR 1964 SC 925 : (1964) 5 SCR 975.
See also, *infra*, under Freedom of Trade, Commerce and Intercourse, Ch. XV.

81. *Man Mohan Tuli v. Delhi Municipal Corp.*, AIR 1981 SC 991.

82. *Monju Kalyanji v. State of M.P.*, AIR 1988 MP 220; *Meera Khandelwal v. State of Madhya Pradesh*,, AIR 1997 MP 163.

Under entry 56, List II, a State can levy a tax on passengers and goods carried on national highways.[83] This entry does not exclude national highways and national waterways.[84] Entry 56 uses the terms 'road' and 'inland waterways'. So "national highways and "national waterways" (so declared under entries 23 and 27, List I) are not exempted from the scope of entry 56. Thus, taxes on passengers and goods carried on national highways fall directly and squarely within entry 56.[85]

However, under this entry, a State could only impose a tax of a 'compensatory' and 'regulatory' nature.[86] A State incurs considerable expenditure in connection with national highways (though the primary responsibility for them rests on the Centre) not directly by constructing or maintaining them but by facilitating the transport of goods and passengers along them in various ways such as lighting, traffic control, amenities for passengers, halting places for buses and trucks, etc.[87] This constitutes sufficient nexus between the tax and the passengers and goods carried on the national highways to justify the State imposition of tax thereon.[88]

57. Taxes on Vehicles, whether mechanically propelled or not, suitable for use on roads, including tramcars subject to the provisions of entry 35, List III[89]

This entry empowers legislation in respect of taxes on vehicles, whether mechanically propelled or not. The Supreme Court has stated in *Bolani*[90] that the power exercisable under this entry "is the power to impose taxes which are in the nature of regulatory and compensatory measures".[91]

In *Jayaram*,[92] the Supreme Court has observed: "By virtue of the power given to them by entries 56 and 57 of List II every one of the States has the right to make its own legislation to compensate it for the services, benefits and facilities provided by it for motor vehicles operating within the territory of the State. Taxes resulting from such legislative activity are by their very nature and nativity, cast and character, regulatory and compensatory and are, therefore, not within the vista of Art. 301, unless…. the tax is a mere pretext designed to injure the freedom of inter-state trade, commerce and intercourse".

The regulatory and compensatory nature of the tax is that the taxing power should be exercised to impose taxes on motor vehicles which use the roads in the State, or are kept for use thereon either throughout the whole area or parts

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83. Under the National Highways Act, 1956, certain highways have been declared as national except such parts thereof as lie within any municipal area. See entry 23, List I, *supra*.
84. Entry 24, List I, *supra*, Ch. X, Sec. D.
85. *International Tourist Corporation v. State of Haryana*, AIR 1981 SC 774 : (1981) 2 SCC 318.
86. For discussion on the concept of a "compensatory" or "regulatory" tax, see, *infra*, Ch. XV.
87. *International Tourist Corporation v. State of Haryana*, AIR 1981 SC 774; *Manmohan Vig v. State of Haryana*, AIR 1981 SC 1035 : (1981) 2 SCC 334.
88. *Supra*, Ch. X, Sec. A.
89. *Infra*, Sec. E.
90. *Bolani Ores Ltd. v. State of Orissa*, AIR 1975 SC 17 : (1974) 2 SCC 777.
91. *Ibid*, 22. For discussion on the expression "regulatory and compensatory" taxes, see, *infra*, Ch. XV.
92. *B.A. Jayaram v. Union of India*, AIR 1983 SC 1005.

thereof and are sufficient to make and maintain such roads.[1] The power of taxation under this entry "cannot exceed the compensatory nature which must have some nexus with the vehicles using the roads, *viz.*, public roads". This means that if vehicles do not use the roads notwithstanding that they are registered, they cannot be taxed.[2] The condition that a tax under this entry should be 'regulatory and compensatory' in nature comes in from Art. 301, discussed later.[3]

The power to impose penalty was upheld as being incidental to the main purpose of regulation in *State of U.P. v. Sukhpal Singh Bal*.[4]

For purposes of taxation, the vehicles in question must be "suitable for use on the roads"; No tax can be levied on vehicles which are not suitable for use on the roads. This means that entry 57 only refers to vehicles "which are reasonably suitable for the road in the sense that an average man could think that plying of the vehicles on the road would be one of the normal uses of the vehicles".[5] Dumpers, rockers and tractors are suitable for use on the roads.[6] Truck chassis, two wheeler scooters, motorcycles, or a three wheeler autorickshaw are all adapted for use on roads. In fact, these vehicles are really meant for use upon roads. Hence all these vehicles are taxable under this entry.[7]

On the question of interpretation of the words "suitable for use on roads" in the entry, the Supreme Court has observed in the *Automobile Transport* case:[8]

> "The words "suitable for use on roads" describe the kinds of vehicle and not their condition. They exclude from the Entry, farm machinery, aeroplanes, railways etc. which though mechanically propelled are not suitable for use on roads.".

Bihar levied a tax at an annual rate on a manufacturer or a dealer in motor vehicles in respect of motor vehicles in his possession as such manufacture or dealer. Telco manufactured chassis and kept them within the factory premises. Telco argued that the tax did not fall within entry 57. The High Court ruled the tax to be valid. The chassis were suitable for use on roads. They were, in fact, manufactured for use on roads. Since the vehicles were meant to be used on roads maintained by the State at its cost, the tax did have a compensatory character.[9]

A tax on motor vehicles on the basis of their seating capacities has been held valid under this entry.[10]

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1. *The Automobile Transport (Rajasthan) Ltd. v. State of Rajasthan*, AIR 1962 SC 1406 : 1963 (1) SCR 491.
2. *Bolani, supra*, footnote 90 at 28.
   Also, *G.K. Krishnan v. State of Tamil Nadu*, AIR 1975 SC 583 : (1975) 1 SCC 375; *State of Karnataka v. K. Gopalakrishna Shenoy*, AIR 1987 SC 1911 : (1987) 3 SCC 655; *Kaushikbhai K. Patel v. State of Gujarat*, AIR 1999 Guj. 84. See also *Southern Petrochemical Industries Co. Ltd. v. Electricity Inspector & ETIO*, (2007) 5 SCC 447 : AIR 2007 SC 1984.
3. *Infra*, Ch. XV.
4. (2005) 7 SCC 615, at page 622 : AIR 2005 SC 3324.
5. *Bolani, supra*, at 23.
6. *Ibid* at 26.
   Also, *Central Coal Fields Ltd. v. State of Orissa*, AIR 1992 SC 1371 : 1992 Supp (3) SCC 133.
7. *Tata Engineering and Locomotive Co. Ltd. v. State of Bihar*, AIR 1999 Pat. 62.
8. *Supra*, footnote 1, at 1438.
9. *Supra*, footnote 52.
10. *Malwa Bus Service (Pvt.) Ltd. v. State of Punjab*, AIR 1983 SC 634 : (1983) 3 SCC 237; *East Bihar Regional Bus Union v. State of Bihar*, AIR 1998 Pat. 152.

A "lifetime tax" leviable in lump sum in advance for the lifetime of a motor vehicle (four-wheeler) on the basis of the index of "weight-cum-value" has also been held to be valid.[11]

There was a difference of opinion among the High Courts on one aspect of taxation under entry 57. According to Patna High Court tax could be levied on vehicles which are suitable tobe used on the road whether or not it is actually used on the road. The expression "suitable for use on the roads" establishes the nexus between the motor vehicles and the roads which are maintained by the State.[12] On the other hand, the Gujarat High Court took a narrower view of the matter. The court ruled that the tax is not levied on ownership or possession of the motor vehicle. If the vehicle is not used, its owner can claim refund of that tax paid by him in advance. Taxation on motor vehicles can be compensatory only. This means that the State cannot impose tax on vehicles for the purpose of raising revenue. The liability to pay tax cannot exceed the compensatory nature. The tax must have correlation with the use of the road by the vehicle. If a vehicle does not use the road, whatever the reason, it cannot be taxed.[13] The view of Gujarat High Court must be taken to be overruled by the Supreme Court which held in *State of Gujarat v. Akhil Gujarat Pravasi V.S. Mahamandal*,[14] that a tax under this entry is a tax and not a fee and that the actual use of the public roads of the State cannot be insisted upon for incurring the liability.

A State tax was levied on all motor vehicles 'used or kept for use in the State'. The Supreme Court interpreting this as 'used or kept for use on the public roads of the State' held it valid under this entry as it authorises levy on vehicles suitable for use on roads.

58. Taxes on animals and boats

A State tax on mechanically propelled barges has been upheld as falling under this entry. The State can tax all kinds of boats. Under this entry, barges belong to the family of boats and not ships. There is no reason to confine the term "boats" in this entry to boats which are exclusively propelled by oars.[15]

Entries 24, 25 and 27 in List I,[16] and entries 31 and 32 in List III[17], operate in their own fields and do not entrench upon the subject covered by entry 58, List II.

59. Tolls

Toll is a payment realised for some service, amenity, advantage or benefit, *e.g.*, for the use of a market or bridge or a road.[18]

A State Government is authorised to levy toll under s. 2 of the Indian Tolls Act, 1851. Toll may be levied upon any road or bridge made or repaired at the expense of the Central or the State Government. "For advantage obtained by the

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11. *State of T.N. v. M. Krishnappan*, (2005) 4 SCC 53 : AIR 2005 SC 2168.
12. *Tata Engineering, supra*, AIR 1999 Pat. 62.
13. *Kaushikbhai K. Patel v. State of Gujarat*, AIR 1999 Guj. 84.
14. (2004) 5 SCC 155, at page 166 : AIR 2004 SC 3894. See also *Jai Prakash v. State of U.P.*, (2004) 13 SCC 390, 398.
15. *Panduronga Timblo Industries v. Union of India*, AIR 1992 SC 1194 : (1992) 2 SCC 635.
16. *Supra*, Ch. X, Sec. D.
17. *Supra*, Ch. X, Sec. F.
18. *P.L. & Lime Stone Co. v. Cantt. Board*, AIR 1967 All. 15.

public by the construction of the roads or bridges, the State Government is entitled to reimburse itself for providing the service". The rate of toll must bear a reasonable relationship to the providing of the benefit.[19]

60. Taxes on professions, trades, callings and employment

A tax under the present entry may be imposed on professions, employments including service, and on trades or callings.[20] A tax on pension is a tax on income and not on profession as being a pensioner is not a profession or employment, and so falls outside entry 60.[21]

A tax may be imposed on the subject-matter of the trade, *e.g.*, on each bale of ginned cotton,[22] or on the income arising from trade or profession.[23] But Entry 60 which refers to professions cannot be extended to include services which are taxable exclusively by Parliament.[24] It may be levied on a corporation, company, an artificial person or a natural person. The tax may be in the nature of a licence fee for a trade, or may be determined by the total business turnover even though there is no income.[25]

Taxes on professions, trades, calling and employments flow from Entry 60. Art. 276(1) only clarifies that levy on such tax is not invalid on the ground that it would relates to tax on income. Such power includes power to determine persons who are liable and rate at which tax is to be paid.[26]

The tax may even be of a graduated type, being measured by income derived from a profession and payable only if there is income. Such a tax is very similar to a tax on income which falls in the Union List. The Constitution recognises this overlapping and, to preserve the State power, Art. 276(1) declares that a tax on professions, *etc*., shall not be invalid on the ground that it relates to a tax on income. Conversely, Art. 276(3) makes it clear that the State power to impose taxes on professions, *etc*., does not limit in any way the power of Parliament to make laws with respect to taxes on income accruing from or arising out of professions, trades, callings and employments.

The idea underlying Arts. 276(1) and (2) is that the State power to levy tax on professions *etc*. is not invalid on the ground that it is a tax on income leviable by Parliament; nor is Parliament's power to levy income tax limited by States' power to levy a profession tax. However, to mitigate the evils arising from an overlapping of Central-State taxes on income, Art. 276(2) lays down that the total amount payable by one person to the State *or* to any one municipality in the State by way of taxes on professions, *etc*. "shall not exceed two thousand and five hundred rupees per annum".

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19. *State of Uttar Pradesh v. Devi Dayal Singh*, (2000) 3 SCC 5 : AIR 2000 SC 961.
20. *Shivananjundappa v. State of Karnataka*, (1993) 2 MPWN 222; *High Court of M.P. Employees' Union v. State of Madhya Pradesh*, AIR 1997 MP 155.
21. *Rajgopalachari v. Corporation of Madras*, AIR 1964 SC 1174.
22. *Bharat Kala Bhandar v. Dhamangaon Municipality*, AIR 1966 SC 249 : (1965) 3 SCR 499; *B.M. Lakhani v. Malkapur Municipality*, AIR 1970 SC 1005.
23. *W.U.P. Electric Power Co. v. Town Area*, AIR 1957 All. 433.
24. *All-India Federation of Tax Practitioners v. Union of India*, (2007) 7 SCC 527, at page 535 : AIR 2007 SC 2990.
25. *Hira Lal Ram Kumar v. S.A. Panchayat*, AIR 1964 Cal. 590.
26. *Karnataka Bank Ltd. v. State of Andhra Pradesh*, (2008) 2 SCC 254 : (2008) 1 SCALE 660.

It is a condition for the validity of this tax that the imposition does not exceed the maximum amount of Rs. 2500.[27] The Supreme Court has held in *Kamta Prasad v. Executive Officer*[28] that under Art. 276(2), the State as well as a municipality can separately levy a profession tax up to the maximum amount each on a person. The word 'or' between the 'State' and 'any municipality' is used disjunctively and not 'conjunctively'.

The State can validly levy profession tax on a person running a nursing home or a hospital.[29]

The validity of the 'circumstances and property tax' levied by a district board in Uttar Pradesh was challenged on several grounds, *e.g.*, it was a tax on professions, trades, callings and employments and, therefore, levied under Art. 276(2); that the tax was income-tax, and so belonged to Parliament. The Supreme Court rejected these arguments in *R.R. Engineering Co. v. Zila Parishad, Bareilly*.[30] The tax was upheld as a tax not on income but on a man's financial position, his status as a whole, depending on his income from trade or business. The tax was referable to entries 49 and 60 in List II,[31] as well as to entry 58.[32] The tax was a composite one, one of its components being the assessee's circumstances by which it meant his financial position, his status as a whole, which depends, *inter alia*, on his income from his lands and buildings and from his trade or calling. The Court observed in this connection:

> "The fact that the tax on circumstances and property is often levied on calling or property is not conclusive of the nature of the tax; it is only as a matter of convenience that income is adopted as a yardstick or measure for assessing the tax. The measure of the tax is not a true test of the nature of the tax. Considering the pith and substance of the tax, if falls in the category of a tax on a man's financial position, his status taken as a whole and includes what may not be properly comprised under the term 'property' and at the same time ought not to escape assessment".

The Court, however, warned that one of the components of the tax, namely, 'circumstances' itself had components referable to other entries in addition to entry 60, and it should not be construed as conferring an unlimited power on the local authorities to impose disproportionately excessive levies on the assessees. An excessive levy on 'circumstances' would tend to blur the distinction between a tax on 'income' and a tax on 'circumstances'. "Income will then cease to be a mere measure or yardstick of the tax and will become the very subject-matter of the tax."

The Court emphasized that one must have regard to the substance of the matter and not to the form or label. This pronouncement made it possible for the States to by-pass the limit imposed by Art. 276(2) on tax leviable under entry 60. However, a recent pronouncement of the law on the subject in *Karnataka Bank Ltd. v.*

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27. *Bharat Kala Bhandar v. Municipal Committee,* AIR 1966 SC 249 : (1965) 3 SCR 499; *Lakhani v. Malkapur Municipality,* AIR 1970 SC 1002; *Akot Municipality v. Manilal,* AIR 1967 SC 1201 : (1967) 2 SCR 100. *Karnataka Bank Ltd. v. State of A.P.,* (2008) 2 SCC 254 : (2008) 1 SCALE 660

28. AIR 1974 SC 685. Also see, *Agra Municipality v. A.B.K.O. Association,* AIR 1976 SC 160.

29. *Dr. Sathurs Sushrushalaya Nursing Home v. State of Karnataka*, AIR 1992 Kant. 274.

30. AIR 1980 SC 1088 : (1980) 3 SCC 330.

31. *Supra*.

32. *Supra*.

State of A.P.,[33] would appear to indicate a reversion to the law as earlier propounded that a State Legislature is precluded by Art. 276 from making laws enabling the authorities to impose tax on professions, trades, callings, etc. in excess of the amount prescribed by Parliament.

61. Capitation Tax:

It is a tax levied on each head or person.

62. Taxes on luxuries including taxes on entertainments, amusements, betting and gambling

The view that this entry contemplates luxuries, entertainments and amusements as objects on which the tax is to be imposed has been discarded.[34] In *Godfrey Phillips India Ltd. v. State of U.P.,*[35] it was held that the word "luxuries" in Entry 62 of List II means the activity of enjoyment of or indulgence in that which is costly or which is generally recognised as being beyond the necessary requirements of an average member of society and not articles of luxury including tobacco.

A tax levied by a State on cinema shows is a tax under this entry and not under entry 60. An entertainment tax is dependent upon whether there would or would not be a show in a cinema house. If there is no show, there is no tax. It cannot be regarded as a tax on profession or calling as profession tax does not depend on the exercise of one's profession but only concerns itself with the right to practice.

The words 'entertainments' and 'amusements' are wide enough to include theatres, dramatic performances, cinemas, sports and the like.[36] The entry envisages a tax on the act of entertaining and it may be levied on the giver or the receiver of an entertainment or on both. A tax levied on each show in a cinema house falls under this entry.[37] A tax levied on cinema shows at prescribed rates in a rising scale according to the seating accommodation and the cities where the shows are held has been held to be valid.[38]

A tax was levied on the basis of the percentage of the gross collection capacity per show. Different percentages were prescribed depending on the type of the theatre and the nature of the local area where it was situated. The tax was held valid under this entry.[39] The Supreme Court has ruled that tax on entertainment can be levied by either of the two modes, *viz.*, per payment of admission or gross collection capacity per show and it is for the legislature to decide which mode to adopt.

A person wishing to see a film in a drive-in cinema sitting in his car was required to pay Rs. 2/- more in addition to a tax on his admission to the cinema.

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33. (2008) 2 SCC 254, at page 266 : (2008) 1 SCALE 660.
34. *Western India Theatres v. Cantonment Board,* AIR 1959 SC 582 : 1959 Supp (2) SCR 63.
35. (2005) 2 SCC 515, at page 540 : AIR 2005 SC 1103; See also *State of W.B. v. Purvi Communication (P.) Ltd.,* (2005) 3 SCC 711 : AIR 2005 SC 1849; *Ghodawat Pan Masala Products (I) Ltd. v. State of Maharashtra,* (2005) 4 SCC 415 : AIR 2005 SC 2909.
36. *Corporation of Calcutta v. Liberty Cinema,* AIR 1965 SC 1107 : (1965) 2 SCR 477.
37. *Western India Theatres v. Cantonment Board,* AIR 1959 SC 582 : 1959 Supp (2) SCR 63; *Delite Talkies v. Jabalpur Corporation,* AIR 1966 MP 299.
38. *Y.V. Srinivasamurthy v. State of Mysore,* AIR 1959 SC 894 : 1957 SCR 874.
39. *Venkateshwara Theatre v. State of Andhra Pradesh,* AIR 1993 SC 1947.

The tax was held valid by the Supreme Court. Applying the principle of pith and substance, the Court ruled that the impugned tax was not a tax on car but on entertainment falling under entry 62, List II. The incidence of the tax was entertainment. Since entertainment necessarily implies the persons entertained, therefore, the incidence of the tax falls on persons entertained. The levy in question was not on the car but on the person being entertained sitting in his car. The word 'entertainment' in entry 62 is wide enough to comprehend within itself the luxury or comfort with which a person entertains himself.[40]

A tax levied on a percentage basis on sums received by way of entry fees by the promoters of a lottery or prize competition of a gambling nature is a tax on betting and gambling under this entry and not a tax on trade or profession under entry 60.[41]

A tax on a wagering contract may fall within this entry. When two parties enter into a contract for sale or purchase of goods at a given price, and for their delivery at a given time, and if they intend not an actual transfer of goods but only to receive the difference according as the market price should vary from the contract price, then it is a wager on the rise or fall of the market which comes within the connotation of gambling.

A tax on forward contracts without reference to the intention of the parties not to take delivery of goods at all would not fall under this entry.[42] A luxury tax can be imposed on tobacco as an item of luxury. Such a tax is not invalid even though an excise tax is levied on tobacco by the Centre.[43]

An expenditure tax levied *ad valorem* on "chargeable expenditure" incurred in hotels where the room tariff for a unit of residential accommodation was Rs. 400/- per person per day has been held to be not a tax on "luxuries". It is a tax on 'chargeable expenditure' incurred by a person in such hotels. Such a tax does not fall under this entry, as it is a tax on "expenditure" and not on "luxuries".[44]

A State tax on lodging charges in hotels has been held to be valid as a tax on "luxuries". In accordance with the principle that each entry should be given its "fullest meaning and widest scope",[45] the expression "luxuries" in this entry has been broadly interpreted. The Supreme Court has ruled: "The concept of a tax on 'luxuries' in entry 62, List II cannot be limited merely to tax things tangible and corporeal in their aspect as 'luxuries'. "The entry encompasses all the manifestations or emanations, the notion of 'luxuries' can fairly and reasonably be said to comprehend" and that "the element of extravagance or indulgence that differentiates "luxury" from "necessity" cannot be confined to goods and articles. There can be elements of extravagance or indulgence in the quality of services and activities."[46]

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40. *State of Karnataka v. Drive-in-Enterprises,* AIR 2001 SC 1328 : (2001) 4 SCC 60.
41. *State of Bombay v. R.M.D. Chamarbaugwala,* AIR 1957 SC 699 : 1957 SCR 874.
42. *Bullion & Grain Exchange Ltd. v. State of Punjab,* AIR 1961 SC 268 : (1961) 1 SCR 668.
43. *Kaitha Kutta v. Board of Revenue,* AIR 1966 Ker 46.
44. *Federation of Hotel & Restaurant v. Union of India,* AIR 1990 SC 1637 : (1989) 3 SCC 634.
45. See, *supra,* Ch. X, Sec. G(a); Ch. XI, Sec. B, *supra.*
46. *Express Hotels Pvt. Ltd. v. State of Gujarat,* AIR 1989 SC 1949 : (1989) 3 SCC 677.
Also see, *Western India Theatres Ltd. v. Cantonment Board, Poona Cantonment,* AIR 1959 SC 582 : 1959 Supp (2) SCR 63; *A B Abdul Kadir v. State of Kerala,* AIR 1976 SC 182 : (1976) 3 SCC 219; *Ramanshree Shopping Arcade Pvt. Ltd. v. State of Karnataka,* AIR 2000 Kant 33.

63. Rates of stamp duty in respect of documents other than those specified in the provisions of List I with regard to rates of stamp duty :

See entry 91 of List I.[47]

The State Legislature may provide for the rates of stamp duty in respect of documents other than those specified in provisions of List I under this entry. Thus the levy and prescription of rates of stamp duty under the Bombay Stamp Act, 1958 on an order of amalgamation passed under Section 394 of the Companies Act, 1956 is constitutional.[48] A provision for pre-deposit pending determination of the market value of property and the proper duty payable, is traceable to this Entry read with Entry 44 of List III as such provisions are for plugging loopholes and for quick realisation of the stamp duty.[49]

66. Fees in respect of any of the matters in this List, but not including fees taken in any court.

Court-fees fall under entry 3 of the List[50] as also market fees in respect of sale and purchase of tobacco within the market area.[51] In State of W.B. v. Kesoram Industries Ltd it was held that cesses levied on coal-bearing land and on tea plantation land could be upheld by reference to Entry 66 read with Entry 5 of List II.[52]

E. CONCURRENT TAXES

The Concurrent List has only a few tax entries, *viz.*—

35. Principles on which taxes on mechanically propelled vehicles are to be levied

Under this entry, Parliament as well as the State Legislatures can legislate to lay down principles of taxation in respect of only the mechanically propelled vehicles. Legislation under this entry cannot be made in respect of vehicles which are not mechanically propelled. On the other hand, under entry 57, List II,[53] the States can impose tax on all kinds of vehicles—mechanically propelled or not.

The two entries, *viz.*, 57 in List II and 35 in List III, deal with two different matters though allied ones—one with taxes on vehicles and the other with the principles subject to which such taxes are to be levied. "Taxes on vehicles in their ordinary meaning connote the liability to pay taxes at the rates at which the taxes are to be levied." On the other hand, the expression 'principles of taxation' denotes the rules of guidance in the matter of taxation.

Explaining the relation between entry 57, List II, and entry 35, List III, the Supreme Court has observed in *Jayaram*[54] that the power to levy taxes on vehicles

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47. See, *supra*, Sec. C.
48. *Hindustan Lever v. State of Maharashtra* ,(2004) 9 SCC 438 : AIR 2004 SC 326.
49. *Govt. of A.P. v. P. Laxmi Devi*, (2008) 4 SCC 720 : AIR 2008 SC 1640.
50. *Supra*, Ch. X, Sec. E; see, *infra*, Sec. H.
51. *ITC Ltd. v. Agricultural Produce Market Committee*, (2002) 9 SCC 232 *:* AIR 2002 SC 852, overruling *ITC Ltd. v. State of Karnataka*, 1985 Supp (1) SCR 145
52. (2004) 10 SCC 201 : AIR 2005 SC 1646; See also *Vijayalashmi Rice Mill v. CTO*, (2006) 6 SCC 763, at page 767 : AIR 2006 SC 2897.
53. *Supra*, Sec. D.
54. *B.A. Jayaram v. Union of India*, AIR 1983 SC 1005 : (1984) 1 SCC 168.

vests solely in the State Legislature, but Parliament may lay down the principles on which taxes may be levied on mechanically propelled vehicles.[55] "In other words, Parliament may lay down the guidelines for the levy of taxes on mechanically propelled vehicles but the right to levy such taxes vests solely in the State Legislature."

Thus, under this entry, only 'principles' for taxation can be laid down; no tax, as such, can be levied. Entry 35, List III, does not confer power to tax but only connotes rules of guidance in the matter of taxation. It is open to Parliament to lay down the principles on which taxes may be levied on mechanically propelled vehicles. So far Parliament has not enacted any law regulating the principles of taxation, or the rules for the guidance of taxation on motor vehicles. The Motor Vehicles Act is only a regulatory measure and does not in any way affect or control the power of the States under entry 57, List II.[56]

The States can levy taxes on mechanically propelled vehicles under entry 57, List II.[57] Thus, each State has the right to make its own law to compensate it for the services, benefits and facilities provided by it for motor vehicles operating within its territory. These taxes have, however, to be regulatory and compensatory in nature.[58]

There are 28 States and 7 Union Territories. As each of them has a right to levy tax on motor vehicles, there may be great difficulties in the way of evolving All-India permits. If a bus has to pay a tax to each State through which it passes, it will impose a heavy burden on inter-State tourist traffic. To overcome such difficulties, and to introduce uniformity of taxation throughout the country, the Centre has been authorised, under entry 35, List III, to lay down principles on which taxes on mechanically propelled vehicles may be levied by the States under entry 57, List II.

44. Stamp duties other than duties or fees collected by means of judicial stamps, but not including rates of stamp duty:

Rates of stamp duties are fixed by Parliament under entry 91, List I[59] on such documents as bills of exchange cheques and debentures etc. Stamp duties in respect of documents not specified in entry 91, List I, are to be fixed by the State Legislatures under entry 63, List II.[60]

A State Legislature can levy stamp duty on the certificate of enrolment of an advocate under this entry read with entry 63 of List II.[61]

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55. *State of Assam v. Labanya Probha Debi*, AIR 1967 SC 1575 : (1967) 3 SCR 611.
56. *Indian Telephone Industries Ltd. v. State of Karnataka*, AIR 1985 Kant 186; *Sharma Transport v. Govt. of Andhra Pradesh*, AIR 2002 SC 322 : (2002) 2 SCC 188. The view expressed in *M.P. AIT Permit Owners Assn. v. State of M.P.*, (2004) 1 SCC 320, at page 327 : AIR 2004 SC 981 that the State cannot provide for additional punishment for the same offence arising under Section 66 read with Section 192-A of the MV Act was differed from in *Hardev Motor Transport v. State of M.P.*, (2006) 8 SCC 613 : AIR 2007 SC 839.
57. *Supra*, Sec. D.
58. *Infra*, Ch. XV; *supra*, Sec. D.
59. *Supra*, Sec. C.
60. *Supra*, Sec. D.
61. *Bar Council, U.P. v. State of Uttar Pradesh*, AIR 1973 SC 231 : (1973) 1 SCC 261; *Hindustan Lever v. State of Maharashtra*, (2004) 9 SCC 438, at page 446 : AIR 2004 SC 326 supra, Sec. D.

47. Fees in respect of any of the matters in this List, but not including fees taken in any court

In *T.N. Godavarman Thirumulpad (87) v. Union of India*,[62] a "Compensatory Afforestation Fund" created by notification of the Ministry of Environment and Forests was held to be referable to this Entry read with Entry 20 of List III.

For discussion on the concept of fee, as distinguished from a tax, see, Sec. H, *infra.*

CONTINUANCE OF STATE TAXING POWER

Article 277 permits continuance of a tax being levied by a State, or a local body, at the commencement of the Constitution in spite of the fact that such a tax falls in the Union List.

The tax may be levied and applied to the same purposes till Parliament makes a law to the contrary. Only the existing range of the taxes is protected and not the expansion of the range of taxation by subjecting new items to it, or by increasing the rates of the tax, or altering is incidence.[63]

The provision seeks to protect the finances of the States and the municipalities from being dislocated by a sudden discontinuance of those taxes which they had been levying earlier, but could no longer levy after the Constitution because these have been allotted to the Centre.

F. NO TAX OUTSIDE THE TAX ENTRIES

Entries 1 to 81 in List I mention the several matters on which Parliament could legislate and entries 82 to 92A, List I enumerate the taxes which Parliament could impose.[64] While the main subject of legislation is included in the first group (1-81), a tax in relation thereto is separately mentioned in the second group (81-92A). Thus, entry 22 in List I deals with Railways, while entry 89 deals with terminal taxes on goods or passengers carried by Railways; entry 41 deals with import and export, and entry 83 with duties of customs; entries 43 and 44 deal with the incorporation and regulation of companies while entry 85 deals separately with corporation tax.

Similarly in List II, entries 1 to 44, form a group comprising the subjects on which States can legislate; entries 45 to 63 deal with taxes. For example, entry 18 is 'land' while entry 45 is 'land revenue'.

From the above, it is clear that taxation is not included in the main subject in which it might, on an extended construction, be regarded as included, but is treated as a distinct matter for purposes of legislative competence. A tax cannot, therefore, be levied outside the specific tax entries enumerated in the three Lists. A tax can be levied only under a 'tax' entry and not under a 'non-tax' entry as an

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62. (2006) 1 SCC 1, at page 14 : AIR 2005 SC 4256.
63. *Amraoti Municipality v. Ramchandra*, AIR 1964 SC 1166 : (1964) 6 SCR 947; *Firm Surajmal Bansidhar v. Ganganagar Municipality*, AIR 1979 SC 246 : (1979) 1 SCC 303.
64. See, *supra*, Sec. C.

ancillary or incidental matter.[65] Therefore, Parliament's power in respect of inter-State trade and commerce under entry 42, List I, could not be read as including tax on inter-State sales.[66] Similarly, though entry 18, List II, mentions the subject of transfer and alienation of land, it does not include taxation on transfers and alienation of land.[67]

The Mysore Legislature passed a resolution under Art. 252 conferring on Parliament the power to make law in regard to control and regulation of prize puzzle competitions[68] and all matters incidental thereto. Later the Legislature levied a tax on prize competitions. The tax was challenged on the ground that the Legislature had surrendered all its legislative power in regard to prize competitions including the power to tax.

The Supreme Court held that the subject of 'betting and gambling' (entry 34)[69] and the taxes thereon (entry 62)[70] are separate powers, and when control of prize competitions was surrendered to Parliament by the resolution, the power to tax was not surrendered.[71]

As stated earlier,[72] a general legislative entry does not support levy of a tax. For purposes of State taxation, reference is to be made to taxing entries (entries 45 to 63) and not to entries 1 to 44, List II, which support general legislation of a non-taxing nature.[73]

In *Synthetics & Chemicals Ltd. v. State of Uttar Pradesh,*[74] the Supreme Court has decided another significant question, *viz.:* can the States levy vend fee or duties in respect of industrial alcohol not fit for human consumption? The States have power to regulate the use of alcohol under entry 8, List II. But the Supreme Court has ruled that in the garb of regulation, a State cannot enact a law which is, in pith and substance,[75] fee or levy which has no connection with the cost of expenses for administering the regulation. The levies in question in the instant case were held as not constituting a part of the regulatory measures.

The Supreme Court has further held that under entry 84, List I, all duties of excise save the ones excepted specifically in entry 84, List I, are generally within the taxing power of Parliament. The power of the State Legislatures to levy duties of excise is circumscribed under entry 51, List II. Entry 8, List II, cannot support a tax. Thus, a State law levying a tax or charge or impost on industrial alcohol, *i.e.,* alcohol used and usable for industrial purposes, is unconstitutional.

The State Legislature has no authority to levy duty or tax on alcohol which is not fit for human consumption as that could only be levied by the Centre. This

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65. *Abdul Quader & Co. v. S.T.O.,* AIR 1964 SC 922 : (1964) 6 SCR 867; *Synthetics & Chemicals Ltd. v. State of Uttar Pradesh,* AIR 1990 SC 1927 : (1990) 1 SCC 109. See also *Shree Digvijay Cement Co. Ltd. v. Union of India,* (2003) 2 SCC 614 : AIR 2003 SC 767.
66. *M.P.V. Sundaramier & Co. v. State of Andhra Pradesh,* AIR 1958 SC 468 : 1958 SCR 1422.
67. *Gaindi v. Union of India,* AIR 1965 Punj. 65.
68. *Supra,* Ch. X, Sec. J.
69. *Supra,* Ch. X, Sec. E.
70. *Supra,* Sec. D.
71. *R.M.D.C. v. State of Mysore,* AIR 1962 SC 594 : (1962) 3 SCR 230; *supra,* Sec. J.
72. *Supra.*
73. *Supra,* Ch. X, Sec. E.
74. AIR 1990 SC 1927 : (1990) 1 SCC 109.
75. For discussion on the Rule of 'Pith and Substance', see, *supra,* Ch. X, Sec. G(d).

decision overrules the earlier decision by the Court in *State of Uttar Pradesh v. Synthetics & Chemicals Ltd.*[76]

G. RESIDUARY TAXES

Entry 97 in the Union List runs thus:

> "Any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists."

This entry is further reinforced by Art. 248 which vests in Parliament "exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or the State List." This includes the power to levy residuary taxes along with residuary powers of legislation.

Several taxes have been enacted by Parliament under the residuary entry. The annual deposit scheme has been held to fall under this head. The scheme envisages borrowing of money by the Central Government from the tax-payers in higher income group which is then repaid to them in instalments.[77]

Gift tax falls under the residuary entry. It is not a tax on lands and buildings as units of taxation and so it does not fall under entry 49, List II.[78] What is taxed is the transmission of title by gift, and the value of the land and building is only the measure of the value of the gift. As entry 49 of List II contemplates "a tax directly levied by reason of the general ownership of lands and buildings, it cannot include the gift tax as levied by Parliament". There being no other entry covering a gift tax, it could be levied under the residuary powers of Parliament.[79] An interesting aspect of this case is the formulation of the scope of the residuary entry in the following words:

> "If, however, no entry in any of the three lists covers it, then it must be regarded as a matter not enumerated in any of the three lists. Then it belongs exclusively to Parliament under Entry 97 of the Union List as a topic of legislation."

The expenditure tax also falls in the residuary entry as there is no entry in any List under which it can fall.[80]

In the *Diamond Sugar Mills case*[81] levy of cess on sugarcane by the States was held invalid by the Supreme Court as not falling under Entry 52, List II. [82] As a consequence, the States were faced with the prospect of refunding huge amounts of money collected by them as such cess. To protect the States from refunding the amount collected through the cess, Parliament enacted an Act levying the cess retrospectively and authorising the States to collect the same on its behalf.

In *Jaora Sugar Mills v. State of Madhya Pradesh*,[83] the Central Act was held to be a valid exercise of the residuary power. The Supreme Court observed that

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76. *Supra.* See also *State of UP v. Van Organic Chemicals Ltd.,* (2004) 1 SCC 225 at page 241 : AIR 2003 SC 4650.
77. *Hari Krishna v. Union of India,* AIR 1966 SC 619 : (1966) 2 SCR 22.
78. *Supra,* Sec. D.
79. *Second Gift Tax Officer v. D.H. Nazareth,* AIR 1970 SC 999 : (1971) 1 SCR 195.
80. *Azam Jah v. I.T. Officer, Hyderabad,* AIR 1972 SC 2319 : (1971) 3 SCC 621.
81. *Diamond Sugar Mills Ltd. v. State of Uttar Pradesh,* AIR 1961 SC 652 : (1961) 3 SCR 242.
82. *Supra,* Sec. D.
83. AIR 1966 SC 416 : (1966) 1 SCR 523.

what Parliament had done in the instant case was not merely to validate the invalid State statutes, but "to make a law concerning the cess covered by the said statutes and to provide that the said law shall come into operation retrospectively". Since the sugarcane cess does not fall within the competence of the States, it must inevitably lie within the Central sphere under the residuary entry. The ratio of this decision was later reiterated by the Court in the decision noted below.[84]

The most significant judicial pronouncement on the scope of residuary power of Parliament is *Union of India v. H.S. Dhillon*.[85] In this case, a Bench of seven Judges decided questions of far reaching significance as to the taxing powers of Parliament and the State Legislatures.

The question involved in *Dhillon* was whether the Centre could levy wealth-tax on the assets of a person including agricultural land. Wealth-tax does not fall within the ambit of Entry 49, List II,[86] and so the States could not levy it. Entry 86, List I, has the words "exclusive of agricultural land", and, therefore, that component of the Central law which refers to agricultural land could not come within that entry.[87] The main question, therefore, was whether the tax could be levied under the Centre's residuary power.

The antagonists of the tax argued that the words 'exclusive of agricultural land' in Entry 86, were words of prohibition which meant that Parliament was prohibited from including capital value of agricultural land in any law levying tax on capital value of assets. It was argued that when Parliament was specifically excluded under an entry to make a law on a subject, it could not do so under its residuary power. Another argument was that a matter would fall within Parliament's residuary power only if it is not mentioned in any of the three Lists, and since the subject of wealth-tax has been included in Entry 86, List I, it could not then fall within the residuary, and Parliament must legislate within the scope of entry 86 and could not go beyond the scope of that entry.

This argument found support from the Court's ruling in *Nazareth*[88] where the Court had taken the view that Parliament could invoke its residuary power only when the subject-matter of the impugned legislation fell under no entry in the three Lists. This meant that what was contained in entry 86, List I, must be excluded from the residuary power. This would mean that since the subject of Wealth Tax was included in entry 86, List I, the residuary power could not be invoked to support the Wealth Tax Act which must be supported only by reference to entry 86, List I. And as this entry excluded agricultural land from the scope of the Wealth Tax, in *Dhillon*, the *Nazareth* ruling was challenged.

The three Judges (Minority) on the Bench took the view that the residuary power contained in Art. 248 and Entry 97, List I, means power in respect of matters not enumerated in any of the three Lists. "Such a residuary power cannot,

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84. *Shetkari Sahakari Sakhar Karkhana v. Collector, Sangli,* AIR 1979 SC 1972 : (1980) 1 SCC 381.
Also see : *In the matters of : District Mining Officer v. Tata Iron & Steel Co.,* JT 2001(6) SC 183 : (2001) 7 SCC 358.
85. AIR 1972 SC 1061 : (1971) 2 SCC 779.
86. *Supra,* Sec. D.
87. *Supra,* Sec. C.
88. *Supra,* footnote 79.

therefore, be ordinarily claimed in respect of a matter already dealt with under an Article or an entry in any of the three Lists." Once a topic or field of legislation has been enumerated and dealt with in any one of the entries in one of the Lists, there is no question of the residuary provision being resorted to. As the subject of wealth-tax falls within entry 86, List I, it is, therefore, taken out of the residuary field. Parliament cannot levy tax on the capital value of agricultural property either under Entry 86 or under its residuary power. In this view, the Judges drew support from the observations made by the Court in the *Nazareth* case cited above.

The other four Judges (majority) took a more expansive view of the residuary power of the Centre. These Judges dissented from the *Nazareth* ruling and took the view that Art. 248 was framed in the "*widest possible terms*" and so the scope of residuary power was vast. A matter not included in List II or in List III falls within the residuary field. No question need be asked whether the matter falls under List I or not. If the subject-matter does not fall in List II or List III, Parliament has power to legislate on it.

As SIKRI, C.J. observed : "... any matter, including tax, which has not been allotted exclusively to the State Legislatures under List II or concurrently with Parliament under List III, falls within List I, including entry 97 of that List read with Art. 248".

The impugned wealth-tax, therefore, has been justified under entry 97, List I, either exclusively, or read with entry 86, List I. The Court has also ruled that Parliament could supplement its power under an entry in List I with the residuary power to enact a law.[89] By a majority, the Supreme Court upheld the validity of the Wealth Tax Act.

This broad interpretation of the Centre's residuary power has given a new dimension to the powers of the Centre. Whatever is contained in List II and List III is excluded from the residuary power of the Centre. List I and the residuary are supplementary to each other. What is included in List I is not excluded from the residuary power of Parliament. Rather, the Centre can make a law seeking support from both.

Such an interpretation is justifiable so as to avoid any vacuum in the area of legislative powers as would have happened had the restrictive view of the residuary power been adopted by the Court. Undoubtedly, under the Constitution, the totality of the powers distributed between the Centre and the States cover the whole area of self-government within the territory of India. As the Court has observed in *Dhillon*:

> "It seems to us unthinkable that the constitution-makers, while creating a sovereign democratic republic, withheld certain matters or taxes beyond the legislative competency of the legislatures in this country either legislating singly or jointly."

Service tax levied on services rendered by *mandap*-keepers was held not to be a tax on land under Entry 49 of List II nor a tax on sale and purchase of goods

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89. For comments on *Dhillon's* case see, Alice Jacob, Residuary Power & Wealth Tax on Agricultural Property, 14 *J.I.L.I.*, 80 (1972); I.L.I. *Annual Survey of Indian Law* (1972), 431. SEERVAI, CONST. LAW OF INDIA, 1265-66 (1976); ANIRUDHA PRASAD, CENTRE & STATE POWERS UNDER INDIAN FEDERALISM 145-53 (1981).

under Entry 54 of List II read with Article 366(29-A)(*f*) but a tax imposed by Parliament under its residuary powers.[90] The use of electromagnetic waves in giving mobile phone connections was held not to be a sale for the purposes of Entry 54 of List II but part of a service in respect of which only Parliament could levy tax under Entry 97.[91]

The Rubber Act, 1947 (as amended in 1960) imposed new excise duty either on the manufacturers or on the owners of the estates. The constitutional validity of the duty was challenged on the ground that it was imposed on the use of rubber. It was argued that under entry 84, List I, excise duty could be levied only on the actual producers and manufacturers of rubber and not on the consumers or users of that commodity. Holding the levy to be valid, the Court ruled that what was called 'excise duty' on the use of rubber could not fall within entry 84, List I, but it was "a kind of non-descript tax which has been given the nomenclature of the duty of excise" which Parliament has undoubted competence to levy under its residuary power.[92] The Court asserted that under its residuary power, Parliament would have legislative competence even with regard to the imposition of a tax which does not fall within entry 84.

Underlying the significance of the Parliament's residuary power in the context of Indian Federalism, the Supreme Court has observed in *Satpal* :[93]

> "Complex modern governmental administration in a federal set-up providing distribution of legislative powers coupled with power of judicial review may raise such situations that a subject of legislation may not squarely fall in any specific Entry in List I or List III. Simultaneously, on correct appraisal it may not be covered by any entry in List II, though on a superficial view it may be covered by an Entry in List II. In such a situation, Parliament would have power to legislate on the subject in the exercise of residuary power under Entry 97, List I, and it would not be proper to unduly circumscribe, corrode or whittle down this power by saying that the subject of legislation was present to the mind of framers of the constitution because apparently it falls in one of the entries in List II, and thereby deny power to legislate under Entry 97."

To protect the State taxing powers from being unduly curtailed, the Supreme Court has cautioned in *International Tourist Corpn. v. State of Haryana,*[94] that before exclusive competence is claimed for Parliament to levy a tax under its residuary power, the legislative incompetence of the State Legislature must be clearly established. Parliament's residuary power is not to be interpreted so expansively as to whittle down the power of the State Legislatures. If there is a competing entry in List II *vis-a-vis* entry 97 in List I, the entry in the State List must be given a broad and plentiful interpretation. In this case, the Court rejected the argument that a tax on passengers and goods carried on national highways would fall under Parliament's residuary power. The Court ruled that such a tax falls under entry 56, List. II.[95]

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90. *T.N. Kalyana Mandapam Assn. v. Union of India,* (2004) 5 SCC 632 : AIR 2004 SC 3757; See also *Gujarat Ambuja Cements Ltd. v. Union of India,* (2005) 4 SCC 214 : AIR 2005 SC 3020. See also supra under Service Tax

91. *Bharat Sanchar Nigam Ltd. v. Union of India,* (2006) 3 SCC 1, at page 30 : AIR 2006 SC 1383.

92. *Jullundur Rubber Goods Manufacturers' Association v. Union of India,* AIR 1970 SC 1589 : (1969) 2 SCC 644.

93. *Satpal & Co. v. Lt. Governor of Delhi,* AIR 1979 SC 1950.

94. AIR 1981 SC 774 : (1981) 2 SCC 318.

95. *Supra,* Sec. D.

Similarly, in *The State of West Bengal v. Kesoram Industries Ltd.*,[1] education cess assessed and computed on the basis of value of coal produced from coal-bearing land and rural employment cess on the basis of dispatches from tea estates by the State of West Bengal were held to be legislatively competent under Entry 49 of List II which provides for taxes on land and buildings and not within the residuary power of legislation in the field of taxation under Entry 97 List I.

Parliament enacted the Expenditure Tax Act, 1987, to levy an expenditure tax at 10% *ad valorem* on "chargeable expenditure" incurred in hotels where the room tariff for a unit of residential accommodation was Rs. 400/- per day per person. The tax was payable by the person incurring the chargeable expenditure in such hotels. The constitutional validity of the tax was challenged on the ground that it was either a tax on 'luxuries' falling under entry 62, List II, or on 'sale or purchase of goods' falling under entry 54, List II and, thus, fell outside the Parliament's legislative sphere. On the other hand, the Centre supported the tax under its residuary power.

The Supreme Court upheld the tax in *Federation of Hotel & Restaurant v. Union of India.*[2] The Supreme Court ruled that the tax in question fell under the residuary power of Parliament as it was a tax on 'expenditure' and not on 'luxuries'. During the course of its judgment, the Court said regarding the Centre-State distribution of powers that "the constitutionality of the law becomes essentially a question of power which in a federal Constitution ..... turns upon the construction of the entries in the legislative lists".[3] The responsibility to interpret the entries lies with the Supreme Court in the scheme of the Indian federal system. Further, the Court has also reiterated the proposition that 'these subjects which in one aspect and for one purpose fall within the power of a particular legislature may in another aspect and for another purpose fall within another legislative power".

At times, the Centre has used its residuary power to enable the States to levy and collect such taxes as are found to be beyond their legislative competence. One such example has already been mentioned above, e.g. Parliament has used its residuary power to validate State levy of sugarcane cess.[4] A cess on the water consumed by any local authority and every person carrying on any specified industry levied by Parliament through the Water (Prevention and Control of Pollution) Cess Act, 1977, has been held to be valid as a residuary tax.[5]

Reference may be made in this connection to *P. Kannadasan v. State of Tamil Nadu*[6] Some State Legislatures enacted provisions laying cesses/taxes on minerals under entry 50, List II. This tax was held invalid by the Supreme Court in *India Cement Ltd. v. State of Tamil Nadu*[7] on the ground that the States were incompetent to levy the tax in view of the passage by Parliament of the Mines and Minerals (Regulation and Development) Act made in terms of entry 54, List I.[8]

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1. (2004) 10 SCC 201 : AIR 2005 SC 1646 (see *supra* under Entry 49 List II).
2. AIR 1990 SC 1637 : (1989) 3 SCC 634.
3. AIR 1990 SC at 1647.
4. *Supra*, see, *Jaora Sugar Mills*, footnote 83.
5. *Municipal Corp., Jullundur City v. Union of India*, AIR 1981 P&H 287.
6. AIR 1996 SC 2560 : (1996) 5 SCC 670.
7. (1990) 1 SCC 12 : AIR 1990 SC 85.
8. This view has been substantially upset in *State of West Bengal v. Kesoram Industries (supra)*. For details, see, *supra*, Sec. D.

The financial position of the States would have become precarious if they had to refund the money collected over the years. Therefore, Parliament which had the power to levy the tax in question came to the rescue of the States. Parliament passed a validation Act saying that the invalidated provisions in the State laws would be deemed to have been enacted by Parliament and would remain in force till the date the Central Act was enacted. The Supreme Court upheld the validity of the Central Act in *Kamadasan*, mentioned above. The effect of the Act was that the relevant provisions of the State laws were "individually and specifically enacted by Parliament'.

COMMENTS

The scheme of allocation of taxing powers in India has been drawn with the following considerations in view:

(*a*) the Centre should have adequate resources at its command so as to be able to meet its high functions of defence, etc.

(*b*) The convenience of tax collection: which agency—Centre or State—may levy and collect what tax from the point of view of administrative convenience, efficiency and effectiveness. Therefore, taxes having a localized base have been entrusted to the States and taxes having a national base have been entrusted to the Centre.

(*c*) Taxes where it is desirable to maintain uniformity of incidence throughout the country have been allotted to the Centre, *e.g.*, stamp duties on negotiable instruments, taxes on transactions in stock exchanges.

(*d*) Taxes of which the tax-base, or incidence is not localised but extends beyond the confines of one State, or where aggregation may be necessary for purposes of levy of tax on a progressive basis, have been given to the Centre, for example income-tax can be collected easily on an all-India basis because a person may carry on business in several States and derive income therefrom. Similarly, customs duties may be collected most effectively by the Centre at the ports; the estate duty may be levied effectively by the Centre as a person may die leaving behind property in several States.

(*e*) Keeping economic development of the country in view, those taxes which have a close relationship with national economy, and which, if allotted to the States may create clogs on economic development, or may interfere with the movement of inter-State trade or commerce or development of a common market in India, have been allotted to the Centre, *e.g.*, excise duties or tax on inter-State sales. Thus, only taxes of a local nature have gone to the States.

A merit of the Indian scheme is that it seeks to avoid the complexities of overlapping and multiple taxation such as have arisen in other federations. Most of these problems arise because the Centre and the States have a large concurrent taxing area and simultaneously levy many taxes of the same kind on the same tax-base.

The key-note of the Indian Constitution is to secure an almost complete separation between Centre-State taxing powers so that a tax leviable by the Centre is not leviable by the States. The two cannot simultaneously levy a similar tax on the same tax-base. This has avoided the conflicts between the Centre and the States resulting in overlapping taxation. Also, taxes having as their tax-base,

transactions or interests which are not localised in one State but may have nexus with more than one State, like income-tax on non-agricultural income, or corporation tax, or succession duty on non-agricultural property, have been given to the Centre and this has avoided multiple taxation of the same base by several governments.

One specific example may be cited to clarify the position. Railways are a Central undertaking and the responsibility to fix passenger fares rests on the Central Government. Tax on railway fares directly affects the railway fares and, therefore, it is desirable to have some co-ordination between the fares charged and the tax levied on them.

This consideration alone suggests that such a tax should be with the Central Government. But other factors also make this necessary. Suppose it is given to the States, then the rates of taxation might vary from State to State. There would also arise problems of allocation and collection. If a person travels over a long distance involving a journey through several States, then each State would seek to levy a tax on the portion of journey through it which would make calculations difficult. Then, which State would collect the tax—the one in which a journey originates or the one in which it ends; if one State collects, then it will have to apportion the same among other States through which the journey passes. To avoid these complications the levy of the tax is given to the Centre.

Such an allocation of taxing powers between the Centre and the States has largely succeeded in avoiding in India the inter-State and Centre-State competition for taxation and conflicts of jurisdiction which other federal countries are faced with. It was a wise step on the part of the Constitution-makers, for the underdeveloped economy of the country could ill-afford the luxury of inter-governmental conflicts for taxation as the taxing capacity of the people is extremely limited, and they form the least potential tax paying community in the world.

With the resources of the country being low and limited, and its needs relatively high, it was necessary to avoid inter-governmental competition in the tax field which, apart from causing inconvenience to tax-payers, would have seriously diminished the productivity of the taxes, which the country could ill afford. Multiple taxation places unduly high burdens on private enterprise and creates a lack of uniformity and efficiency in the tax burdens from State to State. Inter-State competition for revenue leads to litigation and administrative difficulties, raising costs of tax compliance and tax collection. The possibility of inter-State migration of wealth and industry comes into existence. The framers of the Indian Constitution have avoided most of these problems by judiciously distributing the taxing powers between the Centre and the States.

A criticism against the rigid scheme of Centre-State separation of taxing powers can be that in an emergency like war, the Centre might feel handicapped in raising the revenue it might require for its needs are bound to be higher in war-time than in peace-time, and the enumeration of Central taxing powers would hardly leave to it any manoeuverability in emergencies. The Indian Constitution, however, makes adequate provisions for meeting such a contingency. A two-thirds majority resolution by the Council of States enables the Centre to legislate for a year on any State

subject-matter.[9] In serious situations, declaration of an emergency by the Centre enables it to levy any tax for the duration of the emergency.[10] In this way, if need be, the Centre can even levy those taxes which in normal times fall to the State sphere.

Although the scheme drawn by the framers of the Constitution for the division of the Centre-State taxing powers has several merits, *viz.*, it makes for economic tax collection, avoids harassment to the tax-payers by avoiding multiple and overlapping taxation and conflicts of Centre-State jurisdiction, and keeps the interests of national economy in view, still the framers could not take these principles to their logical end in drawing the scheme and had to make a few compromises which militate, to some extent, against these principles and give rise to several anomalies. A few examples may be given here.

(a) The power to levy estate duty and succession duty has been divided between the Centre and the States according as the property is non-agricultural or agricultural.[11]

This constitutional division of taxing authority between the Centre and the States cannot result in having a comprehensive system of death taxation. However, the inconvenience and irrationality of this aspect of the matter has been sought to be corrected by other arrangements.[12]

(b) Similarly, income-tax has been divided between the Centre and the States according to the taxable income being non-agricultural or agricultural.[13]

It is an anomaly that a subject of taxation, which on the basis of the principle of progression and aggregation should have been one integral whole, has been so divided. It would be inequitable to tax merely the non-agricultural income leaving agricultural income untaxed or taxed lightly by the States. The inequity could be illustrated by means of an example. Suppose X's net income in a year is Rs. 10,000 all non-agricultural, while Y's net income is the same but wholly agricultural, and Z's income of Rs. 10,000 may be partly agricultural (Rs. 5,000) and partly non-agricultural (Rs. 5,000). X is subject to a Central income-tax. Z's Rs. 5000 would be subject to a Central tax but the progression of rate applicable to him is bound to be lower than that applicable to X, and Z's agricultural income of Rs. 5,000 may either go wholly untaxed, or be taxed by the State at a much lower figure than his non-agricultural income. In any case, even if both the Centre and the State levy the income-tax, the total liability of Z may still be less than that of X, for while X's income is being taxed as one unit, Z's income will be bifurcated into two parts, and the rate applicable to each of the parts would be less than the rate applicable to the whole income taken as one unit. Y may go completely untaxed if the State is not levying the income-tax. Even if he is taxed, the rate applicable may not be as steep as is applied by the Centre to non-agricultural income.

The best thing would have been to give to the Centre the entire power of levying death duties and income taxation, but that would have appreciably re-

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9. Art. 249, Ch. X, Sec. J, *supra*.
10. Art. 250, Ch. X, Sec. J, and Art. 352, *infra*, Ch. XIII, Sec. B.
11. *Supra*, see entries 87 and 88, List I and entries 47 and 48, List II; Secs. C and D, *supra*.
12. *Supra*, Ch. X, Sec. J.; Also see, *supra*, Sec. G.
13. *Supra*. Entry 82, List I and entry 46, List II, *supra*, Secs. C and D.

duced the powers of the States. But since both the Central taxes are shared taxes, as is explained below,[14] there should not have been much of an objection to centralization of this field. While the area of death duties has been co-ordinated and the problems of divided jurisdiction solved,[15] similar problems in the area of income-tax remain.

The levying of an agricultural income-tax is a politically loaded question for the States, as the majority of voters live in the country-side and that is why the States are reluctant to cultivate this field. However, in view of the present-day political complexion of the country, any adjustments in taxing powers, which will reduce States' power, is not feasible. Some of the anomalies can be solved by more and more States levying agricultural income-tax at rates parallel to those levied by the Centre. It may also be better to have some provision of aggregation of income with a possibility of credit by one government for the tax paid to the other government. To achieve this, Centre-State co-ordinated effort is needed.

(c) Another anomaly is the allocation of 'excise' to the Centre and 'sales tax' to the States. Both are taxes on consumption and tend to push up prices of consumer goods on which they are levied.

It is felt that some steps should be taken to co-ordinate the two taxes. Some limited steps have been taken in this respect in case of a few commodities, but the major problem still remains.[16]

The problem is becoming serious as both these taxes are being levied progressively at higher levels. The Fourth Finance Commission was asked to suggest if a ceiling could be prescribed on State sales taxes. But the Commission failed to evolve any formula and suggested mutual agreement between the Centre and the States.[17]

(d) The States' powers to levy sales tax or tax on carriage of goods, *etc*., also create problems in the way of flow of trade and commerce.[18] The fact is that the Indian economy tends to be national and, thus, local taxation thereof creates problems. Businessmen resent sales tax because of the problems of inter-State sales taxation.

(e) Similarly, taxation of motor vehicles by the States hampers the evolution of an All-India transportation system.

If prohibition policy is seriously implemented, States would lose excise revenue which is sizeable at present. States have successfully used their power to tax land to raise revenue by taxing mineral bearing lands.[19] The Supreme Court has, on the whole, so far sought to give a liberal interpretation to the taxing powers of the States.

H. FEES

There is no *generic* difference between a 'tax' and a 'fee', but the Indian Constitution distinguishes between the two concepts for legislative purposes.

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14. *Infra*, Sec. K(i).
15. See under entry 88, List I, *supra*, Sec. C.
16. *Infra*, Sec. K.
17. *Report*, 38-45 (1965).
18. *Infra*, Ch. XV.
19. See *Supra* Sec. D.

Each List has a number of tax entries, but at the end also has an entry authorising levy of fees in respect of any of the matters included in the List. For example, entry 96, List I, reads : "Fees taken in respect of any of the matters within this List but not including fees taken in any court."[20] Similarly, entry 66, List II, runs: "Fees in respect of any of the matters in this List, but not including fees taken in any court".[21] Entry 47, List III, is also couched in similar terms as the other two entries mentioned above.[22]

The expression "any of the matters in this list" necessarily includes also the entries relating to taxation. This means that a fee may be levied even under an enactment relating to the imposition of a tax. For example, under entry 54, List II, a tax can be levied on the sale or purchase of goods. But licences are issued to dealers for permitting them to carry on business of buying and selling goods, and a licence-fee may be charged for the purpose.

It would appear from the above that the scope for levying fees is much broader than that for levy of taxes. Whereas a tax is to be confined to the few specific tax entries in each List,[23] a fee can be levied in respect of all the entries—tax or non-tax—in the three Lists by the concerned Legislature. The first important incident of the difference between 'tax' and 'fee' is that whereas no tax can be levied outside the tax entries, fees can be levied in respect of a non-tax entry as well. As for example, a State levy on public trusts is invalid as a 'tax' as there is no such tax entry, but it is valid as a 'fee' under entry 47 of List III. A fee may be levied even under a law relating to the imposition of a tax, *e.g.*, licence fee charged from dealers under the Sales Tax Acts.

Another significant difference between "fee" and "tax" is that Arts. 110(2) and 199(2) which deal with 'Money Bills' lay down expressly that a Bill will not be deemed to be a 'Money Bill' by reason only that it provides for the imposition of fines, or the demand or 'payment of fees' for licences, or 'fees for services rendered,' whereas a Bill dealing with imposition or regulation of a tax will always be regarded as a Money Bill.[24] These provisions should, however, be read as excluding from the category of Money Bills not every 'licence fee' but only such as does not amount to a 'tax'. In some situations, a tax can be collected in the form of a licence fee and this could not be exempted from the definition of a Money Bill. The use of the term 'licence fee' in a statute is not decisive of the nature of the levy in question.

This, therefore, raises the question as to how to distinguish between a 'tax' and 'fee'. Over a period of time, as the following discussion will show, there has occurred a sea change in the approach of the Supreme Court towards identifying a levy as 'fee'.

To begin with, the Court adopted a restrictive view of 'fee' and promoted the theory of *quid pro quo* between the 'fee' charged and the 'service' rendered in lieu thereof. This was followed by a period when the Court by and large shed this restrictive approach and more or less gave up the *quid pro quo* theory adopting the approach of regulatory nature of a 'fee'. This gave a far greater leeway to the

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20. *Supra*, Sec. C.
21. *Supra*, Sec. D.
22. *Supra*, Sec. E.
23. *Supra*, Sec. F.
24. See, Ch. II, Sec. J(ii)(c) and Ch. VI, Sec. F(ii), *supra.*

legislatures in the matter of levying fees for various purposes. Of late, the Courts have reverted more to the earlier view without insisting on an exact proof of *quid pro quo*.

(a) Theory of *quid pro quo*

To begin with, the Supreme Court propounded the view that a tax is a compulsory exaction of money by a public authority for public purposes, to meet the general expenses of the State without reference to any special benefit to be conferred upon the tax-payers. The taxes collected are merged in the general revenue and applied for general public purposes. Fees, on the other hand, are payments for some special service rendered, or some work done, for the benefit of those from whom payments are demanded. Thus, in fees, there is always an element of *quid pro quo* which is absent in a tax. The Court treats *quid pro quo i.e.*, some service rendered to the payer of the fee, as an essential element of the concept of fee.

A payment would be a fee if it fulfils the following two elements :

(1) it must be levied in consideration of certain services rendered to the individuals by some governmental agency; and

(2) payments demanded for rendering such services should be kept apart, or specifically appropriated for that purpose, and not merged in the general revenue to be spent for general purposes.

If the funds are kept separate from the general funds, then they can be used for the service for which they have been collected. If any balance is left in a year, then it can be spent later on the same service. But if the fee receipts are mixed up with the general funds, then the surplus may get lost and the fee collected for specific service may not be fully utilised for that service. In *Swamiar*[25], the Supreme Court observed in this connection:

> "... in a fee it is some special benefit accruing to the individual which is the reason for payment in the case of fees; in the case of a tax, the particular advantage if it exists at all is an incidental result of state action. As fee is a sort of return or consideration for services rendered, it is absolutely necessary that the levy of fees should, on the face of the legislative provision, be correlated to the expenses incurred by Government in rendering the services..."

In the instant case, a levy on religious institutions was held to be a 'tax' and not 'fee' because the money raised was not earmarked for defraying the expenses in performing the services. The collections went to the State Consolidated Fund out of which were met the expenses of the Commissioner. There was no correlation between the expenses incurred by the Government and the contributions raised, and, thus, the theory of return or *quid pro quo* did not apply. In the instant case, the percentage of contribution leviable was graded according to the income derived by the institution. The levy being a tax was held unconstitutional as it did not fall under any tax-entry in List II.

It is to be seen that the most restrictive view of 'fee' was propounded by the Supreme Court in the *Swamiar* case. Thereafter, the Court gradually relaxed its approach as is evident from the following discussion.

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25. *Commr., H.R.E. v. L.T. Swamiar,* AIR 1954 SC 282 : 1954 SCR 1005.

An Orissa Act laid down that every temple having income exceeding Rs. 250 should make an annual contribution, on a percentage basis of the income, for meeting the expenses of the Commissioner of Hindu Religious Endowments and his staff—the machinery set up for the due administration of the affairs of religious institutions. The collections were to form a separate fund and were in consideration of the service rendered by the Commissioner, *viz.*, to ensure proper application of the endowment funds. The levy was held to be 'fee'.[26]

A levy on lessees of coal mines to meet the expenditure for providing amenities like communication, water supply and electricity for the better development of the mining area, and to meet the welfare of the labour employed, has been held to be a 'fee'.[27] The money raised was kept in a separate fund out of which the amenities were to be provided. The Court asserted that in case of fee, there must always be correlation between the fee collected and the service to be rendered.

To make a levy a fee, the services rendered for it must benefit, confer advantage on, the person who pays the levy. A mere control exercised on the activities of the person paying the levy, so as to make these activities more onerous, is not such a service rendered to him as to make the levy a 'fee'.[28] A mere inspection of cinema houses twice a year with a view to ensure that the terms of the license were observed does not amount to rendering service to the owners of cinemas and so the levy for the purpose cannot be regarded as a 'fee' as there was no correlation between the amount of levy with the costs of any service. The Supreme Court ruled that fees for licence and fees for services rendered were envisaged to be different kinds of levy. Thus, the Court distinguished between fees for services rendered and those for regulatory purposes.[29]

In *Indian Mica & Micanite Industries v. State of Bihar*,[30] the Supreme Court laid emphasis on three elements: (*i*) to be a fee, the State should render some service to those from whom the fee is charged; (*ii*) a mere regulation of trade in public interest is no service to the person required to pay the levy; (*iii*) the fee charged is to have a reasonable correlation with the expenses incurred in rendering the service, *i.e.*, the levy must be a *quid pro quo* for the service rendered.

But in such matters. it is not possible to have an exact correlationship. The correlation may, however, be of a 'general character' and not of 'arithmetical exactitude'. The correlationship between the services rendered and the levy of fee is essentially a question of fact. It is for the State to place materials before the court to show what service is being rendered to the person required to pay the levy, what is the probable cost being incurred thereon and how much amount is being realised by way of fees. Where the State supervision is meant only to see that tax is not evaded, the State renders no service to the concerned person but serves its own interest. In this case, the Court emphasized that generally speaking by granting a licence, the State does not confer any privilege or benefit on any one. All that it does is to regulate a trade, business and profession in public inter-

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26. *Jagannath v. State of Orissa*, AIR 1954 SC 400 : 1954 SCR 1046.
Also see, *Ratilal v. State of Bombay*, AIR 1954 SC 388 : 1954 SCR 1055; *S.T. Swamiar v. Commr., H.R.E.*, AIR 1963 SC 966 : 1963 Supp (2) SCR 302.

27. *Hingir-Rampur Coal Co. v. State of Orissa*, AIR 1961 SC 459 : (1961) 2 SCR 537.

28. *Cooverji B. Bharucha v. Excise Commr.*, AIR 1954 SC 220 : 1954 SCR 873.

29. *Corporation of Calcutta v. Liberty Cinema*, AIR 1965 SC 1107 : (1965) 2 SCR 477.
Also see, *infra*, footnote 49.

30. AIR 1971 SC 1182 : (1971) 2 SCC 236.

est. It will thus be seen that the Court did not envisage that a 'fee' could be levied merely for regulatory purposes.

Under a State law, a fee was payable by sugar mills to the Cane Development Council which was to perform certain services to the mills. The Supreme Court held that no fee was payable by the mills for the period when the council was not in existence as no service was rendered to the mills.[31]

Water charges levied by a municipality as a percentage of annual rateable value of building constitute a tax on lands and buildings, falling under entry 49 of List II,[32] but amount to 'fee' when levied according to the quantity of the water consumed.[33]

In *Nagar Mahapalika, Varanasi v. Durga Das*,[34] a licence fee on owners and drivers of rickshaws was held invalid, for the amount collected thereby was much larger than the expenses incurred by the Board to render services to the rickshaw owners and drivers. Here the concept of *quid pro quo* was applied very strictly. An interesting feature of the case is that the amount spent by the Mahapalika on discharging its statutory duties was not taken into consideration for, as the Court said, "Licence fee cannot be imposed for reimbursing the cost of ordinary municipal services which the Municipal Board was bound under the statute to provide to the general public."

The same principle was applied in *Govt. of Andhra Pradesh v. H.M.T.*[35] The Supreme Court ruled that the totality of statutory functions of a *gram panchayat* could not justify a fee. There should be services rendered individually to the person on whom the fee is imposed.

The fee payable by a factory owner under the Factories Act has been held to be a 'fee' as the inspection carried on by the inspectors confers benefit on the factory owners as well. A large number of provisions in the Act, particularly those dealing with safety, involve a good deal of technical knowledge. During the course of discharging their duties, the inspectors give proper advice and guidance which avoid many accidents. The bulk of the licence fees realised is actually spent on services rendered to the factory owners.[36]

In *State of Maharashtra v. Salvation Army*,[37] the Court again emphasized upon the correlation between the fee charged and the service rendered. The Court observed:[38]

> "As a fee is regarded as a sort of return or consideration for services rendered, it is necessary that the levy of fees should be correlated to the expenses incurred by the agency in rendering the services".

The Court insisted that two elements were essential for a levy to be regarded as a fee: (1) it is levied in consideration of certain services which the individuals accept either willingly or unwillingly; (2) it must not go to the general revenue of

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31. *Jaora Sugar Mills v. State of Madhya Pradesh*, AIR 1966 SC 416 : 1966 (1) SCR 523.
32. *Kendriya Nagrik Samiti, Kanpur v. Jal Sansthan*, AIR 1982 All. 406; *supra*, Sec. D.
33. *Nizam S. Factory v. Bodhan Municipality*, AIR 1965 AP. 91.
34. AIR 1968 SC 1119 : (1968) 3 SCR 374.
35. AIR 1975 SC 2037 : (1975) 2 SCC 274.
36. *Delhi Cloth & General Mills v. Chief Commn., Delhi*, AIR 1971 SC 344 : (1970) 2 SCC 172.
37. AIR 1975 SC 846 : (1975) 1 SCC 509.
38. *Ibid*, at 851.

the State but be earmarked to meet the expenses on the service rendered. The Court insisted that the "fee must, as far practically as possible, be commensurate with the service rendered". In this case, a 2% charge being levied on charities to meet the expenses of the charity commissioner was held to be *ultra vires* since 1970 as there was a surplus of 54 lakh rupees. The Court ruled that in fixing the fee regard must be had to the surplus.

The concept of *quid pro quo* was very strictly applied by the Supreme Court in *State of Andhra Pradesh v. Hindustan Machine Tools Ltd.*:[39] The Court observed:

> "One cannot take into account the sum total of the activities of a public body like a *gram panchayat* to seek justification for the fees imposed by it. The expenses incurred by a Gram Panchayat or a municipality in discharging its obligatory functions are usually met by the imposition of a variety of taxes. For justifying the imposition of fees the public authority has to show what services are rendered or intended to be rendered individually to the particular persons on whom the fee is imposed."

In the *Chief Commissioner, Delhi v. Delhi Cloth & General Mills Co. Ltd.*,[40] a registration fee charged on the percentage basis on the registration of debentures was held bad. The Court found that the registration fee realised had no correlation with the expenditure incurred on maintenance, registration, organisation, etc., and also that the fees realised formed part of the general revenues of the State.

In *Kewal Krishan v. State of Punjab,*[41] while the Supreme Court held that market fee could be levied on an *ad valorem* basis on the agricultural produce bought or sold by the licensees in the notified market area, it did emphasize that a substantial portion of the fee realized must be spent for rendering services to the licensees in the notified market area in relation to the transaction of purchase or sale of the agricultural produce. Utilisation of the fund for an ulterior purpose, howsoever benevolent or charitable, cannot be permitted, otherwise the whole concept of 'fee' would collapse. There is the principle of *quid pro quo* between the payer of the fee and the authority charging it, for the validity of the fee charged. But this principle cannot be satisfied by rendering some remote service. The special service rendered must be to the payer of the fee. Though it may not be an exact equivalent of the fee with a mathematical precision, yet it must be established broadly and reasonably by the fee charging authorities that the amount is being spent for rendering services to those on whom falls the burden of the fee.

In the instant case, the Court found some of the purposes mentioned in the Act for which the fee collected could be spent to be impermissible, such as, propaganda in favour of agricultural improvements and thrift; production and betterment of agricultural produce or imparting education in agriculture, etc. Also, taking a reasonable and practicable view on the basis of facts and figures placed before the Court, it ruled that a rate of 2% rather than 3% was sustainable on the basis of legal expenditure in relation to the market fee income.[42]

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39. AIR 1975 SC 2037, 2044 : (1975) 2 SCC 274.
40. AIR 1978 SC 1181 : (1978) 2 SCC 367.
41. AIR 1980 SC 1008 : (1980) 1 SCC 416.
42. In *Ram Chandra Kailash Kumar & Co. v. State of Uttar Pradesh*, AIR 1980 SC 1124 : 1980 Supp SCC 27, a market fee of 1% on the price of agricultural produce sold was held valid subject to rendering adequate service by market committees.
Also, *Sajjan Mills Ltd. v. Krishi Upaj Mandi Samiti, Ratlam*, AIR 1981 MP 30; *M.N. Aggarwal v. Krishi Upaj Mandi Samiti, Itarsi*, AIR 1983 MP 126.

In the case noted below,[43] the Supreme Court has again distinguished between a 'fee' and a 'tax'. The 'fee' is levied under entry 66, List II, by a State. The power to levy fee is co-extensive with its powers to legislate with respect to substantive matters and fee is levied with respect to the services which would be rendered by a State under such a law. A fee is payment levied by an authority in respect of services performed by it for the benefit of the payer. On the other hand, a tax is payable for the common benefits conferred by the Authority on all tax payers. "A fee is a payment made for some special payment made for some special benefit enjoyed by the payer and the payment is proportional to such benefit. Money raised by fee is appropriated for the performance of the service and does not merge in the general revenue."

The Court has observed further: "While there is no *quid pro quo* between a taxpayer and the authority in case of a tax, there is a necessary correlation between fee collected and the service intended to be rendered. Of course the *quid pro quo* need not be understood in mathematical equivalence but only in a fair correspondence between the two. A broad correlationship is all that is necessary."[44] In the instant case, the levy in question was held to be a tax as there was no *quid pro quo.*

In course of time, the Supreme Court started taking a more flexible and extended view of the concept of 'fee'. For example, it was said that it is not an essential element of a fee that it should be credited to a separate account and not to the Consolidated Fund. In this connection, attention has been drawn to Art. 266 and so it has been observed that if services rendered are not by a separate body like the Charity Commissioner, but by a government department, the character of the imposition would not change even if credited to the Consolidated Fund.[45]

In *Shri Admar Mutt v. Commr., H.R. & C.E.,*[46] the Court upheld a fee varying from 3 to 5% of the annual income of a religious institution payable to the Commissioner of Religious Endowments because the total collections were just equal to the department's total expenditure. The Supreme Court, however, observed that a levy would not become a tax merely because of the absence of uniformity in its incidence, or because of compulsion in its collection, or because some contributors do not obtain the same degree of services as others may. A mathematical equivalence between fees paid and service rendered is not required. This was a case where fees were chargeable according to the paying capacity and not according to the service rendered to each individual institution as there were many institutions which received the service but had very little paying capacity. The judicial opinion in this case does indicate some flexibility in the theory of *nexus* between the service rendered and the fee charged.

In *Southern Pharmaceuticals v. State of Kerala,*[47] a levy on the supply of rectified spirit to the manufacturers of toilet and medicinal preparations was justified

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43. *Sri Krishna Das v. Town Area Committee, Chirgaon,* AIR 1991 SC 2096 : (1990) 3 SCC 645.
44. *Ibid,* at 2104.
45. *State of Rajasthan v. Sajjanlal,* AIR 1975 SC 706; *Sreenivasa General Traders v. State of Andhra Pradesh,* AIR 1983 SC 1246 : (1983) 4 SCC 353.
46. AIR 1980 SC 1 : (1979) 4 SCC 642.
47. AIR 1981 SC 1863 : (1981) 4 SCC 391.

as a fee. 'Fee' can be payable 'as a condition of a right to carry on a business.' No one has a fundamental right to the supply of rectified spirit which is an intoxicating liquor. Its supply is regulated by the State from a distillery or a spirit ware-house.[48] A fee may be charged for the privilege or benefit conferred, or service rendered, or to meet the expenses connected therewith. "It is in consideration for the privilege, licence or service". A manufacturer of preparations using alcohol may have to bear the cost of establishment. The government may deploy supervisory staff in a bonded manufactory for its own protection to prevent the leakage of revenue, but the licensee also receives a service in return. The Court clarified that merely because the collections are taken to the Consolidated Fund of the State and are not the separately apropriated towards the expenditure for rendering the service is not by itself decisive of the nature of the levy.

The Court also observed in the instant case that the element of *quid pro quo stricto sensu* was not always a *sine qua non* of a fee. This statement does indicate a new approach, a break from the past, somewhat liberalization of the judicial approach towards the concept of fee.

A good example of the liberal judicial view of the concept of fee is furnished by the Supreme Court pronouncement in *Delhi Municipality v. Mohd. Yasin*[49] where the concept of 'service rendered' for a 'fee' was very much diluted. The municipality enhanced 8 times the fee chargeable for slaughtering animals at its slaughter houses. The expenditure shown in the municipal budget under the item slaughter houses was much less than the anticipated collection from the enhanced fees. The municipality, however, argued that the budget only showed the items incurred directly and exclusively on slaughter houses but, in addition, there were several other items in the budget which included expenditure incurred in connection with them. The Delhi High Court held the enhancement in fees as invalid but the Supreme Court, on appeal, held the same to be valid.

According to the Supreme Court, fee is a payment for services rendered, benefit provided or privilege conferred. The relation between the fee and services rendered or advantages conferred need not be direct, "a mere causal relation may be enough". Neither the incidence of the fee nor the service rendered need be uniform. That others, besides those who pay the fees are benefited, does not detract from the character of the fee. "The special benefit or advantage to the payers of the fees may even be 'secondary' as compared with the primary motive of regulation in the public interest." "*Quid pro quo* in the strict sense is not the one and only true index of a fee; nor is it necessarily absent in a tax." Expenditure need not be incurred "directly or even primarily in connection with the special benefit or advantage conferred". If others than those who pay the fee are benefited, it does not detract from the character of the fee. Further, the Court is not to assume the role of a cost-accountant. The Court is not to weigh "too meticulously" the cost of services rendered as against the amount of fee collected so as to evenly balance the two. "A broad correlationship is all that is necessary." "There need not be any fastidious balancing of the cost of the services rendered with the fees collected". That the money collected from the fees goes not in a separate fund but in the Consolidated Fund does not also necessarily make a fee a tax.

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48. On this point, see, *infra*, Ch. XXIV, Sec. H.
49. AIR 1983 SC 617 : (1983) 3 SCC 229.

In *Sreenivasa General Traders v. State of Andhra Pradesh*,[50] the Supreme Court further liberalized the concept of fee and made it even more flexible. The rate of market fee levied by market committees was increased by the State Government from 1/2% to 1% of the aggregate amount for which notified products were purchased or sold at notified market areas. This increase was challenged on the ground that there was no *quid pro quo*, *i.e.*, there was no correlation between the increase in the rate of market fee and the service rendered.

Rejecting the contention and upholding the increase in fee, the Court emphasized that it was not always possible to work out with mathematical precision the amount of fee required for the services rendered and to collect only so much as would be just sufficient to meet the expenses in one year. It would be wrong to take only one year or a few years into account to decide whether fee was commensurate with the service rendered. An overall picture must be taken while dealing with the question whether there was correlation between the increase in fee and services rendered. In the instant case, the Court was satisfied that the income would not be sufficient even after the increase to meet the expenditure of the market committees.

So far, the Court said nothing new and only reiterated what it had said in earlier cases. But then the Court went on to emphasize that the word 'fee' need not be given a rigid technical meaning. While the power to levy fee "is conditioned by the fact that it must be 'by and large' a *quid pro quo* for the services rendered", such a correlationship is of 'general character and not of mathematical exactitude'. All that is necessary is that there should be a 'reasonable relationship' between the levy of the fee and the services rendered. Fee need not have direct relation to the actual service rendered by the authority to each individual who obtains the benefit of the service. The element of "*quid pro quo* in the strict sense is not always a *sine qua non* for a fee."

In the instant case, all the purposes mentioned in the relevant law for which collections from fee were to be spent were extremely beneficial to the growers and the traders. The phrase 'payer of the fee' represents "collectively the class of persons to whom the benefit is directly intended by the establishment of a regulated market" and not the actual individual who belongs to that class, *i.e.* the trader. Thus service does not mean service to each individual payer of fee but to the users of the market, *i.e.*, growers and traders of notified agricultural produce. The Court expressly dissented from some of the observations made by it earlier in the *Kewal Krishan* case.[51]

It will thus be seen that in *Srinivasa*, the Supreme Court diluted the concept of fee at least in two respects : (1) while accepting the proposition that fee is collected for the services rendered, the Court held that the whole of the benefit need not be conferred on the payers of the fee; and (2) element of *quid pro quo* need not be established with arithmetical exactitude; it is enough if a good and substantial portion of the amount collected by way of fees is spent on rendering

50. AIR 1983 SC 1246 : (1983) 4 SCC 353.
51. *Supra*, footnote 41.

services. In fact, the Court went to the extent of saying that the element of *quid pro quo* in the strict sense is not always *sine qua non* for a fee.[52]

In *Om Prakash Agarwal v. Giri Raj Kishore,*[53] a cess was imposed on *ad valorem* basis at the rate 1% of the sale proceeds of the agricultural produce brought or sold in a market area. The money thus collected was to be spent on rural development. The levy was held invalid. In spending money collected through the cess, the interest of the dealers was not at all kept in view. There existed no correlation between the amount paid by way of cess and the services rendered to a person from who it was collected.

The case of *City Corporation of Calicut v. Thachambalath Sadasivan*[54] reflects the change which occurred in judicial thinking as to the nature of fee. The Supreme Court ruled that the traditional concept of *quid pro quo* in a fee has been undergoing transformation. Though the fee must have relation to the services rendered, or the advantage conferred, it is not necessary to establish that *those* who pay the fee must receive direct or special benefit or advantage of the services rendered for which the fee is being paid. The Court held that if one who is liable to pay receives general benefit from the authority levying the fee, the element of service required for collecting fee is satisfied.

In *District Council of Jowai Autonomous District v. Divet Singh,*[55] the Supreme Court again fell back upon the concept of *quid pro quo* to support levy of a fee. The district council levied royalty on timber coming from private forests. The Supreme Court invalidated the levy. The Court ruled that the levy could not be regarded as royalty as the forests did not belong to the district council. It could also not be justified as tax on land. In pith and substance, it was a tax on forest produce grown on private lands. The levy could be justified as fee, but it could be imposed only as *quid pro quo* for services rendered by the district council to the forest owners and contractors, but there was no evidence to show the expenses incurred by the district council towards such services and the total amount of royalty collected by it.

In *Sirsilk,*[56] the Supreme Court ruled that when the entire proceeds of the fee are utilised in financing the various projects undertaken by the Textiles Committee, it cannot be said that there is no reasonable and sufficient correlation between the levy of fee and the services rendered by the Textiles Committee. The Court ruled further that when the levy of the fee is for the entire textile industry, there is sufficient *quid pro quo* between the levy recovered and the services rendered to the industry as a whole.

In *Krishi Upaj Mandi Samiti v. Orient Paper & Industries Ltd.,*[57] a levy on the sale of bamboo by the Forest Department to the mill, payable to the market committee was upheld as a 'fee'. The Court rejected the argument of the mill that the committee performed no service to the mill which paid the levy. The Court

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52. This view has been reiterated by the Supreme Court in *Om Prakash v. State of Punjab,* AIR 1985 SC 218 : (1985) 1 SCC 345; *City Corpn. v. T. Sadasivan,* AIR 1985 SC 756 : (1985) 2 SCC 112.
53. AIR 1986 SC 726 : (1986) 1 SCC 722.
54. AIR 1985 SC 756 : (1985) 2 SCC 112.
55. AIR 1986 SC 1930 : (1986) 4 SCC 38.
56. *Sirsilk Ltd. v. Textiles Committee,* AIR 1989 SC 317 : 1989 Supp (1) SCC 168.
57. (1995) 1 SCC 655 : (1994) 7 JT 414.

ruled that the market committee spent the money on the improvement of the infrastructure to further the object of the Act. The fact that the mill was not the direct beneficiary of the facilities provided by the committee does not absolve it from payment of the market fees. The facilities were meant for the benefit of all the buyers and sellers of all the agricultural produce within the market area.

The Court now stated the proposition: "It is enough if there is a broad, reasonable and general correlationship between the levy and the resultant benefit to the class of people on which the fee is levied, though no single payer of the fee receives direct or personal benefit from those services. It is immaterial that the general public may also be benefited from some of the services if the primary service intended is for the payers of the fees." [58] It will be seen that the emphasis has shifted from provision of services to the individual who pays the fee to the payers of the fee as a class.[59] It is enough that there is a "broad, reasonable and general correlationship" between the levy and the resultant benefit to the "class of people" who are required to pay the fee though no single fee payer receives direct or personal benefit from those services.[60]

(a) REGULATORY FEE

In course of time, the traditional concept of *quid pro quo* started undergoing a transformation as the concept of fee based on benefit to the payers of fee was found to be too restrictive a concept. Accordingly, the Supreme Court started emphasizing that the element of *quid pro quo stricto sensu* is not always a *sine qua non* of a fee. The reason for this change in judicial stance was that most of the present-day state activities are regulatory in nature, and, for this purpose, licensing is regarded as an effective administrative technique.

The idea underlying regulation is more of public interest rather than an individual benefit. In most of the cases, licence fees are levied to meet the expenses of regulation. In this context, the idea of 'benefit' to the licensee is too narrow a concept. It will be more in accord with the present-day realities to accept the minority view in the *Liberty Cinema* case[61] that imposition of charges for supervision, inspection and control of private activity may be regarded as 'fee'.

Articles 110(2) and 199(2) recognise the two concepts *viz.*, "fees for licences" and "fees for services rendered". This indicates that there are these two types of fees.[62]

There may however arise the question of correlation between the fee charged and the cost of regulation. In the *Liberty Cinema* case, the cinema owner was required to pay annually a sum of Rs. 6000 and it was no body's case that this sum was required only to effect inspection of the cinema twice a year. Here, licensing was being used clearly as a technique of raising revenue for the corporation and so the so-called 'licence fee'could justifiably be regarded as a tax. The

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58. *Ibid*, at 674.
59. *Krishi Utpadan Mandi Samiti v. Ashok Kumar Dinesh Chandra*, (1996) 10 SCC 100 : 1996) 7 JT 545; *Etikoppaka Coop. Agricultural Industrial Society v. Secretary, Agricultural Market Committee*, AIR 1999 AP 114; *Belsund Sugar Co. v. State of Bihar*, AIR 1999 SC 3125 : (1999) 9 SCC 620.
60. (1995) 1 SCC 659.
61. See, *supra*, footnote 29.
62. See, Chs. II, Sec. J(ii)(c), and VI, Sec. F(ii), *supra.*

view propounded by the minority in *Liberty Cinema* has now come to be accepted by the Supreme Court.

Through a series of recent cases, distinction between 'compensatory fee' and 'regulatory fee' has now become established. The expression "licence fee" does not necessarily mean a fee in lieu of services and that no *quid pro quo* need be established in such a case.[63] Licence fee can be regulatory when the activities for which a licence is given require to be regulated or controlled.

The State of Tamil Nadu passed an Act to regulate chit funds in which middle class and the poor participate in large numbers. An organisation with the Registrar of Chit Funds was established to supervise and regulate chit funds. A fee graduated according to the value, and the number of subscribers of the chit fund, was levied for registration of bye-laws with the Registrar of Chit Funds. The Supreme Court upheld the validity of the licence fee. The Court observed that the object of the Act was to protect the interests of the subscribers of chit funds and more their number, more the burden on the authorities and, consequently, more fee is needed to meat the expenditure.[64]

In *Vam Organic Chemicals Ltd. v. State of Uttar Pradesh*,[65] the Supreme Court avowedly accepted the notion of fees charged for licences, *i.e.* regulatory fees. The Court now distinguished between "regulatory fees" and "compensatory fees" *i.e.* fees for services rendered. In case of regulatory fee, like the licence fee, where the activities for which licence is given require to be regulated or controlled, existence of *quid pro quo* is not necessary although the fee imposed must not be in the circumstances of the case, excessive, keeping in view the quantum and nature of the work involved in the required supervision. In the instant case, a licensing system for denaturation of spirit and a fee at the rate of 7 paise per litre was imposed. Keeping in view the quantum and nature of the work involved in supervising the process of denaturation and the consequent expenses incurred by the State, the fee imposed was held to be reasonable and proper.

The Hyderabad Municipal Corporation levied a licence fee on eating houses, lodging houses, restaurants etc. This levy was challenged on the ground of lack of *quid pro quo* between the fees charged by the municipality and the service rendered to the licensees. In the case noted below,[66] the Supreme Court upheld the levy as a fee on the ground that the municipality performed regulatory and supervisory functions.

The Court again emphasized that a licence fee may be either regulatory or compensatory. The licence is issued to a restaurant subject to several conditions being fulfilled by the licensee. The Corporation inspects the licensed premises so as to ensure that these conditions are fulfilled. In addition, the municipality performs the general duty of lifting garbage and keeping the city clean. The hotels and restaurants impose an additional burden on the municipality in this respect by

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63. *State of Tripura v. Sudhir Ranjan Nath*, (1997) 3 SCC 665, 673 : AIR 1997 SC 1168.
Also see, *P. Kannadasan v. State of Tamil Nadu*, (1996) 5 SCC 670; *State of Uttar Pradesh v. Sitapur Packingwood Suppliers*, (2002) 4 SCC 566 : AIR 2003 SC 2165.

64. *Commissioner & Secretary to Govt., Commercial Taxes and Religious Endowment Dept. v. Sree Murugam Financing Corp*., AIR 1992 SC 1383 : (1992) 3 SCC 488.

65. (1997) 2 SCC 715 : (1997) 1 JT 625.

66. *Secunderabad Hyderabad Hotel Owners' Ass. v. Hyderabad Mun. Corp.*, AIR 1999 SC 635 : (1999) 2 SCC 274.

reason of the nature of their occupation. The fees in question was part of the general fund but it was earmarked for the purpose it was collected. Fees can be levied on a graded basis, it does not have to be a lump sum levy. But it ought not to be excessive. In the facts of the instant case, the Court found that the licence fees collected formed only a very small part of the total expenditure incurred by the municipal corporation and, hence, the fee imposed was not excessive.

The power to levy a tax or duty on industrial alcohol vests in the Centre. A State Government is not competent to levy a tax or duty on industrial alcohol. Nevertheless, the State is competent to levy a charge on manufacturers of alcohol to meet the cost of maintenance of excise staff to supervise manufacture, storage etc. of industrial alcohol so as to ensure that non-potable alcohol is not diverted and misused as a substitute for potable alcohol. Such a provision can be traced to the regulatory power of the State under entry 33, List III.[67]

The Supreme Court has considered the concepts of regulatory/compensatory fees recently in *B.S.E. Brokers Forum v. SEBI.*[68] SEBI is primarily a regulatory body as it is charged with the function of regulating the business in stock exchanges and other securities markets. Under the relevant statutory provisions, SEBI is authorised to levy a fee "for carrying out the purposes of the SEBI Act, and also for registration of stock brokers etc.

On the concept of regulatory fee, the Supreme Court has stated in *B.S.E.*:

> "… so far as the regulatory fee is concerned, the service to be rendered is not a condition precedent and the same does not lose the character of fee provided the fee so charged is not excessive. It is also not necessary that the services to be rendered by the collecting authority should be confined to the contributories alone….. if the levy is for the benefit of the entire industry, there is sufficient *quid pro quo* between the levy recovered and the services rendered to the industry as a whole."

The Court said further:

> "Once we come to the conclusion that the fee in question is primarily a regulatory fee then the argument that the service rendered by the Board should be confined to the contributories alone, cannot be accepted…. Once the levy is in public interest and connected with the larger trade in which the contributories are involved then confining the services only to the contributories does not arise."

In the instant case, the Court accepted the Board's contention that it can levy a composite fee comprising both, *viz.,* fee for carrying out its purposes, and fee for registration. The Court also found that the fee is not excessive keeping in view the multifarious regulatory functions of SEBI. On this point, the Court has observed :[69]

> "While examining the reasonableness of the quantum of levy, the same will not be done with a view to find out whether there is a correlationable *quid pro quo* to the quantum of levy, because… the *quid pro quo* is not a condition precedent for the levy of a regulatory fee. Such examination will have to be made in the context of the levy being either excessive or unreasonable for the requirement of the authority for fulfilling its statutory obligation."

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67. *Bileshwar Khand Udyog K.S. Mandali Ltd. v. State of Gujarat,* AIR 1992 SC 872 : (1992) 2 SCC 42. See, *supra,* Ch. X, Sec. F.
68. AIR 2001 SC 1010 : (2001) 3 SCC 482.
69. *Ibid,* at 1022.

The Court also noted that all fees collected would be credited to a separate fund and the amount is utilised solely towards the expenses incurred by the Board in performance of its duties mandated under the parent Act. Fee can be levied on the brokers making their annual turn-over as the basis to measure the levy. Because of this, the fee cannot be characterised as income-tax, or a turn-over tax, or even a fee on income, or a fee on turnover.

RECENT DEVELOPMENTS

The requirement of a 'broad co-relation' between the benefit conferred and fee imposed was too widely interpreted in some cases, and since all State revenues are presumably expended or at least are expendable only for the welfare of the nation or the State as a whole, this led to a blurring of distinction with the characteristics of a tax. The decision in *State of H.P. v. Shivalik Agro Poly Products*[70] illustrates this approach.

For execution of a mortgage deed, the plaintiffs were required to pay stamp duty and registration fees amounting in accordance with a notification issued under Sections 78 and 79 of the Registration Act by the State of Himachal Pradesh.They challenged the Notification issued by the State Government. The Trial Court, the District Judge and the High Court declared the notification dated 14-4-1969 issued by the State Government prescribing the registration fee to be null and void decreed the suit. The main ground on which the plaintiffs' suit was decreed was that there is a distinction between tax and fee, that the State had not led any evidence to show that the amount realised by way of registration fee was deposited under a separate head or that it was exclusively utilised for the maintenance of the Registration Department. Placing reliance upon the *Shirur Mutt case* the Courts below correctly concluded that the levy was a tax and not a fee and consequently the impugned notification was ultra vires the Registration Act.

The Supreme Court, contrary to earlier decisions, placed the onus on the plaintiffs to show that the overall amount received by the Government by way of fee from the Registration Department far exceeded the overall expenditure incurred in maintaining the said department.[71] More importantly the Court, overlooking Article 266(2) and Article 283 both of which speak of public funds other than the Consolidated Fund, held that in view of Article 226, "*any amount realised by way of fee by the Central Government or State Government has to be credited to the Consolidated Fund of India or of the State concerned, as the case may be, and will thus necessarily get merged in the public revenues and cannot be set apart*".[72] On these erroneous bases the Court set aside the decrees passed by the Courts below and said :

> "the view taken in Shirur Mutt case has undergone a considerable change by subsequent decisions of this Court. Moreover, having regard to the express language used in Article 266 of the Constitution, it is not possible for the State Government to keep the fee realised in a separate fund other than the Consoli-

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70. (2004) 8 SCC 556, at page 560 : AIR 2004 SC 4393.
71. (*Ibid* at p. 568).
72. (*Ibid* at p. 565). This view was differed from In *T.N. Godavarman Thirumulpad (87) v. Union of India*, (2006) 1 SCC 1 at page 12 : AIR 2005 SC 4256, the Court upheld the constitutionality of a fund generated to protect ecology and provide for regeneration of forests saying that such a fund "cannot in the constitutional scheme of things be considered and treated as a fund under Article 266 or Article 283 or Article 284 of the Constitution" and that "neither Article 110 nor Article 199 and/or Article 294 or 195 would have any application" to such fund.

> dated Fund of the State. In view of the subsequent decisions of this Court, the views taken in the decisions relied upon by learned counsel for the plaintiff-respondents cannot be considered to be good law and they are hereby overruled".

This view was reiterated in a number of decisions.[73] Consequently State legislatures are able to raise revenues by way of fees without any of the fiscal discipline applicable to the imposition of taxes.[74] However, at the same time in another series of decisions the principles in *Shirur Mutt* were relied on and reaffirmed.[75]

The disparity in approaches was resolved by the Constitutional Bench in *Jindal Stainless Ltd. (2) v. State of Haryana*,[76] which held that:

> "When the tax is imposed as a part of regulation or as a part of regulatory measure, its basis shifts from the concept of "burden" to the concept of measurable/quantifiable benefit and then it becomes "a compensatory tax" and its payment is then not for revenue but as reimbursement/recompense to the service/facility provider. It is then a tax on recompense. Compensatory tax is by nature hybrid but it is more closer to fees than to tax as both fees and compensatory taxes are based on the principle of equivalence and on the basis of reimbursement/recompense."

Therefore, as the law stands if the regulatory measure is statutorily imposed, the enactment must broadly indicate proportionality between the compensatory tax sought to be levied to the quantifiable benefit. If the Act does not so indicate the burden will be on the State as a service/facility provider to show by placing the material before the Court, that the payment of compensatory tax is a reimbursement/recompense for the quantifiable/measurable benefit provided or to be provided to its payer(s).

(b) VEND FEE

The term 'fee' is at times used for the amount charged by the State (through a licence or auction) for vending narcotics, opium or liquor. In this context, the term 'fee' is not used in the technical sense of a charge for some service rendered. Here the term 'fee' is used for the price of consideration which the government charges from the licensees for parting with its privileges, and granting them to the dealers.

As the State can carry on the business in question itself, such a charge is the normal incident of business trading.[77]

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73. See *State of Gujarat v. Akhil Gujarat Pravasi V.S. Mahamandal*, (2004) 5 SCC 155 at page 166 : AIR 2004 SC 3894; *Sona Chandi Oal Committee v. State of Maharashtra*, (2005) 2 SCC 345 : AIR 2005 SC 635; *Vijayalashmi Rice Mill v. CTO*, (2006) 6 SCC 763 : AIR 2006 SC 2897.

74. See *infra* under Section J.

75. *Jindal Stripe Ltd. v. State of Haryana*, (2003) 8 SCC 60 : (2003) 8 JT 62; *CCE v. Chhata Sugar Co. Ltd.*, (2004) 3 SCC 466 at page 483 : AIR 2004 SC 3005; *State of U.P. v. Vam Organic Chemicals Ltd.*, (2004) 1 SCC 225 : AIR 2003 SC 4650; *Calcutta Municipal Corpn. v. Shrey Mercantile (P) Ltd.*, (2005) 4 SCC 245 : AIR 2005 SC 1879; *Hardev Motor Transport v. State of M.P.*, (2006) 8 SCC 613 : AIR 2007 SC 839.

76. (2006) 7 SCC 241, at page 268 : AIR 2006 SC 2550; *Gupta Modern Breweries v. State of J&K*, (2007) 6 SCC 317 : (2007) 5 JT 619; *Mohan Meakin Ltd. v. State of H.P.*, (2009) 3 SCC 157 : (2009) 1 JT 599.

77. *Harshankar v. Dy. Excise and Taxation Commr.*, AIR 1975 SC 1121 : (1975) 1 SCC 737; *State of Uttar Pradesh v. Sheopat Rai*, AIR 1994 SC 813; *supra*; *Organon (India) Ltd. v. Collector of Excise*, AIR 1994 SC 2489 : 1995 Supp (1) SCC 53; *supra.*

(c) COURT FEES

In *State of Madras v. Zenith Lamps,*[78] considering the validity of levying court-fees, under entry 3, List II,[79] the Supreme Court ruled that court fees could be levied not for increasing general revenues but to meet the cost of administration of civil justice. The fees must have relation to the administration of civil justice. The State should not make any profit out of court-fees and that "there must be a broad correlationship with the fees collected and the cost of administration of civil justice."

The Court observed in *Zenith*: "But one thing the legislature is not competent to do, and that is to make litigants contribute to the increase of general public revenue. In other words, it cannot tax litigation, and make litigants pay, say, for road building or education or other beneficial schemes that a State may have. There must be a broad correlation with the fees collected and the cost of administration of civil justice".

The Court stated that the *ad valorem* principle though not an ideal basis for distribution of a fee, was yet not so irrational as to incur constitutional invalidity.

In this case, an increase in court fees by the State of Madras was challenged. As enough material was not on record to show how much money was spent on civil justice in the State, the Supreme Court remanded the case to the High Court to decide whether the impugned court-fees amounted to 'fees' or 'tax' on litigation and litigants. The Court also ruled that the fact that collections went to the Consolidated Fund was not in itself conclusive because under Art. 266 all revenue raised by the State has to form part of the Consolidated Fund of the State.[80]

In *P.M. Ashwathanarayaana Setty v. State of Maharashtra,*[81] the Supreme Court considered the question of constitutional validity of court-fees levied on an *ad valorem* basis. The main question involved was whether the *ad valorem* court-fee could be regarded as a 'fee' or a 'tax', inasmuch as the correlation between fee and the value of the services rendered by way of *quid pro quo* was not established. Another question was whether or not such a fee was hit by Art. 14 as being arbitrary.[82]

The distinction between 'fee' and 'tax' has been elaborated by the Supreme Court in many cases.[83] Describing the nature of fee, the Supreme Court said in the instant case:[84]

> "A fee is.....a charge for the special service rendered to a class of citizens by Government or Governmental agencies and is generally based on the expenses incurred in rendering the services."

The Court referred in this connection to what it had said in the earlier decision in *Zenith Lamps,*[85] *viz.*: that "there must be a broad correlationship with the fees

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78. AIR 1973 SC 724 : (1973) 1 SCC 162.
79. *Supra*, Ch. X, Sec. E.
80. *Supra*, Ch. VI, Sec. F(iii).
81. AIR 1989 SC 100 : 1989 Supp (1) SCC 696.
82. *Infra*, Ch. XXI, Secs. B and C.
83. See, *Supra.*
84. AIR 1989 SC at 110.
85. *State of Madras v. Zenith Lamps,* AIR 1973 SC 724 : (1973) 1 SCC 162.

collected and the cost of administration of civil justice". After looking into the statements of receipts and expenses on the administration of justice, the Court concluded that the requisite correlationship between receipts from court-fees and expenses on the administration of civil justice was established.

The Court rejected the argument that there should be a ceiling on the payment of court-fees in a case otherwise there may be a case where a person may have to pay a very high amount of court-fees without consequently deriving an equivalent service. Rejecting the argument, the Court observed:[86]

> "The test of the correlation is not in the context of individual contributors. The test is on the comprehensive level of the value of the totality of the services, set-off against the totality of the receipts. If the character of the 'fees' is thus established, the vagaries in its distribution amongst the class, do not detract from the concept of a 'fee' as such, though a wholly arbitrary distribution of the burden might violate other constitutional limitation."

Thus, the Court ruled that the test of correlation is at the "aggregate" level and not at the "individual" level. The Court observed in this connection:

> "... when a broad and general correlation between the totality of the fee on the one hand and the totality of the expenses of the services on the other is established, the levy will not fail in its essential character of a fee on the ground alone that the measure of its distribution on the persons of incidence is disproportionate to the actual services obtainable by them".[87]

The Court also refused to accept the argument that the *ad valorem* principle of charging court-fees is violative of Art. 14. It may not be an ideal basis for distribution of the fee but at the same time it cannot be said to be so irrational as to incur any constitutional infirmity. "The presumption of constitutionality of laws requires that any doubt as to the constitutionality of a law has to be resolved in favour of constitutionality".

The State is in theory entitled to raise the totality of the expenses by way of fee. Any interference with the present yardstick for sharing the burden might in turn produce a yardstick less advantageous to litigants at lower levels. The Court however criticised levy of court fees at a stiff rate which operates harshly and almost "tends to price justice out of the reach of many distressed litigants."

While court-fees could not be used for general purposes there is no bar against using general revenues on administration of civil justice. While the Court did not strike down the law levying court fees, it did, however, direct the State to take steps to rationalize the court fee structure and gave suggestions for the purpose. One suggestion *inter alia* was to levy a nominal fee—not over 2-2½% on small claims.

In Maharashtra, while there existed a ceiling of Rs. 15,000/- on court-fees payable by a civil litigant, no such ceiling existed for court-fees payable on proceedings for grant of probate and letters of administration where *ad valorem* fees were required to be paid. The Supreme Court found this to be discriminatory *vis-a-vis* Art. 14.

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86. AIR 1989 SC at 117.
87. *Ibid*, at 116.

In Tamil Nadu, an *ad valorem* duty of 7½% on the total claim was chargeable on an appeal from the civil judge to the High Court on the question of increasing of the amount of compensation on the land of the appellant being acquired by the State. The provision was held valid as levying a fee and not a tax.[88]

In the instant case, the Court reiterated certain propositions which it had already expounded earlier in several cases. If the essential character of the levy is that some special service is intended as *quid pro quo* to the class of citizens which is intended to be benefited by the service, and a broad and general correlation between the amount so collected and the expenses incurred in providing the services is found to exist, then such levy would partake the character of a 'fee', irrespective of the fact that such special services for which the amount by levy of fee is collected incidentally and indirectly benefit the general public also. In order to establish the correlation between the amount recovered by way of 'fee' and the expenses incurred in providing the service they should not be examined so minutely or be weighed in golden scale to discern any difference between the two.

It is not necessary to ascertain the same with any mathematical exactitude for finding the correlation but the test would be satisfied if a broad and general correlation is found to exist and once such a broad correlation between the totality of the expenses on the services rendered as a whole, on the one hand, and the totality of the amount so raised by way of the fee, on the other, is established, it would be no part of the legitimate exercise in the examination of the constitutionality of the concept of the impost to embark upon its effect in the individual cases. If the aforesaid relation is found to exist in the levy of the fee, the levy cannot be said to be wanting in its essential character of a fee on the ground that the measure of its distribution on the persons or incidence is disproportionate to the actual services made available to them. The Court clarified that the correlation is not in the context of individual contributors. The test is to ascertain on a comprehensive basis keeping in view the value of the totality of the service, *qua* the totality of the receipts.

It is not necessary that the collection made through the levy of court-fees should exactly tally or correspond to the expenditure incurred on the administration of civil justice. The amount raised through court fee and the expenses incurred in administration of civil justice is not to be examined with exactitutde with a view to ascertain any accurate and arithmetical equivalence. The test is satisfied if a broad and general correlation is found to exist. Even if the collections are somewhat more than the expenditure on the service, the levy would not fail on that account because once it is established that the primary and essential purpose is the rendering of the specific service to the specified class, it is immaterial that the State has earned certain benefits out of it indirectly.

The Court however exhorted the State that it was under an obligation to render administration of justice to its subjects. Accordingly, the amount raised from the suitors should not normally exceed the cost of administration of justice. The State should not seek to enrich itself and levy court fees with a view to collect revenue for general administration. The total receipts from court fees should be such as by and large can cover the cost of administration of justice.

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88. *Secretary to Govt. of Madras v. P.R. Sriramulu,* AIR 1996 SC 767 : (1996) 1 SCC 345.

I. A COMPARATIVE VIEW OF TAXING POWERS IN OTHER FEDERATIONS

In the Federations of the U.S.A., Canada and Australia, no elaborate distribution of taxing powers has been attempted. The general pattern is that the Central Government in each country is authorised, subject to some restrictions, to levy any tax. On the other hand, powers of the constituent units are somewhat restricted. In the U.S.A., the States can levy any tax except duties of imports and exports. In Canada, the Provinces are debarred from levying an indirect tax, while in Australia the States cannot levy duties of customs and excises.

The following gives a comparative view as to how the power to levy some of the major taxes is divided between the Centre and the constituent units in the U.S.A., Canada, Australia and India.

Customs: In all these countries, customs duties are levied by the Centre. In the U.S.A., however, no export duty can be levied by any government.

Income Taxes: In the U.S.A., Canada and Australia, income tax can be levied concurrently by the Centre and the States. In India, the power to levy the tax is divided between the Centre and the States according as the income is non-agricultural or agricultural.

Sales Tax: In Australia only the Centre, while in the U.S.A. and Canada, both levels of government, can levy this tax. In India, States levy sales tax except on an inter-State sale which falls within the Centre's taxing purview.

Excise Duties: In the U.S.A. and Canada, the Centre as well as the units can levy this tax, although in Canada, the provincial taxing statute has to be framed in such a manner that the courts do not hold it as an indirect tax which the Provinces cannot levy. In Australia, the Centre and not the States may levy this tax.[89] In India, the field has been demarcated between the Centre and the States according to the commodity taxed; alcohol and narcotics fall to the States, and all other commodities fall within the exclusive Central competence.

Succession and Estate Duties: In the U.S.A., Canada and Australia, power to levy these duties rests with both, the Centre as well as the units. In India, the field is divided: agricultural property falls within the State purview, while the non-agricultural property falls within the exclusive Central sphere.

Land Revenue or Land Tax: In the U.S.A., the Centre may levy this tax subject to the proviso that it must be apportioned among the several States in the proportion of the population. This condition has in practice nullified the Centre's power to levy land tax and has reserved the power to levy the tax to the States. In Australia and Canada, both tiers of government may levy such a tax. In India, however, it belongs exclusively to the States.

In the U.S.A., Canada and Australia, there is no rigid separation of taxing powers between the Centre and the States and both may levy many similar taxes simultaneously on the same tax base. This has given rise to many acute problems of overlapping and multiple taxation in these countries.

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89. On excise duties see entry 84, List I and entry 51, List II, *supra;* and also, *infra*, Ch. XV.

Overlapping taxation arises when Central and State taxes operate simultaneously on the same tax base. Multiple taxation arises when several States levy similar taxes on one and the same tax base. The former is the result of vertical competition between the Centre and the States; the latter, the result of horizontal competition among the several taxing States. Accordingly, in the three Federations, in the areas of income-tax and succession duties, both the Centre and the States operate simultaneously creating problems of overlapping taxation so that a person has to pay a Central as well as a State tax on the same income or property.

Further, many States can simultaneously levy these taxes on the same base on the ground of *nexus*. For example, a resident of Connecticut (U.S.A) conducts business in New York. The State of New York can tax his income because it originates there; the State of Connecticut can tax the same income because its recipient resides there.[90] Such problems make tax administration costly and inconvenient for the tax-payers and many legal issues arise constantly. In fact, the situation was so complicated in Australia and Canada that during the period of the second world war, income-tax and estate duty were centralised, and the regional governments were compensated with grants.[91]

J. RESTRICTIONS ON TAXING POWERS

If any power to tax is clearly mentioned in List II, the same would not be available to be exercised by Parliament based on the assumption of residuary power, for, under the constitutional scheme, the power to legislate in respect of a matter including a residuary matter does not carry with it a power to impose a tax.[92]

The Constitution imposes few restrictions on the taxing powers of the Centre and the States. As already stated, States' power to levy taxes on profession and trade is restricted by Art. 276,[93] and their power to levy taxes on electricity is restricted by Arts. 287 and 288.[94] Besides, some restrictions have been imposed on the States' power to levy sales taxes.

A limited application of the doctrine of immunity of instrumentalities or intergovernmental immunity, the constitutional provisions guaranteeing freedom of trade and commerce,[95] and a few fundamental rights[96] control the taxing powers of the Centre and the States.

(i) RESTRICTIONS ON THE STATES' POWER TO LEVY SALES TAX

The States' power to levy sales tax[97] has been subjected to a few restrictions with a view to keep inter-State and international trade and commerce, and trade in the goods of special importance, free from haphazard State taxation.

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90. *Guarantee Trust Co. v. Virginia*, 304 US 19; *International Harvester Co. v. Evatt*, 399 US 416 (1946).
91. *South Australia v. The Commonwealth*, 65 CLR 373; *Victoria v. The Commonwealth*, 99 CLR 575.
92. *State of W. B. v. Kesoram Industries Ltd.*, (2004) 10 SCC 201 : AIR 2005 SC 1646.
93. *Supra*, Entry 60, List II; *supra*, Sec. D.
94. *Supra*, Entry 53, List II; *supra*, Sec. D.
95. *Infra*, Ch. XV, headed as "Freedom of Trade and Commerce".
96. *Infra*, Chs. XXI—XXXIII.
97. Entry 54, List II, *supra*, Sec. D.

First, a State is debarred from levying a tax on inter-state sale or purchase.

Secondly, no State can tax a sale or purchase taking place outside the State.

Thirdly, a State is debarred from levying a tax on sale or purchase taking place in the course of import and export.[1]

Fourthly, Parliament is empowered to impose restrictions on State taxation of sale or purchase of goods of special importance.

Each of these restrictions may be discussed here.

(a) TAX ON SALE OR PURCHASE OF GOODS OUTSIDE A STATE AND IN INTER-STATE TRADE AND COMMERCE:

A federation, although divided into several constituent units, nevertheless, constantly strives to promote freedom of trade and commerce within the country in order to weld it into one economic unit. It therefore becomes necessary to regulate taxation of inter-State sale or purchase lest an indiscriminate State taxation may hamper free flow of trade and commerce from one State to another and thus jeopardise the economic unity of the country. The Indian Constitution seeks to regulate taxation of inter-State sale or purchase in two ways: negatively, by prohibiting a State from levying, and, positively, by empowering the Centre to levy, a tax on such sale or purchase.

A sale (or purchase) is composed of many ingredients, *e.g.*, existence of goods forming the subject-matter of a sale; agreement to sell; passing of the title or transfer of ownership in the goods; delivery of goods; payment of the price, *etc*. Each of these ingredients is essential to complete a sale. When all these ingredients take place within one State, the sale is completely intra-state and the State concerned has plenary power to tax the same. On the other hand, when all these ingredients take place outside a State, the sale is completely outside the State and it cannot levy any tax on it.

Difficulties, however, arise when these ingredients take place not in one but several States. Applying the doctrine of territorial nexus[2] in such a situation, each of these States may levy a tax on the sale making the ingredient happening there as the taxable event. For example, Tatas manufacture steel in Bihar but sell it in all other States. Bihar can tax the sale by the Tatas taking advantage of the fact of manufacture within its borders of the goods sold, while other States can tax the sales taking place within their jurisdiction. In this way, a sale whose ingredients touch several States could be subjected to multiple tax burden.

This is what actually happened in India before 1956. Acting on the principle of territorial *nexus*, the States picked out one or more ingredients constituting a sale and made it or them the basis of imposing liability for sales tax. This led to imposition of multiple taxation on a single interstate transaction by different States. As this situation was bound to adversely affect interstate trade and commerce, it became necessary to take some ameliorative steps, and devise some suitable formulae, to mitigate such a situation.

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1. These sales are not taxable by a State but they may be taken into account to compute the gross turnover of dealers requiring them to register themselves for purposes of payment of surcharge over the sales tax payable by them.
Hoechst Pharmaceuticals Ltd. v. State of Bihar, AIR 1983 SC 1019 : (1983) 4 SCC 45.
Also see, *infra*, footnote 22.

2. *Supra*, Ch. X, Sec. A.

Before 1956, Art. 286 had sought to avoid multiple taxation of sales by stipulating that a State could not tax a sale taking place outside the State or in the course of inter-State trade and commerce. A sale was regarded as falling within the State in which goods under it were delivered for consumption. Explanation to Art. 286(1) enacted that a sale was regarded as falling in the State where goods under it were delivered for consumption. Art. 286 was subject of judicial interpretation in *State of Bombay v. United Motors Ltd.*[3] The question related to the validity of a legal provision made by the State of Bombay, taxing a sale under which goods from outside were delivered in Bombay for consumption therein, though property in the goods passed outside Bombay.

The Supreme Court adopted the 'outside consumption' test and held that the exporting State could not tax a sale under which goods went to another State, and that it could be taxed only by the State in which the goods were actually delivered for consumption.[4] The word 'consumption' was interpreted broadly so as to envisage not only consumption by the actual purchaser himself but also distribution for eventual consumption within the State. No other State, except that of consumption, could tax a sale touching several States and, thus, multiple taxation of such a sale was avoided.

The delivery for consumption within the State was considered to be a point at which the tax could be levied on interstate sale. This meant that a sale under which a trader in State A got goods from a trader in State B could be taxed only by state A and not by State B if the goods were delivered in State A for consumption. If, however, goods were not delivered in a State for consumption, *e.g.*, when the goods were re-exported to another State, then the sale concerned could be taxed by the State in which property in the goods passed under it.[5]

This judicial view while avoiding multiple taxation of inter-State sales, nevertheless, created difficulties for the trading community. States resorted to the practice of taxing inter-State sales under which goods came to them for consumption, but placed the liability to pay the tax on out-of-the State dealers. This was done because of convenience of tax collection, but it was very inconvenient to a trader sending goods to several States as he could be taxed by all the States. He had, therefore, to acquaint himself with the taxing laws of all the States, produce his account books and file returns before all the taxing jurisdictions. Consequently, the matter was reagitated in *Bengal Immunity Co. v. State of Bihar*.[6]

A company in Calcutta, manufacturing drugs there, accepted orders there and then sent goods to Bihar. Bihar sought to make the company liable to its sales tax with respect to its sales to Bihar dealers, but the company objected to it. The Supreme Court overruling its view in the *United Motors* case now held that it was an interstate sale which could not be taxed by any State, not even by the State of consumption, because of the bar imposed by Art. 286 on taxation of a sale in the course of inter-State trade and commerce. Inter-State sale thus became immune from all State taxation. The Court adopted this view as it felt it to be necessary to ensure a free flow of trade and commerce and to protect the traders from undue harassment.

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3. AIR 1953 SC 252 : 1953 SCR 1069.
4. M.P. JAIN, JUSTICE BHAGWATI AND CONSTITUTIONAL LAW, 2 *JILI*, 31.
5. *Malayalam Plantations v. Dy. Commr, A.I.T.* AIR 1965 SC 161 : (1964) 7 SCC 391.
6. AIR 1955 SC 661 : (1955) 2 SCR 603.

A privileged position was thus created for inter-State trade and commerce at the cost of local trade because people could make purchases from other States and avoid local taxation. The financial position of the States was adversely affected. The matter was considered by the Taxation Enquiry Commission.

The recommendations of the Commission were as follows: while sales tax must continue to be a State source, the power and responsibility of the States must come to an end, and that of the Union should begin, when the sales tax of one State impinges administratively on the dealers and fiscally on the consumers of another State. Therefore, interstate sales tax should be the concern of the Union, but the revenue should devolve on the States.

Accordingly, to give effect to the recommendations of the Commission and to ensure that the interstate trade and commerce does not go absolutely tax-free and pays tax at least once, the Constitution (Sixth Amendment) Act, 1956, was enacted. The Amending Act made the following changes:

(1) It made taxation of interstate sales a Union matter by introducing entry 92A in List I.

(2) Entry 54 in List II, regarding sales taxation by the States was subjected to entry 92A of List I.[7]

(3) There was difficulty in identifying what was a sale 'outside' a State, or 'in the course of import and export', so as to debar a State from taxing any such sale. Therefore, Art. 286 was modified by addition of cl. (2) so as to enable Parliament to define these concepts.[8]

(4) The Sixth Amendment also amended Art. 269 by adding clause (g) to Art. 269(1) so as to assign the revenue arising from Central taxation of interstate sales to the States.[9]

(5) Cl. (3) was added to Art. 269 so as to authorise Parliament to formulate for determining when a sale or purchase of goods takes place in the course of interstate trade or commerce.[10]

The effect of the above-mentioned modifications is that the power to tax inter-State sale (or purchase) now belongs to the Centre and not to the States which are also debarred from taxing an 'outside' sale, [Art. 286(1)(a)], and what is an 'outside' sale or 'inter-State' sale are matters for Parliament to define under Arts. 286(2) and 269 (3) respectively.

(b) OUTSIDE SALE/INTER-STATE SALE

Accordingly, Parliament levied a tax on interstate sale or purchase by the Central Sales Tax Act, 1956. The object of the Act is to formulate principles for determining when a sale or purchase of goods takes place in the course of inter-State trade or commerce or outside a State.[11]

A sale or purchase of goods is deemed to take place in the course of inter-State trade or commerce if the sale or purchase—(*a*) occasions the movement of goods

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7. *Supra*, Sec. C.
8. See, *infra* Secs. (b) and (c) below.
9. See, *infra*, Sec. K(i).
10. For Art. 269(3), see, *infra*, Sec. K(i), under "Tax Sharing".
11. *Ashok Leyland Ltd v. State of TN* (2004) 3 SCC 1 : AIR 2004 SC 2836.

from one State to another;[12] or (*b*) is effected by a transfer of documents of title to the goods during their movement from one State to another.

The tax is levied by the Centre but the power to assess and collect the same has been delegated to the exporting State which retains the proceeds for its own use.[13] The purpose of the Central Act is thus not to collect revenue for the Centre but to regulate the rate, assessment and collection of tax on inter-State transactions of sale or purchase. By giving power of assessment to the exporting State, the difficulties created by the *United Motors case* are avoided as dealers exporting goods to other States can be assessed by their own State.

The Central Act also lays down the test to determine what is an 'outside' sale. It defines a sale inside a State and characterises the same as being outside all other States. Only an inside sale can be taxed by a State and not an outside sale. The test to ascertain an inside sale is the existence of goods within the State.[14] In this way, a sale or purchase the different ingredients of which occur in different States, is now located, by a fiction of law, in one State only—the State where the goods exist—and thus multiple taxation of such a sale is avoided.

By the Central Sales Tax (Amendment) Act, 2001 which came into force from 11-5-2002. Section 2(g) of the The Central Sales Tax Act, 1956 has been substituted by a new sub-section by which the definition of 'sale' has been widened to include the deemed sales defined by Article 366(29-A) of the Constitution. Consequently, Central sales tax may be levied on transactions involving transfer of property in the goods involved in the execution of works contract or transfer of the right to use the goods. Such transactions are also open to levy by two different States either as inter-State transactions or intra-State transactions.

The problem of multiple taxation of interstate sale or purchase does not arise in Australia as only the Centre and not the States can levy sales tax. In Canada, the Provinces can levy a sales tax payable by the ultimate consumer and the problem of multiple taxation does not arise.[15] The problem is rather acute in the U.S.A. The judiciary has made some attempts to avoid multiple taxation of inter-State commerce by invoking the commerce clause[16] and the due process clause[17]

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12. If delivery of the goods is given to the buyer and title passes to him within the State, subsequent export by him from the State does not make the sale inter-State as the sale was already completed before the movement of goods began.

Cement Marketing Co. v. State of Mysore, AIR 1963 SC 980 : (1963) 3 SCR 1; *STC v. State of Mysore*, AIR 1967 SC 585.

A sale is inter-State if there is a contract of sale preceding the movement of goods from one State to another and the movement is the result of covenant in the contract of sale, or is an incident of that contract; in order that a sale may be regarded as an inter-State sale, it is immaterial whether the property in the goods passes in one State or another.

Ballabhadas Hulaschand v. State of Orissa, AIR 1976 SC 1016 : (1976) 2 SCC 44; *Union of India v. K.G. Khosla & Co.*, AIR 1979 SC 1160 : (1972) 2 SCC 242; *Indian Oil Corpn. Ltd. v. Union of India*, AIR 1981 SC 446, 449 : 1980 Supp SCC 426. See also *State of Orissa v. K.B. Saha and Sons Industries (P) Ltd*., (2007) 9 SCC 97 : (2007) 6 SCALE 284.

13. *Infra*, Sec. K(i), under Tax-sharing.

14. Sec. 4 of the Central Sales Tax Act. Also ILI, *Inter-State Trade Barriers & Sales Tax Laws in India* (1962).

15. *Atlantic Smoke Shops Ltd. v. Conlon*, 1943 AC 550: See, M.P. Jain, *Taxing Powers in Canada*, 1955 *Vyavahara Nirnaya*, 125; *supra*.

16. This clause has been used to invalidate State taxation, as unreasonable impediment to inter-State commerce, when it subjects such commerce to the possibility of multiple burden.

of the Constitution, but the problem is too complicated to be solved only by the Judiciary. In India, however, a systematic attempt has been made to solve the problem as is clear from the above.

(c) EXPORTS AND IMPORTS

Foreign trade being of great importance to the national economy, it becomes necessary to protect it from indiscriminate taxation. Consequently, Art. 286(1)(*b*) bars a State from imposing a tax on sale or purchase of goods which takes place in the course of import of goods into, or export of goods out of, the territory of India.

Under Art. 286(2), Parliament may by law formulate the principles for determining when a sale or purchase of goods takes place in the course of import or export. Accordingly, under S. 5 of the Central Sales Tax Act, 1956, a sale or purchase is in the course of export or import if it occasions the export or import of goods out of, or into, India,[18] or the sale is effectuated by a transfer of documents of title to the goods,—(*i*) in case of export, after the goods cross, and (*ii*) in case of import, before the goods cross, the customs frontiers of India.

Purchases in a State by an exporter for the purpose of export, as well as sales in the State by an importer after the goods have crossed the customs barrier, are not within the exemption. But sale in the State by an exporter or importer by transfer of shipping documents while the goods are beyond the customs barrier are within the exemption. Thus, if an exporter A purchases goods from C, and then exports them to B, the sale between A and B which occasions the export is exempt from sales tax but not the one between A and C. Similarly, if an importer A purchases goods from a foreign supplier B, and then sells them to C, when the goods have crossed the customs barrier, the sale between A and B is exempt from tax but not that between A and C.

Whether a sale has occasioned the export or not is a question of fact to be decided in the context of each case. No single test can be laid down as decisive for determining the question. Generally speaking, "Where the export is the direct result of sale, the export being inextricably linked up with the sale so that the bond cannot be disassociated without a breach of the obligation arising by statute, contract or mutual understanding between the parties arising from the nature of the transaction, the sale is in the course of export."[19]

It is not within the scope of this book to discuss this matter in detail.[20] A few examples will suffice here:

(a) Pursuant to an agreement between the Governments of India and Pakistan, a company loaded coal in wagons consigned to East Pakistan. Bills were drawn in respect of the coal supplied in the name of the Deputy Coal Commissioner,

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17. This provision has been used to invalidate State attempts to tax an object outside the State borders.

18. *Travancore-Cochin v. Bombay Co. Ltd.*, AIR 1952 SC 366 : 1952 SCR 5552: *Travancore-Cochin v. SVC Factory*, AIR 1953 SC 333; *State of Mysore v. Mysore Spinning Co.*, AIR 1958 SC 1003 : (1975) 2 SCC 47; *East India Tobacco Co. v. State of Andhra Pradesh*, AIR 1962 SC 1733 : (1963) 1 SCR 747; *Mohd. Serazuddin v. State of Orissa*, AIR 1975 SC 1564.

19. *B.G.N. Plantations v. S.T.O.*, AIR 1964 SC 1752 : (1964) 7 SCR 706.

20. For details see, I.L.I., *Annual Survey of Indian Law*, under Sales Tax.

Calcutta, who was to realise the price of coal supplied to Pakistan. It was held that no sales tax could be levied as the sale of coal was in the course of export.[21]

(b) Sale of coffee by the Coffee Board to the registered exporters who were under an obligation to export the same was a sale for export but not in 'the course of export' and so was not exempt from sales taxation.[22]

(c) An importer supplied copper to the Central Government. For this purpose, he imported copper under import licences granted by the Government. The Supreme Court held that the movement of goods in the course of import was not occasioned by the contract of sale and it was not exempt from sales tax.[23]

(d) The State of Bihar levied a surcharge on sales tax payable by dealers whose gross turn-over in a year was 5 lac rupees or over. For this purpose, the turn-over of inter-State sale or purchase was also to be counted though the surcharge was payable only on the sales tax levied on intra-State sale and not on inter-State sale.

The Supreme Court held that the provision was not invalid under Art. 286. A State Legislature could for purposes of registration of a dealer and submission of returns of sales tax, include the transactions covered by Art. 286. The provision is not assailable so long as tax is levied on intra-state sales only.[24]

(d) GOODS OF SPECIAL IMPORTANCE

Article 286(3) lays down that a State law imposing a tax on the sale or purchase of goods declared by Parliament by law to be of special importance in inter-State trade or commerce, is to be subject to such restrictions and conditions in regard to tax so levied as Parliament may specify.[25]

A list of such goods is contained in S. 14 of the Central Sales Tax Act. The restrictions on taxation of sales of such goods as imposed in S. 15 of the Act are: a tax shall be levied only on the last sale or purchase inside the State; it shall be levied only at one stage, and at a maximum rate of 4% of the sale price of the commodity.

This clause was added to enable Parliament to restrict States' power to tax important raw materials. This was done on the recommendation of the Taxation Enquiry Commission which had suggested that some restrictions be placed to tax intra-state sales of raw materials produced therein, otherwise, the cost of the manufactured articles whether manufactured in the State producing the raw materials, or in another State, would increase. The manufactured goods are consumed mostly outside the State producing the raw materials, an increase in their cost due to the State taxation is of direct concern to the consumers in other States. Therefore, the Commission felt that it was necessary that such interstate sales be brought under the Central control.

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21. *N.A. Coal Co. v. C.I.T.*, AIR 1966 Cal. 629.
22. *Coffee Board v. Jt. C.T.O.*, AIR 1971 SC 870 : (1969) 3 SCC 349.
23. *Binani Bros. v. Union of India*, AIR 1974 SC 1510 : (1974) 1 SCC 459. But see, *K.G. Khosla & Co. v. Dy. Commr.*, AIR 1966 SC 1216 : 1966 (5) SCR 352; *Dy. Commr. v. Kotak & Co.*, AIR 1973 SC 2491 : (1974) 3 SCC 148.
24. *Hoechst Pharmaceuticals Ltd. v. State of Bihar*, AIR 1983 SC 1019, 1021, 1050 : (1983) 4 SCC 5.
25. *Satnam Overseas (Export) v. State of Haryana*, (2003) 1 SCC 561 : AIR 2003 SC 66.

(ii) INTER-GOVERNMENT TAX IMMUNITIES

As two tiers of governments having autonomous functions and taxing powers operate side by side in a federation, their operations are bound to cross and intersect at several points. A government at one level may exercise its powers in such a manner as to interfere with the working of the government at the other level. The doctrine of immunity of instrumentalities or inter-governmental immunity seeks to ensure that government at one level in a federation operates without unduly restricting the operations and instrumentalities of the government at the other level. Though the doctrine has general application, yet its most significant application is in the area of taxation. The doctrine of immunity restricts, to some extent, the taxing powers of the governments in a federation.[26]

(a) U.S.A.

The doctrine of immunity originated, as did the modern federalism, in the United States. It is not mentioned explicitly in the Constitution but is the result of judicial interpretation.

The doctrine rests on the postulate that in a federal polity, there ought to be inter governmental tax immunities between the Centre and the States. The U.S. Congress enacted a law incorporating a Bank and a State levied a tax on the Bank's operations. Holding the State law to be unconstitutional in *McCulloch v. Maryland*,[27] the Supreme Court expounded the doctrine laying down that the States had no power, by taxation or otherwise, to "retard, impede, burden or in any manner control, the operations of the constitutional law enacted by Congress to carry into execution the powers vested in the general government."

At this early stage in the constitutional development of the U.S.A, the purpose of the doctrine was to protect the Centre against the onslaughts on it by the States. The Centre was at the time in its formative stage and needed to be protected against hostile State action against it or its immunities. But, a few years later, applying the same principle on a reciprocal basis to protect the State instrumentalities from Central taxation, the Supreme Court held in *Collector v. Day*[28] that the Central Government could not tax the income of a State judicial official.

The doctrine of immunity was thus evolved to protect the autonomy of the National and the State Governments within their respective spheres from being encroached upon by each other. In the beginning, a very broad concept of immunity held sway. The judicial tendency was to carry the doctrine of exemption to rather extreme lengths so much so that not only the governmental instrumentalities as such, but even private persons in their dealings with a government in various capacities, such as, suppliers, contractors or creditors, were held immune from being taxed by the other government.[29] For example, a manufacturer of motorcycles was held not subject to the Federal excise tax on sales thereof with respect to sales to a municipality.[30]

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26. M.P. JAIN and S.N. JAIN, *Inter-governmental Tax Immunities in India*, 2 *JILI* 101. (1959-60).
27. 4 Wheat. 316 (1819).
28. 11 Wall. 113 (1870).
29. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TO-DAY, 39 (1978).
30. *Indian Motor Cycle Co. v. U.S.*, 283 U.S. 570 (1931).

Eventually, however, the courts realised that the doctrine in such broad terms benefited private individuals more than the governments, that it unduly restricted governments' taxing powers and that it was creating a tax-free privileged class of people. Consequently, the courts re-examined the doctrine and curtailed its broad canvas. Without going into details, the present position of the immunity doctrine in the U.S.A. may be summarized as follows:

A discriminatory tax by one government on the activities of the other is invalid. A federal non-discriminatory levy imposing a substantial burden on the States, or interfering with the performance of their 'essential' or 'sovereign' functions is also bad.

A State function is not immunized from Central taxation if the burden will be absorbed by private persons.[31] Thus, State employees can be subjected to Central income-tax.[32]

Business activities carried on by the States can also be subjected to Central taxes. The reason being that motives of profit may lead the States into many business enterprises and to immunize these from federal taxation would seriously cripple its revenue raising capacity.[33]

The immunity to the States has thus come to be confined to functions of a governmental character.

As regards the Central instrumentalities, the immunity granted in their favour from State taxation is somewhat broader. The Congress can always confer immunity on any of its instrumentalities from State taxation under the 'necessary and proper' clause.[34]

Even if the Congress is silent, States cannot tax activities or the agencies of the Centre,[35] but burdens which are not 'substantial' are not barred. The States can therefore, tax the salaries of the Central Government employees as it only means an indirect burden on the government.[36] Similarly, a tax on persons dealing with government, like contractors, is not bad even though they pass on the economic burden to the government.[37]

(b) CANADA

In Canada, the courts have refused to apply the American doctrine of immunity.[38] Thus, immunity has been refused to the income of officials of one government from being taxed by another government.[39] But discriminatory taxes by one government against another cannot be levied, and a Province cannot destroy

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31. *Wilmette Park District v. Campbell*, 338 U.S. 411.
32. *Helvering v. Gerhardt*, 304 U.S. 405; *Graves v. New York*, 306 US 466.
33. *South Carolina v. U.S.*, 199 U.S. 437; *New York v. U.S.*, 326 U.S. 572.
34. *Carson v. Roane Anderson Co.*, 342 U.S. 232; CORWIN, *op. cit*., 92, 277; *supra*, Ch. X, Sec. L.
35. *Cleveland v. U.S.*, 323 U.S. 329; *Mayo v. U.S.*, 319 U.S. 441., *United States v. Sales Tax Comm. of the State of Mississipi*, 421 U.S. 599 (1975).
36. *Graves v. New York*, 306 U.S. 466.
37. *Alabama v. King & Boozer*, 314 U.S. 1; *U.S . & Borg-Warner Corp. v. City of Detroit*, 355 U.S. 466 (1958); Grover, Tax Immunities on Federal Property, 1959 *Wisconsin* L.R. 167; Pierce, "Tax Immunity Should Not Mean Tax Inequity., *ibid*., 173; Van Cleve Jr., "State Rights and Federal Solvency", *Ibid.*, 190.
38. *Bank of Toronto v. Lambe*, 12 A.C. 575 (1878).
39. *Forbes v. Att. Gen. for Manitoba*, (1937) A.C. 260.

or sterilise the status and powers of a Dominion company, *e.g.*, a company incorporated under the Dominion law cannot be required to take out a licence from a Province to do business therein.[40]

Section 125 of the British North America Act expressly incorporates, to a limited extent, the principle of inter-governmental immunity insofar as it prohibits taxation of lands or property of one government by the other. This provision, it has been held, does not immunize Provincial imports of goods from Central customs duties.[41] A tax may also be levied on an owner of land leased to the Crown, or on a tenant of government land.[42] No tax can, however, be levied on a corporate body for occupying land when it is a servant or an agent to the Crown.[43]

(c) AUSTRALIA

To start with, the American doctrine of Immunity of Instrumentalities was held applicable in full vigour in Australia. Thus, a Central Government servant was held immune from State tax in respect of his salary.[44] State instrumentalities, like State railways, were held immune from Federal taxation.[45] This phase, however, came to an end with the *Engineers case* in 1920.[46]

The State of Western Australia claimed immunity from a Central law in respect of trading concerns owned and controlled by it. The High Court rejected the doctrine as it thought that otherwise the States could without limit encroach on the Commonwealth power simply by creating a governmental instrumentality. A pay-roll tax on all wages payable by an employer (including the States) was held valid in *Victoria v. Commonwealth.*[47] It, however, appears that the Commonwealth enjoys immunity from State legislation.[48] Discriminatory laws cannot, however, be made by one government against the other.[49]

Section 114 of the Commonwealth of Australia Act, 1900, restricts the Commonwealth and the States from levying taxes on the property of each other. This provision, it has been held, does not immunize State imports from the Central customs duty. The constitutional provision was held to apply to State property within the Commonwealth but the customs duty was levied on the act of import and not on property itself and so did not fall under Section 114.[50] The Commonwealth could not, as occupier of private property, become liable to a municipal tax laid on an occupier of land.[51]

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40. *John Deere Plow Co. v. Wharton,* (1915) A.C. 330; *Caron v. The King,* [1921] 2 AC 91; Bora Laskin, *Canadian Constitutional Law*, 742-747.
41. *Att. Gen. for Br. Col. v. Att. Gen. for Canada,* (1924) A.C. 222.
42. *Spooner Oil Ltd. & Spooner v. Turner Valley Gas Conservation Board,* (1933) S.C.R. 629; *City of Montreal v. Attorney-General for Canada,* (1923) AC 136.
43. *Regina Industries Ltd. v. Regina,* (1947) S.C.R . 345; Bora Laskin *op. cit.*, 742.
44. *D'Emden v. Pedder*, I CLR 19; *Deakin v. Webb*, 1 CLR 585; *Baxter v. Commissioner of Taxation*, 4 CLR 1087 (1906).
45. *The Railway Servants'* case. 4 CLR 488 (1906).
46. *Amalgamated Society of Engineers v. The Adelaide Steamship Co. Ltd.*, 28 CLR 129.
47. (1971) 122 C.L.R. 353.
48. *Commonwealth v. Cigamatic Pty. Ltd.*, (1962) 108 CLR 372.
49. *West v. Commissioner of Taxation*, 56 CLR 657; *Essendon Corporation v. Criterion Theatres Ltd.*, 74 CLR 1; *Melbourne Corporation v. The Commonwealth* (The State Banking case). 74 CLR 31.
50. *Att. Gen. of N.S.W. v. Collector of Customs*, 5 CLR 818.
51. *The Essendon Corp. case, supra*, footnote 49.

(d) POSITION IN INDIA

The scope of the Inter-governmental tax immunities in India is very restricted. Such immunities are dealt with mainly in Articles 285, 287, 288 and 289. The Indian Constitution does not import the broad and general doctrine of immunity of instrumentalities as understood in the United States beyond what can be derived from these constitutional provisions. Arts. 285 and 289 are discussed below. Arts. 287 and 288 have been discussed earlier.[52]

Article 285 : Exemption of Union Property from State Taxation

Article 285 debars a State from taxing Union property.[53] Art. 285(1) provides that the property of the Union shall be exempt from all taxes imposed by a State, or by any authority within the State, except to the extent Parliament may otherwise provide by law. It is clear from the expression "any authority within the State" used in Art. 285(1) that the Union property is exempt not only from "State taxation", but also from tax imposed by any other authority like a municipality. A municipality being a creature of the State cannot enjoy any larger power than the State itself.

Article 285 imposes a ban on State taxation of Central Government property, and there is no way in which a State Legislature can impose a tax on the property of the Central Government. Only Parliament can relax this ban to the extent it likes by making a law.

The word "property" has been used in Art. 285(1) in a "perfectly general sense" without any qualification and includes lands, buildings, chattels, shares, debts, everything that has a money value, and every kind of property—moveable, or immoveable, tangible or intangible.[54] Also, no distinction is made between the Union property devoted to commercial purposes or that used for governmental functions. Thus, the States cannot tax any property of the Union whatever the use it is being put to.

Article 298 which provides that the Central executive power to acquire, hold and dispose of property for any purpose falling outside the Parliamentary legislative sphere, shall be subject to the laws of a State, does not override Art. 285 because what is subjected to State laws is only the Central "executive power" and not "property".[55]

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52. *Supra*, Sec. D.

53. In the Constituent Assembly. a strong plea was made to subject Union property, especially the railway property, to taxation by the local government, on the ground that it renders such services to the property as sanitation, hygiene, conservancy, roads, lighting, fire-brigade, *etc*., and that the financial position of the local bodies was not happy.

Objection was, however, taken to the proposal on several grounds, *viz*: (1) theoretically, it was objectionable to conceive property of a person, who was not represented in an organisation, to be taxed by that organisation *ad infinitium*, (2) The taxing power of the local government depended on the statute passed by the State and it was not known what kind of taxes, and to what extent would a State empower the local government to levy.

The rigours of the exemption have been mitigated, however, by permitting the *status quo* to continue, and empowering Parliament to allow taxation of the Union property by passing a law to that effect, IX CAD, 1147-1160.

54. *Governor-General in Council v. Corporation of Calcutta*, AIR 1948 Cal. 116. Also, *The Corporation of Calcutta v. The Governor of St. Thomas School*, AIR 1949 FC 121.

55. *Infra*, Ch. XII; *supra*, Ch. III.

Parliament has enacted the Railways (Local Authorities Taxation) Act, 1941, under which the Central Government may by a notification make railway property liable to pay tax in aid of the funds of any local authority. This Act has been enacted in pursuance of Art. 285(1).[56] The proscription relates to tax and does not affect the liability of the Railways to pay fees levied by the local authorities for supply of water and maintaining sewerage systems.[57]

The immunity from State taxation applies to the Central Government and its departments, and not to incorporated companies in which that government has a controlling interest.[58] Now a days many public corporations and government companies have come into existence. The Government uses these bodies as tools to conduct commercial functions. Government has, generally speaking, controlling interest in such bodies. These bodies enjoy a sort of intermediate position between independence and complete accountability through a Minister to Parliament. Since each of these bodies is incorporated under the relevant law, such a body is regarded as a separate and distinct legal entity and not as a part of the government like a department. Thus, the government companies like the Hindustan Steel Private Ltd., and the Sindri Fertilizers and Chemicals Ltd., or public corporations, would not be immune from State taxation.

Even when the entire share capital of a company is subscribed by the Central Government, it does not mean that the company is owned by the government. Jurisprudentially a company incorporated under the Companies Act has a separate corporate personality of its own, distinct from that of the government, and is not identified with it. Therefore, it would not be immune from State or municipal taxes. A municipality can levy tax on lands and buildings owned by such a company.

Certain government companies incorporated under the Companies Act, the entire share capital of which was held/owned by the Government of India, claimed exemption from the State taxation under Art. 285(1). The Supreme Court rejected the plea holding that merely because the entire share capital is held or owned by the Government of India, it cannot be held that the companies themselves are owned by the Government of India. It was observed that the companies which are incorporated under the Companies Act have a corporate personality of their own, distinct from that of the Government of India and that the lands and buildings are vested in and owned by the companies whereas the Government of India only owns the share capital.[59]

Similar is the position of statutory corporations set up by or under statutes enacted by Parliament. Such a body is not regarded as a department of the Central Government. It has a separate personality. It is regarded as an instrumentality of

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56. *Union of India v. Sahibganj Municipality,* AIR 1973 SC 1185 : (1973) 1 SCC 676. Also see, *Union of India v. Purna Municipal Council,* AIR 1992 SC 1597 : (1992) 1 SCC 100.

57. *Union of India v. State of U.P.*, (2007) 11 SCC 324.

58. JAIN & JAIN. PRINCIPLES OF ADMIN. LAW, Ch. XXV (1986).

59. *Western Coalfields Ltd. v. Spl. Area Development Authority,* AIR 1982 SC 697, 705 : (1982) 1 SCC 125. Also see, *Electronics Corp. of India v. State of Andhra Pradesh*, AIR 1983 A.P. 239; *Electronics Corp. of India v. Secretary, Revenue Deptt., Govt. of A.P.*, AIR 1999 SC 1734 : (1999) 4 SCC 458; *Bhilai Steel Plant, Bhilai v. Special Area Development Authority, Bhilai,* AIR 1991 MP 332; *Mahanadi Coalfields Ltd. v. State of Orissa,* AIR 1994 Ori. 258.

the Central Government. The property owned by such bodies is not exempt from State taxation.[60]

The Board of Visakhapatnam Port Trust is constituted under the Major Port Trusts Act, 1963. It is a body corporate with perpetual succession. It can acquire, hold or dispose of property. The Central Government can supersede the Board. In that case, all properties vested in the Board would vest in the Central Government until a new board is reconstituted. It was argued that the board is not an absolute owner of the properties, only the management of the properties vest in the board and as the properties belong to the Central Government, and so they were exempt from State taxation under Art. 285. Rejecting the argument, the Court ruled that the properties vest in the Board and not in the Government. The board is not a department of the Government but is distinct from the Central Government and it cannot, therefore, claim exemption from State taxation under Art. 285.[61]

Similarly, it has been ruled that the International Airport Authority of India constituted by the International Airports Authority Act, 1971, is a distinct juristic entity having its own properties, fund and employees. It is a statutory corporation distinct from the Central Government. Accordingly, the property vested in the Authority are subject to municipal taxation. The Authority cannot invoke the immunity created by Art. 285(1) of the Constitution.[62]

The Union property has been immunized from all taxes "imposed by a State, or by any other authority within a State" if the following two requisites are fulfilled:

(1) the State tax is levied directly on property:[63] and

(2) such property is vested in the Central Government.

Under these principles there is no scope for considering the incidence of tax—whether falling on the government or the private individual—in adjudicating the validity of a State taxing statute. A State tax would not be invalid, even though it ultimately falls on the Central Government, if the above two conditions are not satisfied. Conversely, a tax would not be valid merely because its incidence falls on a private individual. What is material is to ascertain the object "on" which the tax is levied irrespective of its incidence and, for this purpose, the charging section in the taxing statute is to be looked into.[64]

A municipality or a municipal corporation is an 'authority within a State'. Therefore, the municipality is not competent to levy any taxes upon the proper-

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60. *Food Corporation of India v. Municipal Committee,* AIR 1999 SC 2573 : (1999) 6 SCC 74; *Central Warehousing Corp. v. State of Rajasthan,* AIR 1995 Raj 180; *Municipal Commissioner of Dum Dum Municipality v. Indian Tourism Development Corp.,* (1995) 5 SCC 251 : (1995) 5 JT 610; *Hotel Corporation of India v. State of J&K,* AIR 2001 J&K 36.

61. *Board of Trustees for the Visakhapatnam Port Trust v. State of Andhra Pradesh,* (1999) 6 SCC 78 : AIR 1999 SC 2532. Also see, *Paradip Port Trust v. Notified Area Council, Paradip,* AIR 1990 Ori. 145.

62. *International Airport Authority v. Municipal Corp. of Delhi,* AIR 1991 Del. 302; *Municipal Commr. of Dum Dum Municipality v. India Tourism Development Corpn.,* (1995) 5 CC 251 : (1995) 5 JT 610.
Similar is the position of the *Indian Tourism Development Corporation.*

63. *Director, Maintenance, Dept. of Telecom., Bangalore v. State of Karnataka,* AIR 1998 Kant 335.

64. *Corp. of Calcutta v. Governor of St. Thomas School, supra,* footnote 54.

ties of the Union of India. The Calcutta Maidan belonging to the Government of India was leased to the petitioners. A tax imposed by the Calcutta Corporation was held bad because the tax was imposed on the property of the owner, *i.e.*; the Government of India, and not on the interest of the occupier, though part of the tax was realised from him.[65]

No tax can be levied by a municipality on the property belonging to the Central Government even if it is being used for residential or commercial purposes. If the property belongs to the Union, no tax could be levied thereon by the State or municipality irrespective of its use. Art. 285 does not provide for the concept of use.[66]

A State tax can be levied on the interest of the lessee of Central Government property. A municipality cannot levy octroi on goods imported by railway for consumption by it within the municipal limits.[67] A State cannot levy road tax on the vehicles owned by the Central Government, or the railway which is only a department of the Central Government.[68]

But the Karnataka High Court has differed from this approach. The High Court has ruled that the levy of tax on motor vehicles belonging to the Central Government is not invalid as the tax is not levied directly on property but indirectly on the use of the vehicles. The High Court has emphasized that Art. 285 bars State tax levied directly on property of the Central Government. Thus, Art. 285 does not bar levy of excise duty as the taxable event in this case is not goods but manufacture thereof. A State can levy sales tax on goods sold to the Central Government as the taxable event in this case is not goods but the sale thereof.[69] This view can be said to have been affirmed by the Supreme Court[70] which has held that the States can levy sales tax on the supply of materials by the Union of India to its contractors.

Under Art. 285(1), it is open to Parliament to enact a law to abrogate the exemption of its property from State taxation. No such law has however been enacted so far. However, the Centre has issued a circular that service charges in respect of its properties shall be paid by it to local authorities and that it shall be treated not as a tax but as compensation. This circular has been held to be legally enforceable.[71] It is only a State tax on Union property which is bad. A State may levy a tax on the employees of the Central Government.

Under Art. 285 (2), *status quo* has, however, been maintained as regards taxes levied on the Central property immediately prior to the commencement of the Constitution by any authority within the State until Parliament provides otherwise. Art. 285(2) enacts that until Parliament by law provides otherwise, Art. 285(1) would prevent any authority within a State from levying any tax on any Union property to which such property was immediately before the commence-

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65. *Turf Properties v. Corp. of Calcutta*, AIR 1957 Cal 431.
66. *Union of India v. City Municipal Council,* AIR 2000 Kant 104.
67. *Union of India v. Bhusaval Municipal Council*, AIR 1982 Bom 512
68. *Union of India v. State of Punjab,* AIR 1990 P&H 183; *Union of India v. State of Rajasthan,* AIR 1991 Raj 96.
69. *Director, Maintenance, Dept. of Telecom, Bangalore v. State of Karnataka,* AIR 1998 Kant. 335.
70. *Karya Palak Engineer, CPWF v. Rajasthan Taxation Board,* (2004) 7 SCC 195 : AIR 2004 SC 4499.
71. *Food Corporation of India v. Alleppey Municipality,* AIR 1996 Ker. 241.

ment of this Constitution liable so long that tax continues to be levied in that State. Art. 285(2) does not permit levy of any tax by a State; it benefits an 'authority' within the State, such as, a municipal body.

The authority can reap the benefit of Art. 285(2) if two conditions are fulfilled, *viz*.:

(1) That it is 'that tax' which is being continued to be levied and no other;

(2) That the local authority in 'that State' is claiming to continue the levy of the tax.

"In other words, the nature, type and the property on which the tax was being levied prior to the commencement of the Constitution must be the same as also the local authority must be the local authority of the same State to which it belonged before the commencement of the Constitution".

Thus, according to Art. 285(2), the local authority in the same State should continue to levy the tax. When the local authority in one State was levying the tax on railway property before the Constitution, but that authority was then transferred to another State after the Constitution, it could not claim the benefit of Art. 285(2).[72]

Some railway property had been subject to house tax and water tax long before the commencement of the Constitution. In March, 1953, as a result of a fresh assessment, the amount of the tax was enhanced. Holding the enhancement to be valid, the Supreme Court stated that a variation in the quantum of tax based on an increase in the value of the property would be covered by the constitutional provision.[73]

Certain properties belonging to the Telephone Corporation, a private body, were being taxed by the Calcutta Corporation. In 1943, the Corporation was taken over by the Central Government, but the tax on properties continued to be paid. In 1951, the Union disputed its liability to pay the tax on the ground that the assessment of the tax on its properties during 1943-51 was illegal. It was held that even if the pre-Constitution assessment was unlawful, the Union was, nevertheless, liable to pay the tax after the commencement of the Constitution, for the tax was being paid in fact immediately before the Constitution, commenced.[74]

It is open to Parliament to enact a law and abrogate the right of the local authority to continue to levy the tax under Art. 285(2).

Article 289: Property and Income of the States and the Union Taxing Powers:

Article 289(1) limits the taxing power of the Union by exempting from its purview State property and income. Art. 289(1) declares that the "property and income of a State shall be exempt from Union Taxation". Thus, ordinarily, the income derived by a State both from governmental and non-governmental or commercial activities would be immune from Central taxation. The term Central taxation means all taxes which the Centre is empowered to impose.

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72. *Union of India v. Bellary Municipality*, AIR 1978 SC 1803 : (1979) 2 SCC 1. Also see, *Union of India v. State of Punjab*, AIR 1990 P&H 183.
73. *Union of India v. Municipal Board, Lucknow*, AIR 1957 All 452.
74. *Corp. of Calcutta v. Union of India*, AIR 1957 Cal. 548. Also *see*, *Union of India v. Municipal Commr., Bhagalpur*, AIR 1959 Pat. 216.

However, under Art. 289(2), the business operations of a State, State property used or occupied for trade or business, or income accruing therefrom, may be taxed if Parliament so provides.[75]

The scheme of Art. 289 is that, ordinarily, the income derived by a State both from governmental or non-governmental or commercial activities is immune from Union taxation, provided the income is the income of the State. This general proposition flows from Art. 289(1), Then, Art. 289(2) provides an exception to Art. 289(1). The Centre is authorised to impose a tax in respect of the income derived by a State government from trade or business carried on by it, or on its behalf. This can be done by Parliament making a law.

In the U.S.A., great difficulty was felt in drawing a line between governmental and commercial functions of the State Governments.[76] Therefore, in India, instead of leaving this matter to the courts, power has been given to Parliament to draw such a distinction by legislation. Parliament can specify the trading activities of the State Governments making them liable to Union taxation.

The Supreme Court in *New Delhi Municipal Committee v. State of Punjab*[77] has taken the view that under Art. 289(2), removal of exemption is not automatic; it comes about only when the Parliament makes a law imposing taxes in respect of any trade or business carried on by a State Government and all activities connected therewith, or any property used or occupied for the purposes of such business as also the income derived therefrom. If any property—whether movable or immovable—is used or occupied for the purpose of any such trade or business, it can be denied exemption provided by Art. 289(1), but this denial can be only by way of a law made by Parliament.

The Court has also ruled that unless an activity in the nature of trade and business is carried on with a profit motive, it would not be a trade or business contemplated by Art. 289(2). Only where a trade or business is carried on with a profit motive, or any property is used or occupied for the purpose of carrying on such trade or business, that Art. 289(2) would be attracted.

Under Art. 289(3), Parliament has power to declare by law any class of trade or business as incidental to the ordinary functions of government, and it would then be immune from Union taxation. Art. 289(3) means that whatever trade or business is declared to be incidental to the ordinary functions of government, would cease to be governed by Art. 289(2) and would then be exempt from Union Taxation.

Article 289(3) is an exception to Art. 289(2). When a trade or business is declared by Parliament to be incidental to the ordinary governmental functions, it

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75. In the Constituent Assembly, objection was taken to the Centre taxing a State enterprise on the ground that it would place a heavy financial burden on the States which might retard country's industrialisation. But several arguments were adduced in favour of Central taxation, *e.g.*, Centre had heavy responsibilities and so it should be able to raise sufficient revenue; States might start a number of industries which though not financially successful might yet kill private enterprise: Parliament could exempt any specific State industry from taxation and so the arrangement was flexible, etc.

On behalf of the Centre, assurances were given that it would not tax any State-run public utility industry and that it would tax equally a State-owned industry and a similar Central industry, if any: *IX CAD*, 1161-71.

76. See, *New Yark v. United States*, 326 US 572 (1946).

77. AIR 1997 SC 2847 at 2900, 2901 : (1997) 7 SCC 339.

would cease to be governed by Art. 289(2) and it would then be exempt from Union Taxation. This provision derives support from the principles developed in America according to which State commercial operations have been held not to be immune from Central taxation.[78] In the U.S.A., however, it has proved difficult to determine which function is incidental to the ordinary functions of government as it has to be determined judicially. In India, this difficulty has been got over by giving to Parliament the power to declare any trade or business to be incidental to the ordinary functions of government.

The principles underlying Art. 285(1) also apply *mutatis mutandis* to the taxation of State property by the Union, subject to one difference, *viz.*, whereas Union property devoted to commercial functions is exempt from State taxation, such State property is not so exempt from Union taxation *ipso facto*, and Parliament can pass a law to impose tax on such property.

The Supreme Court has held by a majority, in an advisory opinion, that the Centre can levy customs duty on goods imported or exported, or an excise duty on goods produced or manufactured, by a State Government irrespective of whether or not it is used for purposes of trade or business.[79] The exemption under Art. 289 in favour of the State property from Union taxation does not extend to the levy of customs duty on State imports and exports. Similarly, the exemption does not extend to levy of excise duty on production of goods by the States.

The Supreme Court has opined that to exempt the exports or imports made by the States from customs duty would seriously impair the power of Parliament to regulate foreign trade by using its taxing powers. Similary, exempting manufacture or production of goods by States from Central taxation would adversely affect the Central power to regulate interstate commerce. Art. 289(1), the Court has held, bars Central taxes *directly* on property or income of the States and not those taxes which may *indirectly* affect, or are *in respect of*, income or property. The customs duty is a tax on 'import or export', and excise on 'production or manufacture' and none of these taxes is levied on property or income as such, and, therefore, none of these taxes fall within the purview of Art. 289(1).[80]

The majority opinion is in line with the views held in other federations.[81] Another factor which the Court has invoked in favour of its view is that as the Centre is under an obligation to share its revenue with the States,[82] its revenue raising capacity should not be impaired by interpreting the exemption in favour of the States broadly.

The Centre can impose a tax on income or property of State-owned companies or corporations because they have an entity separate from its shareholders and, accordingly, their property and income cannot be regarded as that of the concerned State. Exemption from Central taxation under Art. 289(1) extends only to

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78. *Supra.*
79. The issue was decided by the Bench of the Supreme Court by a majority of 5 : 4.
80. *In re Sea Customs Act*, S. 20(2), AIR 1963 SC 1760. This was a reference made by the President to the Supreme Court under Art. 143, see, *supra*, Ch. IV, Sec. C. Also see, *Director, Maintenance Deptt. of Telecom, Bangalore v. State of Karnataka*, AIR 1998 Kant. 335.
81. *Supra.*
82. *Infra*, Sec. K(i).

the States and not to their instrumentalities. An instrumentality of a State is a different entity from the State itself.[83]

Further, companies are normally incorporated to carry on commercial functions and, under Art. 289(2), Parliament has power to tax the commercial undertakings of the States. It may be realized that granting tax exemption to State enterprises not only places them in a favoured position *vis-a-vis* private enterprise which is heavily taxed, but also adversely affects the tax raising capacity of the Centre.

In the case noted below,[84] the Supreme Court has ruled that income of a corporation is not the income of the State since the former is an independent legal entity and, hence, Art. 289(1) does not apply. In this case, the Andhra Pradesh State Road Transport Corporation was constituted under the Road Transport Corporations Act, 1950. Prior to the Act, road transport was a department of the Andhra Pradesh Government and was being run by it and, thus, the income from road transport was exempt from tax as income of the State Government. But, after the formation of the corporation, income-tax was levied on its income.

The corporation argued against the levy on the ground that under the Act, the net income of the corporation was to go to the State of Andhra Pradesh, and, therefore the income of the corporation was really the income of the State Government. The Supreme Court rejected this contention holding that the corporation has a personality of its own as it has a separate fund of its own; it can borrow funds from any source, can enter into contracts and own property. The Court held that the fact that the corporation is owned by the State Government, or that in all material particulars, the corporation's activities are controlled by the State, are of no consequence.[85]

The Supreme Court has given a broad interpretation to the term "Union taxation" in Art. 289(1). It embraces all taxes leviable by Parliament including levy of taxes under Art. 246(4) in the Union Territories. In *New Delhi Municipal Committee v. State of Punjab*,[86] the question was raised whether the property of the States situated in the Union Territory of Delhi would be exempt from taxation by the New Delhi Municipality because of Art. 289(1). A nine Judges Bench of the Supreme Court has ruled in the affirmative. The term "Union Taxation" in Art. 289(1) has been held to include taxation by the New Delhi Municipality. The Court has argued that so far as a Union Territory is concerned, Parliament is the only law-making body,[87] or a legislature created by it. There is distribution of legislative powers between Parliament and the State Legislatures but there is no such distribution with respect to the Union Territories. Therefore, the phrase "Union Taxation" in Art. 289(1) encompasses municipal taxes levied by municipalities in the Union Territories.

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83. *Andhra Pradesh State Civil Supplies Corpn. Ltd. v. I.T. Commr., Hyd.*, 1983 Tax L.R. 1564. For the concept of an instrumentality, see., *infra*, Ch. XX, Sec. C.

84. *A.P. State R.T. Corp. v. I.T.O.*, AIR 1964 SC 1486 : (1964) 7 SCR 17.
Also, M.P. JAIN AND S.N. JAIN, Inter-governmental Tax Immunities in India, 2 *JILI*, 101 (1960).

85. See *Adityapur Industrial Development Authority v. Union of India*, (2006) 5 SCC 100 : AIR 2006 SC 2375.

86. AIR 1997 SC 2847 at 2892-2894 : (1997) 7 SCC 339.

87. For "Union Territories", see, *supra*, Ch. IX.

The Court has ruled that the term "Union Taxation" "can and should be given the widest amplitude, allowing it to encompass all taxes that are levied by the authority of Parliamentary laws". The Court refused to limit it to those matters falling within Arts. 246(1). The Court saw "no reason why such a limiting principle must be read into the definition of the phrase 'Union Taxation'". Therefore, levy of taxes under Art. 246(4) ought to be covered by the term "Union Taxation". This means that the State property situated in the Union Territories would be exempt from taxes on property leviable by the Union or municipalities therein created by the Centre.

The Supreme Court has refused to apply the general doctrine of immunity of instrumentalities beyond the area laid down in Articles 285, 287, 288, 289. The most significant pronouncement on the subject is *State of West Bengal v. Union of India*.[88] The State of West Bengal challenged the competence of Parliament to enact S. 47 of the Coal Bearing Areas (Acquisition and Development) Act, 1957, which sought to empower the Centre to acquire State-owned coal bearing lands and rights over them. The main argument invoked against the Act was that the States had within their allotted field "full attributes of sovereignty" and, therefore, "exercise of authority by the Union agencies" which "trenches upon that sovereignty is void."

The Court held the Act to be valid by a majority. Referring to the historical processes, the Court pointed out that during the British period, India's administration was highly centralised and the Provinces were never treated as sovereign. Under the present Constitution, sovereignty vests in the people of India. Examining the structure of the Constitution, the Court declared that Parliament was not incompetent, on account of "some assumption as to absolute sovereignty of the States", to acquire State property by legislation for government purposes.

The Court also refused to apply the general doctrine of immunity of instrumentalities.[89] The Supreme Court specifically rejected the American doctrine of immunity of instrumentalities. SINHA, C.J., speaking for the majority ruled that the Privy Council had rejected the doctrine and held it inapplicable to the Canadian and Australian constitutions. The doctrine was equally inapplicable to India. Referring to entries in List I (22, 23, 24, 26, 27, 30, 32, 52, 53, 54, 56, 57), under which Parliament can directly legislate in respect of property in the States, the Court held that to deny to Parliament, while granting the extensive powers of legislation, power to legislate in respect of property situated within a State, and even of the State, would render the constitutional machinery practically unworkable. In the ultimate analysis, the matter is of legislative competence. The power under entry 42, List III,[90] which may be exercised by Parliament in respect of all property—private as well as State-owned and is meant for the effectuation of the entries in the Central List, is not incapable of being exercised in respect of property of the States, as there is no constitutional interdict against it. Power to legislate for the regulation and development of mines and minerals under the control of the Union (entry 54 List I)[91] would, by necessary implication, include the power to acquire mines and minerals.

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88. AIR 1963 SC 1241 : 1964 (1) SCR 371.
89. *Supra.*
90. *Supra.*
91. *Supra*, Ch. X, Sec. D.

SUBBA RAO, J., however, dissented from the majority view and enunciated a broader doctrine of immunity. He insisted that "the Indian Constitution accepts the federal concept and distributes the sovereign powers between the co-ordinate constitutional entities, namely, the Union and the States". "This concept implies that one cannot encroach upon the governmental functions or instrumentalities of the other, unless the Constitution expressly provides for such interference", and, in the instant case, "there is no provision which enables one unit to take away the property of another except by agreement". But this argument did not prevail with the majority.

This is a momentous pronouncement by the Supreme Court and strengthens the viability of the Indian federalism. The doctrine of State rights stands discredited even in the older federations where the States had enjoyed a much greater autonomy before the creation of the federation than the State rights in India. The State rights doctrine, if accepted, would have weakened the Central Government as the States in future could have claimed more and more rights and immunities as against the Central Government and, thus, weaken the constitutional fabric.

The extension of the doctrine of immunity of instrumentalities beyond what is envisaged by the Constitution was rightly rejected by the Court as the doctrine is running into heavy weather even in the country of its origin and has been rejected in other countries like Canada and Australia.[92] The Indian Constitution seeks to provide a federal structure with a strong bias towards the Centre.[93] This position should not be corroded by any process—whether of judicial interpretation or otherwise.

K. EXPEDIENTS TO CREATE FINANCIAL EQUILIBRIUM AT THE STATE LEVEL

The scheme of allocation of Centre-State taxing powers, though designed with many considerations in view—convenience, simplicity, economy and uniformity, yet fails to create an equilibrium between responsibilities and resources at the State level. Most of the expansive and lucrative sources of taxation lie with the Centre, *e.g.*, income-tax, corporation tax, customs and excises. Moreover, the Centre has the whole country to tap and can tax the taxing capacity existing anywhere in India. On the other hand, while the fiscal needs of the States are huge, because of their responsibility to provide for development, welfare and social service activities like education, housing, health, agriculture, etc., for which there is an insatiable demand in the country, their revenue raising capacity is cabined due to many reasons, some of which are:

(1) the economic conditions prevailing within their boundaries;

(2) the fact that they have to share their taxing powers with the local governments; and,

(3) by their taxing powers being somewhat inelastic.

Land revenue constitutes an important tax for the States and gives sizeable revenue to them at present, but its capacity for further exploitation is limited be-

92. *Supra*.
93. See, *infra*, Ch. XIV, Sec. H.

cause a large number of holdings are small and uneconomic. Also, if agricultural income-tax is to be used increasingly, the land revenue would have to go down in relative importance. Agricultural income-tax would be meaningful only if a State has large agricultural income which means a high level of agriculture, and not all States can raise appreciable revenue from this source.

Further, political and populist considerations also deter the States from fully utilising the taxable capacity of the agricultural economy. Excises on alcoholic liquors could give to the States sizeable revenue but because of the policy of prohibition this is not being exploited by them fully as a source of revenue. The States, are, therefore, left with only sales tax as the only flexible source of revenue which can be cultivated by them in depth.

The framers of the Constitution had themselves realised that the States' taxing powers would not enable them to raise adequate revenue to meet their needs. They also appreciated that in spite of its expansive and expensive responsibilities, Centre's taxing powers were flexible and it could rise sizeable revenue, and after meeting its own requirements could spare some funds for the States.[1] The framers, therefore, sought to augment the resources of the States and create an equivalence between their functions and resources by making elaborate provisions in the Constitution for transfer of a part of the Central Funds to the States. Two expedients, tax-sharing and grants-in-aid, have been devised for this purpose.

Before discussing the Indian scene, it may be worthwhile to have some idea of the developments in other Federations in area of fiscal relationship between the Centre and the regional governments.

In the U.S.A., the Constitution makes no provision for transfer of revenue from the Centre to the States. Nevertheless, under the force of circumstances, a pervasive system of conditional grants has arisen under which the Centre financially supports many State activities.[2]

In Canada, the system of grants to the Provinces is in vogue and with the centralisation of income-tax during the war, a kind of tax-sharing has also come to be adopted.

In Australia, Central revenue goes to the States in several ways, *e.g.*, through conditional grants, sharing of income-tax, fiscal need grants through the Commonwealth Grants Commission, and loans.

These three Constitutions were drafted in the *laissez faire* era. Gradually *laissez faire* gave way to the concept of social welfare which generated public demand for social services and this led to the emergence of the system of Central grants to the States to enable them to meet these demands.

There is another value which is now sought to be promoted to some extent in each federation, *viz.*, removal of regional disparities arising out of differences in economic and natural resources. While the taxing capacity of the people in a poor State is low, their needs are rather high and, therefore, to leave such a State to its own resources to provide services to the people would be to condemn the people

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1. REPORT OF THE EXPERT COMMITTEE ON FINANCIAL PROVISIONS, *VII CAD*, 59. Also, IX *CAD*, 203-343.

2. JAIN, Federal Grants-in-aid in the U.S.A., *supra*, note 53, on 823.

to remain in a backward situation. To avoid this, the Central Government seeks to transfer funds to the States in such a way that even a poor State is able to provide social services to its own people at a level comparable with the rich States. Not to do so would generate disaffection among the various States which may generate tensions in the country. While this process of equalization is at work in some way in all federations, it has been taken farthest in Australia through the operation of the Commonwealth Grants Commission[3] and giving of grants to the States as their share of the income-tax revenue.

(i) TAX-SHARING

The Indian Constitution provides for a scheme of Centre-State tax sharing on a big scale. This envisages that the Centre shares some of the taxes levied and collected by it with the States. All revenue accruing to the States from their taxes is used by them, but all taxes leviable by the Centre are not meant for its exclusive use. The Centre is required to share some of its taxes with the States.

The powers of taxation assigned to the Union are based mostly on considerations of convenience of imposition and collection and not with a view to allocate them solely to the Union. The constitution-framers did not intend that all taxes assigned to the Centre should be solely spent by the Centre for its own purposes. They desired that a part of the Central revenue arising from taxation be used for subsidising the State activities.

(a) SCHEME EXISTING BEFORE 2000[4]

From the point of view of tax-sharing, all Central taxes were arranged in the following five categories.

1. Taxes levied and collected by the Centre, and used by it as a whole.

These taxes were: customs, corporation tax, capital gains tax, surcharges on taxes mentioned in categories (2) and (4) below [Art. 271], and residuary taxes.[5]

2. Taxes levied and collected by the Centre, but the net proceeds[6] of which had to be *compulsorily* shared by it with the States. [Art. 270].

The tax on non-agricultural income (excluding corporation tax) fell in this category. The Centre had to hand over a part of the revenue accruing to it from the levy of income tax to the States.

Such percentage, as 'may be prescribed', of the net proceeds of this tax in a financial year, except the proceeds attributable to the Union Territories, or to taxes payable in respect of Union emoluments,[7] was to be distributed among the States in such manner as was to be 'prescribed'. This divisible pool of the income-tax did not even form part of the Consolidated Fund of India.[8]

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3. Also see, *infra*, Sec. L.
4. For the new scheme of tax-sharing after the year 2000, see, *infra*, (b).
5. *Supra*, Secs. C and G.
6. The term 'net proceeds' means the proceeds of a tax minus the cost of collection. The net proceeds of a tax are to be ascertained and certified by the Comptroller and Auditor-General of India, whose certificate is final: Art. 279.
7. 'Union emoluments' include all emoluments and pensions payable out of the Consolidated Fund of India on which income-tax is charged: Art. 270(4)(*c*).
8. *Supra*, Ch. II, Sec. J(ii)(g).

The word 'prescribed' here meant prescribed by the President by order after considering the recommendations of the Finance Commission.[9] Parliament need not pass a law for the purpose. This technique had been adopted as it was feared that there might be a good deal of wrangling in Parliament if the matter were to be discussed there and there might be undue political pressures for favouring one State at the cost of another State, and the big States having a large number of representatives in Parliament might combine to do injustice to the smaller States.[10]

Under Art. 271, the Centre could levy a surcharge on income-tax on non-agricultural income for its exclusive use without sharing it with the States [see category I above].

3. Taxes levied and collected by the Centre but a portion of the net proceeds of which '*may* be assigned' by it to the States by its own law [Art. 272].

The Central excises (other than on medicinal and toilet preparations) fell in this category. Unlike the income-tax which *must* be shared, Centre-State tax-sharing in this area was not compulsory but *optional* for the Centre. The revenue accruing from the Central excises formed part of the Consolidated Fund of India out of which payments were to be made to the States when Parliament passed a law for this purpose.

4. Taxes levied and collected by the Centre, but the whole proceeds of which belonged to the States [Art. 269(1)].

The taxes falling in this category were:

(*a*) duties of succession on property other than agricultural land;

(*b*) estate duty in respect of non-agricultural property;

(*c*) terminal taxes on goods or passengers carried by rail, sea or air;

(*d*) taxes on railway fares and freights;

(*e*) taxes other than stamp duties on transactions in stock exchanges and futures markets;

(*f*) taxes on the sale or purchase of newspapers and on advertisements published therein;

(*g*) taxes on the sale or purchase of goods other than newspapers in the course of inter-State trade or commerce [see entry 92A List I];

(*h*) taxes on the consignment of goods (whether the consignment into the person making it or to any other person), where it takes place in the course of inter-State trade or commerce, (entry 92B, List I).

The net proceeds in a financial year of these taxes, except the proceeds attributable to the Union Territories, did not form part of the Consolidated Fund of India, but were distributed among the States in accordance with the principles formulated by law by Parliament [Art. 269(2)]. No part of the revenue arising from the taxes mentioned in this category was to be kept by the Centre.

As already noted above, the Centre could levy a surcharge on any of these taxes for its own purposes, which was not divisible among the States [Art. 271].

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9. For Finance Commission, see, *infra*, Sec. L.

10. *IX CAD* 212.

With reference to (g) and (h) above, Art. 269(3) of the Constitution authorised Parliament by law to formulate principles for determining when a sale or purchase of, or consignment of, goods took place in the course of inter-State trade or commerce. In exercise of this power, Parliament enacted s. 3. of the Central Sales Tax Act, 1956, laying down the principles todetermine when a sale or purchase of goods took place in the course of inter-State trade or commerce so as to be liable to the Central sales tax imposed under Art. 269(1)(g).[11]

It had been held that a State possessed no competence to impose a tax on mere despatch of goods by a manufacturer to his own branch outside the State. It was held that this could not be regarded as a sale or disposal of goods and, therefore, it would not fall within the ambit of entry 54 of List II. Such a tax would fall within the Parliamentary field of legislation in the residuary field by virtue of Art. 248 and the residuary entry No. 97 of List I. Now, under Art. 269(1)(h) along with entry 92B, such a tax fell exclusively within Parliamentary field and a State Legislature could not intrude into the Parliamentary field.[12]

5. Taxes levied by the Centre but collected and utilised by the States [Art. 268].

Taxes like stamp duties and duties of excise on medicinal and toilet preparations fall in this category. Proceeds from these duties, except those collected by the Government of India for the Union Territories, do not form part of the Consolidated Fund. The States themselves collect the duties, though under a Central law, and appropriate them for their own purposes.

These taxes have been placed within the Central sphere merely for legislative purposes so that there may be uniformity in the rates of taxation throughout the country, and also that the Centre may co-ordinate these excises with its own wider scheme of excises on other commodities.

Under the Central Sales Tax Act, the tax on the sales in the course of inter-State trade and commerce is levied by the Centre but is assessed, collected and used by the exporting State.

(b) COMMENTS

The above scheme appreciably augmented the tax resources of the States and correspondingly curtailed those of the Centre. The exclusive Central tax resources were:

(*a*) taxes levied, collected and appropriated by the Centre (category I above); and

(*b*) taxes levied and collected by the Centre but shared with the States either compulsorily or voluntarily (categories 2 and 3 above).

However, the Centre had power to levy surcharges on some of the taxes (see 2 and 4 above) for its own purposes and not share them with the States although the basic tax revenue had to be shared. During an emergency, the Centre can further augment its tax resources.[13]

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11. See, *supra*, Sec. J(i)(b).

12. *Goodyear India Ltd. v. State of Haryana*, AIR 1990 SC 781 : (1990) 2 SCC 71.
Art. 269(1)(h) and entry 92B have been added by the Constitution (Forty-Sixth Amendment) Act, 1982. For the Amendment, see, Ch. XLII, *infra.*

13. *Infra*, Ch. XIII.

The State tax resources were:

(*a*) taxes levied and collected by them (all taxes enumerated in List II);

(*b*) taxes levied by the Centre but collected by them (category 5 above);

(*c*) taxes levied and collected by the Centre, the whole of the proceeds of which belonged to the States (category 4 above);

(*d*) taxes levied and collected by the Centre but voluntarily shared with them (category 3 above) and

(*e*) taxes levied and collected by the Centre but compulsorily shared by it with the States (category 2 above).

The Constitution had devised a flexible and elaborate scheme of tax-sharing.

Article 274 lays down that none of the following Bills or amendments is to be introduced or moved in a House of Parliament except on the President's recommendation:

(1) a Bill imposing or varying a tax in which the States are interested, *i.e.*, a tax from the proceeds of which the States get a share;

(2) a Bill varying the meaning of the expression 'agricultural income' as defined for purposes of the Indian income tax law;[14]

(3) a Bill affecting the principles on which, under the provisions of the Constitution (Arts. 268-273), moneys may be distributable to the States; and

(4) a Bill imposing a surcharge on a tax for Central purposes.

As noted above, Parliament has power, under Art. 271, to levy a surcharge on taxes mentioned in Arts. 269 and 270. Revenues arising from surcharges are not shared by the States. The effect of Art. 274, therefore, is that a Bill of the type mentioned therein can be moved only by or with the consent of the Central Government. The advantage of this is that when once an allocation of funds has been made to the States, it cannot be disturbed by a private member bringing in a Bill for the purpose.

NEW SCHEME OF TAX-SHARING AFTER 2000

There was a major reconstruction of the scheme of tax-sharing between the Centre and the States in the year 2000.

Till the year 2000, only a few Central taxes were shareable between the Centre and the States. The Tenth Finance Commission suggested that the present system be replaced by a new scheme in which the States shared in the total tax revenue of the Centre. The Commission also suggested that the share of the States in the gross receipts of Central taxes be fixed at 26% and that this ratio be reviewed after 15 years.

The Commission saw many advantages in the new proposed scheme, as for example : the States can share in the aggregate buoyancy of Central taxes; the Central Government can pursue tax reforms without the need to consider whether a tax is shareable with the States or not; the impact of fluctuations in Central tax

14. *Supra.*

revenue would be felt alike by the Central and State Governments.[15] At present, if the Centre needs more revenue for its own needs, it has to take recourse to non-shareable taxes which distorts the pattern of Central taxation. This distortion will be avoided by the proposed scheme. But, inevitably, to introduce the proposed scheme, the Constitution would have to be amended.

Consequent upon the suggestion made by the Tenth Finance Commission, as stated above, to orient the system of tax-sharing between the Centre and the States Parliament has enacted the Constitution (Eightieth Amendment) Act, 2000. This Amendment has altered in a fundamental manner the pattern of sharing of Central taxes with the States which had been prevailing hitherto and which has been described above.[16]

In 2003 Article 268-A was introduced in the Constitution by the Constitution (Eighty-eighth Amendment) Act, 2003, which provides that taxes on services shall be charged by the Union of India and shall be appropriated by the Union of India and the States.

A new Art. 270 has been substituted for the old one. The new Article [(270(1)] provides that the net proceeds of all taxes and duties referred to in the Union List, except the following, levied and collected by the Centre shall be distributed between the Centre and the States. The exceptions to this are:

(1) Duties and taxes referred to in Arts. 268, 268-A and 269 respectively;

(2) Surcharge on Taxes and duties referred to in Art. 271;

(3) Any cess levied for specific purposes under a law made by Parliament.

The new Article 270 does not fix the percentage of the net proceeds of the Central taxes which must be distributed among the States. Art. 270(2) merely says "such percentage as may be prescribed". In practice, the prescription of the distributable percentage of the Central taxes has been left to be settled to the Finance Commission.

The Eleventh Finance Commission has fixed this percentage at 29.5%. Thus, 29.5% of the Central Tax revenue has to be transferred to the States. The Commission has also worked out the scheme of *inter se* distribution of this tax revenue among the various States keeping in view a number of considerations, such as, population, collection, State budgetary deficits, State effort to improve its resource base, economy in State administration, fiscal discipline.

The 12th Finance Commission Report (2005-2010) raised the share of States in shareable Central taxes from 29.5 per cent to 30.5 per cent, the total transfers recommended being higher by 73.8 per cent over those recommended by the Eleventh Finance Commission.[17]

Article 269 has also been recast by the 80th Amendment. The new Article includes two taxes now, *viz*., taxes on the sale or purchase of goods in the course of inter-state trade or commerce; taxes on consignment of goods in the course of

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15. REPORT OF THE TENTH FINANCE COMMISSION, 59-61 (1994).
16. For this Amendment, see, Ch. XLII, *infra*.
17. On November 14, 2007 the Thirteenth Finance Commission was constituted under Article 280(1) of the Constitution. Its recommendations will cover the period of five years from Ist April, 2010 to 31st March 2015 to be submitted by 2009.

inter-State trade or commerce. These two taxes are levied by the Centre but are assigned as a whole to the States. Art. 272 has been repealed.

The new scheme of tax sharing is simple as all, and not a select few, Central taxes are shared between the Centre and the States. The scheme is designed to enable the states to share the aggregate buoyancy of the Central taxes. It will also enable the Centre to pursue its programme of tax reforms without being bothered as to whether a tax is sharable or not with the States.

The revenue transferred to the States by way of tax-sharing is unconditional which they use as they like. Thus, the major burden of taxation falls on the Centre while the States enjoy a part of the fruits of its efforts. Politically and economically, the Centre is in a much stronger position to tax than the States are. From the State point of view, the disadvantage of the scheme may be that they do not have control over the level of taxation, and they do not enjoy flexibility of varying the rates of taxation to suit their needs, as they could have done had the taxes been in their own legislative domain. But, as the situation exists today, the rates at which the Centre is levying these taxes are pretty high and it is very doubtful if the States could have collected as much revenue themselves from these taxes as they secure now as their share from the Central levy. Besides, many advantages which arise out of separating the Centre-State taxing powers have already been noted earlier.[18]

The fact however remains that in spite of the higher devolution of funds from the Centre, the financial position of the States is none-too-happy. Practically all States run deficit budgets and indulge in huge borrowing.

Although the Constitution devises an elaborate and flexible scheme of Centre-State financial relationship, and also that larger and larger Central funds have been devolving on the States over time, the fact remains that the present day financial health of the States is none too happy. Several factors have contributed to this situation, such as, the States do not make adequate tax effort; their tax collection machinery is weak; the demands of planning have cast a shadow over their resources. The States indulge in populist, but economically unsound, schemes which increase their budget deficit. For example, they do not charge economic rates from some favoured sections of consumers for the services provided by them. For example, in spite of huge investments made in generation of electricity, the States incur heavy losses instead of getting any return from their investment.

The Tenth Finance Commission has observed in this connection:[19]

> "We are painfully conscious of the fact that most States have preferred the softer option of letting services deteriorate rather than improving their spread and quality by realising economic returns on the investment in these areas and deploying the additional resources for this purpose."

Certain fiscal improvements have been sought to be evolved by enactment of fiscal responsibility legislations by the Centre and 26 State Governments. The Fiscal Responsibility and Budget Management Act was enacted by the Central Government in 2003 to reduce revenue and fiscal deficit. All the State Governments, barring West Bengal and Sikkim, have enacted Fiscal Responsibility Acts

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18. *Supra.*
19. REPORT OF THE TENTH FINANCE COMMISSION, 9

to phase out their revenue deficits and bring down their fiscal deficits to 3 per cent of GSDP by 2008-09.[20]

(ii) GRANTS-IN-AID

Apart from the scheme of tax-sharing as mentioned above, another expedient used to effect transfer of revenue from the Centre to the States is the system of grants-in-aid. The Constitution envisages and provides for several forms of grants.

(a) FISCAL NEED GRANTS

Article 275 makes provision for 'fiscal need' grants. Parliament is authorised to provide by law as grants-in-aid to the revenues of such States as Parliament determines to be in need of assistance; and different sums may be fixed for different States.

These grants are fixed by Parliament every five years on the basis of recommendations of the Finance Commission.[21] These grants are given not to each State but only to such States as may be in need of assistance. The amount of money payable to the States by way of fiscal need grants is also unconditional and the recipient States can use this money as they like.

(b) SPECIFIC PURPOSE GRANTS

In common with other Federations, a system of grants oriented to promoting specific State activities and programmes, is also in operation in the country. These grants are known as 'conditional grants' or "specific purpose grants". These grants are given at the discretion of the Centre for supporting such activities as the Centre may wish to promote to achieve the desired national goals.

A few such grants are prescribed by the Constitution itself, *viz.*, Art. 275(1) requires the Centre to make grants to a State to enable it to meet costs of schemes of development undertaken by it with the approval of the Central Government, for promoting the welfare of the Scheduled Tribes, or for raising the level of administration of the Scheduled Areas in the State.[22]

A Central grant is payable to Assam equal to the average excess of expenditure over the revenues during the two years preceding the commencement of the Constitution in respect of the administration of Tribal Areas in that State,[23] and the cost of such schemes of development as may be undertaken by the State with the approval of the Centre for raising the level of administration of these areas.[24]

The most important provision for conditional grants, however, is Art. 282 which has been discussed later.[25]

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20. Report submitted to the Prime Minister on July 30, 2008 by the Economic Advisory Council to the Prime Minister: II.2.
21. *Infra*, Sec. L.
22. *Supra*, Ch. IX, C; *infra*, Ch. XXXV.
23. *Ibid.*
24. *Proviso* to Art. 275(1).
25. *Infra*, Sec. M.

L. FINANCE COMMISSION

After providing for the taxes which the Centre *shall* or *may* share with the States, and for fiscal need grants from the Centre to the States, the Constitution desists from laying down any rigid formula to determine the specific amounts payable to the States by the Centre under each head.

The Constitution-framers realised that a 'permanent' or immutable formula would hardly meet the situation for all time to come as changes in socio-economic conditions in the country would demand constant adjustment in the basis of transfer of revenue from the Centre to the States. They, therefore, devised a flexible scheme for transfer of Central revenue to the States, a scheme adjustable in the light of experience, contemporary economic situation, and financial position of the Centre and the States; and reviewable periodically, and which should work automatically without causing any inter-governmental friction. In this approach, they were fortified by the experiences of Canada and Australia where the formula laid down in the respective constitution for Central grants to the units soon proved to be inadequate and new bases had to be evolved from time to time for the purpose.

The above mentioned objectives were achieved by making provisions in the Constitution for a periodic appointment of a Finance Commission, a 'non-political' body, and by leaving it the task of making inter-governmental financial adjustments from time to time.

Article 280(1) provides for the appointment by the President of a Finance Commission every five years, or earlier, if he considers it necessary. The Commission is to consist of a Chairman and four other members appointed by the President. Under Art. 280(2), Parliament is empowered to determine by law the requisite qualifications for appointment as members of the Commission.

Accordingly, the Finance Commission (Miscellaneous Provisions) Act, 1951, has been enacted by Parliament. The Chairman of the Finance Commission is to be a person having experience in public affairs. Its other four members are to be selected from among persons qualified to be appointed as the High Court Judges, having special knowledge of government finances and accounts, having wide experience in financial matters and administration, or having special knowledge of economics.

A person is disqualified to be appointed as a member of the Commission if he is of unsound mind, is an undischarged insolvent, has been convicted of an offence involving moral turpitude, or has financial or other interests prejudicially affecting his functions as a member of the Commission.

Article 281 lays down that the President shall cause every recommendation made by the Finance Commission together with an explanatory memorandum as to the action taken thereon, to be laid before each House of Parliament.

The functions of the Commission, as prescribed by Art. 280(3), are to make recommendations to the President with regard to the following matters:

(*a*) The distribution between the Union and the States of the net proceeds of the taxes which are to be, or may be, divided between them and the allocation of the respective shares of such proceeds;

(*b*) The principles to govern the grants-in-aid of the revenues of the States out of the Consolidated Fund of India;

(*c*) The measures needed to augment the State Consolidated Fund to supplement the resources of the panchayats in the State on the basis of the recommendations made by the State Finance Commission;

(*d*) The measures needed to augment the State Consolidated Fund to supplement the resources of the municipalities in the State on the basis of the recommendations made by the State Finance Commission;

(*e*) Any other matter referred to it by the President in the interest of sound finance.

According to Art. 280(4), the Commission is to determine its procedure and is to have such powers as Parliament may by law confer on it. According to the Finance Commission Act, it has all the powers of a civil court for summoning the witnesses, requiring production of any document, requiring any person to furnish information on any point which the Commission regards as useful or relevant to any matter under its consideration. The Finance Commission can be characterised as the balance wheel of the Indian federal financial relationship between the Centre and the States.

The idea of the Finance Commission has been adopted from the model of the Commonwealth Grants Commission of Australia, but there are many interesting points of departure between the two bodies. The Indian Commission is a constitutional body and is not a continuing body, but sits only once in five years. The Australian Commission, on the other hand, is a statutory body, is a continuing body and recommends grants to the deficit States every year. While in Australia, members are appointed for three years at a stretch, in India they are appointed for nearly a year, and the Commission becomes *functus officio* after completing its assigned work. No continuity is provided for in India in the Commission's work.

Further, the Indian Commission has much wider functions to discharge than its Australian counterpart. The latter recommends annual grants to the claimant States, and has nothing to do with the sharing of income-tax which is negotiated between the Centre and the States from time to time. On the other hand, the Indian Commission makes recommendations not only for tax-sharing, but also for 'fiscal-need' grants.

As regards tax-sharing, the scope of the Commission's work has been increasing over time as will be seen below. The Commission not only considers the bases of sharing the taxes which must be shared, or which accrue fully to the States, but also recommends what other taxes the Centre may share with the States. As regards 'fiscal need' grants, it is for the Commission to decide which States need such grants and in what amounts. Besides, other questions of intergovernmental financial relationship are also referred to the Commission for advice from time to time.

The Indian Commission thus plays a significant and pivotal role in adjusting inter-governmental financial relationship. As finance is the *sine qua non* of good government, it will not be an exaggeration to say that the constitution-makers envisaged the Commission as the balance-wheel of the Indian Federalism. By endeavouring to create an equilibrium between the resources and demands at each governmental level, the Commission is designed to ensure that the Indian

federal structure continues to function without avoidable stresses and strains. The framers of the Constitution envisaged an expert body functioning on a non-political basis and, thus, the task of devolution of resources from the Centre to the States has been removed from the arena of political bargaining.

The Commission during the course of its work holds discussion, receives memoranda and hears evidence not only from the Central Government and the various State Governments, but even from private individuals and bodies who might be interested in placing their views before it on the questions under its review. It visits all State capitals to hold discussions with the representatives of the State Governments before finalising its report.

Thirteen Finance Commissions have been appointed so far since the commencement of the Constitution, and a review of their work throws a flood of light not only on the evolution of the Central-State financial relations during the last sixty years, but also on the changing panorama of the Indian Federalism.[26] One significant fact is that with each Commission, progressively the amount of Central funds transferred to the States has been increasing.

The Finance Commission envisaged by the Indian Constitution is a unique body. It is an expert body of a non-political character. Thus, the question of devolution of resources from the Centre to the States has been taken out of the arena of political bargaining and entrusted to an objective body and the matter is to be settled on merits and not on the basis of political horse-trading. The Commission, in theory, is an advisory body and its recommendations are not binding on the Central Government.

The Constitution accords to Parliament the supreme authority to oversee the implementation of the Commission's recommendations. This has been ensured by Art. 281 which requires the Central Government to place before both Houses of Parliament recommendations made by the Finance Commission alongwith an explanatory memorandum as to the action taken thereon. However, a convention has developed over time under which the Central Government invariably accepts the recommendations of the Commission as regards the funds to be transferred to the States under the various heads.

In the area of tax-sharing between the Centre and the States prior to the year 2000, the position was as follows:

(a) INCOME TAX

This was a compulsorily shareable tax between the Centre and the States [Art. 270]. The role of the Finance Commission in this area was twofold: *viz.*, first, to determine the proportion of the net income-tax revenue which the Centre should give to the States, and, secondly, to fix the ratios in which the States should share in the divisible pool.

The States' share in the income-tax revenue was gradually increased from 50 per cent, on the eve of the commencement of the Constitution to 85 per cent by the Seventh Finance Commission. The Eighth and the Ninth Commission let it

26. For a detailed review see M.P. Jain, Central-State Fiscal Relationship, footnote 1 on 823.

remain at 85%, but the Tenth Commission reduced it to 77.5% as it thought that the centre ought to retain adequate interest in Income-tax.[27]

The most significant task of the Finance Commission in this area, however, was to evolve the basis on which the States should *inter se* share in the divisible pool. A peculiar circumstance in India is that nearly three-fourths of the income-tax revenue is collected in the two States of Maharashtra and West Bengal, which together have only one-fifth of the country's population. Even in these States, nearly three-fourths of the collection is made within the two cities of Bombay and Calcutta, the two big financial and industrial Centres of India. To these States, the basis of 'collection' suits most for sharing in the divisible pool. On the other hand, the other States, which are less industrialised but more populous, put forward 'population' as the sole basis for the purpose.

The Finance Commissions refused to accept 'collection' as the sole basis of distribution of the income-tax revenue among the States and gave a much larger weightage (90 per cent) to 'population'. The reasons for this approach are that the income arising in an industrialised State is not wholly created there; the underdeveloped regions of the country also contribute to the same by offering vast markets for the sale of industrial production and also by supplying raw materials.

A federal economy is regionally interdependent; no region is self-sufficient by itself and the bases of income are far more diversified and widely spread over the whole country than the figures of income-tax collection would appear to suggest. Industrialisation of a region is promoted not solely by the genius or enterprise of its residents, but also, in a substantial manner, by national policies, geographical factors, etc. Therefore, national considerations should influence the sharing of the proceeds of such enterprises.

A federation being a compromise between economic integration and political autonomy, the existing regional economic inequalities would be further accentuated if proper correctives are not applied and, therefore, emphasis should be placed on 'equalization' rather than on 'collection'. It is almost impossible to establish precisely the contribution made by different regions to a common tax pool in an industrially and commercially complex national economy. Lastly, distribution based on 'collection' might fail to create a balance between resources and demands of social services at the State level.

A proper scheme of distribution of Central revenue among the States should aim at enabling each State to meet its expanding responsibilities concerning people's welfare. Thus, by giving weightage to 'population' and allowing 'collection' only a small (10 per cent) role to play in the formula for distributing income-tax revenue among the States, the Finance Commissions adopted an avowedly egalitarian approach and sought to remedy the regional imbalances by giving larger amounts to populous but economically backward States as compared to the economically advanced States. The latter can mobilise larger resources through the use of other levies (*e.g.*, sales tax, entertainment and motor vehicles taxes, electricity duties, etc.) than the former, and so there is not much justification for giving larger share of income-tax revenue to them.[28]

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27. REPORT OF THE TENTH FINANCE COMMISSION, 22 (1994).

28. Before 2000, the corporation tax was non-shareable. The States had been urging the Finance Commissions to make this tax shareable. The Seventh Finance Commission expressed its inability to do so in view of the existing constitutional provisions. See, REPORT, 65-66.

The Tenth Commission dropped 'collection' as an element in the formula for distribution of income tax revenue among the States. The formula now comprised *inter alia* of two elements, *viz.,* population and the distance of per capita income of a State from the highest per capita income: Other elements used were: area, infrastructure and tax effort made by a State.[29]

The three main considerations in the selection of criteria for determining *inter se* shares of states of the Eleventh Finance Commission were (1) resource deficiency, (2) higher cost of providing services, and (3) fiscal discipline. The Twelfth Commission basis for revenue sharing were population, income distance, area, tax effort and fiscal discipline.

(b) UNION DUTIES OF EXCISES

Central excises were not compulsorily shareable between the Centre and the States. These duties could be shared if Parliament so provided by law [Art. 272]. Nevertheless, to bolster up State finances, the Finance Commissions had recommended sharing of this tax as well.

To begin with, the First Finance Commission recommended 40% revenue accruing from three commodities, *viz.,* tobacco, matches and vegetable products to be given to the States. Since then, the State share in Union excise duties has been progressively increased by the successive Finance Commissions. The Tenth Finance Commission recommended that the share of the States in the net proceeds of the Union excise duties be fixed at 47.5%.[30] Again, in order to strengthen the resources of the poor States, the formula to divide the distributable portion of the excise revenue is devised keeping in view the same factors as in case of distribution of income-tax among the States.

Sharing of Central excise duties with the States augmented their financial resources as these duties constitute an expanding source of revenue because of rapid industrialisation of India.

(c) ADDITIONAL EXCISE DUTIES

To co-ordinate the incidence of Centrally levied excise duties and the State-levied sales taxes, and for convenience of tax collection, a scheme has been put into force, with the consent of the States, under which the States have surrendered sales taxes on four commodities, *viz.*, factory-made textiles, sugar, tobacco and silk fabrics, and the Centre has started levying an 'additional' excise duty on these commodities over and above its normal levy. The entire revenue accruing from the 'additional' levy was distributed among the States as compensation for their losing the sales tax revenue on these commodities. The formula to distribute this revenue among the States was designed so as to enable each State to get the equivalent of what it would have secured had it not surrendered its power to levy sales tax on these commodities.

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29. REPORT, 24.
The Eighth Finance Commission which presented its report in 1984 maintained the share of the States at 85% in the net proceeds of the income tax. The Commission emphasized upon the relative economic backwardness of the States in the scheme of allocation of tax resources among them. The weightage given to the population was reduced. The basis of State contribution was maintained at the same level as before *i.e.,* at 10%.

30. REPORT, 22.

The Ninth Finance Commission adopted the basis of consumption of the concerned articles in the different States for dividing this revenue among them. This Commission maintained the view that since the additional excise duties were levied in lieu of sales tax which itself is a tax on consumption. The Tenth Commission evolved a formula for the purpose based on three elements, *viz.*, population, State domestic product, and collection of State sales tax.[31]

The replacement of sales tax with the additional excise duty has many advantages. It results in a uniform rate of tax throughout the country instead of variable rates of sales tax from State to State and this helps in the free flow of commodities in the country; with the levy of the tax at the stage of production, chances of evasion of the revenue are minimised; traders are spared from much inconvenience involved in rendering accounts for sales tax assessment from State to State.

Because of its advantages, the traders plead that the scheme be expanded further so as to cover more commodities of mass consumption. The traders regard the working of sales tax laws as vexatious and believe that amalgamation will be beneficial to trade and commerce as well as to the States because administrative expenses will be much less and there will be little scope for evasion. The States are not, however, enthusiastic about this. In the sales tax, the States have an expansive and flexible source of revenue and they can adjust the rates of taxation from time to time to suit their budgetary needs. By forgoing this right to levy sales tax, they would compromise their own freedom and autonomy and come to depend for funds on the Centre.[32]

(d) OTHER TAXES

The Finance Commission would also go into the question of distributing among the States of estate duty, grant *in lieu* of tax on railway passenger fares and wealth tax on agricultural property.

The whole of the revenue accruing from estate duty used to go to the States, but this tax has now been abolished.

The revenue accruing from tax on railway fares would also go to the States.[33] The Centre levied such a tax in 1957 but repealed it in 1961 and merged it with railway fares and started giving a fixed grant to the States *in lieu* of the tax on the recommendation of the Finance Commission.

The wealth tax on agricultural property was a residuary tax levied by the Centre since 1970.[34] Although under the Constitution it was not a shareable tax, the Centre *suo motu* decided that the net proceeds accruing from this tax would be passed on to the States as grants-in-aid. The Commission used to lay down the bases on which the States would share this revenue. This tax has now been abolished.

To begin with, revenue realized by way of service tax under Entry 97 of List I was shareable with the states. The position changed after the Constitution (Eighty-eighth Amendment) Act, 2003 which has inserted Article 268-A and Entry 92-C. Revenues from taxation of services that are taxed by the centre under

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31. REPORT, 28 (1994).
32. FICCI, SALES TAX—A PLEA FOR SIMPLIFICATION (1969).
33. *Supra*.
34. *Supra*, sec. G.

Article 268A rather than under Article 270 were excluded from the purview of the finance commission. The Twelfth Commission however recommended that "any legislation that enacted in respect of service tax must ensure that the revenue accruing to a state under the legislation should not be less than the share that would accrue to it, had the entire service tax proceeds been part of the shareable pool".

(e) FISCAL NEED GRANTS

Under Art. 275, the Centre is to give grants to the States in need of assistance.[35] This provision lays down no criteria for judging whether a State is in need of assistance, and if so, to what extent. These matters are left to the Finance Commission for consideration and recommendation. Under Art 280(3)(b), the Finance Commission is to recommend the principles to govern the grants-in-aid of the revenue of the States. Over the years, the revenue flowing to the States under this head has been increasing.

The idea of fiscal need has been borrowed from Australia. As early as 1936, the Commonwealth Grants Commission[36] expounded the idea thus: "Special grants are justified when a State through financial stress from any cause is unable efficiently to discharge its functions as a member of the federation and should be determined by the amount of help found necessary to make it possible for that State by reasonable effort to function at a standard not appreciably below that of the other States". Every year, therefore, the Commission seeks to assess the sums necessary to bring the claimant States to the level of that of the non-claimant States, necessary adjustments being made for the relative tax effort of the States and differences in standards of social services so that these may be brought to a corresponding level. In this process of adjustment, be it noted, the element of self-help is an important constituent, the basic idea of which is that within its taxable capacity a claimant State makes the same relative tax effort as a non-claimant State.[37]

The First Finance Commission in India adopting a somewhat similar approach laid down a few guiding norms for assessing these grants, for example, budgetary needs and the extent of tax-effort made by a State. Failure of a State to maximise tax effort should be taken note of so that no premium is placed on lack of self-help, and no penalty is levied on those States which seek to raise adequate resources. To discourge extravagance, the States' endeavour to secure reasonable economies in expenditure should be taken into consideration. Grants should help in equalising standards of basic social services and, therefore, a State having a significantly lower standard of social services than others should qualify for assistance. Two other matters mentioned by the Commission for the purpose are: State susceptibility to famine, floods, etc; burdens of national concern though falling within the State sphere yet beyond its control. These principles have been applied by the various Finance Commissions with some change of emphasis here and there to assess the fiscal need grants.[38]

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35. *Supra*.
36. *Supra*, p. 928.
37. COMM. GRANTS COMM., THIRD REP., 1-25 (1936); THIRTY-SECOND REPORT, 1-15, (1965).
38. REPORT OF THE FIRST FINANCE COMMISSION, 90-104 (1952).

The underlying idea of these grants is to transfer resources from the rich to the poor States. This concept has now come to be accepted in all federations. However, the methodology adopted by the Commissions in India to compute these grants does not take the process very far. The Commissions have gone too much by the budgetary deficits in assessing grants for the States. The Tenth Commission also recommended grants to several States to cover their budgetary deficits.

This approach has a weakness, *viz.*, a State which shows large deficit by increasing its expenditure and keeping its taxation low, gets larger fiscal need grants from the Centre as compared with the State which keeps its expenditure low or its taxation high. Another notable lacuna in this connection is that there prevails a lack of uniformity in the levels of social services in the several States. For example, in the field of education, the per capita expenditure varies from State to State.

Commenting on the system of fiscal need grants in India in 1970, this author had remarked: "Such an approach on the part of the Finance Commission would further accentuate regional imbalances and create tensions and stresses in the body politic. It is, therefore, necessary for the Finance Commission to evolve some standard of comparison of social services among the States *inter se*, as is done by the Australian Commission, and then apply the necessary correctives so as to bring the services in all the States on a comparable level".[39]

The Sixth Finance Commission explicitly accepted the proposition that the social services in backward States should be improved and assessed funds with a view to progressive equalization of social services within a definite time-period.[40]

Another lacuna in the method of assessment of these grants is that not enough importance has been accorded so far to tax-effort made by the States. In Australia, the aspect has been given a good deal of significance; a State making more than its due effort is rewarded, and the State making less than its due is penalised while assessing the grants. In India, the States do not make adequate tax-effort according to the capacity of the people to pay, and continuously pressurize the Centre for larger allocations.

For a robust federal system, it is necessary that the States do not merely look towards the Centre for money but also indulge in self-help which is essential for them to maintain their autonomy. The Finance Commission should, therefore, give due weight to relative tax severity among the States while assessing fiscal-need grants. Thus, a two-fold process of adjustment appears to be necessary in assessing these grants: (1) bringing State expenditure on social services on a comparable level; (2) taking into account the relative State tax effort. The Seventh Finance Commission also accepted the validity of these principles.

(f) OTHER GRANTS

The drawback pointed out above in the computation of fiscal need grants is being taken care of to some extent by the Finance Commission recommending grants for several purposes, *viz.*, modernisation of administration; upgrading the

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39. *Indian Cons. Law*, 376 (1970).
Also see, M.P. JAIN, Anomalies in the Scheme of Fiscal-Need Grants in India, in THE UNION AND THE STATES, 265-280.

40. REPORT OF THE SIXTH FINANCE COMM., 8, 9, 51, 68 (1973).

standards in non-developmental sectors and services, Education, grants for local bodies.

From the Sixth Finance Commission onwards, upgradation of State administration emerged as a matter of concern for which grants began to be given to the States. The effort being made is to upgrade the administration in 'backward' States to the level of the more advanced States. The items considered for the purpose are police, fire services, jails, record rooms, treasuries and accounts at the district level.

In the field of education, items considered for grant are : promotion of girls' education; facilities for primary schools, providing drinking water in primary schools.

Panchayats/municipalities have recently been formally made an integral part of our federal democratic structure. These institutions are sought to be strenghened by the 73rd and 74th Amendments of the Constitution.[41] Their action or inaction will directly impinge on the welfare of the people.

These bodies will be ineffective if they lack adequate financial resources to discharge their duties.

Under Art. 280(3)(bb), the Commission has been charged with the specific duty of recommending "the measures needed to augment the Consolidated Fund of a state to supplement the resources of *panchayats/*municipalities in the State. The implication of the provisions is that the Centre would help the States financially so that they may transfer adequate resources to the panchayats / municipalities. Accordingly, the Tenth Commission has recommended Central grants to the States for the purpose of augmenting the resources of the panchayats/municipalities.[42] It would have been much more effective if a way could be found to give Central grants directly to the panchayats/local bodies instead of through the medium of the States. There is no assurance that whatever money the Centre gives to the States for helping the panchayats/local bodies will be passed on by the States to these bodies.

The Tenth Finance Commission also recommended specific grants to several States for enabling them to meet their special problems.

(g) CALAMITY RELIEF FUND

On the recommendation of the Ninth Finance Commission, a Calamity Relief Fund (CRF) has been established in each State to which the Centre contributes 75% of the amount. The amount of this Fund for each State is settled by the Finance Commission. This scheme has been continued by the Tenth Finance Commission.

In addition, the Tenth Commission suggested setting up the National Fund for Calamity Relief (NFCR) to deal with a calamity of rare severity. From time to time, calamities of such a severity may occur in one State or other which the concerned State may not be able to cope with its own CRF. In such a situation, the Centre must be in a position to come to the rescue of the troubled State and organise relief therein on a national scale.

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41. *Supra*, Ch. IX.
42. REPORT, 46-48.

To The NFCR, both the States and the Centre subscribe. The size of the fund and the amount of Centre and State contributions thereto (in the ratio of 75: 25) have been settled by the Finance Commission. This fund puts on a formal basis the urge for national solidarity in a moment of distress.

The Twelfth Finance Commission made an innovative departure from the approach of the earlier Commissions by providing for Rs 1,000 crore for maintenance of forests and Rs 625 crore for heritage conservation.[43]

(h) COMMENTS

From the above discussion, it is clear that over the years, the trend has been towards augmenting the flow of funds from the Centre to the States both by way of tax-sharing as well as through fiscal need grants. Each Finance Commission has helped and strengthened this trend. The underlying reason for this has been the inadequate resources but expanding responsibilities of the States.

Over the years, the Finance Commissions have strengthened the resources of the poor States much more than those of the rich States. Thus, an effort is made to reduce regional disparities to some extent. This approach concretises the new concept of co-operative federalism that the federal country is one and indivisible economic unit and that every citizen should be able to get a national minimum of social services irrespective of the fact whether he resides in a poor or a rich State.[44]

It is also worth-while to note that the Central Government has at times used the mechanism of the Finance Commission for a broad consideration of the Centre-State financial relations, and has many a time referred to it, under Art. 280(3), such questions as it could have settled by itself. For example, the Tenth Finance Commission was required to assess the debt position of the States. The Finance Commission plays an important role as resource sharing between the Centre and the States is a critical element in the federal system. In this way, the Centre-State relations are sought to be adjusted on a non-political basis.

The tendency is to treat the Commission as a mechanism of arbitration to decide on the conflicting claims and contentions of the States as well as of the Centre. Although the recommendations of the Commission are not binding on the Centre, and the Constitution merely assigns to it an advisory role, yet the convention has grown under which the Centre invariably accepts Commission's recommendations regarding tax-sharing and grants. There is a practical reason for such an approach. It is realised that if once any change is made in the quantum of grant or share in the Central tax recommended by the Commission for one State, then there would be no end to pressurization by other States for modifications in their favour. On the whole, it can be said that the mechanism of the Finance Commission is fulfilling a significant role in evolving a viable system of Centre-State relationship in India.

M. SPECIFIC PURPOSE GRANTS

Along with tax-sharing and fiscal need grants,[45] Central assistance also flows to the States through grants under Art. 282, which provides that the Union or a

43. See in this connection *T.N. Godavarman Thirumulpad (87) v. Union of India*, (2006) 1 SCC 1, at page 40 : AIR 2005 SC 4256.
44. Co-operative Federalism, see, *infra*, Ch. XIV.
45. *Supra*, Sec. K(ii).

State may make grants for any public purpose notwithstanding that the purpose is not one with respect to which Parliament or the State Legislature, as the case may be, may make laws.

This provision vests in the Centre a very broad power to give grants to the States for any specific public purpose. What is "public purpose"? The attitude of the courts is not to interfere in this matter and leave it to the judgment of the Central Government. The proper place to criticise any grant by the government is the legislature and not the courts.[46]

The grants given under Art. 282 are also known as discretionary grants, the reason being that the Centre is under no obligation to give these grants to any State; the Centre may give such a grant to one State and not to another, and the matter lies solely within the Centre's discretion. The use of the word 'may' in Art. 282 signifies the discretionary nature of these grants. Unlike the 'fiscal need' grants under Art. 275, these grants lie outside the purview of the Finance Commission.

While the funds flowing to the States through the Finance Commission are unconditional, and may even be regarded as coming to the States as a matter of right, the grants under Art. 282 may be conditional and tied to specific purposes.

The technique for grants under Art. 282 is used for a number of purposes. There are programmes which fall within the State sphere for purposes of legislation and administration, but being of an all-India significance, the Centre is also interested in their implementation. Therefore, to promote State action in such areas, the Centre may give grants as incentive to the States. In this way, the financial resources of the Centre, and the legislative and administrative resources of the States are pooled together with a view to achieve certain preferred national goals.

Though the Centre has limited legislative powers, it is not so circumscribed in the matter of giving grants and no question can arise regarding the legality of a Central grant to a State on the ground that the purpose for which the grant is being given lies outside the Central sphere. The grants under Art. 282 are also used to help a State tide over an unforeseen crisis such as famine, drought, floods, etc. Though the fiscal need grants recommended by the Finance Commission make provision for expenditure on such calamities, yet in times of acute distress, the Centre may have to give additional funds to a State to tide over the crisis. Many programmes fall within the Concurrent or the Union List and can thus be implemented by the Centre itself. But keeping in view administrative convenience, these may be left to the States for execution, and the Centre makes grants to the States for meeting the expenditure on these programmes. These schemes continue to proliferate every day as the Centre becomes interested in pursuing many varied social programmes of national importance.

Under Art. 257, the Centre can direct the States to construct and maintain roads of national or military importance, and make grants to the States under Art. 282 to meet expenditure on programmes undertaken by them under the Central directive.[47] The grants under Art. 282 are thus given to meet multifarious situa-

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46. *K.N. Subba Reddy v. State of Karnataka,* AIR 1993 Kant 66; *Brij Kishore Mohanty v. State of Orissa,* AIR 1975 Ori. 8.

47. For Art. 257, Sec. E, see, Ch. XII,*infra.*

tions and, accordingly, in terms of money and variety of programmes, such grants play a very significant role in the present-day pattern of Centre-State fiscal relationship. These grants have enabled the States to launch or expand activities in various fields.

The most significant use of these grants is being made in the area of planning.[48] Because of the exigencies of the Five Year Plans, the plan grants under Art. 282 have assumed a dominant position in the scheme of Centre-State fiscal relations. Grants under Art. 282 have increased manifold under the impact of planning and have dwarfed the fiscal need grants being given through the Finance Commission. 'Economic and social planning' is a Concurrent subject.[49] Many plan programmes fall within the State sphere for which the Centre has no direct constitutional responsibility but, as the State resources are inadequate, the Centre makes grants to the States under Art. 282.

These grants have a twofold purpose: to help the States financially to fulfil plan targets and to give some leverage to the Centre to influence and co-ordinate State action to effectuate the national plan. The Centre can use the grants to persuade, encourage and pressurize the States to keep within the plan targets. Because of the gigantic nature of the plan grants, Art. 282 has assumed a unique importance in the present-day Indian Federalism. Art. 282 grants are much larger in dimension than the fiscal need grants made to the States through the Finance Commission, and, therefore, Art. 282 has emerged as the most significant constitutional provision for transfer of funds from the Centre to the States. And since most of the Art. 282 funds are given on the advice of the Planning Commission,[50] in effect, it has assumed a very significant role in the area of Centre-State financial relationship as compared to the Finance Commission.

The State Planning sector consists of the Central-aided schemes and non-aided schemes. The Central sector comprises of Central schemes, and the Central-sponsored schemes which fall for administration within the State sphere, but are counted not in the State but the Central sector, and for which the Centre gives aid to the States. In effect, therefore, the State sector consists of not only the State sector as such but also the Central-sponsored schemes.

Allocation of Central money to the States under Art. 282 has raised a few controversies. The States constantly pressurize the Centre for larger funds and accuse it of partisanship, favouritism or prejudice in favour of, or against, some States. To allay such an apprehension, it is necessary that the basis of allocation of Central funds among the States is clearly laid down so that the indices and criteria adopted for the purpose are well known. Usually, Art. 282 grants are given on a matching basis, *i.e.*, States themselves have to find a part of the money to earn the Central funds for a particular programme. This raises the question whether there should be a uniform matching basis for all States, or that it should favour the poor States. A uniform matching basis may be inequitable as it may favour the rich States as against the poor States, for the former are in a better position than the latter to find the countervailing funds and avail of the Central grants.

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48. See, *infra*, Ch. XIV, Sec. G.; Entry 20, List III, Ch. X, Sec. F.
49. *Supra*, Ch. X, Sec. F.
50. *Infra*, Ch. XIV, Sec. G, under Co-operative Federalism.

In the U.S.A., where a very elaborate system of conditional grants is in operation, it has come to be accepted that such grants should serve an equalitarian purpose and, therefore, the same should happen in India as well. Further, in the U.S.A., the Centre exercises supervision in order to ensure that the States utilise the money for the purposes for which it is given.

No effective supervisory apparatus has been created in India so far and the States enjoy freedom to utilise Central funds to some extent. On the whole, the States do not very much like the system of conditional grants for several reasons. First, being tied to specific purposes, the States are not free to use the money for any other purpose. Secondly, because of the matching requirement, the States must find their share before they can utilise the Central money and they find this restriction irksome. The evolution of a proper system of Art. 282 grants is very much tied up with plan methodology, but the above objections do not have much substance. The justification underlying the matching condition is that it is primarily a State activity which the Centre seeks to finance and it should, therefore, ensure that the State concerned itself takes an abiding interest in the programme. The matching requirement spurs the States into activity and makes them find money for their share through taxation, economy or reappropriations.

It is also necessary to make the grants programme-oriented, otherwise the targets which the Centre wants to achieve may never be fulfilled. In India, large amounts of unconditional revenue are given to the States by the Centre through the Finance Commission, and the States should not have a cause for grievance if matching grants are also instituted, especially when the activities thus sought to be promoted fall within their constitutional sphere and not that of the Centre. It also should be noted that the burden of matching funds by the States will sooner or later be passed on to the Centre, for this part of the State expenditure will also be taken into consideration by the Finance Commission for assessing the fiscal-need grants. Therefore, the responsibility of the States to find matching funds exists only till the next Finance Commission considers the question of fiscal-need grants, and this period can in no case be more than five years.

From time to time, efforts have been made to persuade the Centre to give plan grants not under Art. 282, but as fiscal need grants through the Finance Commission. The Central Government has not accepted this idea for several reasons. It will lose whatever leverage it has to ensure that the States keep themselves within the framework of the plan. If money is given to the States without being tied to specific purposes, then the States may spend the same on purposes outside the plan structure and the plan targets may thus go awry.

In the U.S.A., it is only the system of conditional grants on a matching basis that is operative at present. The Centre gives no unconditional revenue. In Canada and Australia, the position is somewhat akin to India as both conditional and unconditional funds are given by the Centre to the units. The conditional grants have done much good in the U.S.A. as they have helped in stimulating the States to launch and expand many welfare activities, and have also greatly improved the State administration. The system has proved useful and it is expanding all the time as more and more activities are brought within its purview. There is no reason why conditional grants should not play a similar role in India.

N. BORROWING POWER

The Central Government can borrow within such limits, if any, as may be fixed by Parliament by law. Under Art. 292, the executive power of the Union extends to borrowing upon the security of the Consolidated Fund of India within such limits, if any, as may from time to time be fixed by Parliament by law and to the giving of guarantees within such limits, if any, as may be so fixed.

Similarly, under Art. 293(1), the executive power of a State extends to borrowing within India upon the security of its Consolidated Fund within such limits, if any, as may from time to time be fixed by the State Legislature by law and to the giving of guarantees, within such limits, if any, as the State Legislature may fix by law.

No quantitative restriction on loans has yet been fixed either by Parliament or by any State Legislature.

Under Art. 293(2), the Central Government may, subject to the conditions as may be laid down by a law of Parliament, make loans to any State, or give guarantees for loans raised by a State, within the amounts fixed by Parliament, if any. Any sums required for making of such loans are charged on the Consolidated Fund of India.

Under Art. 293(3), a State may not raise any loan without the Centre's consent if there is still outstanding any part of a loan made by the Centre to the State, or in respect of which the Centre has given any guarantee. The Central Government may, however, give its consent to a State to raise a loan subject to such conditions as it may think proper to impose [Art. 293(4)]. As all the States owe money to the Centre, in effect, today no State can raise loan without the Centre's consent. The States are also debarred from raising any loan out of India. Foreign loans can be raised exclusively by the Centre [see, Entry 37, List I].[51]

Since the inauguration of the era of planning, Central loans to the States have been increasing by leaps and bounds. The States now complain that much of their annual taxation is consumed by payments made to the Centre towards loans and interest thereon.

The question of State indebtedness to the Centre has become a complicated matter because of several factors, *viz.*, the number of loans is large; terms of repayment and rates of interest vary from loan to loan; while the bulk of the loans have been given for developmental and productive purposes, some part of the same has also been spent on unproductive purposes.

The Second Finance Commission recommended that "it will simplify matters and save a great deal of labour and accounting if these loans are consolidated and the rates of interest and terms of repayment rationalised".[52] The question of State indebtedness to the Centre has been considered since then by several Finance Commissions.[53]

The Seventh Finance Commission recommended a write off of over Rs. 942 crores of Central loans to the States. The Commission also evolved a new con-

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51. *Supra*, Ch. X, Sec. D.
52. REPORT OF THE SECOND FINANCE COMM., 53 (1957).
53. REPORT OF THE SIXTH FINANCE COMM., Chap. XVII (1973).

cept—'loans in prepetuity'. Over Rs. 3000 crores advanced to the States out of small savings have been converted into such loans. Besides, relief in debt-repayment amounting to over Rs. 2155 crores within a five year period (ending 1983-84) was also recommended by the Commission.

The Tenth Finance Commission has estimated that the total debt of the State Governments would be Rs. 2,09,159 crores as on 31st March, 1995. Loans advanced by the Centre to assist financing of State plans constitute the bulk of the total State debt. The debt liability has placed a huge burden of debt servicing on the States. The Commission has made some proposals for debt relief.[54]

The Commission has drawn attention to three disturbing features of the debt profile of the States, *viz*.:

(1) debt funds are being used for meeting revenue expenditure;

(2) loan funds are being used in unproductive enterprises; and

(3) in respect of government owned assets, no provision is being made for depreciation or amortisation of funds. This leads to repayment of loans out of fresh borrowings.

The Eleventh Finance Commission has observed in connection with the borrowing power of the Centre and the States:[55]

> "A time has come when, as a part of the overall thrust towards fiscal responsibility, concrete steps are taken under the provisions of articles 292 and 293. In particular, Parliament and respective State Legislatures may consider fixing limits on total borrowing as well as on guarantees to be given by them."

The Twelfth Commission recommended that each state must enact a fiscal responsibility legislation prescribing specific annual targets with a view to eliminating the revenue deficit by 2008-09 and reducing fiscal deficits based on the basis of reduction of borrowings and guarantees. Enacting the fiscal responsibility legislation on the lines indicated in its Report would be a pre-condition for availing of debt relief. It was also said that "States, like the centre, must decide their annual borrowing programme, within the framework of their respective fiscal responsibility legislations". Other major steps recommended were the need to let the states access the market directly for their borrowing requirements and the fixing and supervision of the overall limit to states' annual borrowing from all sources by an independent body like a Loan Council. [56]

54. REPORT OF THE TENTH FINANCE COMM., Ch. XII (1994).
55. REPORT OF THE ELEVENTH FINANCE COMM., 107 (2000).
56. REPORT OF THE TWELFTH FINANCE COMM. (Ch XV) (2004),

CHAPTER XII

ADMINISTRATIVE RELATIONS

SYNOPSIS

A. DISTRIBUTION OF EXECUTIVE POWER

In the modern administrative age, administration plays a very significant role by way of enforcing the law and promoting socio-economic welfare of the people. The pattern of administrative relationship between the Centre and the States, therefore, assumes a great significance in a developing country like India.

The Indian Constitution contains more elaborate provisions regarding administrative relations between the Centre and the States than are to be found in any of the three Federations of the U.S.A., Canada and Australia. The Constitution lays down a flexible and permissive, and not a rigid, scheme of allocation of administrative responsibilities between the Centre and the States. The scheme is so designed as to permit all kinds of co-operative administrative arrangements between the two levels of government.

Along with the distribution of legislative and taxing powers,[1] the executive power has also been divided between the Centre and the States. Subject to a few

1. *Supra*, Chs. X and XI.

exceptions, the general principle followed in this connection is that the executive power is coextensive with legislative power. The scope and extent of the executive power of the Centre extends—

(1) to the exercise of rights, authority and jurisdiction available to the Government of India under a treaty or agreement; and

(2) to the matters with respect to which Parliament has power to make laws, subject to this exception, however, that it does not extend in a State with respect to matters regarding which the State Legislature also has power to make laws save when expressly provided in the Constitution or a law made by Parliament [Art. 73].[2]

This means that the executive power with respect to the matters in the Concurrent List ordinarily remains with the States unless the Constitution or Parliament by law expressly provides otherwise.

The executive power of a State extends to matters with respect to which the State Legislature has power to make laws, provided that in a matter with respect to which both Parliament and State Legislature have power to make laws, the executive power of a State is subject to, and limited by, the executive power expressly conferred by the Constitution, or by any law made by Parliament, upon the Union or its authorities [Art. 162].[3] The proviso refers to the Concurrent area.

From the above constitutional provisions, the following propositions emerge:

(1) The executive power of the Centre extends to the whole of India in respect of matters in List I.[4]

(2) However, the Centre is not obligated to administer by itself all matters in its exclusive domain. It can, if it so desires, entrust administrative responsibility in any matter to the States [Art.154(2)(b)].[5]

(3) A State's executive power extends to its territory in respect of matters in List II.[6]

(4) In respect of matters in which both the Centre and the States have legislative powers (which means List III and List II in cases falling under Arts. 249, 250, 252, 353 and 356), ordinarily, the executive power rests with the States except when either the Constitution, or a law of Parliament, expressly[7] confers it on the Centre.

In this area, therefore, there are several alternatives available. If the Centre makes no law, the executive power rests with the States. When the Centre makes a law, it can adopt any of the following alternatives regarding executive power under that law—

(a) it can leave it with the States, or

(b) it may take over the entire administrative power itself by making an express provision in the law to this effect; or

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2. *Supra*, Ch. III.
3. *Supra*, Ch. VII.
4. *Supra*, Ch. X, Sec. D; Ch. XI, Sec. C.
5. *Supra*, Ch. VII, Sec. D(iii).
6. *Supra*, Ch. X, Sec. E; Ch. XI, Sec. D.
7. *Supra*, Ch. X, Sec. J; Sec. I; also, *infra*, Ch. XIII.

(c) it may create a concurrent area by taking a part of the executive power itself and leaving the rest to the States.

In the Concurrent field, therefore, ordinarily the authority to execute laws rests with the States even when the law is passed by the Centre. In exceptional cases, however, Parliament may prescribe that the execution of a Central law shall be with the Centre alone, or with both the Centre and the States. In this field, even after the Centre assumes executive power under its law, the residuary executive power under the entry may still rest with the States.[8] In this field, even after the centre assumes executive power under its law, the residuary execution power under the entry may still rest with the States.

All these patterns may be seen working in actual practice. Under the Electricity (Supply) Act, 1956, enacted by Parliament under entry 38, List III,[9] administrative powers have been left wholly with the State Governments. Under the Industrial Disputes Act, enacted by Parliament under entry 22, List III,[10] administrative powers rest with both the Centre and the States. Under the Essential Commodities Act, enacted by Parliament under entry 33, List III,[11] the whole of the power is vested in the Central Government which, however, delegate power to the States to any extent it deems desirable. In actual practice, Centre has delegated a good deal of power under this Act to the States. Under the Forest (Conservation) Act, 1980, the Centre has assumed the entire responsibility for administration of the Act.

While there may be centralization in the sphere of legislation, there is lot of decentralisation in the area of administration. This is because the Centre has not established a separate machinery of its own to execute most of its laws. Only a few subjects in the Union list, such as, defence, foreign affairs, foreign exchange, posts and telegraphs, All India Radio and Television airways, railways, currency, customs, union excises, income-tax, etc. are administered by the Centre directly through its own machinery. Administration of a number of matters in the Union list and most of the matters relating to them, is secured through the machinery of the States.

As has already been pointed out, the executive power of a modern government is not capable of any precise definition. Art. 73 or 162 does not contain any definition as to what the executive function is, or gives an exhaustive enumeration of the activities which could legitimately come within its scope.[12] A government in exercise of its executive powers is charged with the duty and the responsibility of framing policies and carrying on the general administration. So long as it does not go against any constitutional provision or any law, the width and amplitude of its executive power cannot be circumscribed.

If there is no enactment covering a particular aspect, the government can carry on the administration by issuing administrative instructions until the legislature chooses to make a law in that behalf.[13] Thus, a State Government can establish a

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8. *Bishamber Dayal Chandra Mohan v. State of Uttar Pradesh*, AIR 1982 SC 33 : (1982) 1 SCC 39.
9. *Supra*, Ch. X, Sec. F.
10. *Ibid*.
11. *Ibid*.
12. *Supra*, Chs. III and VII.
13. *Ram Jawaya, supra*, Ch. III, Sec. D(iii); *Bishamber Dayal Chandra Mohan v. State of Uttar Pradesh, supra*, footnote 8.

bureau of investigation for investigation of cases of tax evasion,[14] or create a new district,[15] or prescribe syllabi or text books for schools,[16] in the exercise of its executive power.

However, a government cannot in exercise of its executive power infringe the rights of the people. If any governmental action is to operate to the prejudice of any person, it must be supported by law.[17]

B. CENTRAL-STATE ADMINISTRATIVE CO-ORDINATION

(a) INTER-GOVERNMENTAL DELEGATION OF ADMINISTRATIVE POWER

To mitigate rigidity which might arise from Centre-State division of administrative power, the Indian Constitution makes provisions for inter-governmental delegation of administrative power.

The Indian constitutional system does not envisage that there should be separate, parallel administrative agencies for the Centre and the States for carrying into effect their respective laws. Most Union laws, especially those enacted in the Concurrent List, are executed through the State administrative machinery. Therefore, the Constitution devises certain provisions to obviate the necessity of creating Central administrative machinery for executing every Central law. It is possible to use the state machinery for implementing Central laws. Such an arrangement is not only economical but also promotes cooperative federalism as well as national integration.[18]

Inter-governmental delegation may happen either under an agreement between the governments or by legislation. While the Centre can use both the methods to delegate administrative power to the States, a State can use only the first method to delegate administrative power to the Centre.

(b) CENTRE CONFERRING POWERS ON THE STATES UNDER THE CONSTITUTION

Article 258(1) provides that "notwithstanding anything in the Constitution", the President may, with the consent of the State Government, entrust either conditionally or unconditionally, to the State Government, or its officers, any function in relation to a matter to which the Centre's executive power extends. This provision authorises entrustment to a State Government, with its consent, of any function of the Central Government.

It is entirely for the Centre to determine if the entrustment to be made to a State should be conditional or unconditional; and if conditional, what conditions are to be imposed on the State concerned. Art. 258(1) provides a tool which, if used liberally, can substantially promote the concept of cooperative federalism.

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14. *A.S. Narayana v. State of West Bengal*, 78 C.W.N. 295.
15. *R. Sultan v. State of Andhra Pradesh*, ILR 1970 AP 1075; *Madhusoodanan Nair v. State of Kerala*, 1983 KLT 43.
16. *Ram Jawaya, supra; Naraindas Indurkhya v. State of Madhya Pradesh*, AIR 1974 SC 1232 : (1974) 4 SCC 788.
17. *State of Madhya Pradesh v. Bharat Singh*, AIR 1967 SC 1170 : (1967) 2 SCR 454*; Satwant Singh v. A.P.O.*, AIR 1967 SC 1836 : (1967) 3 SCR 525*; Bennett Coleman Co. v. Union of India*, AIR 1973 SC 106 : (1972) 2 SCC 788.
18. For Co-operative Federalism, see, *infra*, Ch. XIV.

Usually, while making delegation under Art. 258(1), the Central Government reserves to itself power to issue directions to the State Governments for the exercise of delegated power. It also usually reserves to itself a concurrent power to continue to exercise, along with the State Governments, the functions being delegated to them.

Delegation may be specific or general, to one State or many States, of any function whether within the Union or the Concurrent List. The necessary notification under Art. 258(1) is issued in the name of the President and the consent of the State Governments to the arrangement is necessary.[19]

A few important features of Art. 258(1) may be underlined.

(a) Entrustment of a Central function to a State is to take place only with the consent of the State.

(b) The function which may be entrusted should relate to a matter with respect to which the executive power of the Union extends.

(c) This constitutional provision does not authorise the President to delegate those powers and functions with which he is, by the express provisions of the Constitution, invested as the President.

Commenting on Art. 258(1), the Supreme Court has observed in *Jayantilal*[20] that "the effect of Art. 258(1) is merely to make a blanket provision enabling the President by notification to exercise the power which the Legislature could exercise by legislation, to entrust functions to the officers to be specified in that behalf by the President and subject to the conditions prescribed thereby."

This constitutional provision is used extensively to delegate Central functions to the State Governments when a statute confers functions on the Centre, but makes no provision for delegation of the same to the States. But, even when a statute contains a provision authorising the Central Government to delegate its power to the States, Art. 258(1) can still be invoked for the purpose instead of the statutory provision. If, however, the nature of the power involved is such as cannot be delegated under Art. 258(1), then the statutory provision will be necessary for the purpose.

To take a few examples of delegation under Art. 258(1), functions of the Central Government have been entrusted to various State Governments under the Registration of Foreigners Rules, 1939, the Foreigners Act, 1946, and the Foreigners Order, 1948, *vide* a notification issued under Art. 258(1),[21] subject to two conditions:

(1) in exercising these functions, the State Governments are to comply with such general or special directions as the Central Government may issue from time to time;

(2) notwithstanding the entrustment, the Central Government may itself exercise any of these functions should it deem fit to do so in any case.

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19. *A.H. Magermans v. S.K. Ghosh*, AIR 1966 Cal. 552; *Kamal Agency v. State of Maharashtra*, AIR 1971 Bom. 332; *L.B. Paradise Lottery Centre v. State of Andhra Pradesh*, AIR 1975 AP 50.

20. *Jayantilal Amratlal v. F.N. Rana*, AIR 1964 SC 648 : (1964) 5 SCR 294.

21. Notification issued under S.O. 590, dated 19-4-1958 of the Ministry of Home Affairs, Govt. of India.

The Government of J&K made an order of deportation on the petitioner under the Foreigners Act, 1946. The petitioner challenged the order on the ground that it could be made only by the Central Government. The Supreme Court rejected the contention saying that the President had under Art. 258(1) lawfully entrusted *inter alia* to the Government of Jammu & Kashmir the function of the Central Government under the Foreigners Act.[22]

Under S. 7 of the Explosives Substances Act, 1908, no court can try any person for any offence under the Act without the consent of the Central Government. The Centre has entrusted this function to the State Governments.[23] Atomic Energy is item 6 of List I.[24] The Centre has delegated to the State Governments, with their consent, the functions of the Central Government under cls. 4 and 5 of the Atomic Energy (Control of Production and Use) Order, 1953, subject to the usual conditions of the State Governments complying with the Central directions and of the Centre itself being able to exercise its function should it deem fit to do so in a case.

Under S. 10(1) of the Industrial Disputes Act, the Central Government has jurisdiction to refer a labour dispute to a tribunal in respect of certain industries, *e.g.*, mines, major ports, etc., but it can delegate this power to a State Government under Art. 258(1).[25] The Minimum Wages Act enacted by Parliament under entries 22, 23, and 24 of the Concurrent List,[26] provides for fixation of minimum wages in industries. Certain industries are reserved for the Centre while others fall within the State sphere. Under the Act, the Centre can issue directions to the States as to the execution of the Act in the States. If thought necessary, the Central Government can confer its power on a State Government with respect to any specific industry under Art. 258(1).[27] Similarly, power to acquire land under the Land Acquisition Act for the purpose of the Union can be entrusted by the Central Government to a State Government under this constitutional provision.[28]

The most important case on Art. 258(1), however, is *Jayantilal Amrat Lal v. F.N. Rana*.[29] Under the Land Acquisition Act, 1894, the Central Government is competent to acquire land for the purposes of the Union. The Central Government by a notification under Art. 258(1) entrusted this power to the Commissioners in the State of Bombay who were to exercise the power subject to the control of the State Government. Thereafter, the State of Gujarat was carved out of the Bombay State, and a Commissioner in Gujarat, acting under the original entrustment of power, took proceedings to acquire certain land for the Union purposes. S. 87 of the States Re-organisation Act kept alive all laws prevailing in the State before re-organisation. When the Commissioner's power to acquire land was challenged, the Supreme Court by a majority developed the view that the Presidential notification under Art. 258(1) had the force of law and so was kept alive by S. 87. The Commissioner in Gujarat could thus exercise the functions of the

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22. *Anwar v. State of Jammu & Kashmir*, AIR 1971 SC 337 : (1971) 3 SCC 104.
23. In re *K.C. Ranga Reddi*, AIR 1962 AP 322; *State of U.P. v. Rampal*, AIR 1965 All. 15; *Supdt. and Remembrancer of LegaI Affairs, State of West Bengal v. Nesaruddin Shaikh*, AIR 1963 Cal. 508.
24. *Supra*, Ch. X *Sec. D.*
25. *Bararee Coke Plant v. Their Workmen*, AIR 1968 Pat. 133.
26. *Supra.*
27. *N.K. Jain v. Labour Commissioner*, AIR 1957 Raj 35.
28. *Zubeda Begum v. Union of India*, AIR 1971 All 452.
29. AIR 1964 SC 648 : (1964) 5 SCR 294.

Central Government under the Land Acquisition Act without a fresh notification having been issued.

Two interesting points mentioned in the Court's opinion may be noted. First, a distinction has been drawn between—

(i) functions vested in the Union and exercisable by the President on behalf of the Union, and

(ii) functions entrusted to the President by express provisions of the Constitution.

Only the former functions, but not the latter, can be entrusted to the States under Art. 258(1).

In the latter category fall such functions as the power to promulgate ordinances (Art. 123);[30] to suspend the provisions of Arts. 268-279 during an emergency (Art. 354); to declare an emergency under Art. 352; to declare failure of the constitutional machinery of the States under Art. 356; to declare financial emergency under Arts. 360;[31] to make rules for recruitment to and conditions of service of persons appointed to posts and services in Central services (Art. 309);[32] to appoint judges (Arts. 124 and 217);[33] to appoint a commission for Backward Classes (Art. 340);[34] to appoint a Special Officer for the 'Scheduled Castes etc. (Art. 338),[35] and President's pleasure regarding Union servants (Art. 310).[36] These powers cannot be delegated to the States as these are not powers of the Central Government, but are vested in the President, as such, by the Constitution.

Secondly, what can be delegated under Art. 258(1) is a function to which the 'executive' power of the Union extends. A question, therefore, arises whether under Art. 258(1) only an executive function can be entrusted to the States or even what is characterised as '*quasi*-judicial' or 'delegated legislation' as well. The balance of judicial opinion so far is that only executive, and not other functions, can be delegated under Art. 258(1).[37] The majority in the *Rana* case left the question open as the function involved in the case was only administrative. It could thus mean that powers of delegated legislation, and of a *quasi*-judicial nature, can be delegated by the Centre to the States only if there is a statutory provision warranting the same and not under Art. 258(1).

Under s. 7 of the Explosive Substances Act, 1908, the consent of the Central Government is requisite for prosecution under the Act. The Central Government entrusted this power to the District Magistrates in the States. The State of Madhya Pradesh issued a notification conferring the powers of DM "under the Criminal Procedure Code or under any other law" on the Additional District Magistrate. The question arose whether the ADM could exercise the power of the DM under s. 7 of the Explosives Act.

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30. *Supra*, Ch. III.
31. *Infra*, Ch. XIII.
32. *Infra*, Ch. XVI.
33. *Supra*, Chs. IV and VIII.
34. *Infra*, Ch. XXXV.
35. *Ibid*.
36. *Infra*, Ch. XXXVI.
37. *N.K. Jain v. Labour Commr., supra*; the Minority view in the *Rana case*, *supra*, footnote 29; *Supdt. & Legal Remembrancer v. Nesaruddin*, AIR 1963 Cal 508; *supra*, footnote 23.

The Supreme Court answered in the negative ruling that the power of granting consent under s. 7 rests with the Central Government. The Central Government has delegated the power to the DM. It is therefore not competent for the State Government to delegate to the ADM a power of the Central Government which it has delegated to the DM.[38]

(c) DELEGATION BY CENTRE TO THE STATES BY LAW

Delegation of power by the Centre to the States through legislation is made possible by Art. 154(2)(*b*) according to which Parliament is not prevented from conferring by law functions on any authority subordinate to the Governor.[39] Also, according to Art. 258(2), a law made by Parliament, even if it relates to a matter in the Union List, with respect to which the State has no power to legislate, may confer power and impose duties, or authorise the conferring of powers and the imposition of duties, upon a State, its officers and authorities. Therefore, a Central law, whether pertaining to a matter in List I or List III, may confer powers and impose duties on the States, their officers and authorities.

Article 258(2) thus covers a situation where under a law made by Parliament, powers can be conferred and duties imposed on a State Government, or its officers even though the State Legislature has no power to make a law with respect to the subject-matter of the Union law.

Unlike Art. 258(1), under Art. 258(2), the conferment is made by Parliament by law and no consent of the State Government is required for the purpose. Whenever, Parliament needs State assistance to enforce a law made by it, necessary provisions are introduced therein for the exercise of the requisite powers and duties by the State administration or, in the alternative, it can empower the Central Government to entrust such powers and duties to the States.

When such a provision is not included in the statute, the Central Government can invoke Art. 258(1) to delegate administrative functions to the States. However, under Art. 258(2), Parliament has to act only within its own competence. Under this clause, Parliament can delegate *quasi*-judicial and *quasi*-legislative powers for effective execution of a Union-law as such powers are regarded as a part of the Central executive power.

Arts. 258(1) and 258(2) largely overlap in so far as matters with respect to which the Central executive functions can be delegated on the State administration. However, the power of Parliament under Art. 258(2) is *sui generis* and uncontrolled by Art. 258(1). Art. 258(2) covers a situation where without the consent of the concerned State, powers can be conferred and duties imposed on it by a Central law enacted by Parliament within the area of its competence, even if the State legislature has no competence to make a law with respect to the subject-matter of the Union law.

The rationale underlying Art. 258 is that it makes it possible to enforce Central laws through the State administrative machinery instead of having two separate and parallel agencies of the Centre and States. Art. 258 provides for two alternative courses for the Centre for the implementation of its laws and policies, *viz.*:

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38. *State of Madhya Pradesh v. Bhupendra Singh*, (2000) 1 SCC 555 : AIR 2000 SC 679.
Also see, *Hari Chand Agarwal v. Batala Engineering Co. Ltd.*, AIR 1969 SC 483 : (1969) 2 SCR 201.

39. *Supra*, Ch. VII.

(1) Entrustment of functions by the Central Executive to the State Executive with the consent of the State concerned.

(2) Parliament may confer functions on the State administration by law.

The second course does not need State consent as Parliament has power to determine the appropriate instrumentalities, whether belonging to the Centre or the States, for enforcing the law enacted by it.

Whenever Parliament needs the assistance of the States for enforcing its law, the law itself may provide for the exercise of the necessary powers and duties by the State administration, or, it may provide for delegation of powers by the Centre to the States. However, there may be a law not making any such provision but which may entrust powers and functions to the Centre. There may also be government policies which are not backed by any law. In such cases, the Centre may take recourse to Art. 258(1).

A few examples of conferment of administrative powers by Parliament on the State agencies may be cited here. The Central Sales Tax Act, enacted by Parliament under entry 92A, List I,[40] the task of assessment and collection of sales tax on inter-State sales confers on the State sales tax authorities. Under MISA, the power of passing an order of preventive detention has been conferred on all district magistrates.[41]

Under the Mines and Minerals (Development and Regulation) Act, 1957, the Centre has taken under its control the regulation of mines and development of all minerals and then has left to the States the task of regulating minor minerals by making rules. The rule-making power conferred on the States by the Centre under the Mines and Minerals (Development and Regulation) Act has been held to be valid by the Supreme Court.[42]

An interesting point to note here is that reading entries 54 in List I, and entry 23 in List II, a mineral not centrally controlled lies within the State purview.[43] Therefore, the Centre could have taken under its control only the major minerals and the minor minerals could then have been regulated by the States under their own constitutional powers. But, instead, the States now regulate the minor minerals as delegates of the Centre. Further, an interesting administrative pattern has been created under the Mining Concession Rules, 1949, promulgated under the Mines and Minerals Act. The initial power to grant a mining licence for a major mineral rests with the States, but then an appeal can be taken to the Central Government against an order of the State Government. The State power is thus ultimately subject to the Central power.

Census is another example.[44] Census takes place once in ten years. It is not practicable for the Centre to create an entirely new machinery for the purpose every ten years and then to disband the same after the census is over. Therefore, the Centre has to depend on the co-operation of the States for purposes of census.

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40. *Supra*, Ch. XI, Sec. C.
41. *Infra*, Ch. XXVII, Secs. B, C and D.
42. *D.K. Trivedi & Sons v. State of Gujarat*, (1986) Supp SCC 20 : AIR 1986 SC 1323; *Quarry Owners' Association v. State of Bihar*, (2000) 8 SCC 655 : AIR 2000 SC 2870. Also see, Ch. X, Sec. D and Sec. G(iii)(a).
43. *Supra*, Ch. X, Secs. D, E.
44. *Ibid.*

In some Central statutes, provision exists to enable the Central Government to delegate any of its powers under the Act to the State Governments 'in relation to such matters and subject to such conditions, if any, as may be specified'.[45]

In some cases, powers left with the States are made exercisable by them subject to the concurrence of the Central Government. Such a provision is made when the Central Government feels it necessary to satisfy itself that a State does not use the delegated power in a manner detrimental to the interests of the neighbouring States, or of the country as a whole, or of individuals. Not infrequently, Parliamentary laws confer power on the Central Government to delegate its powers directly on the officers and authorities of the State Governments.

The Essential Commodities Act, 1955, enacted by Parliament under entry 33, List III, confers powers on the Central Government to regulate various aspects of supply, production, storage, etc., of essential commodities (S. 3). The Act provides for an extensive mechanism of delegation of powers from the Centre to the States or their officers/authorities.

The Act authorises the Central Government to confer power on the State Government or its officers and authorities. The States thus act as delegates of the Centre, within the scope of authority conferred on them, and subject to the conditions imposed, and directions given, by the Centre regarding the exercise of delegated power. The Centre can thus delegate legislative, administrative or *quasi*-judicial powers on the State Governments and their agencies and maintain supervisory control over them.[46]

Under the Act, powers are conferred on the States and their officers in several ways, namely:

(1) The Act empowers the Central Government to direct that the power to make an order under S. 3, in relation to such matters and subject to such conditions as may be specified in the order, shall be exercised also by—(a) an officer/authority subordinate to the Union Government, or (b) a State Government or officer/authority subordinate to that Government (S. 5).

A condition usually imposed by the Centre that before making an order, the State Government shall seek the prior consent of the Central Government.

An example of such delegation can be found in the case noted below.[47] Under S. 5, Essential Commodities Act, the Central Government conferred power under S. 3(1) of the Act on State Government under the following two conditions:

(1) The State Government shall exercise the power subject to any directions issued by the Central Government.

(2) Before issuing any order, the State Government shall obtain prior concurrence of the Central Government.

(3) Another device adopted by the EC Act for delegating power is that an order made by the Central Government under S. 3 may confer powers and impose

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45. The Rice-Milling Industry (Regulation) Act, 1958, S. 19; S. 14 of the Public Premises (Eviction of Unauthorised Occupants) Act, 1958; The Industries (Development and Regulation) Act, 1951.

46. See, *Afzal Ullah v. State of Uttar Pradesh,* AIR 1964 SC 264 : (1964) 4 SCR 991; *Sujan Singh Matu Ram v. State of Haryana,* AIR 1968 P&H 363; *Foremost Dairies Ltd. v. State,* AIR 1986 Raj 116.

47. *Saurashtra Oil Mills Assn. v. State of Gujarat,* (2002) 3 SCC 202 : AIR 2002 SC 1130.

duties upon the State Government, or any of its officers or authorities. The order may also contain directions as to how the powers are to be exercised and the duties to be discharged (S. 4).

(4) The third pattern of delegation of powers under the Act is that certain sections of the Act straightway empower either a State Government or an officer under it to exercise/perform certain powers/functions.

(5) In other cases, the Central Government delegates power on the State Governments which can further delegate them on their officers and authority.[48]

There may be occasions when the Centre may impose its administrative control over the States even in an area belonging to them. At the time of general re-organisation of States in 1956, S. 115(1) of the States Re-organisation Act, 1956, stipulated that a civil servant in any State would continue to serve in the successor State. Proviso to Sec. 115(7), however, stipulated that the successor State could not vary the conditions of service of such a civil servant to his disadvantage without the previous approval of the Central Government. A kind of protection was thus given to civil servants against being prejudicially affected from State action.

Then, S. 117 of the same Act authorised the Central Government to give directions to a State Government for the purpose of giving effect to these provisions, and the State Government was obligated to comply with such directions.

In a number of cases, rules made by the States adversely affecting service conditions of the civil servants coming to them after re-organisation have been held to be inoperative in the absence of approval of the Central Government.[49] A State action ignoring the Central directive issued under S. 117 has also been held to be invalid.[50]

An instructive case dealing with the exercise of delegated power is *Mount Corp. v. Director of Industries*.[51] Imports fall within the exclusive Central jurisdiction and are regulated under the Imports and Exports (Control) Act, 1947. The Steel Controller was authorised to issue import licences for stainless steel when the Director of Industries of the State concerned issued an essentiality certificate. The petitioner's application was rejected by the Director of Industries. It transpired that the State had constituted a committee with a Deputy Minister as Chairman and the Director as a member to deal with the distribution of raw materials in the State, and that the application had been rejected by this committee.

Quashing the action of the committee, the High Court held that the power to grant the essentiality certificate had been vested in the Director under the Central Act and orders made thereunder. Instead of leaving him free to exercise this power in his discretion, the State Government sought to usurp the same by appointing a committee. The Court emphasized that when a State official functioned as a delegate under a Central law, he really discharged the functions of the

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48. S. 22 of the Supply and Prices of Goods Act, 1950; The Industries (Development and Regulation) Act, 1951.

49. *C.K. Appanna v. State of Mysore*, AIR 1965 Mys. 19; *T.S. Mankad v. State of Gujarat*, AIR 1970 SC 143 : (1969) 2 SCC 120; *Raghvendra Rao v. Dy. Commr*., AIR 1965 SC 136 : (1964) 7 SCR 549.

50. *Roshanlal v. Union of India*, AIR 1968 Punj 47.

51. AIR 1965 Mys. 144.

Central Government and not of the State Government. The scheme of federation would be a myth if the State Government, by a clever device, could direct the actions of its officers when they discharge statutory powers on behalf of the Central Government. An authority having power under a law must exercise its own individual judgment and not adopt the decision of any other body as his own.

(d) CENTRE TO DEFRAY COST

Under Art. 258(3), where powers and duties are entrusted by the Centre to the States or their officers, the Centre is to recoup the States in respect of any extra costs of administration incurred by the States in connection with those powers and duties. The Centre and the States may agree as to the sums payable in this connection, or, in default of agreement, the amount may be determined by an arbitrator appointed by the Chief Justice of India.

What payment is to be made by the Centre to the State in this connection is entirely a matter between the two governments and no third person can challenge the entrustment or delegation of powers and duties on the ground of absence of such payment. An agreement as to such payments is not a pre-requisite for entrustment of powers by the Centre to the States.[52]

(e) ENTRUSTMENT OF STATE FUNCTIONS TO THE CENTRE

According to Art. 258A, a State Government may, with the consent of the Government of India, entrust either conditionally or unconditionally to the Central Government or to its officers, functions in relation to any matter to which the executive power of the State extends.

This Article was inserted in the Constitution in 1956 by the Constitution (Seventh Amendment) Act, as a corresponding provision to Art. 258(1). The lack of a provision enabling a State to entrust its functions to the Centre was found to be of practical consequence in connection with the execution of certain development works in the States.

The complicated arrangements existing between the Government of India and the Orissa Government in respect of the Hirakud Dam, a State enterprise, can be seen from the details given in *N.B. Singh v. Duryodhan*.[53] The High Court has ruled that the relationship arising by virtue of Art. 258A between the Central and the State Governments is not that of the principal and agent.

C. POWER TO CARRY ON TRADE

Article 298 also has a bearing on the inter-relation of the Central executive power with that of a State and *vice versa*. Under this provision, the executive power of the Union, or of the State, extends to the carrying by it of any "trade or business" whether or not it is related to a matter within its legislative competence and also to hold, acquire or dispose of property and make contracts for any purpose.

This constitutional provision extends executive power of the Centre, or of the State. However, it is subject to one condition. According to provisos (a) and (b),

52. *Mulchand v. State of Bihar*, AIR 1974 Pat. 380
53. AIR 1959 Ori. 48, 65.

if an activity falls outside the legislative domain of the government which carries it, then it would be subject to the laws made by the other government having the necessary legislative power. Thus, if the trade or business carried on by the Centre does not fall within the legislative domain of the Centre, then its executive power to carry on that trade or business is subject in each State to the legislation by the concerned State. It is the only case of its kind when the Central executive power has been made subject to the State legislative power. Similarly, if the trade or business carried on by a State does not fall within its legislative domain, then the executive power of the State to carry on that trade or business is subject to legislation by Parliament.

Article 298 enlarges the scope of the executive power of the Centre as well as the States by adding various matters in respect of which these governments may exercise their executive power. It has been held in *Khazan Singh v. State of Uttar Pradesh*[54] that Art. 298 envisages carrying on of trade and business by a State without any territorial limitations and the restriction, if any, on the executive power of the State is contained in proviso (b) to Art. 298. The Court has further ruled that there is nothing in Art. 298 to say that the trade or business to be carried on by a State must be restricted to the area within its territorial limits. The carrying on of business by one State within the territory of another State does not entail an encroachment upon the executive power of the latter State. If a State has power to carry on trade in its own State it can carry on the same in every part of India.

A State could organize its own lotteries by virtue of its executive power under Art. 298, until law is made by Parliament for the purpose under entry 40, List I.[55]

It may be interesting to note that the Supreme Court has distinguished between Art. 301 and Art. 298. The Court has ruled that the words "trade or business" used in Art. 298 are wider in scope than the words "trade, commerce and intercourse" used in Art. 301.[56] This means that while a State can conduct lotteries under Art. 298, lotteries being 'gambling' and not 'commerce' cannot claim the protection of Art. 301.[57]

The words 'for any purpose' in Art. 298 indicate that the executive power of the Centre or the States to acquire, hold and dispose of property, or make contracts, is not limited by the division of Centre-State legislative powers. In this way, the width and amplitude of the executive power of the Centre and the States have been expanded. This means that the executive power of the Centre [or the States] is apart from the executive power granted under Art. 73 [or Art. 162].[58] Under this provision, a State Government has power to reserve a mining area for exploitation in the public sector even when it cannot do so under Art. 162, but this will be subject to the Central legislation.[59]

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54. AIR 1974 SC 669 : (1974) 1 SCC 295.
55. *H. Anraj v. State of Maharashtra* (*I*), AIR 1984 SC 781 : (1984) 2 SCC 292; for entry 40, List I, see, *supra*, Ch. X, Sec. D.
56. For discussion on Art. 301, see, *infra*, Ch. XV.
57. *B.R. Enterprises v. State of Uttar Pradesh*, AIR 1999 SC 1867 at 1903 : (1999) 9 SCC 700. For discussion on Art. 301, see, *infra*, Ch. XV.
58. For Art. 73, see, *supra*, Ch. III, For Art. 162, see, *supra*, Ch. VII.
59. *Amritlal v. Union of India*, AIR 1973 Guj. 117; *Lal & Co. v. Union of India*, AIR 1975 Pat. 44.

D. STATES NOT TO IMPEDE THE CENTRE

The Constitution places certain restrictions and obligations on the States in order to ensure that the Centre can exercise its powers unimpeded by them. It is necessary to ensure that no State by its action or inaction interferes with the legislative and administrative policies of the Centre.

Article 256 imposes a general obligation on the States to so exercise their executive power as to ensure compliance with the laws made by Parliament. This lays down the general constitutional duty of every State.

Article 256 further enacts that the executive power of the Centre extends to the giving of such directions to a State as may appear to the Centre to be necessary for the purpose.

It is clear from the phraseology of Art. 256 that the existence of a law made by Parliament is a condition precedent which must be satisfied for the issuance of a direction under it. No direction can be issued under Art. 256 where no enforcement of a law made by Parliament is involved.[60]

Article 256 comes into operation if the Government of India feels that the executive power of the State is being exercised in a manner which may amount to impediment to enforcement of the Central laws.

The State of West Bengal issued a circular to police officers not to intervene in case of *gherao* of industrial establishments by its workers. A writ petition was filed in the Calcutta High Court to challenge the circular. The Court declared that the provisions of Art. 256 were mandatory which must be complied with by the States. Accordingly, the directive issued by the State Government to its officers not to enforce certain sections of the Criminal Procedure Code (a Central law) was struck down as being in violation of Art. 256.[61]

The Calcutta High Court observed in this connection:[62] "The authority and the jurisdiction of the State Government to issue administrative directions are limited, firstly by the Constitution and secondly, by the laws of the land. There is no law which authorises the State Government to issue directives to officers in charge of maintenance of law and order not to enforce the law of the land upon certain conditions being fulfilled and complied with. The provisions in Article 256 of the Constitution…. are mandatory in nature".

Under Art. 257(1), the executive power of a State is to be so exercised as not to impede or prejudice the exercise of the Centre's executive power. The Centre can give such directions to a State as may appear to the Central Government to be necessary for that purpose.

The words "for that purpose" in Art. 257(1) indicate that the power of the Centre to give directions is limited to such situations only where some State executive action impedes or prejudices the valid exercise of the Central executive power. This means that the Centre is not entitled to give directions about the exercise of the State executive power in any field reserved for the State executive which does not impede or collide with, or prejudice the exercise of, the Union's

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60. *Sharma Transport v. Govt. of A.P.*, AIR 2002 SC 322 : (2002) 2 SCC 188.
61. *Jay Engineering Works v. State of West Bengal*, AIR 1968 Cal 407.
62. *Ibid*, at 488.

executive power. Such a direction would be invalid. Art. 257(1) primarily emphasizes the principle of federal supremacy.

It is obligatory on the part of the State Government to comply with the directions issued by the Central Government under Arts. 256 and 257(1). The sanction to enforce the directions is enshrined in Art. 356.[63]

CHANDRACHUD, J., has observed in *A.D.M., Jabalpur v. Shukla*,[64] as regards Art. 256 that it "does not seem to confer any right on any individual. That Article appears in Part XI which deals with relations between the Union and the States. A failure to comply with Art. 256 may attract serious consequences but no court is likely to entertain a grievance at the instance of a private party that Art. 256 has not been complied with by a State Government."[65]

This seems to be a casual, not a well considered and definitive, statement. This was the view expressed only by one Judge in a Bench of five Judges and is only an *obiter dicta*. It is not clear how can it be argued that any State action inconsistent with a law is not challengeable in a court. On the other hand, there are High Court cases where persons whose interests are adversely affected by the failure of the State Government to comply with Art. 256, have been permitted to seek judicial relief against the State Government asking it to exercise its executive power to ensure compliance with Art. 256. This is illustrated by *Jay Engineering*.[66] A circular issued by the West Bengal Government interfering with the implementation of the provisions of the Criminal Procedure Code was quashed by the Calcutta High Court on a writ petition being filed by a company. It was ruled that the provisions of Art. 256 are mandatory in nature and must be complied with by the Council of Ministers. "If the command of the Constitution in Art. 256 of the Constitution is violated and disregarded by the Council of Ministers, by issuing instructions contrary to the mandate of that Article, it must be held that the Council of Ministers had no authority to issue such directives or administrative instructions." Accordingly, the circular was struck down by the Court.[67]

Under S. 20 of the Urban Land (Ceiling and Regulation) Act, 1976—a Central Act—the State Government is authorised to grant exemption to the vacant land of a person from the operation of the Act. Under S. 36, the Central Government may issue directions to any State Government for effective execution of any of the provisions of the Act. The Central Government issued certain directions to the State Governments as regards exercise of their power under S. 20. Instead of following these directions, the Andhra Pradesh Government decided to reject all applications for grant of exemption under S. 20. The Andhra Pradesh High Court ruled, on a writ petition filed by a cooperative society, that it was obligatory under Arts. 256 and 257 on the part of the State Government to ensure compliance with the law made by Parliament and the directions given by the Central Government for the implementation of the Act. The sanction to enforce these directions is contained in Art. 365.[68] The court declared the order of the State Gov-

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63. See, *K. Co-op. Building Society Ltd. v. State of Andhra Pradesh*, AIR 1985 AP 242.
For discussion on Art. 356, see, *infra*, Ch. XIII.

64. AIR 1976 SC 1207, 1338 : (1976) 2 SCC 521.
For a detailed discussion on this case, see, Ch. XXXIII, Sec. F.

65. For Art. 256, see, Sec. D, *supra*.

66. *Jay Engineering Works v. State of West Bengal*, AIR 1968 Cal 407.

67. *Ibid.*, at 488.

68. See, Sec. E, below.

ernment invalid as it impeded or prejudiced the compliance with the guidelines issued by the Central Government.[69]

E. CENTRE'S DIRECTIVES TO THE STATES

Apart from Arts. 256 and 257(1), a few other constitutional provisions authorise the Centre to issue directives to the States in several matters falling under their purview.

'Communications' is a State subject.[70] However, under Art. 257(2), the Centre may give directions to a State as to the construction and maintenance of means of communication declared in the direction to be of national or military importance. This, however, does not restrict the power of Parliament to declare highways or waterways to be national; nor is the Centre's power restricted with respect to the national highways or waterways nor its power to construct and maintain means of communication as part of its functions with respect to naval, military and air force works.[71]

Article 257(3) empowers the Centre to give directions to a State as to the measures to be taken for the protection of the railways within the State. 'Railways' is a Central subject[72] but 'Police' is a State subject[73] and, consequently, the protection of railway property lies within the field of the State Government. It may be that in a particular situation the Centre may desire that the railway property be protected by taking special measurers by the State and for that purpose the Centre has power to give directions to the States.

Explaining the rationale of Arts. 257(2) and 257(3)[74] the Sarkaria Commission has observed:[75]

> "Even though clause (1) of Article 257 gives the Union full control over the exercise of the executive power of every State to ensure that it does not impede or prejudice the exercise of the executive power of the Union, the Constitution-makers, nevertheless, considered it necessary to make separate provisions in clauses (2) and (3) regarding means of communication and protection of railways…..Clause (2), ……. is intended to lay stress on the overall importance of well-coordinated effective executive action in regard to means of communications and railways which are so vital for the defence of the country, inter-State social intercourse, travel, trade and commerce, and incidentally are conducive to national integration. Further, as the States have exclusive legislative and executive power in respect of 'land' (vide entry 18 in the 'State List' read with Art. 162), the Constitution-framers appropriately found it necessary in the national interest, for the Union to have control over the State executive to ensure availability of 'land' for purposes of communication and protection of railways."

Provision has been made in Art. 257(4) for the Centre to pay sums to the States in respect of the extra costs incurred by the States due to the directions

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69. *Katya Coop. Building Society Ltd. v. State of Andhra Pradesh,* AIR 1985 AP 242; *Muppavarapu Siva Ramakrishnaiah v. State of Andhra Pradesh,* AIR 1985 AP 376.
70. Entry 13, List II, see, *supra,* Ch. X, Sec. E.
71. Entries 4, 23, 24, List I. *Supra,* Ch. X, Sec. D.
72. Entry 22, List I.
73. Entry 2, List II, *Supra,* Ch. X, Sec. E.
74. IX CAD 1186.
75. REPORT, 103.

issued under Cls. (2) and (3) of the Article. This constitutional provision recognises the fact that in complying with any Central directions given to a State under Arts. 257(2) and (3), it may incur extra costs. The Centre is thus placed under an obligation to pay to the State sums to meet the extra costs so incurred by the State.

The Sarkaria Commission has justified the existence of Arts. 256 and 257 in the Constitution in the following words:

> "In a two-tier-system of Government, with a single judiciary, where the administration of Union law is largely secured through the machinery of the States, differences are bound to arise between the Union and the States in regard to the manner of implementation of Union laws and the exercise of the Union's executive powers, specially if they conflict with the exercise of the executive powers of the State. Articles like 256 and 257 are essential to ensure harmonious exercise of the executive power by the Union and by the States, in keeping with the principle of Union supremacy and to enforce this principle, by giving appropriate directions, in the event of irreconcilable differences on vital issues".[76]

OTHER CONSTITUTIONAL PROVISIONS

Apart from Arts. 256 and 257, there are several other provisions in the Constitution authorising the Union to give directions to the States.

In certain matters pertaining to the Minorities, the Central Government has power to issue directives to the States. Art. 339(2) entitles the Centre to give directions to a State as to the drawing up and execution of schemes specified in the direction to be essential for the welfare of Scheduled Tribes in the State.[77]

Under Art. 350A, a State is obligated to provide facilities for instruction in the mother-tongue at the primary stage of children belonging to a linguistic minority and the President has been empowered to issue such directions to any State as he considers necessary.[78]

Under Art. 344(6), the President may issue directions in regard to the official language of the Union, and under Art. 347 with regard to the recognition in a State of the language spoken by a substantial proportion of the State population.[79]

Besides, a number of administrative functions have been entrusted to the Centre in the area of minority affairs which are detailed later.[80]

During an emergency under Art. 352, the Centre gets some overriding powers *vis-a-vis* the States. It can give directions to the States as to the way they should exercise their executive power [Art. 353(a)]. During a financial emergency, the Centre can give directions to a State [Art. 360(3)], and, under Art. 356, the Centre can take over a State Government when it cannot be carried on in accordance with the Constitution.[81]

Under Art. 371C(2), the President can issue directions to the Governor of Manipur as to the administration of hilly area therein.[82]

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76. *Report*, 106.
77. See, *infra*, Ch. XXXV.
78. See, *infra*, Chs. XVI and XXXV.
79. *Infra*, Ch. XVI.
80. *Infra*, Part V. Ch. XXXV.
81. For discussion on these Emergency Provisions, see, *infra*, Ch. XIII.
82. *Supra*, Ch. IX.

Lastly, there is the all important constitutional provision, Art. 365, which lays down the sanction behind the Central directives to the States. In case of failure of a State to comply with, or give effect to, the Central directions, given under any Constitutional provision, the President may hold that a situation has arisen in which the State Government cannot be carried on in accordance with the provisions of the Constitution. Thereafter, the Centre can take over the administration of the State as provided for in Art. 356.[83]

The rationale underlying Art. 365 is that the constitutional provisions authorising the Centre to issue directions to the States would be rendered futile if any direction issued thereunder can be ignored or disobeyed by a State with impunity. Any direction issued by the Centre under a constitutional provision is meant to be complied with and not ignored by the concerned State. Without Art. 365, there would have been no sanction to ensure enforcement of Central directions issued to the States under any constitutional provision in exercise of its executive power. However, taking recourse to Art. 365 is a measure of last resort. So far, there has been no occasion for the Centre to invoke Art. 365.

Article 365 can be validly invoked only if the following two conditions are satisfied:

(1) A direction is issued by the Centre in the valid exercise of its executive power under a constitutional provision,

(2) The State concerned has not complied with, or given effect to, such direction.

If any of the above conditions is not satisfied, Art. 365 cannot be invoked. Thus, the power conferred by Art. 365 is conditional and not absolute; its exercise may thus become subject to judicial review. If a Central direction does not fulfil the pre-conditions prescribed in the specific constitutional provision under which it is purportedly issued, or has been given for a purpose extraneous to the one for which the power has been conferred by that provision, it would be invalid and open to challenge on that ground in the court.

F. STATUTORY PROVISIONS

Along with the above constitutional provisions, several statutory provisions confer power on the Central Government to give directions to the States. For example, S. 23 of the Supply and Prices of Goods Act, 1950, (enacted under Art. 249),[84] empowered the Central Government to give directions to any State Government as to the carrying into execution of any of the provisions of the Act, or of any order or direction made thereunder.

Under the Plantation Labour Act, 1951, the executive power is left with the States but the Central Government has power under S. 41 to give directions to a State Government as to the carrying into execution of the provisions of the Act.

Many more such examples can be collected from the statute book. Usually, whenever administrative power is delegated to the States under a Central law, a

83. *Infra*, Ch. XIII, Sec. B.
84. *Supra*, Ch. X, Sec. J.

reservation is made enabling the Centre to give directions to the States as to the carrying into effect the functions so delegated to them.

G. ALL-INDIA SERVICES

Article 312 introduces an important feature into the Constitution, namely, that besides separate services for the Union and the States, the Centre can create certain services common to both.[85]

If the Rajya Sabha declares by resolution supported by not less than two-thirds of the members present and voting that it is necessary or expedient in the national interest so to do, Parliament may by law provide for the creation of one or more All-India Services (including an all-India Judicial Service) and regulate recruitment and conditions of service for it.[86] The all-India Judicial Service is not to include any post inferior to that of a district judge.

These services give cohesion to the federal structure and help in achieving greater efficiency in the administration of the Union and the States. The all-India basis of recruitment attracts the best available talent in the country to these services. The two main All-India Services are the Indian Administrative Service and the Indian Police Service. The *raison d'eter* of creating All-India Services is that officers on whom the brunt of the responsibility for administration will inevitably fall, may develop a wide and all-India outlook.[87]

With a view to correcting particularistic trends, and also to secure greater inter-State co-ordination for efficient implementation of all-India policies, efforts have been undertaken towards creation of a few more All-India Services, especially for technical departments, for "the Central and State Governments have to work in very close co-operation in executing important development projects, which necessitates that technical personnel should be trained and recruited on a common basis".[88] Consequently, in 1961, the Chief Ministers' Conference accepted in principle the creation of three new All-India Services in the field of engineering, forestry and medicine and public health. After the adoption of a resolution under Art. 312(1) by the Rajya Sabha, these services were created by amending the All-India Services Act, 1951 in 1963.

The State Governments had also agreed to the creation of two more All-India Services, *viz*., the Indian Educational Service and the Indian Agricultural Service. The necessary resolution under Art. 312(1) was also adopted by the Rajya Sabha. After the fourth general elections, a few State Governments modified their stand and refused to participate in these two services and, consequently, the matter was deferred.[89]

H. GENERAL OBSERVATIONS

Some of the provisions made in the Constitution are unique insofar as these are not to be found in the Federations of U.S.A., Canada and Australia. The basic

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85. *Infra*, Ch. XXXVI.
86. See, *D.S. Garewal v. State of Punjab*, AIR 1959 SC 512 : 1959 Supp (1) SCR 792.
87. STATES REORGANIZATION COMMISSION REPORT, 232 (1955).
88. *Ibid*, 231. Also, A.K. CHANDA, FEDERALISM IN INDIA, 106 (1965).
89. ANNUAL REPORT, MINISTRY OF HOME AFFAIRS, 2 (1968-69).

pattern of administration in these countries is that central legislation is by and large implemented through the federal executive. In India, it is not so.

In India, the Constitution is so devised as to leave most of the administration to the States. The Centre directly administers through its own agencies only a few functions in its exclusive List, *e.g.*, defence, foreign affairs, railways, collection of taxes, regulation of foreign trade, foreign exchange and currency, centrally controlled industries, etc. Quite a number of its exclusive functions are administered through the States, *e.g.*, till recently passports were issued by the States, but this task has now been centralised; policing of some of the international borders still rests with the States though the Centre has now created the Border Security Force for the purpose.

Many functions in the Central List are delegated to the States under Art. 258(1), or under legislation, and in some areas co-operation of State agencies is sought informally. On the other hand, the States have responsibility to administer all the functions falling in List II. In addition, the administration of functions in the Concurrent List also belongs to them unless Parliament by passing a law confers power of administration in a particular matter on the Centre. Further, the States also administer such functions in List I as are delegated to them.

Even when the Centre assumes power under a law enacted by it in the Concurrent area, it delegates most of these on the States. Thus, under the Essential Commodities Act, 1955, while the power to regulate essential commodities has been centralised, it exercises the power through its own agencies only in respect of a few commodities like iron and steel, jute, etc., and leaves quite a big slice of administration under the Act to the States subject to its over-all control. The Constitution thus envisages a good deal of administrative cooperation between the Centre and the States.

A mosaic of Central-State relationship has thus come into existence in the country. The law enforcement machinery, like the police, etc., wholly belongs to the States and, therefore, even if a Central law makes an activity penal, the efficacy of the law, by and large, depends almost wholly on the zeal with which the States seek to enforce it. It is not uncommon to see that many Central laws are diluted and remain mere paper legislation because of weak and indifferent administration by the States.

Most of the administration at the grass-roots vests in the States. The States carry out their own exclusive functions along with a number of functions as delegates of the Central Government.

A large sector of five-year plans falls to the States for implementation because many nation-building activities fall within their legislative purview. The plans deal with many matters in the State and Concurrent Lists and, therefore, the successful implementation of the plans, and of many national policies of development, depends mostly on State initiative and enterprise and on the effectiveness with which the States administer them.

The modern era has been characterised as the administrative age in which much depends on an effective administration. It is much more so in India where successful planning depends on sustained administrative effort, initiative and enterprise as plan programmes are to be completed within a fixed time.

Opinions have been expressed from time to time that too much dependence by the Centre on the States for purposes of administration is the weak link of the present-day Indian Federalism. It is well known that, on the whole, State administration is rather weak and this means that the administration of plan projects and other Central programmes and functions is not as vigorous as it should be.

Appleby has pointedly commented on this aspect of the matter thus: "The Nation is crucially dependent on the States for actual achievement of the chief programmatic objectives of the Nation". "Because of the Constitutional arrangments, in many fields of pre-eminently national importance, the Centre's hopes for success are dependent on its capacity for influencing and co-ordinating administration actually in the States' systems and not on directing or controlling the States or holding them strictly and specifically accountable. The Centre holds conferences, makes studies and plans, issues pronouncements, and is fundamentally lacking in administrative authority," and that "the new national government of India is given less basic resource in power than any other large and important nation, while at the same time having rather more sense of need and determination to establish programmes dealing with matters important to the national interest." The Centre does not have effective power of enforcing on the States any coordinative decision when there is, instead, the diluted and incomplete task of coordination not involving exercise of a real, formal and continuing power of control.

Appleby went on to say further: "Even when the Centre has power to issue directives to the States, matters do not improve very much for, in the very nature of things, such a power cannot be exercised too frequently. Even in the area of conditional grants-in-aid made under Art. 282, no effective mechanism to supervise use of funds by the States has been worked out so far.[90] When the Centre provides grants to the States on conditions to help the State activities, the Central inspection and control being lax, the States accepting grants do not fully discharge the obligations willingly undertaken by them. In consequence, national programmes tend to lag behind". Thus, APPLEBY concludes:[91]

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

In spite of the detailed provisions in the Constitution regulating the Centre-State administrative relationship, there is not always smooth sailing. Stresses and strains arise between the Centre and the States at times. For example, the Constitution squarely rests the responsibility to protect the means of communication on the States, but such protection is not always forthcoming in adequate measure.

In November 1967, the Central Government addressed a general letter to all State Governments drawing their attention to their obligations under Arts. 256 and 257 and cautioning them that such a failure on their part was against the Constitution which clearly placed on them the responsibility to ensure proper functioning of the Central agencies and protection of Central property. The Central Government hoped that occasions would not arise necessitating resort by it to powers under Arts. 256 and 257. The Centre advised the States to seek Central

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90. *Supra*, Ch. XI, Sec. M.
91. PUBLIC ADMINISTRATION, *supra*, at 17.

assistance if they ever felt that they could not on their own prevent interference with the working of Union agencies and services in their respective jurisdiction.

Embarrassment is caused to the Centre when a State Government of a political complexion different from that of the Central Government, in spite of the constitutional obligation to do so, does not give its full co-operation to the Centre in implementing its laws even in its exclusive area. One example of this may be mentioned here. The employees of the Central Government threatened to go on a token strike for a day. In anticipation of the strike, the Central Government promulgated the Essential Services Maintenance Ordinance, 1968, declaring the strike illegal and sent directives to the States as to how to deal with the threatened strike. The State Governments were requested to issue appropriate instructions to district authorities to take suitable action, including arrest of, and institution of cases against, the offenders. The Kerala Government publicly declared that it would not implement the Central directive but follow its own policies in the matter. The Centre then drew the attention of the State Government to Art. 256.[92]

The State Government then informed the Centre that it would take all action necessary and found suitable, keeping in view the provisions of Art. 256. Later, the State Government withdrew all the criminal cases against those Central employees who had been arrested on charges of violence under the Central law and, though this caused embarrassment to the Centre, yet it could do nothing as the law enforcement machinery belongs to the States. The situation was saved by the Kerala High Court which held that the withdrawal of cases by the State was bad in law and directed that the accused persons be tried and not acquitted.[93]

The intransigence of the Kerala Government to implement a Central law came in for a lot of criticism in the Lok Sabha.[94] The Central Government took the view that no State has a right to place its own interpretation on a Central law, or have its own policy on how it should be enforced. Under the Constitutional provisions, if a State fails to honour its obligation to enforce a Central law, the Centre can, under Art. 256, issue a directive to the defaulting State. If this is not heeded by the State Government, the Central Government can invoke Art. 356 as authorised by Art. 365.[95] But it is not feasible always to resort to such a drastic step.

As regards the relationship between Arts. 356 and 365, it may be pointed out that Art. 365 merely sets out one instance in which the President (*i.e.*, the Central Government) may hold that the State Government cannot be carried on in accordance with the provisions of the Constitution. Art. 356 is however much wider in scope than Art. 365. Art. 365 is not exhaustive of the situations where the President may form the said satisfaction under Art. 356.

Article 365 merely says that in case of failure to comply with the directions given, "it shall be lawful" for the President to hold that the requisite type of situation (as contemplated in Art. 356(1)) has arisen. It is not that each and every failure to observe a Central direction *ipso facto* results in the failure of the State Government.

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92. *Supra*, Sec. D.
93. *Deputy Accountant-General v. State of Kerala*, AIR 1970 Ker 158.
94. LOK SABHA DEB., Nov. 19, 1968.
95. *Supra*, Sec. E.

Two conditions are pre-requisite for taking action under Art. 365, *viz.*, (i) the directions given by the Centre must be lawful; and (ii) their disobedience must give rise to a situation contemplated in Art. 356(1). The President has to judge in each specific case whether such a situation has arisen or not. Art. 365 says it is permissible for the President to say so in case of failure of the State Government to observe a Central direction. This implies that there is 'discretion' which has to be applied fairly.[1]

For example, in *Rajasthan v. Union of India,* the question was raised whether the Centre can issue a direction to a State to dissolve its legislative assembly and hold fresh elections for theHouse. There seems to be a difference of opinion amongst the Supreme Court Judges on this issue. For example, BEG, C.J., observed after referring to Arts. 256 and 257:

> "It could, therefore, be argued that, although the Constitution itself does not lay down specifically when the power of dissolution should be exercised by the Governor on the advice of a Council of Ministers in the State, yet if a direction on that matter was properly given by the Union Government to a State Government, there is a duty to carry it out. The time for the dissolution of a State Assembly is not covered by any specific provision of the Constitution or any law made on the subject. It is possible, however, for the Union Government, in exercise of its residuary executive power to consider it a fit subject for the issue of an appropriate direction when it considers that the political situation in the country is such that a fresh election is necessary in the interest of political stability or to establish the confidence of the people in the Government of a State".[2]

But FAZL ALI, J., disagreed with the above view. Taking phraseology of Arts. 256 and 257 into consideration, he expressed the view that no such direction could be issued. He observed on this point:

> "The Chief Minister, as the head of the Council of Ministers in the State, has the undoubted discretion to advise the Governor to dissolve the Assembly if a particular situation demands such a step. The Chief Minister is the best judge to assess the circumstances under which such an advice should be given to the Governor. The Central Government cannot interfere with this executive power of the State Government by giving directions under Art. 256 or Art. 257 of the Constitution because the dissolution of the Assembly by the Governor is purely a matter concerning the State and does not fall within the four corners of either Art. 256 or Art. 257 of the Constitution".[3]

FAZL ALI, J.'S opinion is more rational and consistent with the wordings of Art. 256 and 257 and with the federal concept.

Whenever there is a general strike, agitation or demonstration in a State, the State generally fails to give adequate protection to the Central Government's agencies so that these may keep on functioning normally, nor is adequate protection given to the Central property in the States against destruction by the agitators, although there is a specific constitutional obligation to do so.[4] The result is that Central services like railways, posts and telegraph, etc., have to be suspended now and then in one State or the other. The Centre has drawn the attention of the

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1. For further discussion on Arts. 356 and 365, see, next Chapter.
2. AIR 1977 SC at 1384.
Also, see, *infra,* Ch. XIII.
3. *Ibid,* at 1434.
4. LOK SABHA DEB., Feb. 13, 1968.

States to their obligations under Arts. 256 and 257 and has cautioned them that such a failure on their part is against the Constitution which clearly places on them the responsibility to ensure proper functioning of the Central agencies and protection of the Centre's properties, installations and institutions within the States' boundaries.

In anticipation of the Central Government employees' strike in 1968, the Centre deployed the Central Reserve Police in Kerala to protect Central Government offices and installations. The State objected to this on the ground that the Centre should have consulted it before doing so. The Centre, however, took the view that it was not obligatory for it to consult the State Government to deploy the Central Reserve Police to protect its own institutions in the State.

The Central Reserve Police has been created by an Act of Parliament under entry 2 of List I, pertaining to "any other armed forces of the Union".[5] Though 'public order' is a State matter being entry 1 in List II,[6] yet, "armed forces of the Union" have been specifically excluded from the scope of the entry.

Reference is also to be made to the Centre's obligation under Art. 355.[7] The Centre, therefore, argued that if a State fails to protect its property, it could not stand by helplessly and let its property be destroyed or its agencies prevented from proper functioning. It must take necessary action to deal with any eventuality, particularly when, as it happened in Kerala, the State Government had declared that it would ignore the Central law preventing strike by Central employees and would not activise the local law and order apparatus for the purpose. The issues remain unresolved so far.

A similar controversy arose between the Centre and West Bengal on the deployment of the units of the Reserve Police to protect Central Government's property within the State without seeking its concurrence. Another angle of the controversy was that on April 10, 1969, there was statewide strike as a protest against firing by the guards of the Central Defence Ordinance Factory. The State Government failed to give protection against obstruction in the functioning of the Central Services within the State as a result of which these services had to be suspended for the day. The Central Government took a serious view of such an attitude on the part of some of the States.[8]

Although, for the present, the phase of tension between the Centre and the States has passed over, there is no knowing as to when a similar phase may re-emerge. The political complexion of the Central and State Governments has much to do with the stresses and strains in their relationship. What happened in the past is only a symptom of a much more serious constitutional crisis that could arise if a State decides to ignore the Central laws and fails to implement them. It is, therefore, necessary to re-orient Centre-State administrative relationship. A greater federalization of the important Central functions is necessary so that the Centre depends less on the States, and more on its own instrumentalities to enforce its laws.

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5. *Supra*, Ch. X, Sec. D.
6. *Supra*, Ch. X, Sec. E.
7. *Infra*, next Chapter.
8. LOK SABHA DEB., April 11 & 14, 1969.

Before 1956, the entire administration of the Company Law was left to the States. The administration of the law by them was perfunctory and ineffective and most of the regulatory provisions remained unenforced. When, keeping in view the new economic developments in the country, thoughts began to be given to modify the Company law, it appeared inevitable that there should be a strong and competent administrative machinery to enforce the same and, therefore, the Centre established its own administrative agencies under the Companies Act, 1956.

The Centre has enacted the Industrial Security Force Act, 1969, with a view to ensure better protection and security of installations and industrial undertakings belonging to the Centre all over the country.[9] Such a development *viz*., federalization of Central administration, will be in line with the practices already in vogue in other federations.

It is also necessary to develop a Central mechanism for a close and effective Central supervision and inspection over an effective aided State activities. The performance of the States ought to be audited and watched closely by federal officers before releasing further grants to the States. In the U.S.A., this mechanism is extensively adopted. At the same time, in view of the known inadequacies and deficiencies in the State administration, it is also necessary to strengthen the same so as to make it more efficient. It is necessary to do so because a lot of administration falls in the State sector, particularly with regard to the multifarious programmes of social-economic well-being of the people. The States have to play a meaningful role as administrative entities because they are the nearest to the people, and much of the well-being of the people depends on effective State administration.

Tensions are bound to arise if there is a lack of balance between the responsibilities of the States and their administrative capacity. It is, therefore, necessary, even crucial, to devise ways and means to improve the effectiveness of administration at the State level. It is extremely necessary for the future well-being of the Nation that the States be in a position to discharge their role as robust administrative units.

The Finance Commission now recommends Central grants to the States for improvement of their essential administrative services.[10] The Seventh Finance Commission suggested improvement in the pay scales of the State personnel and took into account the increased expenditure on this head in the revenue expenditure forecasts of the concerned States.

The Commission felt concerned that in many States "the level of emoluments is unduly depressed compared not only to the Centre but also to other States". The Commission also proposed Central grants to the States for up-gradation of standards of administration. The heads selected for the purpose were: fiscal services, judicial administration, district administration, police and jail administration.[11]

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9. RAJYA SABHA DEB., Feb. 28, 1969;
ANNUAL REPORT OF THE MINISTRY OF HOME AFFAIRS, 49 (1968-69).
10. *Supra*, Ch. XI, Sec. L.
11. REPORT, Ch. XI, Sec. L.

The Tenth Finance Commission has also recommended grants for the purpose of improvement in the State administration. The Eleventh Finance Commission has provided for Central Grants to the States for improvement of State administration in several fields, e.g., district administration, police administration, prisons administration, judicial administration, fiscal administration etc.[12] But the crucial question remains: do the States effectively use the money given to them by the Centre for the purposes for which the money is given? Is there any mechanism to ensure that the funds given to the States for the purpose of improving administration is being used for the specified purpose?

12. REPORT OF THE ELEVENTH FINANCE COMMISSION, 62-63 (2000).

CHAPTER XIII

EMERGENCY PROVISIONS

SYNOPSIS

A. INTRODUCTORY

A notable feature of the Indian Constitution is the way in which the normal peace-time federalism can be adapted to an emergency situation. The framers of the Constitution felt that, in an emergency, the Centre should have overriding powers to control and direct all aspects of administration and legislation throughout the country.

The Constitution envisages three types of emergencies:

(i) emergency arising from a threat to the security of India;

(ii) breakdown of constitutional machinery in a State;

(iii) financial emergency. Each of these emergencies is discussed below.

Proclamation of an emergency is a very serious matter as it disturbs the normal fabric of the Constitution and adversely affects the rights of the people. Such a proclamation should, therefore, be issued only in exceptional circumstances and

not merely to keep an unpopular government in office as happened in June 1975 when an emergency was declared on the ground of internal disturbance without there being adequate justification for the same.

As a consequence thereof, the emergency provisions (especially Arts. 352 and 356) have been extensively amended by the Constitution (Forty-fourth Amendment) Act, with a view to introduce a number of safeguards against abuse of power by the executive in the name of emergency. Amendments have thus been made by the Forty-fourth Amendment to the emergency provisions of the Constitution to make repetition of the 1975 situation extremely difficult, if not impossible.[1]

B. PROCLAMATION OF EMERGENCY

Under Art. 352(1), if the President is 'satisfied' that a grave emergency exists whereby the security of India or any part thereof is threatened, whether by war, or external aggression, or armed rebellion, he may, by proclamation, make a declaration to that effect. Such a proclamation may be made in respect of the whole of India, or such part of the Indian territory as may be specified in the proclamation.

Article 352(1) thus means that the proclamation need not extend to the whole of India. It may be restricted to a part of the Indian territory.

A proclamation of emergency under Art. 352(1) may be made before the actual occurrence of war, external aggression or armed rebellion.[2]

Before 1978, an emergency could be declared because of war, external aggression or 'internal disturbance'. The expression 'internal disturbance' was too vague and broad. The 44th Constitutional Amendment substituted the words 'armed rebellion' for 'internal disturbance' with a view to exclude the possibility of an emergency being proclaimed on the ground of 'internal disturbance' only not involving armed rebellion, as happened in 1975. This change has somewhat restricted the scope of what may be called as internal emergency.

As the Supreme Court has explained in the following case,[3] the expression "internal disturbance" has a wider connotation than "armed rebellion" in the sense that "armed rebellion" is likely to pose a threat to the security of the country, or a part thereof, while "internal disturbance", though serious in nature, would not pose a threat to the security of the country, or a part thereof.

The intention underlying the substitution of the words 'internal disturbance' by the words "armed rebellion" is to limit the invocation of Art. 352 only to more serious situations where there is a threat to the security of the country, or a part thereof. The reason underlying restricting the scope of Art. 352 is that a proclamation of emergency under Art. 352 has a very serious impact on the powers of the States as well as the Fundamental Rights of the people.[4]

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1. Also see, *infra*, Ch. XXXIII, Sec. F; Ch. XLII.
2. *Expls*. to Art. 352(1).
3. *Naga People's Movement of Human Rights v. Union of India*, AIR 1998 SC 431 : (1998) 2 SCC 109.
4. For discussion on this aspect, see *infra*, Ch. XXXIII, Sec. F.

A proclamation issued under Art. 352(1) may be varied or revoked by a subsequent proclamation [Art. 352(2)].

The 44th Amendment has introduced a clause, *viz.*, Art. 352(3), to the effect that the President shall not issue a proclamation of emergency [under Art. 352(1)], or a proclamation varying the same, unless the decision of the Union Cabinet (that is to say, the Council consisting of the Prime Minister and other Ministers of Cabinet rank appointed under Art. 75) that such a proclamation may be issued has been communicated to him in writing. This means that the decision to issue such a proclamation has to be arrived at collectively by the Cabinet and not by the Prime Minister alone without consulting the Cabinet. It so happened in 1975 that the President proclaimed emergency on the advice of the Prime Minister alone and the Council of Ministers was later presented with a *fait accompli*. It is to avoid any such situation in future that Art. 352(3) has been introduced in the Constitution.

Every proclamation issued under Art. 352(1) is to be laid before each House of Parliament [Art. 352(4)]. It ceases to operate (except when it is a proclamation revoking the previous proclamation) at the expiration of one month unless, in the meantime, it has been approved by resolutions of both Houses of Parliament [Art. 352(4)]. Thus, the purport of Art. 352(1) is that Parliament must be convened within a month to consider the proclamation of emergency.

A proclamation will automatically cease after one month if not approved by Parliament in the meantime. Formerly, the period allowed for parliamentary approval of the proclamation was two months. The 44th Amendment has reduced it to one month.

If, however, at the time of the issue of the proclamation or thereafter, Lok Sabha is dissolved without approving the proclamation, and the Rajya Sabha approves it, then the proclamation ceases to operate 30 days after the Lok Sabha sits again after fresh elections, unless in the meantime the new Lok Sabha passes a resolution approving the proclamation [Proviso to Art. 352(4)].

Another significant safeguard introduced by the 44th Amendment is to lay down that a resolution approving the proclamation of emergency (or one varying it) has to be passed by each House by a majority of the total membership of each House and not less than two-thirds of the majority of the members present and voting in each House [Art. 352(6)].

Before the 44th Amendment, passage of such a resolution by a simple majority in each House was sufficient. Art. 352(6) introduces a very wholesome safeguard. Since a proclamation of emergency virtually results in amending the Constitution for the period of the emergency (Fundamental Rights are suspended[5] and, from the legislative point of view, it becomes practically unitary)[6], it is desirable that the proclamation of emergency be approved by the same majority in Parliament as is required for amendment of the Constitution.[7]

Once approved by Parliament, the proclamation remains in force, unless revoked earlier, only for six months from the date of the passing of the later of the

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5. *Ibid.*

6. See, *infra*, under "Consequences of a Proclamation of Emergency".
Also see, Ch. XXXIII, Sec. F, *infra.*

7. For the Amendment of the Constitution see *infra*, Ch. XLI.

resolutions [Art. 352(5)]. For continuance of the emergency beyond that period, parliamentary approval is needed again. Thus, each time Parliament approves the proclamation, its life is extended for six months [Proviso to Art. 352(5)]. In this way, the question whether the emergency should continue in force or not must periodically come before both Houses of Parliament.

This provision has also been added by the 44th Amendment. Previously, once approved by the two Houses, the proclamation could remain in force as long as the executive desired. There was no provision for periodical parliamentary review of the need for continuance of the emergency. This is a very wholesome provision. Each resolution of approval is to be passed by Parliament by the special majority mentioned above [Art. 352(6)]. It may however be noted that the Central Executive can revoke the proclamation at any time it likes.

Another safeguard introduced by the 44th Amendment is that the President is obliged to revoke a proclamation of emergency issued under Art. 352(1) (or one varying the same) if the House of People passes a resolution disapproving the same [Art. 352(7)]. This resolution is to be passed by a simple majority of the members of the House present and voting. Formerly the power to revoke the proclamation vested in the executive and the House had no say in the matter. Now, the executive has to withdraw the emergency if the Lok Sabha so desires.

The Forty-fourth Amendment introduced another innovation: where a notice in writing, signed by not less than 1/10th of the total members of the Lok Sabha has been given, of their intention to move a resolution disapproving the proclamation of emergency, to the Speaker if the House is in session, or to the President, if the House is not in session, a special sitting of the House is to be held within 14 days from the date on which such notice is received by the Speaker or the President, as the case may be, for the purpose of considering such resolution [Art. 352(8)]. Thus, it does not lie within the power of the government to convene or not a session of the House to consider the resolution in question.

According to Art. 352(9), the President has power to issue different proclamations on different grounds, "being war or external aggression, armed rebellion or imminent danger of war or external aggression or armed rebellion whether or not there is a Proclamation already issued by the President under clause (1) and such Proclamation is in operation."

This provision was introduced in 1975 by the 38th Amendment after the proclamation was issued on the ground of internal disturbance. There was already in existence at the time a proclamation of emergency (issued in 1971)[8] on the ground of external aggression. The provision was to ensure that there might be no legal hurdle in the way of having two proclamations of emergency on two different grounds operating at one and the same time. The 44th Amendment has continued this provision.

(a) JUSTICIABILITY OF PRESIDENT'S DISCRETION

According to Art. 352(1), the President may make a proclamation of emergency only when he is satisfied as to the existence of a threat to the security of India, or a part thereof. Thus, the question whether the security of India is threatened or not lies within the subjective satisfaction of the President acting on the

8. *Infra*, Ch. XXXIII, Sec. F.

advice of the Cabinet. The question has arisen from time to time whether this satisfaction of the President is justiciable or not.

In *Bhut Nath v. State of West Bengal*,[9] the Supreme Court refusing to hold the continuance of the emergency under Art. 352 'void' stated that the question is "a political, not justiciable issue and the appeal should be to the polls and not to the courts."

Nevertheless, to put the matter beyond any shadow of doubt, the Constitution (Thirty-eighth Amendment) Act, 1975[10] amended the Constitution by adding clause 5 to Art. 352 which declared that the "satisfaction" of the President mentioned in Art. 352(1) and (3) "shall be final and conclusive" and "shall not be questioned in any court on any ground." It was further declared that "neither the Supreme Court nor any other court shall have jurisdiction to entertain any question, on any ground, regarding the validity of—(i) a declaration made by proclamation by the President to the effect stated in clause (1); or (ii) the continued operation of such proclamation." The 'satisfaction' of the President in declaring the emergency, and, thus, the proclamation of emergency under Art. 352, were thus sought to be placed beyond the ken of judicial scrutiny.

In *Bhut Nath*, that was the view taken by the Supreme Court when it said that the proclamation of emergency was not a justiciable issue but was essentially a political matter in substance. The amendment sought to put this judicial view in the form of a constitutional provision lest the court might change its opinion at some future date. Now, the Forty-fourth Amendment of the Constitution has repealed Art. 352(5).[11] The position has thus been restored to what it was before the 38th Amendment. It is therefore for the Supreme Court to decide whether it will treat the 'satisfaction' of the President to issue a proclamation of emergency, or to vary it or to continue it, as 'final' and 'non-justiciable', or as being subject to judicial review on some grounds.

Since the passage of the Forty-fourth Amendment of the Constitution, the question of judicial review of the discretion of the President to declare or not to declare an emergency has not arisen as no emergency has been declared after 1975. In *Minerva Mills*,[12] however, BHAGWATI, J., did express the view that whether the President in proclaiming the emergency under Art. 352 had applied his mind, or whether he acted outside his powers, or acted *mala fide* in proclaiming the, emergency could not be excluded from the scope of judicial review.[13]

BHAGWATI, J., also observed that the 38th Amendment which barred the satisfaction of the President from being called into question in a court could be declared unconstitutional as being violative of the basic structure of the Constitution.[14] Judicial review has now come to be regarded as a basic feature of the Constitution.[15] Further after the Supreme Court decision in *Bommai*,[16] in which the

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9. AIR 1974 SC 806 : (1974) 1 SCC 645.
10. See, Ch. XLII, *infra*, for 38th Amendment.
11. See, Ch. XLII, *infra*, for 44th Amendment.
12. AIR 1980 SC 1789 : (1980) 2 SCC 591.
For discussion on the case, see, *infra*, Ch. XLI "Amendment of the Constitution".
13. AIR 1980 SC, at 1840.
14. *Ibid*., at 1838.
15. For discussion on this doctrine, see, *infra*, Ch. XLI.
16. *Infra*, Sec. D.

Supreme Court did go into the validity of a proclamation issued by the President under Art. 356, it can now be safely asserted that a proclamation of emergency under Art. 352 is reviewable by the Court on the grounds mentioned by BHAGWATI, J., in *Minerva Mills.*

The Constitution seeks to control the exercise of power to proclaim an emergency in two ways:

(i) The President must act on the advice of the Central Cabinet and not in his own subjective satisfaction and also not on the advice of the Prime Minister alone. Thus, the effective power to declare an emergency lies with the Cabinet.

(ii) The democratic control over the executive power in respect of proclaiming an emergency has been strengthened in so far as parliamentary approval is necessary for the proclamation immediately after it is made and, then, after every six months.

But these safeguards may prove tenuous in practice because the government of the day enjoys support of the majority party, and the Cabinet functions on the principle of collective responsibility.[17] A strong willed Prime Minister may have his way as he may dominate his Cabinet as well as the party and, thus, mobilise support for the emergency even though, in effect, there may be no need for the same. A pliant Parliament may support the Government making any parliamentary control of the emergency fictitious. It therefore appears to be essential that a limited judicial review of the exercise of the power to proclaim emergency remains available. This extra-Parliamentary check is extremely important for safeguarding democracy in the country.

(b) CONSEQUENCES OF A PROCLAMATION OF EMERGENCY

The following drastic consequences follow from the issue of the proclamation of emergency under Art. 352(1).

(a) There is a transformation in the behaviour of the Indian federalism. The normal fabric of the Centre-State relations undergoes a fundamental change. Parliament becomes empowered to make a law with respect to any matter in the State List, and such a law operates till six months after the proclamation ceases to operate [Art. 250].[18]

It thus means that the normal peace-time distribution of legislative powers is practically suspended so far as Parliament is concerned. The State Legislatures continue to function as usual and may make any law in their assigned area, *viz.*, Lists II and III, but Parliament becomes empowered to legislate even in the exclusive State sphere (List II) as a result of the Proclamation of emergency.

Parliament can meet the emergency by passing any law that it may regard necessary without being trammelled by the scheme of distribution of powers [Art. 250(1)], and a Central law would override a State law even with respect to a matter in the State List [Art. 251].[19] Article 359 provides for suspension of the enforcement of the rights conferred by Part III during emergencies. However, by the Constitution (Forty-fourth Amendment) Act, 1978, it has been provided that

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17. See, Ch. III, Sec. B(d), *supra.*
18. *Supra*, Ch. X, Sec. E.
19. *Supra*, Ch. X, Sec. J.

even during emergencies, the enforcement of the rights under Articles 20 and 21 cannot be suspended.[20]

The life of a law made by Parliament which it would not be competent to enact, but for the issue of a proclamation of emergency, comes to an end to the extent of the emergency on the expiry of 6 months after the proclamation of emergency cases to operate, except for things done or omitted to be done before the expiry of this period [Art. 250(2)].

This provision means that a law enacted by Parliament during an emergency in the exclusive State sphere ceases to exist six months after the emergency comes to end. This means that six months after the ending of the emergency, the normal scheme of distribution of legislative powers is fully restored.

(b) Further, the Centre becomes entitled to give directions to a State as to the manner in which it is to exercise its executive power [Art. 353(a)]. Since Parliament can make a law even in the exclusive State field, it means that the Centre can give directions even in the area normally allotted to the States.[21] Parliament may confer powers and impose duties upon the Centre or its officers and authorities even though the law pertains to a matter not in the Union List [Art. 353(b)].

(c) When emergency is declared not in the whole of India but only in a part of India, the executive power of the Centre to give directions, and the power of Parliament to make laws as mentioned above, extend not only to the State in which the territory under emergency lies, but also to any other State "if and so far as the security of India or any part of the territory thereof is threatened by activities in or in relation to the part of the territory of India in which the Proclamation of Emergency is in operation" [Proviso to Art. 353].

This provision means that in such a case, directions may be issued by the Centre to the States which are not included in the Proclamation of Emergency. This provision has been inserted in the Constitution in order to make emergency effective in the area where it has been imposed, by restricting undesirable activities in the adjoining areas. Miscreants could not be allowed to take advantage of the fact that the Proclamation does not relate to the particular spot where such activities are, for the time being, being carried on.

(d) While the proclamation of emergency is in operation, the President may by order direct that any provision (Arts. 268 to 279) relating to the distribution of revenue between the Centre and the States,[22] shall take effect subject to such exceptions or modifications as he thinks fit [Art. 354(1)].

This provision frees the Centre from its obligation to transfer revenue to the States so that its own financial capacity remains unimpaired to deal with the emergency.

An order suspending distribution of revenue is to be laid before both Houses of Parliament, [Art. 354(2)] and it would not remain in force beyond the end of the financial year in which the proclamation of emergency ceases to operate [Art. 354(1)].

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20. See *infra*. See also *I.R. Coelho v. State of T.N.*, (2007) 2 SCC 1, at page 109 : AIR 2007 SC 861.
21. See, *Supra*, Ch. XII, for these provisions.
22. See, *Supra*, Ch. XI, Sec. K, for these provisions.

(e) During an emergency, Parliament can also levy any tax which ordinarily falls in the State List [Art. 250].[23]

Thus, although the State Governments continue to operate, the Central Government becomes omnipotent and the normal distribution of legislative, executive and taxing powers, and the scheme of distribution of revenue between the Centre and the States, all are undone so far as the Centre is concerned. The reason is that during an emergency, the Central financial needs become greater than its peace-time commitments and, therefore, the normal financial arrangements between the Centre and the States cannot continue to function. The war-time experiences of Canada and Australia will bear out the wisdom of these provisions. In both these countries, the Centre had to exclude the States from the field of Income-tax.[24]

(f) As has already been pointed out, during the operation of the proclamation of emergency, the life of the Lok Sabha may be extended beyond its normal five year period by Parliament by law for a year each time, up to a period not extending beyond six months after the proclamation of emergency ceases to operate.[25]

Parliament continues to function normally during the emergency. However, to avoid any confusion which might arise from holding fresh elections during the period of the emergency, if the life of Lok Sabha comes to an end, this provision enables the same to be extended for the period of emergency.

(g) Parliament may by law extend the life of the State Legislatures by one year each time during an emergency, subject to a maximum period of six months after the emergency ceases to operate [Proviso to Art. 172].[26]

(h) The proclamation of emergency also affects the operation of the Fundamental Rights. The matter has been discussed in detail in another part of the book.[27]

(c) EMERGENCY PROVISIONS IN OTHER CONSTITUTIONS

The kind of emergency provisions as exist in the Indian Constitution are not to be found in the U.S.A., Canada and Australia, and at first sight may even appear to be drastic and out of place in a democratic and federal country. But it is not entirely so if the matter is probed into somewhat deeply and is viewed in the light of adjustments and developments which come about in other federations under the impact of an emergency like war when these federations undergo a kind of a silent metamorphosis.

Federalism, says DICEY, is a weak government because of the distribution of powers between the Centre and the units, but the war-time experiences of the U.S.A., Canada and Australia have shown that this is not necessarily so and that a federation can very well stand the test of time. As CORWIN has asserted, "Federalism as a system of counterpoise is no longer viable in the field of war-making," and that there is "incompatibility between the requirements of total war and principles thus far deemed to be fundamental to government under the Constitution".[28]

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23. *Supra*, Ch. X, Sec. J; Ch. XI, Secs. C, D, E.
24. *Supra*, Ch. XI, Sec. I.
25. Proviso to Art. 83(2); *supra*, Ch. II, Sec. I(c).
26. *Supra*, Ch. VI, Sec. B(ii).
27. *Infra* Ch. XXXIII, Sec. F.
28. TOTAL WAR AND THE CONSTITUTION, 70, 130.

These federations have faced the emergency of two world wars [1911-14 and 1939-45]. In the U.S.A. and Australia, the emergency was met by the courts giving an expansive and liberal interpretation to the 'war' or the 'defence' power of the Centre and, thus, giving it a greater area of operation than its peace-time ambit so as to enable it to do all those things which are necessary for the safety of the country, or the effective prosecution of war.[29]

In Canada, the 'general power' of the Centre was interpreted by the courts broadly and so the Centre became more powerful during the war-time than it would be in the peace-time.[30]

During the war crisis, the Constitutions of the U.S.A., Canada and Australia functioned very differently from their normal peace-time behaviour. As WHEARE points out:[31]

> "While it is the essence of federalism to be pluralistic, it is the essence of the war power to be unitary, to be centralised and regimented, to be, in the modern word, 'totalitarian'. There is an immediate contrast between the multiplicity of federalism with its divisions of authority, and the unity necessary if war is to be conducted efficiently."

And, further, he observes:[32]

> "War leads to the transformation of a federal government into a unified state, with its plurality and multiplicity of jurisdictions co-ordinated for the unitary and totalitarian process of war."

The Indian Constitution seeks to achieve the same result in the area of federalism but in a different way. In the three foreign constitutions, the final word rests with the courts to decide whether a particular act of the Centre is justifiable under the 'war', 'defence' or 'emergency' power. Thus, necessary adjustments in the Centre-State power balance in response to the emergency are effectuated through the process of judicial interpretation. This, however, is a somewhat uncertain process as one cannot be sure which way a judicial decision may go in a particular disputed fact-situation, and the area of operation of the Centre depends on the view the courts take at the time. In India, on the other hand, the method provided to meet an emergency is more overt, more direct, and simpler because it depends on the Central executive issuing the necessary proclamation, and the incidents flowing therefrom are settled by the Constitution itself without making them dependent on the judicial attitude or inter-pretation.

A reason underlying the Indian approach may be that owing to the elaborate nature of the distribution of powers, there was not much room left for the judiciary to make necessary adjustments in emergency situations. Moreover, the Indian Constitution envisages certain emergency situations which are not to be found in the three federal constitutions, *e.g.,* a financial emergency. But it needs to be underlined that the powers of the Centre in the three other federations do not extend to such an extent as they do in India whereas peace-time federalism undergoes a drastic change.

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29. *Supra*, Ch. X, Sec. L.
30. *Ibid.* Also see, MURPHY, The War Power of the Dominion, 30 Can B.R. 791, 798 (1952).
31. FEDERAL GOVERNMENT, 197, (1953).
32. *Ibid., at 220.*

Also, in the other federations, the powers of the Centre during emergency extend on sufferance of the judiciary. The courts have to agree to what extent the Centre can expand its powers. This is, therefore, a built-in control mechanism. In India, the control mechanism over the executive and the Parliament is rather weak during an emergency, as it rests, primarily, with Parliament and, secondarily, with the judiciary.

(d) INVOCATION OF ART. 352

Article 352 has been invoked three times so far.

A proclamation of emergency was issued under Art. 352, for the first time, on October 26, 1962, in the wake of conflict with China. It remained in force during the Indo-Pakistan conflict in 1965, and was revoked only in January, 1968.

Emergency was proclaimed again in December, 1971, as a result of the Indo-Pakistan dispute, on the ground of external aggression.

While the 1971 proclamation was still effective, another proclamation was issued on June 26, 1975. This time the proclamation was issued on the ground of "Internal disturbance" threatening the security of India. Both these proclamations were revoked in March, 1977. Thus, from June 26, 1975 to March, 1977, two emergency proclamations were in force simultaneously.

The proclamation of 1975 on the ground of internal disturbance proved to be the most controversial. There was violation of the Fundamental Rights of the people on a large scale; drastic press censorship was imposed. A large number of persons were put in preventive detention.[33] The reasons for imposing the emergency were explained by the Central Government in a White Paper, dated July 21, 1975, and the two Houses of Parliament approved the proclamation on the same day. The general public perception was that issuing of this proclamation amounted to misuse of power on the part of the Central Government of the day insofar as there was no real emergency. The public reaction to the proclamation was so intense that when elections were held in 1977 for the Lok Sabha after the proclamation ceased to exist, the Congress Party, which was responsible for the proclamation, lost its majority and the Janata Government came to power.

The Janata Government appointed the Shah Commission to probe into the circumstances which led to the declaration of the emergency in 1975. This Commission in its report held that there was no evidence of any circumstances which could warrant the declaration of the emergency in 1975. There was no unusual event, or even a tendency in that direction, to justify the imposition of the emergency. There was no threat at all to the well-being of the nation from external or internal sources.

One of the direct results of the proclamation of the emergency in 1975 was the amendment of Art. 352 by the 44th Constitutional Amendment so as to introduce some more safeguards therein against any unwarranted declaration of emergency in future.[34] The idea underlying the 44th Constitutional Amendment is that it ought to be ensured that what happened in 1975 is not repeated in future.

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33. For discussion on this aspect, see, *infra*, Ch. XXXIII, Sec. F.

34. For provisions of this Constitutional Amendment, see *infra* Ch. XLII; also see, *supra*, Sec. B.

C. CENTRE'S DUTY TO PROTECT THE STATES

Article 355 imposes a twofold duty on the Centre:—

(i) to protect every State against external aggression and internal disturbance, and

(ii) to ensure that the government of every State is carried on in accordance with the provisions of the Constitution.

The two limbs of Art. 355 are not interdependent as constitutional break-down can take place in a State even without there being a situation of 'external agression" or "internal disturbance".

A provision of this type is to be found in other federal constitutions as well. The American Constitution places a duty on the Central Government to guarantee to every State a Republican form of government and to protect a State against invasion, and, on application of the State Legislature, or, of the Executive (when the Legislature cannot be convened), against domestic violence.[35] A vast potential is rooted in this clause. This clause does not mention the manner in which the guarantee as regards the Republican form of Government may be enforced in a State.

S. 119 of the Australian Constitution provides in express terms that the Centre shall protect every State against invasion, and, on application of the State Executive, against domestic violence.

An important distinction between the Australian and the American provisions, on the one hand, and the Indian provision, on the other, is that while, in the former, application by the State to the Centre is necessary for protection against domestic violence, no such condition is laid down in India.

The first limb of Art. 355, that of protecting the States, does not stipulate that a State should request the Centre before it could send its forces into a State to counter the breakdown of law and order therein. On the other hand, the parallel provisions, as stated above, in other federations, do stipulate that request from the State is necessary to protect it against domestic violence.

The U.S. Supreme Court has, however, held that if internal disturbance in any State interfered with the operation of the National Government itself, or with the movement of inter-State commerce, the Centre can send force on its own initiative, without waiting for the application of the State authorities.[36] As the Court said, "the entire strength of the Nation may be used to enforce in any part of the land, the full and free exercise of all national powers and security of all rights entrusted by the Constitution to its care." After this ruling the requirement of an application by the affected State for aid for suppression of internal violence has lost its importance. In 1963, the Central Government in the U.S.A. did not hesitate to deploy the national militia in Little Rock to quell racial disturbances, and to enforce the decisions of the Supreme Court on racial integration. This was done very much against the wishes of the State concerned.[37]

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35. Art. IV, Sec. 4.
36. In *Re Debs.*, 158 US 564 (1895).
37. KELLY & HARBINSON, THE AMERICAN CONSTITUTION, 864.

Under Art. 355, mentioned above, the obligation of the Centre to protect a State arises in the following three situations:

(i) external aggression;

(ii) internal disturbance, and

(iii) when the State Government cannot be carried on in accordance with the Constitution.

The word "aggression" has been construed to be a word of very wide import not limited only to war but as comprising many other acts which cannot be termed as war. A "bloodless aggression from a vast and incessant flow of millions of human beings forced to flee into another State" could constitute aggression under Article 355. Thus, it was found that the State of Assam is facing "external aggression and internal disturbance" on account of large-scale illegal migration of Bangladeshi nationals[38]

Article 355 uses the term "internal disturbance", while Art. 352 uses the term "armed rebellion". The term "armed rebellion" is narrower in scope than "internal disturbance" which is certainly broader. This means that a mere "internal disturbance" short of armed rebellion cannot justify a proclamation under Art. 352. Further, Art. 356 only talks of "breakdown of constitutional government in the State. This means that mere "internal disturbance" does not justify a proclamation under Art. 356 unless it results in the constitutional breakdown in the State.[39]

In India, law and order is a State subject[40] and, therefore, Central intervention under Art. 355 would be justifiable only in case of aggravated form of disturbance, which a State finds beyond its means to control. Although not laid down in the Constitution, a convention has arisen that ordinarily the Centre sends help to a State on request by the State Government. In view of the specific constitutional obligation placed on the Centre, it will be unjustifiable for the Centre to refuse to help a State when requested by it. It cannot, however, be asserted that the Centre shall never intervene in a State *suo motu* without its request, though it may be a difficult question to decide when it would do so. The final decision appears to rest with the Centre. The controversy between the Centre and some of the States regarding deployment of the Central Reserve Police to protect Central Government property in these States without consulting them has already been referred to.[41]

To get over these problems, the 42nd Amendment of the Constitution added a new provision, Art. 257A, into the Constitution enabling the Centre to deploy any armed forces of the Union, or any other force under its control, for dealing with any grave situation of law and order in any State. Any such force had to act subject to the control and directions of the Centre and not of the concerned State Government.

Under Art. 257A, the Centre could act without the concurrence of the concerned State Government. However, the Law Minister gave an assurance on the

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38. *Sarbananda Sonowal v. Union of India*, (2005) 5 SCC 665, at page 709 : AIR 2005 SC 2920.
39. For Art. 356, see, *infra*, Sec. D.
40. *Supra*, Ch. X, Sec. E.
41. *Supra*, Ch. XII.

floor of Parliament that the power under Art. 257A would be used only in exceptional situations and in consultation with the concerned State Government. To give full effect to Art. 257A, some changes were made in the legislative entries in the three Lists. A new entry, 2A, was added to List I to the following effect:

> "2A: Deployment of any armed force of the Union or any other force subject to the control of the Union or any contingent or unit thereof in any State in aid of the civil power; powers, jurisdiction, privileges and liabilities of the members of such forces while on such deployment."

Consequent changes were made in entries 1 and 2 of List II to exclude any such force from the purview of the States.[42]

Article 257A raised a good deal of controversy and was vehemently criticised. The States regarded it as causing diminution in their autonomy. The 44th Amendment, therefore, repealed Art. 257A, but entry 2A still remains a part of List I, giving legislative and executive power to take necessary action to deploy armed forces in a State in aid of civil power. This power vested in the Centre can be justified with reference to Art. 355.

Also, the fact that Art. 352 permits declaration of emergency in a part of the country because of armed rebellion means that the Centre has to take all possible steps necessary to maintain law and order in any part of the country if there is a serious breakdown thereof. It appears that even under entry 2A, List I, the Centre is entitled to deploy forces *suo motu* in a State to put down internal disturbance in a State and restore peace therein.

The words "in aid of the civil power" in entry 2A mean in aid of State instrumentalities responsible for maintenance of law and order. Thus, the Centre uses its forces to help the law enforcing authorites in the State. But the above-mentioned words do not necessarily imply that the Centre cannot introduce its forces, if need be there, without the request of the State. If there is serious breakdown of law and order in a State, the Centre will be justified to send its forces to meet the situation without receiving any State request for the purpose. This result emerges by reading entry 2A, List I, along with Art. 355.

Article 355 also imposes a duty on the Centre "to ensure that the government of every State is carried on in accordance with the provisions of the Constitution". The exact significance of this provision is not clear. It is in fulfilment of this obligation that the Centre takes over the Government of a State (Art. 356) in case of breakdown of the constitutional machinery therein.[43]

Recently, in the notable decision in *Sarbananda Sonowal*, the Supreme Court held that since the State of Assam is facing "external aggression and internal disturbance" on account of large-scale illegal migration of Bangladeshi nationals, it was the duty of the Union of India to take all measures for protection of the State of Assam from such external aggression and internal disturbance as enjoined in Article 355 of the Constitution. The Illegal Migrants (Determination by Tribunals) Act, 1983 (Act 39 of 1983) was held to be ineffective in comparison to the Foreigners Act, 1946 in dealing with the influx of illegal immigration from Bangladesh. Therefore, the Court struck down the Illegal Migrants (Determina-

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42. *Supra*, Ch. X, Sec. D and E .
43. See, Sec. D, *infra.*

tion by Tribunals) Act, 1983 (Act 39 of 1983) as being ultra vires the Constitution as it "clearly negated the constitutional mandate contained in Article 355".[44]

A parallel to this provision is to be found in the American Constitution which places the Centre under a duty to maintain the republican form of the government in each State,[45] or in the provision in the Australian Constitution which provides that the central executive power extends to the execution and maintenance of the Constitution.[46] There is, however, no specific provision in any of the three federal constitutions enabling the Centre to take over the Government of a State in case of breakdown of the constitutional machinery therein. The Indian provision stipulates, in essence, that the form of the government prescribed in the Constitution must be maintained in the States.

INQUIRY INTO COMPLAINTS AGAINST STATE CHIEF MINISTERS

An interesting and significant question arising out of the obligation of the Centre to ensure that a State Government is carried on in accordance with the Constitution is whether the Centre can take cognisance of complaints made from time to time regarding the deeds of omission or commission, bordering on corruption, against State Chief Ministers.

It has been a common feature of the Indian political life that such complaints are usually made to the Centre against State Chief Ministers. Whether the Centre should take cognisance of these charges, or leave the matter to the State Government concerned?

The difficulty in following the second course is that justice is not seen to have been done when charges against the Chief Minister are referred to the very Chief Minister against whom they have been made. If no action is taken then people are bound to lose faith in the democratic system of government based on rule of law. On the other hand, if the Centre intervenes, it may be accused of interfering too much in State matters and its *bona fides* may become suspect if the parties controlling the State and the Centre happen to be of different political complexion.

On several occasions, the Centre has moved against the State Chief Ministers. It appointed a commission of enquiry to go into certain charges against the Chief Minister of Punjab who later resigned because of an adverse report by the commission.[47] Then, the Chief Minister of Orissa resigned when a committee of the Central Cabinet held that he had been guilty of administrative impropriety. In these cases, matters were somewhat easy because all belonged to one and the same party, *viz.,* the Congress Party. But things may be very difficult when the Central and the State Governments belong to different political parties. The Centre can easily be accused of political motives in such a situation.

In 1973, a centrally appointed commission, consisting of a Judge of the Supreme Court, was appointed to enquire into some complaints against the members of the Karunanidhi Ministry in Tamil Nadu which was dismissed earlier by the President under Art. 356.[48] The Chief Minister had earlier asserted on the

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44. *Supra* at p. 716; See further *Sarbananda Sonowal (II) v. Union of India,* (2007) 1 SCC 174 : (2006) 13 SCALE 33.
45. Art. IV, Sec. 4.
46. Sec. 61.
47. A.K. CHANDA, *Federalism in India*, 127-33.
48. For Art. 356, see below, Sec. D.
Also see, *infra*, pp. 993-994.

floor of the State Legislature that, under the Constitution, the Centre had no right to interfere in the powers conferred on the State under List II. The State cabinet was responsible only to the State Assembly which was supreme in so far as the affairs of the State were concerned.[49] These arguments did not, however, prevail with the Centre. Later the legality and constitutionality of the appointment of the commission was challenged in the Supreme Court but the Court upheld the same.[50]

On the question of ministerial corruption, it may be worthwhile to take note of the following:

(1) On several occasions, the State governments have appointed enquiry commissions to probe into allegations of corruption and misuse of power against their ex-ministers and ex-chief ministers. The legality and constitutionality of appointing such commissions has been judicially upheld in several cases.[51] But nothing concrete appears to have been achieved by such an exercise as no conviction has ever resulted as a result of the reports of these commissions.

(2) For the first time, in 1984, a State minister was dismissed from office in Andhra Pradesh on the charge of corruption.[52]

(3) A very significant chapter has been added to the legal and constitutional history of India by the criminal prosecution of A.R. Antulay, ex-Chief Minister of Maharashtra, under the Prevention of Corruption Act on a private complaint. The Supreme Court ruled that a private citizen can launch a prosecution against the ex-Chief Minister on charges of corruption.[53]

Earlier, the Governor of Maharashtra had given permission to launch the prosecution. But a crucial question was raised during the trial: whether an M.L.A. was a public servant and whether the permission of the legislature concerned would be necessary to prosecute him? The Supreme Court had ruled that an M.L.A. was not a public servant under S. 21 of the I.P.C., and, therefore, the question which authority must give sanction to prosecute him was merely an academic one.[54] But the Court has now changed its view on this question.[55]

In 1977, the Central Government appointed a commission of inquiry under S. 3 of the Commission of Inquiry Act to probe into certain allegations of corruption, favouritism and nepotism against the Chief Minister and a few Ministers of the State of Karnataka.[56] The State filed a suit in the Supreme Court under Art.

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49. *The Times of India*, 16-12-1972.

50. *M. Karunanidhi v. Union of India*, AIR 1979 SC 898 : (1979) 3 SCC 431; *supra*, Ch. X. Sec. H.

51. *State of Jammu & Kashmir v. Bakshi Gulam Mohamed*, AIR 1967 SC 122 : 1966 Supp SCR 401; *Krishna Ballabh Sahay v. Commission of Inquiry*, AIR 1969 SC 258 : (1969) 1 SCR 385; *P.V. Jagannath Rao v. State of Orissa*, AIR 1969 SC 215 : (1968) 3 SCR 789.
Also see, BHARATIYA, Central Inquiry of State Ministers' Accountability, (1976) 18 *JILI* 56.
For the text of some of these cases, and author's comments thereon, see, JAIN, CASES & MATERIALS ON INDIAN ADMINISTRATIVE LAW, III.

52. *The Overseas Hindustan Times*, dated 3-3-1984.

53. *A.R. Antulay v. R.S. Nayak*, AIR 1984 SC 718 : (1984) 2 SCC 500.

54. *R.S. Nayak v. A.R. Antulay*, AIR 1984 SC 684 : (1984) 2 SCC 183.

55. *P. V. Narasimha Rao v. State of Andhra Pradesh*, AIR 1998 SC 2120 : (1998) 4 SCC 626.
Also, *supra*, Ch. II, Sec. L(i)(a).

56. The Central Government belonged to the Janata Party while the Congress Party was in power in the State. The Chief Minister at the time was Devraj Urs.

131 of the Constitution[57] for a declaration that the appointment of such an inquiry commission was illegal and *ultra vires*. An important question raised was whether the Centre could appoint a commission of inquiry to probe into the allegations of corruption and misuse of power by the State Ministers, and whether S. 3 of the Commissions of Inquiry Act was constitutional?

The Supreme Court ruled in *Karnataka v. Union of India*[58] (6 : 1) that the appointment of the inquiry commission was valid and that S. 3 of the Inquiry Commission Act under which the commission was appointed was constitutional. The Court argued that the commission of inquiry is a fact-finding body having no power to pronounce a binding or definitive judgment. Its function is to ascertain facts, or to establish responsibility of Ministers for particular decisions. Therefore, the appointment of an inquiry commission to probe into allegations of corruption, etc., against the State Ministers does not constitute interference with the executive functions of the State Government. Such an inquiry commission does not raise directly or indirectly the subject of Centre-State relationship. When the Centre takes some action on the commission's report, then will be the time to assess the constitutional validity of what the Centre proposes to do.

Parliament has power to enact the Commission of Inquiry Act under entries 94 of List I and 45 of List III, read with entry 97 of List I,[59] and the Central Government has the executive power to appoint a commission to inquire into matters relating to the entries in List II. A justification for appointment of such an inquiry commission can be found in Art. 356. Whether a State Government or its Chief Minister is or is not carrying out the trust placed in their hands so as to determine whether use of power under Art. 356 is called for or not is certainly a matter lying within the Centre's power and is also a matter of public importance as envisaged by S. 3 of the Act in question.

The Indian Federalism has a "strong unitary bias" and the Central Government has powers to 'supervise', and even to supersede, in certain circumstances, a State Government temporarily to restore normalcy or to inject honesty and integrity into the State administration where these essentials of good government may be lacking.

Over a period of time, the Courts have, in a sense, facilitated this "unitary bias" as far as allegations of corruption against Chief Ministers of a State are concerned. In *M.C. Mehta v. Union of India*,[60] the CBI was directed to take appropriate steps for holding an investigation against the Chief Minister of Uttar Pradesh, Ms Mayawati. The CBI was also directed upon conclusion of the inquiry to submit a self-contained note to the Chief Secretary to the Government of Uttar Pradesh as well as to the Cabinet Secretary, Union Government. Again in *Vishwanath Chaturvedi (3) v. Union of India*[61], the Court directed an enquiry by the CBI into alleged acquisition of wealth by Mulayam Singh Yadav, Chief Minister of Uttar Pradesh and to submit a report to the Union of India. On receipt of such report, the Union of India was permitted to take further steps depending upon the outcome of the preliminary enquiry.

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57. *Supra*, Ch IV, Sec. C(iii)(b).
58. AIR 1978 SC 68 : (1977) 4 SCC 608.
59. *Ram Krishna Dalmia v. Justice Tendolkar*, AIR 1958 SC 538 : 1959 SCR 279; *supra*, Ch. X, Sec. D, Jain, *Cases*, Vol. III.
60. (2003) 8 SCC 696, at page 703 : AIR 2004 SC 800.
61. (2007) 4 SCC 380, at page 394 : (2007) 4 JT 144.

The doctrine of 'implied prohibitions' has been rejected by the Supreme Court and is not applicable in India.[62]

The doctrine of collective responsibility of the State Ministers to the State Legislature does not give them any immunity from such an inquiry.[63] Collective responsibility represents ministerial accountability to the legislature. If a minister uses his office as a cloak for corruption, nepotism, or favouritism the entire council of ministers could not be held collectively responsible to the legislature. Appointment of the commission does not make ministers less answerable to the legislature. Maintenance of honesty and integrity in the State administration is democratic and not anti-democratic.

KAILASAM, J., alone ruled against the inquiry on the ground that it would impinge on the right of the State to function in its limited sphere allowed to it by the Constitution. According to his ruling: "As there is no specific Article in the Constitution enabling the Union Government to cause an inquiry into the governmental functions of the State the power cannot be assumed by ordinary legislation but resort must be had to a constitutional amendment." He also stated that the word 'inquiries' in entry 45, List III,[64] should not be given a wide meaning as conferring on the Union and the State Governments powers to enact a provision to embark on an enquiry as to the misuse of governmental powers by the other.

One interesting development in this matter was that anticipating the appointment of an inquiry commission by the Centre, the State Government had itself appointed an inquiry commission of its own. Thus, two commissions, one Central and one State, came into existence to probe into the conduct of the State Ministers. Under S. 3(b) of the Commissions of Inquiry Act, the Centre could not appoint a commission of inquiry into a matter which was already the subject of inquiry by a State-appointed commission. Thus, the question was whether the Central Commission could function after the State Commission had been appointed. The Supreme Court concluded that both the Commissions could continue to function as they were to inquire into different matters.

Although the Supreme Court referred to Art. 356 as a justification for appointing the said commission by the Centre, it appears to be more appropriate to relate such an inquiry commission to Art. 355 which obligates the Centre to ensure that State Governments are carried on in accordance with the constitutional provisions. Certainly a corrupt State Government cannot be regarded as a government being carried on in accordance with the Constitution. In the opinion of the author, even Art. 356 emanates from Art. 355, and not *vice versa*.

D. FAILURE OF CONSTITUTIONAL MACHINERY IN A STATE

Articles 356 and 357 provide for meeting a situation arising from the failure of the constitutional machinery in a State.[65]

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62. *Supra*, Ch. XI, Sec. J(ii).
63. *Supra*, Ch VII, Sec. B.
64. *Supra*, Ch. X, Sec. F.
65. SHETTY, President's Power under Art. 356 of the Constitution—Theory and Practice, in ILI, CONSTITUTIONAL DEVELOPMENTS SINCE INDEPENDENCE, 335 (1975), ILI, PRESIDENT'S RULE IN THE STATES; REPORT OF THE SARKARIA COMMISSION.

If the President, on receipt of a report from the Governor of a State or otherwise, is 'satisfied' that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution, the President may by proclamation—

(*a*) assume to himself all or any of the functions of the State Government, or the powers of the Governor, or any body or authority in the State other than the State Legislature;

(*b*) declare that the powers of the State Legislature are to be exercised by Parliament;

(*c*) make such incidental provisions as may appear to him to be necessary or desirable for giving effect to the provisions of the proclamation; the President may even suspend in whole or in part the provisions of the Constitution relating to any body or authority in the State [Art. 356(1)].

The President is not, however, authorised to assume the powers of the High Court, or to suspend any constitutional provision pertaining to it [Proviso to Art. 356(1)]. Such a proclamation may be revoked or varied by a subsequent proclamation [Art. 356(2)].

Every proclamation under Art. 356(1) is to be laid before each House of Parliament, and it ceases to operate (except the one which revokes the earlier one), after two months, unless in the meantime, it has been approved by resolutions of both Houses of Parliament [Art. 356(3)]. Parliament can thus discuss at this time whether the proclamation should or should not have been made by the Central Government.[66]

If at the time of issuing the proclamation (other than revoking an earlier proclamation), or thereafter, the Lok Sabha is dissolved without approving it, and if the Rajya Sabha approves the proclamation, then it ceases to operate thirty days after the date on which the Lok Sabha first sits after the general elections unless a resolution approving the proclamation is passed by it before that period.[67]

The normal operative period for the proclamation is six months from the last of the days on which the Houses pass resolutions approving the same. The life of the proclamation may be extended by six months each time by both Houses passing resolutions approving its continuance. In this way, each time Parliament ratifies the proclamation, its life is extended for another six months.[68]

In case Lok Sabha is dissolved within any period of six months, the proclamation remains in force for thirty days from the date the Lok Sabha first sits after its reconstitution within which period it can pass the necessary resolution. The Rajya Sabha should, however, pass the necessary resolution within the stipulated period.[69]

The idea behind periodic parliamentary ratification of continuance of the proclamation under Art. 356 is to afford an opportunity to Parliament to review

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66. But the power under Article 356 is not legislative in character. See *Rameshwar Prasad (VI) v. Union of India,* (2006) 2 SCC 1, at page 123 : AIR 2006 SC 980.

67. Proviso to Art. 356(3).

68. The 42nd Amendment had raised the period of six months to one year. Thus, once approved by the two Houses, the proclamation could remain in force for one year. The Forty-fourth Amendment again reduced this period to six months : See, *infra,* Ch. XLII.

69. Second Proviso to Art. 356(4).

for itself the situation prevailing in the concerned State so that the Central Executive does not feel free to keep the proclamation in force longer than what may be absolutely necessary. The Central Government is responsible and accountable for all its actions to Parliament. A safeguard against any misuse of power by the Executive is that the ultimate authority to decide whether a proclamation under Art. 356 is to be continued or not lies in Parliament.

The maximum period for which a proclamation can remain in force in a State is three years.[70] Thereafter, the President's rule must come to an end, and the normal constitutional machinery restored in the State.

The Forty-fourth Amendment has introduced a new provision to put restraint on the power of Parliament to extend a proclamation issued under Art. 356 beyond one year. No House of Parliament is to pass a resolution approving continuance of such a proclamation beyond one year unless the following two conditions are satisfied:

(i) there is a proclamation of emergency (under Art. 352) in operation at the time of passing of such a resolution in the whole of India, or the concerned State, or a part of the State; and

(ii) the Election Commission certifies that the continuance in force of the proclamation under Art. 356 during the period specified in such resolution is necessary on account of difficulties in holding general elections to the concerned State Legislative Assembly.[71]

The effect of the clause is that normally a proclamation under Art. 356 remains in force in a State for one year at the most, but, under special circumstances mentioned above, it can remain in force up to three years which is the absolute maximum ceiling.

From the above discussion, it appears that a proclamation issued under Art. 356(1) expires in any of the following modes:

(a) After two months of its making if it is not presented for approval before both Houses of Parliament [Art. 356(3)].

(b) Even before two months, if the proclamation on presentation to the Houses of Parliament fails to get approval from any House [Art. 356(3)].

(c) After 6 months from the date of the proclamation, in case no further resolution is passed by the House of Parliament after the passage of the initial resolution approving the said proclamation [Art. 356(4)].

(d) After the expiry of 6 months from the passage of the last resolution of approval passed by the two Houses of Parliament subject to an overall maximum limit of 3 years from the date of the proclamation. Continuance of the proclamation beyond one year is subject to the fulfilment of the conditions laid down in Art. 356(5), and mentioned above.

(e) The date on which the President issues a proclamation of revocation [Art. 356(2)].

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70. First Proviso to Art. 356(4).

71. Art. 356(5).

For the 44th Amendment of the Constitution, see, Ch. XLII, *infra.*

Under Art. 356(1), the President acts on a report of the Governor, or on information received *otherwise*. In view of the fact that Art. 355 imposes an obligation upon the Centre to ensure that each State Government is carried on in accordance with the Constitution, and Art. 356 is designed to strengthen the hands of the Centre to discharge this obligation and to protect a State, the framers of the Constitution felt it necessary not to bind the Centre to act under Art. 356 merely on the Governor's report. A situation may develop in a State when, though the Governor may not make a report, the Centre may yet feel that its intervention has become necessary. The Centre thus has freedom to act even without the Governor's report when, on the basis of the facts within its knowledge, it thinks that it ought to act in fulfilment of its constitutional obligation.

The Governor makes his report under Art. 356(1) in his discretion. On the face of it, it may seem to be somewhat incongruous that the Governor, who as the constitutional head of the State, acts on the aid and advice of his Ministers, also reports against them to the President. This is a case of the Governor reporting against his own government. But, under the Constitution, the Governor has a dual capacity—he is the constitutional head as well as the Centre's representative in the State. He is appointed by the President and he takes the oath prescribed by Art. 159, to preserve, protect and defend the Constitution. It is this obligation which requires him to report to the President the acts of omission or commission of his Ministers which, in his opinion, have created the situation when the State Government cannot be carried on in accordance with the constitutional provisions and which, as the constitutional head, he is not able to check. Thus, the Governor acts as the head of the State as well as the holder of an independent constitutional office under oath to protect and preserve the Constitution.

(a) LEGISLATION FOR THE STATE

When a proclamation under Art. 356(1) declares that the powers of the State Legislature are to be exercised by or under the authority of Parliament, Parliament can then confer on the President the power of the State Legislature to make laws. The President may also be authorised by Parliament to delegate the power so conferred on him, to any other authority specified by him subject to such conditions as he may impose [Art. 357(1)(a)].

The President may authorise, when the Lok Sabha is not in session, expenditure from the State Consolidated Fund pending its sanction by Parliament [Art. 357(1)(c)].

A law made under these provisions by Parliament or the President, or the authority in which the power to make laws is vested under Art. 357(1)(a), may confer powers and impose duties upon the Union officers or authorities [Art. 357(1)(b)]. Such a law continues to have effect, to the extent it could not have been made but for the issue of the proclamation under Art. 356(1), even after the proclamation ceases. Such a law may, however, be altered, repealed or amended by the State Legislature [Art. 357(2)].

It is thus clear from the above that the life of a law made by Parliament or the President during the operation of Art. 356 proclamation is not co-terminus with the subsistence of the proclamation. The law does not come to an end automatically as soon as the proclamation is revoked. This provision means that though the power of the Union to make laws for the State concerned on the subject

within the State List ceases as soon as the proclamation under Art. 356(1) comes to end, the laws made during the existence of the proclamation continue to remain in force until they are altered or repealed by the State Legislature. In other words, an action by the State Legislature is necessary to change these laws.

(b) ART. 356 *V.* ART. 352

Article 352 differs from Art. 356 in several material respects.

While Art. 352 restricts Central intervention to a situation of war, external aggression, or armed rebellion, Art. 356 applies to a situation of failure of constitutional machinery in a State. Art. 352 gives no authority to suspend the Constitution in a State. The State Governments and Legislatures continue to function normally and exercise the powers assigned to them under the Constitution. All that happens under Art. 352 is that the Centre gets concurrent powers of legislation in State matters and thus it can make the States follow a uniform all-India policy. On the other hand, under Art. 356, the State Legislature ceases to function as it is either dissolved or kept in suspended animation. Laws for the State are made by Parliament and the Governor administers the State on behalf of the President. Further, while Art. 352 affects Fundamental Rights,[72] Art. 356 does not.

Under Art. 352, the relationship of all the States with the Centre undergoes a change, but under Art. 356, the relationship of only one State (where the action is taken) with the Centre is affected.

The powers of the Centre under Art. 356 as well as under Art. 352 are rigorously controlled by the Constitution. The proclamation under Art. 356 is to be approved by Parliament first within two months, and thereafter every six months, and the maximum period for which it can remain in force is three years. On the other hand, a proclamation under Art. 352 has to be approved by Parliament within a month and thereafter every six months, but there is no maximum duration prescribed for the operation of such a proclamation.

Though the scope and purpose of Arts. 352 and 356 are very different, yet there may be a situation when Art. 356 may have to be invoked to effectuate Art. 352, *e.g.*, when a State Government does not co-operate with the Centre in defence, or in quelling internal disturbance, or when it encourages the same.

(c) CONSEQUENCES OF INVOKING ART. 356

Article 356(1) has been invoked a number of times since the advent of the Constitution.[73] Reading Art. 356 along with Art. 357 a pattern has thus come into existence, whenever the Centre takes over a State Government. Hitherto, the Centre has acted only when the Governor has reported failure of the Constitutional machinery in the State and in no case has the Centre acted 'otherwise'. The Governor makes his report to the President in his discretion and he is under no constitutional obligation to act in this matter on the advice of the Council of Ministers.[74]

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72. *Infra*, Ch. XXXIII, Sec. F.

73. President's rule has been imposed over a hundred times till 2000. See further Gopal Subramanium : Emergency Provisions Under the Constitution : Supreme but not infallible; Oxford.

74. *Supra*, Ch. VII, Sec. C.

The proclamation issued by the President under Art. 356(1) is placed before Parliament. If it is expected to remain in force only for two months, then no further action is necessary. But if it is proposed to keep it in force for a longer period, it is to be ratified by both Houses when a discussion is held on the circumstances leading to the issue of the proclamation and on the advisability or otherwise of the Central intervention.

Under Art. 356(1)(*a*), the President can assume to himself the powers of the Governor. One of the Governor's powers is to dissolve the Legislative Assembly.[75] Consequently, when the President issues a proclamation and assumes the Governor's powers, the power to dissolve the Assembly and hold fresh elections is automatically transferred to the President. Therefore, the Presidential proclamation may dissolve the State Legislature and arrangements for holding fresh elections are set afoot. But it is not inevitable to dissolve the State Legislature whenever a proclamation is issued. Several times, the State Legislature has been kept in suspended animation rather than dissolved.

In the meantime, Parliament becomes entitled to exercise the authority and the powers of the State Legislature whether it is suspended or dissolved. Parliament being a busy body finds it extremely burdensome to itself exercise the legislative power for the concerned State, and pass all the legislative measures needed for the State concerned. Necessary time would not be available to Parliament for the purpose and measures of all-India importance would be held up. Therefore, under Art. 357(1)(*a*), Parliament passes an Act and delegates the legislative power for the State concerned for the duration of the emergency to the President, *i.e.*, the Central Executive. The President can then enact President's Acts for the State concerned whether Parliament is in session or not.

Each President's Act is laid before Parliament which may direct any modifications to be effected therein and the President would carry out the same by enacting an amending Act. Provision is usually made in the delegating Act for appointment of a Parliamentary Committee for consultation in the legislative work.[76] All members in Parliament, from the State concerned are appointed members of this committee.

As mentioned above, under Art. 356(1)(a), the President may assume to himself all or any function of the Sate Government and all or any of the powers exercisable by the Governor. Usually, the President, after assumption of the powers of the State Government, exercises these powers through the State Governor. The administration of the State, under the proclamation under Art. 356(1), is carried on by the State Governor as a delegate of the Centre. In effect, the Governor acts on the advice of the Union Ministry and not the State Ministry. The Governor becomes responsible to the Central Government which is responsible to Parliament.[77] The Council of Ministers in the State does not remain in office. It usually resigns *suo motu* in anticipation of the Centre's action. If it does not do so, it can be dismissed from office.

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75. *Supra*, Ch. VI, Sec. E; Ch. VII, Sec. C.

76. Non-consultation with the Committee before enacting the President's Act does not render the Act invalid. The words of the statute usually are: The President may 'whenever he considers it practicable' consult the Committee before enacting an Act for the concerned State.
Saiyedbhai Kaderbhai v. Saiyed Intajam Hussen, AIR 1981 Guj 154.

77. *Badrinath v. Govt. of Tamil Nadu*, (2000) 8 SCC 395, 413 : AIR 2000 SC 3243.

(d) WHEN IS ART. 356 INVOKED?

The sweep of the phrase, "the government of the State cannot be carried on in accordance with the provisions of this Constitution" in Art. 356(1) has indefinite connotations. Failure of the constitutional machinery in a State may arise because of various factors; these factors are diverse and imponderable. Nevertheless, some situations of the breakdown of the constitutional machinery may be as follows:

(1) No party in the Assembly has a majority in the State Legislative Assembly to be able to form the government.

(2) A government in office loses its majority due to defections and no alternative government can be formed.

(3) A government may have majority support in the House, but it may function in a manner subversive of the Constitution. As for example, it may promote fissiparous tendencies in the State.

(4) The State Government does not comply with the directions issued by the Central Government under various constitutional provisions.[78]

(5) Security of the State may be threatened by a widespread breakdown of law and order in the State.

(6) It may be debatable whether Art. 356(1) can be invoked when there are serious allegations of corruption against the Chief Minister and the Ministers in a State.

Reading Arts. 355 and 356 together, it can be argued plausibly that the constitutional machinery breaks down in the State when the government indulges in corruption.

Article 356 has been invoked in the State of Uttar Pradesh because it did not appear to be feasible to form a stable government. In the general elections held for the State Legislature, the public gave a fragmented verdict with no party having a majority in the House; and no party wanted to support any other party to form the government. The leader of the Samajwadi Party staked his claim as the single largest party to form the government. He claimed that he would prove his majority on the floor of the House. Implicit in the statement was the fact that being in power, it would be easier for him to engineer defections from the other parties. The Governor was not satisfied with his claim. On the recommendation of the State Governor, the Central Government imposed the President's rule in the State on March 9, 2002. This is an instance of President's rule being invoked in a State because it was not possible to form a viable government in the State due to the politically fragmented legislature.

In a number of cases, Central intervention has taken place in the States because of the instability of the State Governments. When the existing Ministry either resigns, or is defeated on the floor of the Legislature, and no viable alternative Ministry is in sight, the Centre takes over the State administration and carries it through the Governor. Accordingly, Art. 356(1) was invoked in 1951 in Punjab, in 1953 in Pepsu, in 1954 in Andhra, in 1956 in Travancore-Cochin and in 1961 in Orissa.

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78. *Supra*, Ch. XII, Sec. E.

In 1966, consequent upon the Centre's decision to bifurcate the State of Punjab into the States of Punjab and Haryana, to smoothen the process of partition, the Ministry resigned and President's rule was imposed. The Legislature was not dissolved but suspended, for it was thought desirable that the Legislature of the composite State be broken into two parts so as to constitute the Legislatures of Punjab and Haryana till new Legislatures could be elected.

During the period 1967-69, Art. 356(1) had to be invoked rather frequently. The reason was that, in the wake of the fourth general election, there was a proliferation of political parties in the State Legislatures, and stable governments became very difficult. Parties with disparate programmes came together to form coalition governments but they could not stay in office for long because of internal tensions. In 1967, because of the difficulties in Ministry-making in Rajasthan, the State Legislature was suspended and Presidential rule imposed under Art. 356. After some time, normal machinery was restored when it became possible to instal a Ministry in office.

In 1968, due to instability of coalition Ministries, the Uttar Pradesh Legislature was first suspended and later dissolved. In 1968, the Bihar and Punjab Legislatures were dissolved under Art. 356 owing to Ministerial crisises.[79] In the same year, West Bengal Legislature had to be dissolved because its functioning became impossible due to the intransigent attitude of the Speaker.[80] In 1973, the Congress Ministry of Andhra Pradesh resigned on the advice of the Congress High Command, and Presidential rule imposed, so that the situation arising out of a public agitation for creation of a separate Telengana State could be adequately handled. The State Legislature was not dissolved but kept in suspended animation. It was revived when the Centre was able to find a political solution to the demand being raised.

In 1974, the Gujarat Assembly was dissolved following the resignation of the Ministry. Though the Ministry was in a majority in the Legislature, yet it left office because there was a wide spread public agitation against it. In November, 1975, Art. 356 was invoked in Uttar Pradesh when Bahuguna Ministry resigned. A new Ministry was installed in January, 1976. Gujarat was placed under the President's rule in March, 1976, when the Patel Ministry resigned after being defeated in the House on a budget demand. Such instances may be multiplied.

Invocation of Art. 356(1), in a situation mentioned above, becomes necessary, and at times, even inevitable. But use of Art. 356 becomes very controversial and questionable when a Ministry in a State having majority support in the State Legislature is dismissed from office for certain reasons. For the first time, such a situation arose in Kerala in 1959. In 1957, a Communist Ministry commanding a majority of two in the State Assembly of 127 members took office. Within two years, there was wide spread discontent and mass upsurge in the State against the policies of the Ministry. Law and order situation in the State practically broke down and there was every indication that the agitation might take a violent turn.

Accusations were made that the State Government was subverting the Constitution by transplanting party cells in police, administration and co-operatives in the State. The financial position of the State very much deteriorated. The Prime

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79. *Supra*, Ch. VI, Sec. C.
80. *Supra*, Ch. VI, Sec. C; Ch. VII, Sec. B.

Minister advised the State Ministry to resign and dissolve the House so that fresh elections could be held, but the Ministry did not heed this advice. In the circumstances, on receipt of the Governor's report, the Centre invoked Art. 356, dismissed the State Ministry and dissolved the Legislature. After fresh elections were held to the State Legislature, a new State Government took office in early 1960. The proclamation thus remained in force for nearly six months.

The Kerala episode brought into sharp focus the question of the scope of Art. 356 and the circumstances under which it could be invoked. What is the significance of the words "in accordance with the provisions of the Constitution" in Arts. 355 and 356? Do these words mean merely the letter of the Constitution or include as well the democratic spirit, conventions and fundamental assumptions on which the Constitution is based?

On the one hand, it could be argued that since in Kerala there was a government in office enjoying the confidence of the majority in the Legislature, theoretically, the administration was being carried on in accordance with the 'provisions' of the Constitution. On the other hand, it could be argued that the words 'provisions, of the Constitution' should be interpreted not in a narrow literal sense to signify only the formal written words in the Constitution but also comprising the conventions, usages and the democratic spirit underlying the Constitution. If forms of the Constitution are used to subvert its spirit, then the Constitution can be regarded as having broken down in the State. As the Preamble to the Constitution declares India as a Sovereign Democratic Republic, subversion of democracy in any State may be regarded as being against the 'provisions' of the Constitution and action may be taken on that basis.[81]

The Communist Party characterized the Central Government's action as political intolerance on the part of the Congress Government at the Centre towards a Communist Government in a State. The Central Government justified its action on the ground that law and order had broken down, that Rule of Law and the Constitution had been subverted in the State, and that the action was inevitable if democratic institutions were to be protected from being destroyed. The Presidential proclamation was approved by Parliament by a huge majority.[82] In the context, therefore, Central intervention could not be characterised as unwarranted or unjustified.

It would be difficult to argue that the Centre should remain a passive spectator when the entire constitutional fabric is being subverted in a State. This would amount to a violation of Art. 355 on the part of the Central Government. Kerala, it may be noted, was a chronic case for some time as it fell under the President's rule several times. On September 10, 1964, again the President assumed the governance of the State, consequent upon the resignation of the Ministry. A general election held in March, 1965, again resulted in a fragmented House, with no prospect of a stable government. After consulting the party leaders, the Governor reported to the President that it was not possible to form the Council of Ministers in the State. The State Legislature was dissolved again and President's rule imposed. A writ petition challenging the Central action on the ground that the State Legislature could not have been dissolved without its meeting at all, was rejected

81. See, Ch. I, *supra.*
82. See, REPORTS OF THE LOK SABHA DEBATES, Aug. 18-21, 1959.

by the Kerala High Court. The Court also rejected the contention that the action of the President was *mala fide*.[83]

Again in Haryana, in 1967, the Ministry in office was dismissed and the State Legislature dissolved because of large scale defections of members of the Assembly from one party to another. Defections reached to such a farcical level that about 20 members had defected 20 times, 6 members twice, 2 members thrice and 2 members four times.

The Governor in his report to the President pointed out that defections "had made a mockery of the Constitution and had brought democracy to ridicule," and that the State administration had been totally paralysed by frequent defections and change of loyalties by the legislators. The Ministry had sought to maintain itself precariously in power by creating too many Ministers to reward defectors which was "an abuse of constitutional power." In an Assembly of 79, thirty-seven members had defected one way or the other, some three or four times. With such large scale and frequent defections, it was impossible to find out whether the will of the majority in the legislature represented the will of the people. Central interference in these circumstances appears to be justifiable as it may be regarded as an attempt to discourage opportunistic politicians oscillating across the floor of the House without any principle but only for self-aggrandisement. The Ministry was seeking to maintain its majority in the House by dubious means, and it could not, therefore, be maintained that the State Government was being carried on in accordance with the Constitution.[84]

Another case of this type occurred in 1976, when the D.M.K. Ministry in Tamil Nadu was dismissed, the State Legislature dissolved, and President's rule imposed. The D.M.K. Ministry enjoyed a majority in the Assembly, but the Governor in his report charged the Ministry with corruption, maladministration, misuse of power for partisan ends, and misuse of emergency powers. The Governor also recommended the appointment of a high powered commission to enquire into the several serious allegations against the Ministry and the Ministers involved. The Central Government accordingly invoked Art. 356 and appointed an enquiry commission.[85]

A very dramatic invocation of Art. 356 occurred in 1977. In the general elections held for Lok Sabha in 1977, after the revocation of the emergency imposed in 1975, people gave vent to their anger against the imposition of the emergency. This led to a landslide victory of the Janata Party which formed the Central Government. The Congress Party was badly routed. There were at the time 9 Congress Party-ruled States. The Janata Government at the Centre invoked Art. 356 in April, 1977, and dismissed the 9 State Governments, dissolved the State Assemblies and held fresh elections thereto.

History repeated itself in 1980. Fresh elections were held for the Lok Sabha in 1980. As a result of the general elections held in that year, the Congress Party again secured majority in Lok Sabha. The Congress Party which had been routed in 1977 elections was victorious this time and formed its government at the Centre with Indira Gandhi as the Prime Minister. The Congress Government dismissed under Art. 356 the Janata Governments in nine States where there were

83. *K.K. Aboo v. Union of India*, AIR 1965 Ker 229.
84. This episode gave rise to a court case; see, footnote 11, Sec. E, *infra.*
85. *Supra*, Sec. C.

non-congress governments in office. These government were installed in office in 1977. The nine States were: Uttar Pradesh, Bihar, Tamil Nadu, Rajasthan, Madhya Pradesh, Maharashtra, Punjab, Orissa and Gujarat. These States were subjected to direct Central rule pending fresh elections. Now, the Congress Government at the Centre took the plea that the existing State Governments did no longer reflect the wishes of the electorate. It had the 1977 precedent to fall back upon to support its action.[86]

The propriety of the wholesale use of Art. 356 first in 1977, and again in 1980, has been widely questioned. These proclamations were not based on any report from the Governors of the States concerned. Commenting on the use of Art. 356(1) in a wholesale manner in these 18 cases, the Sarkaria Commission has observed:[87]

> "In our opinion, these 18 cases are typical instances of wholesale misuse of Art. 356 for political purposes, extraneous to the one for which the power has been conferred by the Constitution".

The fact is that the defeat of the party in power in a State in the election to the Lok Sabha cannot amount to the breakdown of constitutional machinery in the concerned State. The federal structure in India clearly envisages the situation of different political parties being in power in different States and at the Centre. Upto the year 2000, Art. 356 has been invoked as many as 100 times.

In April, 1992, the Governor of Nagaland dissolved the State Legislative Assembly on the advice of the then Chief Minister retaining him as the Chief Minister till fresh elections were held.

The Governor had done so in exercise of his power under Art. 174(2)(b) without consulting the Centre before taking such an action.[88] The Central Government did not approve of this action of the Governor. Accordingly, the Centre imposed the President's rule in the State under Art. 356 on April 2, and dismissed the Governor soon thereafter. The Centre's justification for taking the action was that the Chief Minister had already lost his majority in the Legislature when he advised the Governor to dissolve the House. The Opposition parties in Parliament described Centre's action as an attack on the federal character of the Constitution.

This episode does bring to the forefront two issues of crucial importance to the Indian federalism: (1) Is the Governor a constitutional authority in his own right or is he bound to seek the consent of the Centre before exercising the powers vested in him by the Constitution? (2) Use of Art. 356 in a State.

On the first question, theoretically speaking, as per the constitutional provisions, the Governor should be entitled to decide in his own judgment whether the powers vested in him by the Constitution should be exercised or not at a particular moment. Theoretically speaking, it should not be necessary for him to seek the Centre's consent to his proposed exercise of any such power. Therefore, in theory, in the instant case, the Governor may not have done anything wrong or improper in exercising his power under Art. 174 and dissolving the House. But, then, hitherto, the practice has developed in a different manner. Governors rarely

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86. For comments on this case see: ILI, PRESIDENT'S RULE IN THE STATES, *supra*, Ch. III.
87. REPORT, 175.
88. See, Chs. VI, Sec. E and VII, Sec. C, *supra.*

act in their own judgment independently of the Centre's views. They usually act either at the behest of, or with the consent, express or implied, of the Centre.

On question No. 2, the Opposition parties criticised the use of Art. 356 in the State in the instant case. Presidential rule had been imposed by the Centre *suo motu* without any such recommendation having been made by the Governor. The State Government dismissed from office was a non-Congress Government and, therefore, use of Art. 356 in the instant case became a controversial matter. Centre's ostensible justification for imposing the President's rule was that it was no longer possible to carry on the administration in the State in accordance with the provisions of the Constitution as there was political instability in the State. An unsavoury aspect of the Nagaland party system has been that 40 MLAs out of the 60 member Assembly had changed their party affiliations some time or the other.

On December 6, 1992, the Ram Janmabhoomi—Babri Masjid disputed structure was demolished by the volunteers of the B.J.P. and its sister organisations. Consequently, the BJP Government in the State of U.P. resigned. The Central Government invoked Art. 356 and also dismissed the B.J.P. Governments in Madhya Pradesh, Rajasthan and Himachal Pradesh, dissolved the Assemblies therein and issued proclamation under Art. 356(1) in respect of these States. This step taken by the Centre was supported by all the opposition parties in Parliament except the B.J.P. of course.[89]

The various episodes, mentioned above, show that the Centre takes a broad view of Art. 356 and feels justified in intervening in a State in case of constitutional breakdown, gross mismanagement of affairs or abuse of powers or perversion of democracy by a State government, and, at times, to promote the political interests of the political party in power at the Centre.

Theoretically, invocation of Art. 356 can be justified on the ground that temporarily a bigger democracy, *viz.*, the Central Government takes over a smaller democracy, *viz.* the State Government. Parliament is a representative body elected on adult suffrage on an All India basis, in which the particular State in which Art. 356 is applied is also represented. Thus, in a way, under Art. 356, the whole of India becomes responsible for the good administration of one of its constituent parts. The State administration is run subject to the supervision of the Central Cabinet which is responsible to Parliament. Nevertheless, there is no gainsaying the fact that the power placed by Art. 356 in the hands of the Central Government is very significant and places a great responsibility on it, and inherent therein are the seeds of conflict between the Centre and the States, particularly, when the Central Government seeks to dismiss a State Ministry belonging to a different political party.

It may be that, at times, the Centre is motivated by political, rather than mere constitutional, considerations in using its power under Art. 356(1). The way the power is used is bound to have an abiding effect on the growth of the Indian Federalism, which envisages co-existence of governments of different political complexion. It is, therefore, extremely necessary that the power under Art. 356 is used with circumspection and in a non-partisan manner. Art. 356 is meant to be invoked not lightly to serve political ends, or to get rid of an inconvenient State

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89. For further discussion on this episode see, the *Bommai* case, *infra*, Sec. E(b).

Government, but only in an extreme case of demonstrable breakdown of the Constitution in a State.

While it is not possible to exhaustively catalogue all the various situations when the constitutional provision can be justifiably invoked, some of these, however, appear to be: political breakdown in a State with no possibility of a stable Ministry taking office; breakdown of the law and order situation; gross mismanagement of affairs by a State Government; corruption or abuse of its powers; danger to national security; non-compliance of Central directives (Art. 365);[1] subversion of the Constitution, or of the democratic social fabric.[2] However, the ground of maladministration by a State Government enjoying majority is not available for invoking power under Article 356.[3] Restraints on the Centre to act under Art. 356 are the enlightened public opinion both within and outside Parliament, political realities of the situation, prudence and sagacity of the Central Government, the effectiveness of the Parliamentary control, and, ultimately, judicial review of the proclamation under Art. 356.[4]

There has been frequent criticism of the use of Art. 356. The purport of the criticism has been that, more often than not, Art. 356 has been misused by the political party in power at the Centre to promote its own political interests in the State rather than to meet the situation arising out of the breakdown of the constitutional machinery therein. It needs to be emphasized that in exercising this power, the Centre ought to be very careful otherwise an injury may be caused to the federal fabric which envisages different political parties being in power at the Centre and the States.

An alternative expedient to deal with the situation arising in a State from the Ministry losing confidence of the House is to invoke the Governor's power to dissolve the House, hold fresh elections and keep the Ministry in office in the meantime as a caretaker government.[5] This is the method which will have to be followed at the Centre, in case of a ministerial crisis because there is no constitutional provision for Presidential rule at the Centre such as there is for the States.[6] But, somehow, at the State level, political parties find it more acceptable to invoke Art. 356, rather than to take recourse to the other method, for the reason that no political party likes to see another political party in office when elections are being held in the State.

It may be pointed out that since the day Art. 356 was used for the first time by the Nehru Government in 1959 against the Communist Ministry in Kerala, use of Art. 356 has been a very controversial matter in India. The question of invocation of Art. 356 was looked into by the Sarkaria Commission which said in its report:[7]

> "Art. 356 should be used very sparingly, in extreme cases, as a measure of last resort, when all available alternatives fail to prevent or rectify a breakdown of constitutional machinery in the State. All attempts should be made to resolve

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1. *Supra*, Ch. XII, Sec. E.
2. Because of the deteriorating law and order situation, President's rule was imposed in Punjab on Oct. 6, 1983. Through a constitutional amendment, the government was empowered to extend the President's rule in Punjab for one more year: *supra*.
Also see, Ch. XLII, *infra.*
3. *Rameshwar Prasad (VI) v. Union of India* ,(2006) 2 SCC 1, at page 129 : AIR 2006 SC 980.
4. See, Sec. E, *infra* on this point.
5. *Supra*, Ch. VI, E.
6. *Supra*, Ch. III, Sec. A.
7. *Report*, 178.

the crisis at the State level before taking recourse to the provisions of Art. 356….."

Alternatives may be "dispensed with in a case of extreme urgency, where failure on the part of the Union to take immediate action under Art. 356 may lead to disastrous consequences."

The purpose of Art. 356 is that the Centre can take remedial action to put the State Government back in its place so that it can function according to the Constitution. Any misuse or abuse of power by the Central Government will damage the fabric of federalism.

In the present day political configuration at the Centre, it seems that the invocation of Art. 356(1) by the Centre in a State has become very difficult. The reason is that while the ruling alliance at the Centre (NDA) enjoys a majority support in the Lok Sabha, it does not enjoy a majority in the Rajya Sabha. This means that it is not possible for the Central Government to have the proclamation approved in the Rajya Sabha unless there is national consensus in its favour. This happened recently in case of Bihar. In 1999, the Central Government invoked Art. 356(1) in Bihar because of serious breakdown of law and order in the State. The State Government was dismissed but the State Legislature was suspended and not dissolved. The Proclamation was approved by the Lok Sabha. But the Government was not in a position to have it approved in the Rajya Sabha because of the opposition by the Congress Party. Consequently, the Government revoked the proclamation and restored the State Government.

E. JUSTICIABILITY OF THE PROCLAMATION UNDER ART. 356

From time to time, attempts have been made to bring the matter of invocation of Art. 356(1) before the courts for scrutiny but such attempts have not succeeded.

In 1968, the ex-Chief Minister of Haryana challenged the action of the Centre through a writ petition, but the High Court dismissed the same for the following reasons:[8]

(1) The court cannot go into the validity or legality or propriety of the proclamation because the President had issued the same in pursuance of his constitutional powers under Art. 356(1) which is not an executive action of the Union, and the President himself is not amenable to the jurisdiction of the court in view of Art. 361(1).[9]

(2) The consideration of the proclamation has been specifically vested by the Constitution in Parliament and this excludes the jurisdiction of the courts.

(3) Regarding the argument of *mala fides* against the Home Minister, the Court held that it could not enquire into the advice given by him to the President in view of Art. 74(2).[10]

(4) The conclusions reached by the Governor in his report to the President cannot be questioned in the court as those are matters for the consideration of the

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8. See, *supra*, Sec. D(d), for the circumstances in which Art. 356 was invoked in the State.
9. *Supra*, Ch. III, Sec. A.
10. *Supra*, Ch. III, Sec. A(iii)(a).

President and Parliament. The court has no jurisdiction to require disclosure of material forming the basis of the President's satisfaction.[11]

In *Jyotirmoy Bose v. Union of India*,[12] the Calcutta High Court rejected a writ petition challenging the President's proclamation issued on March 19, 1970, under Art. 356. It was argued *inter alia* that in making the proclamation, the President should have acted in his discretion and not on ministerial advice. Rejecting this plea, the Court emphasised that in the matter of making a proclamation under Art. 356, the President acts as a constitutional head and must act as advised by the Council of Ministers. "To say that the power given under Art. 356 is a discretionary power to the President is ..... wholly misconceived."

Bijayanand v. President of India,[13] is a highly instructive decision rendered by the Orissa High Court in relation to Art. 356. The Government of Nandini Satpathy fell in 1973 because of defections from the Congress Party. At that time, Bijayanand Patnaik, the leader of the Pragti Party, commanded a strength of 70 in a House of 140 (139 excluding the Speaker). The Governor did not invite Bijayanand to form the government. He took the view that political defection in the State had become common and had adversely affected the political life of the State. Defection was harmful to democracy. The Governor thought that the government formed by Bijayanand would not remain in office for long and be stable. He, therefore, recommended to the Centre that the President's rule be imposed in the State under Art. 356. The President, accordingly, issued the proclamation.

Bijayanand and his colleagues in the Pragti Party challenged the President's proclamation in the Orissa High Court. The High Court rejected the challenge but in the process enunciated certain very important propositions in relation to Art. 356. The Court ruled that in sending his report to the President under Art. 356, the Governor is to act directly and not with the aid and advice of the Council of Ministers.[14] Whether the Governor's report is *mala fide* or based on any extraneous facts cannot be questioned in a court of law. It is not justiciable as against the Governor because of the protection and immunity under Art. 361(1).[15]

In exercising powers under Art. 356, the President is to act with the aid and advice of his Council of Ministers.[16] Under Art. 356, the source of information on which the President would reach his 'satisfaction' is very wide. He may act on the Governor's report or any other information. The amplitude and undefined character of the information on which the President acts, and is to be satisfied, "indicates that the satisfaction and the source thereof are not justiciable."

The satisfaction of the President under Art. 356 and the basis thereof "are subjective and are not subject to objective tests by judicial review. The question involves high executive and administrative policy and the court will find out no standard for resolving it judicially."

The Andhra High Court also asserted that the satisfaction of the President under Art. 356 was not a justiciable matter. The President can act under this Article in a number of situations. The Constitution does not enumerate these circum-

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11. *Rao Birinder Singh v. India*, AIR 1968 Punj 441.
12. AIR 1971 Cal 122.
13. AIR 1974 Ori 52.
14. *Supra*, Ch. VII, Sec. C.
15. *Supra*, Ch. III, Sec. A(i); Ch. VII, Sec. A(i).
16. *Supra*, Ch. III, Sec. B(a).

stances. There is no satisfactory criteria for a judicial determination of what are relevant considerations and this makes the question of satisfaction an intrinsically a political one and beyond the reach of the court.[17]

These cases settled the point that it was practically impossible to question President's or Governor's or Central Government's action under Art. 356. The only control over the exercise of this power lies in Parliament as noted above. The matter was placed beyond any shadow of doubt when the Constitution (Thirty-Eighth Amendment) Act, 1975, declared that the 'satisfaction' of the President mentioned in Art. 356(1) "shall be final and conclusive and shall not be questioned in any court on any ground." But this clause has now been withdrawn by the Forty-fourth Amendment of the Constitution.

In *Bijayanand*,[18] the Orissa High Court criticised the conduct of the Governor in so far as he recommended President's rule in the State without first calling upon Bijayanand to form the government. After taking note of the conventions of the British Constitution, the Court observed that by not calling upon the leader of the Opposition to form the government after the resignation of the Satpathy Government, the Governor failed to honour the conventions prevalent in Great Britain. What the Court suggested was that, on the fall of the Ministry, the Governor should automatically ask the leader of the opposition to form the government and that the Governor should not be concerned whether the government formed by him would be stable or not. It was for the leader of the opposition to decide whether he should form the government or not and, ultimately, it was for the House to decide whether his government would remain in office or not. In saying so, however, the Court failed to give due weight to the vice of defections prevailing in the body polity. Even in the instant case, defections were the order of the day. It thus stands to reason whether the British conventions, if followed automatically in India, would not encourage defections from one side to another and whether that will be a happy situation. The situation has not been redeemed much in this regard even by the Anti-Defection Law, for while this law illegalises defection by a single member, defection of a group of members of the Assembly is still possible.[19]

The British conventions have evolved in the context of a well-established two party system where defection of a member of one party to the other is indeed a rarity. In India, the party system is as yet fluid and has not yet stabilised. There is a danger that if the members know that, as soon as they leave the ruling party and join the opposition, the leader of the opposition would be called upon to form the government, defections from the ruling party would be promoted. There is no such provision as Art. 356 in England and there a Council of Ministers must always remain in office. That convention will be applicable at the Central level. But different considerations arise under Art. 356 and it is difficult to accept the theory that the British conventions should apply automatically under Art. 356.

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17. *In re A. Sreeramulu*, AIR 1974 AP 106. For detailed comments on these cases see, ILI, PRESIDENT'S RULE IN THE STATES, 128-53.

18. *Supra*, footnote 13.

19. *Supra*, Chs. II, Sec. F and VI, Sec. B(iv). The view of the learned author has not found favour with the Supreme Court which has said that: "The remedy for corruption or similar ills and evils lies elsewhere and not in Article 356(1)". *Rameshwar Prasad (VI) v. Union of India*, (2006) 2 SCC 1, at page 129 : AIR 2006 SC 980.

Further, in England, a Prime Minister who had a majority, can claim dissolution of the House on being defeated in the House.[20] In the instant case, the Chief Minister, Nandini Satpathy, on defections from her party, while tendering resignation of her office, advised dissolution of the House. According to the British conventions, she could have sought dissolution of the House and remained in office till the new House was elected. If instead of that, the Governor dissolved the House under Art. 356, as suggested by the out-going Chief Minister, no objection could possibly be taken to that course.

In 1975, the Thirty Eighth Constitutional Amendment introduced cl. 5 in Art. 356 barring judicial review of a Proclamation under Art. 356(1) on any ground. The clause made presidential 'satisfaction' to issue a Proclamation under Art. 356(1) as 'final and conclusive' which "shall not be questioned in any court on any ground'. This clause was however withdrawn by the Constitution (44th Amendment) Act, 1978.

(a) *RAJASTHAN V. INDIA*

A constitutional controversy of great significance *vis-a-vis* Art. 356 was raised in *State of Rajasthan v. Union of India*.[21]

When the general elections for Lok Sabha were held in the country in 1977, after the lifting of the emergency of 1975, the Congress Party was badly routed in several States by the Janata Party which won a large number of seats in the Lok Sabha and, thus, formed the government at the Centre. In these States, Congress Ministries were functioning at the time and they still had some more time to run out for completion of the full term.

The Central Home Minister, Charan Singh, wrote a letter to each of the Chief Ministers of these States suggesting that he should seek dissolution of the State Legislature from the Governor and obtain fresh mandate from the electorate. The State of Rajasthan (along with several other States) filed an original suit in the Supreme Court against the Union of India under Art. 131 praying the Court to declare this 'directive' of the Home Minister as unconstitutional and illegal. It was argued that the letter in question was a prelude to the invocation of Art. 356 in these States and that the dissolution of the State Legislatures on the ground mentioned in the said letter was *prima facie* outside the purview of Art. 356. In substance, the suit was designed to forestall the invocation of Art. 356 in the several States.

The Supreme Court, however, dismissed the suit unanimously. The broad position adopted by the Court was that it could not interfere with the Centre's exercise of power under Art. 356 merely on the ground that it embraced 'political and executive policy and expediency unless some constitutional provision was being infringed.' Art. 74(2) disables the Court from inquiring into "the very existence or nature or contents" of ministerial advice to the President.[22] Art. 356(5) makes it impossible for the Court to question the President's satisfac-

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20. *Supra*, Ch. II, Sec. I; Ch. VI, Sec. E; Ch. VII, Sec. C.

21. AIR 1977 SC 1361 : (1977) 2 SCC 592.
Also see, DHAVAN & JACOB, The Dissolution case: Politics at the Bar of the Supreme Court, (1977) 19 *JILI* 355-91; ILI, PRESIDENT'S RULE, *supra*, Ch. III.
Also see, *supra*, Ch. IV, Sec. C(iii)(b), *supra*, Sec. D(d).

22. See, Ch. III, Sec. A(iii)(a) *supra.*

tion on any ground unless and until resort to Art. 356 in a particular situation is shown to be so "grossly perverse and unreasonable" as to constitute "patent misuse of this provision or an excess of power on admitted facts".[23]

The second limb of Art. 355 would seem to cover all steps which are enough to ensure that the State Government is carried on in accordance with the provisions of the Constitution. In the words of BEG, C.J., the sweep of Art. 355 "seems quite wide. It is evident that it is this part of the duty of the Union towards each State which is sought to be covered by a proclamation under Art. 356..... It is a proclamation intended either to safeguard against the failure of the constitutional machinery in a State or to repair the effects of a breakdown. It may be either a preventive or a curative action."[24]

Article 356 can be used by the Centre for securing compliance with democratic norms by the States. The language of Art. 356 is quite wide and loose. As BHAGWATI, J., emphasized the satisfaction of the President under Art. 356 "is a subjective one and cannot be tested by reference to any objective tests", or by "judicially discoverable and manageable standards."[25] The court cannot go into the question of "correctness or adequacy" of the facts and circumstances on which the satisfaction of the Central Government is based. In the instant case, the possibility of the State Governments having lost the confidence of the people could not be ruled out. To continue these governments in office would be "purely undemocratic in character."

FAZL ALI, J., emphasized: "As our Constitution is wedded to the democratic pattern of government, if a particular State Government ceases to be democratic or acts in an undemocrate fashion, it cannot be said that the government of the State is carried on in accordance with the provisions of the Constitution." In the circumstances, "the second part mentioned in Art. 355 appears to have been *prima facie* satisfied."

As regards the privative clause contained in Art. 356(5),[26] BHAGWATI, J., asserted that this clause could not preclude the Court from examining extraneous grounds or whether it was based on no satisfaction at all. BHAGWATI, J., expressed himself on this point as follows:

> "The satisfaction of the President is a condition precedent to the exercise of power under Art. 356, Cl. (1) and if it can be shown that there is no satisfaction of the President at all, the exercise of the power would be constitutionally invalid. Of course by reason of Cl. (5) of Art. 356, the satisfaction of the President is final and conclusive and cannot be assailed on any ground, but this immunity from attack cannot apply where the challenge is not that the satisfaction is improper, or unjustified, but that there is no satisfaction at all. On such a case it is not the satisfaction arrived at by the President which is challenged, but the existence of the satisfaction itself."

The highlight of the decision, however, lies in the assertion by almost all the Judges that in spite of the broad ambit of the power under Art. 356, a presidential

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23. At this time Art. 356(5) declared the 'satisfaction' of the President as "final and conclusive". This clause was added by the 38th Constitution Amendment. But this clause has now been withdrawn by the 44 Amendment.
See, *supra*.

24. AIR 1977 SC at 1380 : (1977) 3 SCC 592.

25. *Ibid*, at 1414.

26. For this clause, see, *supra*, footnote 24.

proclamation could be challenged if power was exercised *mala fide*, or on "constitutionally or legally prohibited" grounds, or for "extraneous or collateral purposes." As BHAGWATI, J., stressed:

> "But one thing is certain that if the satisfaction is *mala fide* or is based on wholly extraneous and irrelevant grounds, the Court would have jurisdiction to examine it, because in that case there would be no satisfaction of the President in regard to the matter in which he is required to be satisfied."[27]

And if there is no satisfaction of the President, there could be no proclamation under Art. 356 as 'satisfaction' of the President is a condition precedent to the exercise of power under this constitutional provision.

It was also held that maintenance of democratic norms could not be regarded as a perverse or irrelevant ground for the exercise of power under Art. 356. The letter of the Home Minister was characterised as not being a directive but only advisory in nature. The grounds given in the letter were not *mala fide* or extraneous or irrelevant.

On the question of interpretation of Art. 356, the Court ruled that the State Legislative Assemblies could be dissolved without the President's proclamation having been approved by the Parliament. The proclamation comes into immediate effect and remains in force for two months without parliamentary approval.

(B) *BOMMAI*

The Supreme Court then rendered a landmark decision on Art. 356(1) in *S.R. Bommai v. India*.[28] The case arose in the context of the followings facts.

In 1989, the Janata Dal Ministry headed by Shri S.R. Bommai was in office in Karnataka. A number of members defected from the party and there arose a question mark on the majority support in the House for the Bommai's Ministry. The Chief Minister proposed to the Governor that the Assembly session be called to test the strength of the Ministry on the floor of the House. But the Governor ignored this suggestion. He also did not explore the possibility of an alternative government but reported to the President that as Shri Bommai had lost the majority support in the House, and as no other party was in a position to form the government, action be taken under Art. 356(1). Accordingly, the President issued the proclamation in April, 1989.

Bommai challenged the validity of the proclamation before the Karnataka High Court through a writ petition on various grounds. The High Court ruled that the proclamation issued under Art. 356(1) is not wholly outside the pole of judicial scrutiny; the satisfaction of the President under Art. 356(1) which is a condition present for issue of the proclamation ought to be real and genuine satisfaction based on relevant facts and circumstances. The scope of judicial scrutiny is therefore confined to an examination whether the disclosed reasons bear any rational nexus to the action proposed or proclamation issued. The courts may examine as to whether the proclamation was based on a satisfaction which was *mala fide* for any reason, or based on wholly extraneous and irrelevant grounds. In such a situation, the stated satisfaction of the President would not be a satisfaction in the constitutional sense under Art. 356. In the end, however, the High

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27. *Ibid.*, Also, UNTWALIA, J., at 1422; FAZL ALI, J., at 1441.
28. AIR 1994 SC 1918 : (1994) 3 SCC 1.

Court dismissed the petition holding that the facts stated in the Governor's report could not be held to be irrelevant, Governor's *bona fides* were not questioned and his satisfaction was based upon reasonable assessment of all facts. The Court also ruled that recourse to floor test was neither compulsory nor obligatory and was not a pre-requisite to the sending of the report to the President. Bommai appealed to the Supreme Court against the High Court decision.

Besides the Karnataka proclamation, the Supreme Court was also called upon to decide the validity of similar proclamations under Art. 356(1) in the States of Meghalaya and Nagaland.

Besides, there were three more proclamations before the Supreme Court for review—those made in Madhya Pradesh, Himachal Pradesh and Rajasthan in 1992 in the wake of the demolition of the disputed Babri structure in Ayodhya. The governments in these States belonged to the B.J.P. which was sympathetic to the organisations responsible for the demolition.[29] The M.P. High Court had held the Madhya Pradesh proclamation to be "invalid and beyond the scope of Art. 356". The Court had ruled that from the material placed before it no inference could be drawn that the State Government had disrespected or disobeyed any Central direction nor was there any specification of any alleged deeds or misdeeds on the part of the State Government in meeting the law and order situation. Merely because there was some worsening of the law and order situation in the State in the wake of Ayodhya incidents, no inference could be drawn that the State Government could not be carried on in accordance with the Constitution, or that the constitutional machinery had broken down in the State.

Needless to say that this was an unprecedented ruling as never before any proclamation issued under Art. 356(1) had been invalidated by any court. Accordingly, the Central Government appealed to the Supreme Court against the High Court verdict. There were also writ petitions pending in the respective High Courts challenging the proclamations under Art. 356, as mentioned above. All these writ petitions were transferred to the Supreme Court for a hearing. The great significance of *Bommai* can be gauged from the fact that the Supreme Court had to adjudged the constitutional validity of six proclamations issued under Art. 356(1) in six different States during 1989 to 1992.

It may be mentioned that by the time the *Bommai* case came before the Supreme Court, Art. 356(5) putting a ban on judicial review of Art. 356 proclamations had been repealed.[30]

The Supreme Court in its judgment by majority declared the Karnataka, Meghalaya and Nagaland proclamations as unconstitutional but the proclamations in Madhya Pradesh, Rajasthan and Himachal Pradesh as valid. Thus, both the High Court decisions mentioned above were overruled.

A Bench of nine Judges was constituted in *Bommai* to consider the various issues arising in the several cases, and seven opinions were delivered. While some of the Judges (AHMADI, VERMA, RAMASWAMY, JJ.) adopted a passive attitude towards judicial review of the presidential proclamation under Art. 356(1), others adopted somewhat activist stance. On the basis of consensus among the Judges,

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29. See, *supra*, Sec. C.
30. *Supra*, footnote 24.

the following propositions can be enunciated in relation to Art. 356(1) and the scope of judicial review thereunder:

1. The President exercises his power under Art. 356(1) on the advice of the Council of Ministers to which, in effect, the power really belongs though it may be formally vested in the President.
2. The question whether the incumbent State Chief Minister has lost his majority support in the Assembly has to be decided not in the Governor's Chamber but on the floor of the House. There should be test of strength between the government and others on the floor of the House before recommending imposition of the President's rule in the State.

   The Court ruled that the Karnataka High Court was wrong in holding that floor test was neither compulsory nor obligatory nor a pre-requisite to sending the report to the President recommending action under Art. 356(1).
3. The Governor should explore the possibility of installing an alternative Ministry, when the erstwhile Ministry loses support in the House.
4. The validity of the proclamation issued under Art. 356(1), is justiciable on such grounds as : whether it was issued on the basis of any material at all, or whether the material was relevant, or whether the proclamation was issued in the *mala fide* exercise of the power, or was based *wholly* on extraneous and/or irrelevant grounds.
5. There should be material before the President indicating that the Government of the State cannot be carried on in accordance with the Constitution. The material in question before the President should be such as would induce a reasonable man to come to the conclusion in question.

   Once such material is shown to exist, 'the satisfaction' of the President based on such material will not be open to question. But if no such material exists, or if the material before the President cannot reasonably suggest that the State Government cannot be carried on in accordance with the Constitution, the proclamation made by the President is open to challenge.

   According to JEEVAN REDDY, J., Art. 356 confers upon the President conditioned power. "It is not an absolute power. The existence of material which may comprise of or include the report of the Governor—is a pre-condition. The President's satisfaction must be formed on relevant material."
6. When a *prima facie* case is made out against the validity of the proclamation, it is for the Central Government to prove that the relevant material did in fact exist. Such material may be the report of the Governor or any other material.
7. The dissolution of the Legislative Assembly in the State is not an automatic consequence of the issuance of the proclamation. The dissolution of the Assembly is also not a must in every case. It should be done only when it is found to be necessary for achieving the purposes of the proclamation.

8. The provisions in Art. 356(3) are intended to be a check on the powers of the President under Art. 356(1). If the proclamation is not approved within two months by the two Houses of Parliament, it automatically lapses. This means that the President ought not to take any irreversible action till the proclamation is approved by the Houses of Parliament. Therefore, the State Assembly ought not to be dissolved.

   The dissolution of the Assembly prior to the approval of the proclamation by the Parliament under Art. 356(3) will be *per se* invalid.[31] The State Legislative Assembly should be kept in suspended animation in the meantime. Once the Parliament has put its seal of approval on the proclamation, the State Assembly can then be dissolved. The Assembly which was suspended will revive and get reactivated if the proclamation is not approved by Parliament.

   Here a word of explanation is necessary. A view was expressed in *Rajasthan v. Union of India*,[32] that the proclamation is valid when issued under Art. 356(1), and the State Legislature can be dissolved by the Centre without waiting for its approval by the Houses of Parliament.[33] But, in *Bommai*, the Court has disagreed with this view and for a very good reason. If the proclamation is not approved by Parliament, it automatically lapses after two months. How is the State Government to run thereafter? It would be inevitable that the dissolved assembly be revived for no fresh elections can be held for the House within the short period of two months. *Bommai* view avoids any such embarrassment to the Central Government.

   Some time back, when in February, 1999, a proclamation under Art. 356(1) was issued in respect of Bihar, the State Government and the State Legislature were suspended. The proclamation was approved by the Lok Sabha on February 26, 99. But when it became clear that the Rajya Sabha would not approve it, because of the opposition by the opposition parties which were in a majority in that House, the Government revoked the proclamation on March 8, 99, in exercise of the powers under Art. 356(2). The State Government was installed in office and the State Legislature which had been suspended was then revived.

9. Once the proclamation is approved by Parliament, and then it lapses at the end of six months, or it is revoked earlier, neither the dismissed State Government, nor the dissolved legislature will revive.

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31. When in October, 1995, President's rule was imposed in the State of U.P., the State Assembly was first suspended and then dissolved ahead of the ratification of the proclamation by Parliament.

There was a Congress Government headed by P.V. Narasimha Rao at the Centre. The ostensible reason given for the step was that there was a possibility of "horse trading" of M.L.As in case of a suspended Assembly. The real reason, however, was that the Congress Government at the Centre wanted to kill the possibility of emergence of a B.J.P. Government in the State. The decision to dissolve the Assembly was purely a political decision which was not in consonance with the *Bommai* ruling.

32. *Supra.*

33. BEG, C.J., AIR 1977 SC at 1391; CHANDRACHUD, J, *ibid.* at 1398, BHAGWATI, J., *ibid,* at 1410.

10. If the Court invalidates the proclamation, even if approved by the Parliament, the action of the President becomes invalid. The State Government, if dismissed, is revived and the State Assembly, if dissolved, will be restored.

11. Art. 74(2) bars an inquiry into the question whether any or what advice was tendered by the Council of Ministers to the President.[34] Art. 74(2) "does not bar the Court from calling upon the Union Council of Ministers to disclose to the court the material upon which the President had formed the requisite satisfaction. The material on the basis of which advice was tendered does not become part of the advice. Even if the material is looked into by or shown to the President, it does not partake the character of advice".

    According to JEEVEN REDDY, J., when called upon, the Union Government has to produce the material on the basis of which action was taken. It cannot refuse to do so, if it seeks to defend the action. The Court will not go into the correctness of the material or its adequacy. Its enquiry is limited to see whether the material was relevant to the action taken. Even if some material was irrelevant, the court will not interfere so long as there was some material which was relevant to the action taken.[35]

Applying these principles, the Karnataka, Meghalaya and Nagaland proclamations were invalidated. In case of Karnataka, the Court ruled that the question of lack of majority support for the Ministry was not tested on the floor of the House. A duly constituted Ministry was dismissed on the *ipse dixit* of the Governor who made no effort to instal in office an alternative ministry. The Governor's report thus was faulty and clearly smacked of *mala fide*s. The proclamation based on such a report also suffered from *mala fides* and was liable to be struck down.

In case of Meghalaya, after reviewing the circumstances leading to the issue of the proclamation, the Court ruled that *prima facie,* the material before the President was not only irrational but motivated by factual and legal *mala fides*".

In case of Nagaland, there was defection in the ruling Congress Party as 1/3rd of its members formed a new party. The Chief Minister resigned. The leader of the breakaway group claimed majority support but instead of allowing him to test his strength on the floor of the House, on the report of the Governor, the President issued the proclamation under Art. 356(1). The Court ruled that in the circumstances, the proclamation was unconstitutional. The Court emphasized that the Anti-Defection Law did not prohibit the formation of a new political party if it was backed by at least 1/3rd members of an existing legislature party.[36] The leader of the new party ought to have been given an opportunity to prove his majority on the floor of the House.

The case of the proclamations issued in case of Madhya Pradesh, Rajasthan and Himachal Pradesh fell in a different category. None of the State Governments had lost its majority. These proclamations were issued in the wake of the

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34. *Supra*, Ch. III, Sec. A(iii)(a).
35. Also see, *A.K. Kaul v. Union of India,* AIR 1995 SC 1403, at 1411 : (1995) 4 SCC 73.
36. *Supra*, Chs. II, Sec. F; VI, Sec. B(iv).

incidents at Ayodhya on December 6, 1992. But here the crucial question involved was that of upholding the basic constitutional value of secularism.[37]

The Court emphasized that the various constitutional provisions by implication prohibit the establishment of a theocratic State and prevent the State from either identifying itself with, or favouring any particular religion or religious sect or denomination. The state is enjoined to accord equal treatment to all religions and sects. Religion cannot be mixed with any secular activity of the state. In the words of RATNAVEL PANDIAN, J.: "In matters of State, religion has no place. No political party can simultaneously be a religious party and politics and religion cannot be mixed".

Secularism is a part of the basic structure of the Constitution.[38] If any State Government acts in a manner which is calculated to subvert or sabotage secularism, it can lawfully be regarded that a situation has arisen in which the State Government cannot be carried on in accordance with the constitutional provisions. The three proclamations were thus held valid on this ground. The decision of Madhya Pradesh High Court, mentioned above, was reversed.

In *Bommai,* the Supreme Court seeks to promote several basic and wholesome constitutional values, such as, parliamentary system, federalism, control over the executive and secularism. Bommai is a very fine example of judicial creativity.[39]

To promote parliamentary government, the Court has insisted that the question whether the incumbent State Chief Minister has lost majority support or not, must be decided on the floor of the House and not by the Governor himself. Further, the Governor ought to explore the possibility of installing an alternate Ministry before reporting failure of the constitutional machinery in the State to the President under Art. 356(1).[40]

Federalism has been designated as a basic value in the Indian Constitution.[41] Dismissal of a duly elected State Assembly by the Central Government is really a negalation of the federal concept. The power under Art. 356(1) has thus to be exercised sparingly, scrupulously and with circumspection. Abuse or misuse of this power will damage the federal fabric and disturb the federal balance.

The Court has emphasized that the President exercises the power under Art. 356(1) on the advice of the Central Ministry which is a political body. In a pluralistic democracy and federal structure, the parties in power at the Centre and the States may not be the same. Hence it is necessary to confine the exercise of power under Art. 356(1) strictly to the situation mentioned therein which is a condition precedent to its exercise.[42]

In this connection, the fact situation in the *Rajasthan* case may be referred to.[43] There the question was whether the nine Congress State Governments could be dismissed under Art. 356(1) in the wake of the Congress defeat in the recently held election for the Lok Sabha and installation of the Janata Government at the

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37. For discussion on the concept of "Secularism", see, *supra,* Ch. I; *infra,* Ch. XXIX, Sec. A.
38. For discussion on this concept, see, *infra,* Ch. XLI.
39. On judicial creativity, see, *infra,* Ch. XL.
40. AIR 1994 SC at 1986, 2100 : (1994) 3 SCC 1.
41. See, *infra,* Ch. XLI.
42. *Ibid,* at 1970.
43. *Supra.*

Centre. The Judges had expressed views supporting such a step. But in *Bommai*, several Judges expressed disapproval of what had happened, first in 1977 and, then in 1980. The Court has now firmly stated that so long as a State Government is functioning within the discipline of the Constitution and pursues an ideology consistent with the constitutional philosophy, its dismissal under Art. 356(1) solely on the ground that a different political party has come to power at the Centre is unwarranted and unjustified.

India has consciously adopted a pluralist democratic system which implies that different political parties may be in power in the various States and the Centre. "The mosaic of variegated pattern of political life is potentially inherent in a pluralist multi-party democracy like ours".[44] Accordingly, several Judges have expressed disapproval of the view that if the ruling party in the States suffers an overwhelming defeat in the election to Lok Sabha—however complete the defeat may be—it can be a ground for the issue of the proclamation under Art. 356(1). Simply because a political party had overwhelming majority at the Centre, it could not on that ground alone advise the President under Art. 356 of the Constitution to dissolve the State Assemblies of the opposition-ruled States. As SAWANT, J., has observed[25] in this connection:

> "So far the power under the provision has been used on more than 90 occasions and in almost all cases against governments run by political parties in opposition. If the fabric of pluralism and pluralist democracy and the unity and integrity of the country are to be preserved, judiciary in the circumstances is the only institution which can act as the saviour of the system and of the nation."[45]

Absolute power cannot be conceded to the Executive under Art. 356(1). The reason is that in the past the power has been used at times on "irrelevant, objectionable and unsound" grounds.[46]

Finally, the Court has laid a good deal of emphasis on secularism.[47] It is a part of the basic structure of the Constitution.[48] If any State Government acts in a manner which is calculated to subvert or sabotage secularism, it can lawfully be regarded that a situation has arisen in which the State Government cannot be carried on in accordance with the Constitution. A State Government may enjoy majority support in the Assembly, but if it subverts the basic value of secularism, it can be dismissed under Art. 356(1). Such a government may be regarded as not functioning in accordance with the provisions of the Constitution.[49]

Breakdown of the constitutional machinery in the State is the *sine qua non* for invoking Art. 356. What is the significance of the phrase "breakdown of the constitutional machinery." K. RAMASWAMY, J., in *Bommai* has elucidated the matter as follows:

> "The exercise of the power under Art. 356 is an extraordinary one and needs to be used sparingly when the situation contemplated by Art. 356 warrants to maintain democratic form of government and to prevent paralysing of the political process. Single or individual act or acts of violation of the Constitution for good, bad or indifferent administration does not necessarily constitute fail-

44. SAWANT, J., *ibid*, at 1980.
45. *Ibid.*
46. SAWANT, J., *Ibid.* at 1980.
47. For a detailed discussion on Secularism, see, *infra*, Ch. XXIX, Sec. A.
48. See, *infra*, Ch. XLI, for discussion on this doctrine.
49. AIR 1994 SC at 2000, 2113**.**

ure of the constitutional machinery or characterises that a situation has arisen in which the government of the state can not be carried on in accordance with the Constitution."

(C) AFTER BOMMAI

It has become very difficult to invoke Art. 356 after the *Bommai* decision. The following incidents prove the point.

On Oct. 21, 1997, the Chief Minister of Uttar Pradesh obtained a vote of confidence on the floor of the House amidst pandemonium. This vote was sought by him as a result of the Supreme Court ruling to that effect.[50] Thereafter, the Governor in his report recommended imposition of the President's rule in the State under Art. 356(1) on the ground of breakdown of the constitutional machinery in the State. Accepting the Governor's report, the Central Cabinet recommended to the President the invocation of Art. 356, in the State, but under Art. 74(1), the President returned the recommendation for reconsideration of the Cabinet.[51] The President expressed a doubt about the constitutional correctness of the Governor reporting breakdown of constitutional government in the State immediately after the Chief Minister had seemingly won the vote of confidence in the House. Better sense prevailed with the Central Government which then withdrew its recommendation to the President to invoke Art. 356(1) in Uttar Pradesh. The matter came to an end at the Central level leaving Kalyan Singh Ministry intact in the State.

Again, in October, 1998, the Central Government recommended to the President invocation of Art. 356 in the State of Bihar. The Central Government had done so on the basis of the Governor's report in which had been listed a series of acts of commission and omission on the part of the State Government as constituting a breakdown of the constitutional machinery in the State—a *sine qua non* for the exercise of power under Art. 356(1). The main allegation against the State Government was the worsening of the law and order situation in the State. At this time, the State Government undoubtedly enjoyed the majority support in the Assembly.

The President considered the Governor's report and the recommendation of the Central Cabinet and then decided to refer back the matter to the Cabinet for reconsideration under Art. 74(1). The President took the view that the acts complained of did not constitute a breakdown of the constitutional machinery in the State so as to justify the use of his extraordinary power under Art. 356. Obviously, taking his cue from *Bommai*, the President distinguished between bad government and breakdown of constitutional machinery. The President's stand was in accordance with the letter and substance of the Supreme Court decision in *Bommai*.

For sometime, the Central Cabinet deferred the decision, but somewhat later it again revived its recommendation. The President cannot refer back the matter twice under Art. 74(1)[52] and, therefore, he fell in line with the Cabinet. The requisite proclamation under Art. 356(1) was issued. The State Government was dismissed and the State Legislature was suspended. The proclamation was approved by the Lok Sabha but the Government had to revoke it when it found that,

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50. *Supra*, Ch. VII, Sec. A(ii)(a).
51. *Ibid.*
52. *Supra*, Ch. III, Sec. B(a).

because of the hostility of the Congress Party, it would not be approved by the Rajya Sabha.[53]

After the revocation of the proclamation, the Governor invited the earlier Chief Minister Rabri Devi to form the government. The Governor, however, imposed a condition that the government must prove its majority on the floor of the House within ten days. This condition was challenged as unconstitutional. The Patna High Court however upheld the same saying that the Governor can impose such a condition in his discretion where there is doubt about the majority support enjoyed by the government in the House. The principle of collective responsibility means that the government must enyoy majority support in the House and how that majority support is to be ascertained is a matter left to the discretion of the Governor.[54]

In 2005, Legislative Assembly elections were held in the State of Bihar. Since no political party was in a position to form a Government, a notification was issued on 7th March, 2005 under Article 356 of the Constitution imposing President's Rule over the State of Bihar and the Assembly was kept in suspended animation. The object of the proclamation imposing President's Rule was to give time and space to the political process to explore the possibility of forming a majority Government in the State through a process of political realignment.

Before even the first meeting of the Legislative Assembly, its dissolution was ordered on 23rd May, 2005 under Article 356 on the basis of the report of the Governor that attempts were being made to cobble a majority by illegal means and lay claim to form the Government in the State of Bihar. The Governor's report was in turn based on information gathered from the media, meeting with various political functionaries, as also intelligence reports. The Presidential notification formally dissolving the Bihar Assembly was challenged directly before the Supreme Court under Article 32.[55] The court followed the reasoning in Bommai saying that "the narrow minimal area of judicial review as advocated in State of Rajasthan case is no longer the law of the land in view of its extension in Bommai case".[56]

The notification was held to be unconstitutional on the ground that the drastic and extreme action under Article 356 cannot be justified "on mere *ipse dixit*, suspicion, whims and fancies of the Governor" without any verification of the authenticity of the information.

> "There was no material, let alone relevant, with the Governor to assume that there was no legitimate realignment of political parties and there was blatant distortion of democracy by induced defections through unfair, illegal, unethical and unconstitutional means".[57]

F. FINANCIAL EMERGENCY

Article 360 makes provisions concerning financial emergency. If the President is satisfied that a situation has arisen whereby the financial stability or credit of India, or any part thereof, is threatened, he may by a proclamation make a declaration to that effect [Art. 360(1)].

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53. *Supra.*
54. *Sapru Jayakar Motilal C.R. Das v. Union of India,* AIR 1999 Pat. 221.
55. *Rameshwar Prasad (VI) v. Union of India,* (2006) 2 SCC 1 : AIR 2006 SC 980.
56. *Ibid* paragraph 54.
57. *Ibid* at page 119.

When such a proclamation is in operation, the Centre can give directions to any State to observe such canons of financial propriety as may be specified in the directions. It may also give such other directions as the President may deem necessary and adequate for the purpose [Art. 360(3)]. Any such directions may provide for the reduction of salaries and allowances of all or any class of persons serving in the State [Art. 360(4)(*a*)(*i*)].

The Centre may require that all money bills, or financial bills or those which involve expenditure from the State Consolidated Fund, shall be reserved for the President's consideration after being passed by the State Legislature [Art. 360(4)(*a*)(*ii*)].

The President may also issue directions for reducing the salaries and allowances of persons serving the Union including the Supreme Court and the High Court Judges [Art. 360(4)(b)].

A proclamation issued under Art. 360(1) may be revoked or varied by a subsequent proclamation [Art. 360(2)(a)], and has to be laid before each House of Parliament [Art. 360(2)(b)]. The proclamation ceases to have effect after two months unless in the meantime it is approved by resolutions of both Houses of Parliament [Art. 360(2)(e)]. If at the time, the proclamation under Art. 360(1) is issued, Lok Sabha is dissolved it may be approved by the Rajya Sabha, and then approved by the Lok Sabha after elections within thirty days from its first sitting. If not so approved, the proclamation ceases to exist.[58]

The proclamation of financial emergency increases the supervision of the Centre on the States in financial matters. Perhaps, the framers of the Constitution adopted the idea underlying Art. 360 from the experiences of the federations of the U.S.A., Canada and Australia during the depression of the 1930's when the Central Government found itself very much handicapped in taking effective action to meet the situation. In fact, the argument given in the Constituent Assembly to support this constitutional provision was that during the depression, the U.S. Congress had passed the National Industrial Recovery Act which was declared unconstitutional by the Supreme Court,[59] and that the Central Government in India should face no such difficulty in coping with emergency economic problems.[60] The Government of India can take effective action under Art. 360 whenever an occasion arises for the same. There has not been any occasion so far for invoking Art. 360.

By the Thirty-Eighth Amendment of the Constitution, the Presidential 'satisfaction' in Art. 360(1) was declared to be 'final and conclusive' and not questionable in any court on any ground. No court was to have jurisdiction to entertain any question, on any ground, regarding the validity of—(*i*) a declaration made by proclamation by the President to the effect stated in Art. 360(1); or (*ii*) the continued operation of such Proclamation. This provision has now been deleted by the Forty-Fourth Amendment of the Constitution.[61]

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58. Proviso to Art. 360(2)(c).

59. *Schechter Poultry Corp. v. United States*, 295 US 495.
The Act in question was declared invalid in *Schechter* on the ground of involving an improper delegation of legislative power by the Congress to the President.

60. XCAD, 361-72.
Also, AUSTIN, THE INDIAN CONST., 209-16.

61. See, Ch. XLI, *infra.*

CHAPTER XIV

CO-OPERATIVE FEDERALISM

SYNOPSIS

A. FROM COMPETITIVE TO CO-OPERATIVE FEDERALISM

Though there is division of functions between the Centre and the units in a federation, and the respective areas of competence of each is earmarked, yet it would not be correct to assume that the various governments act in water-tight compartments. As these governments act side by side in the same country, inevitably many types of relations arise amongst them and many instrumentalities to promote intergovernmental co-operation come into existence.

In the three older Federations of the U.S.A., Canada and Australia, in the formative stages of development, the dominant operative concept was that of 'competitive federalism' which denoted a spirit of competition and rivalry between the Centre and the States. The formative stages were, therefore, marked by intergovernmental disputes; the units were very conscious of their powers and rights and, thus, resented the growth of the Centre's powers and any encroachment by it on their domain.[1]

With the passage of time, however, the concept of 'competitive federalism' slowly gave way to 'co-operative federalism'. This trend has been promoted by three powerful factors:

1. *Supra*, Ch. XI, Sec. J(ii), under "Intergovernmental Tax Immunities".

(1) the exigencies of war when for national survival, national effort takes precedence over fine points of Centre-State division of powers;

(2) technological advances means making of communication faster;

(3) the emergence of the concept of a social welfare state in response to public demand for various social services involving huge outlays which the governments of the units could not meet by themselves out of their own resources.

The concept of 'co-operative federalism' helps the federal system, with its divided jurisdiction, to act in unison. It minimises friction and promotes co-operation among the various constituent governments of the federal union so that they can pool their resources to achieve certain desired national goals.[2]

It has come to be realised that the various governments in a federation are interdependent and that they should act, not at cross-purposes, but in co-ordination so as to promote and maximise the public welfare. Money has been one of the strongest motive forces in the emergence of this concept. The Centre with its vast financial capacity is always in a position to help the units which always need it to meet the expanding demands on them for social services falling in their legislative sphere, and this brings the two levels of government closer. Thus, in the U.S.A., intergovernmental co-operation has been built mostly around the system of conditional central grants to the States for centrally-sponsored schemes.[3]

In Australia, financial difficulties of the States have led to the establishment not only of the Commonwealth Grants Commission,[4] but also of another unique institution, the Australian Loan Council, which was created in 1927 to co-ordinate the borrowing programmes of the various governments. The Council meets once a year and consists of the Prime Ministers of the Centre and the States. Each State has one vote, but the Centre has two and a casting votes. All loans are arranged by the Centre and then distributed among the various governments in accordance with an agreed formula. This arrangement has reduced competition among the governments for funds and thus loans can now be arranged on more advantageous terms than was possible before. Besides, expedients like conditional grants, loans by the Centre to the States, income-tax sharing between the Centre and the States with an accent on State financial needs, have also come to be adopted to promote inter-governmental co-operation.

Canada has also developed some co-operative techniques, such as Central Grants to the Provinces, delegation of power by the Centre and Provinces simultaneously to some subordinate agencies created by one or the other government,[5] referential legislation, etc.

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2. CORWIN defines co-operative federalism thus: "The States and National Governments are regarded as mutually complementary parts of a single governmental mechanism all the whose powers are intended to realise the current purposes of government according to their applicability to the problems in hand." THE CONST. OF THE U.S.A., SENATE DOC., 14 (1953).

3. *Supra*.

Ch. XI, Sec. M; See *People of the State of New York v. O'Neill*, 359 US 1 (1959) for judicial support to the development of co-operative federalism in the U.S.A.

Also, CLARK, *Joint Activity between Federal and State Officials*, 51 *Pol. Sc. Q.*, 230 (1936); FRANKFURTER AND LANDIS, The Compact Clause, 34 *Yale LJ* 685, 688-691.

4. *Supra*, Ch. XI, Sec. L.

5. *Supra*, Ch. XI, Sec. M; Ch. XII, Sec. B(c).

It may be remembered that these three Constitutions were drafted in an era when *laissez faire* was the dominant political philosophy. The process of adjustment from *laissez faire* to the contemporary era of social welfare state could not be consummated without a corresponding adjustment in the constitutional norms as well. The process of constitutional amendment in each of these countries is extremely rigid. Though the courts have helped the process of adjustment by giving an extended significance to the Central powers, yet this by itself could not have sufficed to satisfy the needs of the changing panorama. The concept of 'co-operative federalism' has, therefore, provided the necessary flexibility and resiliency to an otherwise rigid constitutional framework so as to enable it to cope with the newly emerging demands and challenges.[6]

The twentieth century federalism has come to be understood as a dynamic process of co-operation and shared action between the two levels of Government, with increasing inter-dependence and centrist trends. The antiquated concept of dual federalism is nowhere a functional reality in the modern world not even in the so-called classical federal model of the U.S.A.

The framers of the Indian Constitution took due note of the emerging trend of co-operative federalism in the older federations. They realised that governments in a federation were arranged not hierarchically or vertically but horizontally, that no line of command runs from the Centre to the States, and that common policies among the various governments can be promoted not by dictation but by a process of discussion, agreement and compromise.

The States of India have a large field of administration and decision-making and it becomes essential, therefore, to create agencies to co-ordinate intergovernmental action in those fields at least where the repercussions of a State action would not be confined merely to its own boundaries but would be felt outside the State as well, or where national interests demand a uniform approach. Also, when a number of governments with divided jurisdiction function in the same territory, inter-governmental disputes and differences are bound to arise and it is essential that mechanisms be evolved to resolve and reconcile these differences amongst the various governments so that all of them may pool their resources towards the realization of the social and economic objectives for the welfare of the people. Accordingly, the framers incorporated into the Constitution, an infrastructure to promote co-operation and coordination, and minimise tensions, among the various governments. Several features and provisions of the Constitution have been deliberately designed to institutionalise the concept of Centre-State co-operation.

The provisions for enabling Parliament to legislate in the State area on the request of two or more States,[7] the scheme of financial relations between the Centre and the States,[8] grants-in-aid under Art. 282,[9] the scheme of Centre-State administrative relationship along with provision for all-India services,[10] are some of the instruments designed to promote inter-governmental co-operation and introduce the necessary flexibility in an otherwise rigid federal system.

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6. SAWER, MODERN FEDERALISM, 70-8, 92, 100, 102-5, 122-5, 152 (1969).
7. *Supra*, Ch. X, Sec. J(c).
8. *Supra*, Ch. XI, Sec. K.
9. *Supra*, Ch. XI, Sec. M.
10. *Supra*, Ch. XII, Secs. B and G.

In addition, the Constitution provides for the creation of many agencies with the same purpose in view, *e.g.,* Art. 307.[11] But, even outside the Constitution, a number of bodies have been established either by statutes or by administrative decisions with a view to facilitate inter-governmental co-operation. A notable example of Centre-State co-operation is furnished by the fact-situation in the *Jaora Sugar* case where Parliament used its own legislative power to validate the State tax on entry of sugarcane into the premises of sugar mills, which had been declared invalid by the Supreme Court.[12]

Besides the above specific examples of co-operative federalism in India, a few more are discussed below.

B. FULL FAITH AND CREDIT

The several States in the U.S.A., before the creation of the Federation, were sovereign entities and each was thus free to ignore obligations created under the laws, or by the judicial proceedings of the other. It was, therefore, necessary to evolve a mechanism by which rights legally established in one State could be given nation-wide application, and so there is the Full Faith and Credit clause in the U.S. Constitution.[13] On the same model, the Indian Constitution has Art. 261. Since under Art. 245(1),[14] the jurisdiction of each State is confined to its own territory, it could possibly have been argued that the acts and records of one State could not be recognised in another State. Art. 261 removes any such difficulty. Art. 261(1) lays down that "full faith and credit" is to be given throughout the territory of India to 'public acts', records and judicial proceedings of the Union and the States.[15]

Article 261 is prospective and not retrospective. This provision does not apply to decrees passed before the coming into force of the Constitution. The term 'public acts' in this Article refers not only to statutes but to all other executive and legislative acts. The clause, however, does not envisage that a greater effect be given to the public act of one State in another State than it is entitled to in the 'home' State itself. Hence, an *ultra vires* or unconstitutional statute need not be recognised in any other State. Similarly, the issue of a permit to ply a motor vehicle on a public route, which is void on account of the grant being *ultra vires* the grantor, cannot be regarded as 'an act' within the meaning of this clause. The permit never had any value or life as a permit, *i.e.*, it never came into existence, and so need not be recognised in any other State.[16] Art. 261(1) does not bar an inquiry into the jurisdiction of the court by which a judgment was rendered or passed.[17]

According to Art. 261(2), the manner in which, and the conditions under which, the acts, records and proceedings referred to in Art. 261(1) are to be

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11. *Next Chapter*.
12. *Supra*, Ch. XI, Sec. B.
13. Art. IV, Sec. 1; CORWIN, WHAT THE CONST. MEANS TO-DAY, 199 (1973); JACKSON, Full Faith and Credit—Lawyer's Clause of the Const., 45 *Col. LR* 1 (1945). Also, Secs. 118 and 51 (XXV) of the *Australian Const*.
14. *Supra*, X, Sec. A.
15. *S. Mohd. Ibrahim Hadhee v. State of Madras*, 21 STC 378 (1968).
16. *R. Venkitaraman v. Central Road Traffic Board*, AIR 1953 TC 392.
17. *Yousoof v. State of Mysore*, AIR 1969 Mys 203.

proved, and the effect thereof determined shall be 'as provided by law made by Parliament'. Art. 261(2) thus empowers Parliament to lay down by law:

(a) the mode of proof, as well as,

(b) the effect of acts and proceedings of one State in another State.

Under entry 12, List III, 'recognition of laws, public acts and records and judicial proceedings' is a concurrent subject.[18] Therefore, the States are also entitled to legislate on this matter but subject to the exclusive power conferred on Parliament under Art. 261(2).[19]

Under Art. 261(3), a final judgment or order delivered or passed by a civil court in any part of India is capable of execution anywhere within India according to law. This is a constitutional provision which enjoins that a decree shall be executable in any part of the territory of India according to law. The words 'final judgment' in this clause include 'decrees' also. The clause applies to civil and not to criminal courts. A decree passed by a civil court in any other State is executable in any other State 'according to law' and the word 'law' here means 'procedural' law relating to the execution of the decrees, *e.g.,* the law of limitation. It does not refer to the merits of the decision which cannot be re-opened in another court.[20]

The Bombay High Court passed a decree on June 29, 1960. Goa became a part of India and was made a Union Territory in 1962.[21] The Code of Civil Procedure was made applicable to Goa in 1965. The Supreme Court ruled that as the decree was passed by the Bombay High Court after the Constitution came into force, Art. 261(3) would apply to the decree in question. Further, this Article would also apply to Goa because at the time of its execution, Goa had become a part of India. The decree would be executed according to the C.P.C. which became applicable at the time of the execution of the decree.[22]

C. INTER-STATE COUNCIL

Article 263 provides that the President may by order appoint an Inter-State Council if it appears to him that public interest would be served by its establishment. The President may define the organisation, procedure and duties of the Council. Generally, it may be charged with the duty of:

(a) inquiring into and advising upon disputes which may have arisen between States;

(b) investigating and discussing subjects in which some or all of the States, or the Union and one or more of the States, have a common interest;

(c) making recommendations upon any subject and, in particular, recommendations for the better co-ordination of policy and action with respect to that subject.

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18. *Supra*, Ch. X, Sec. F.
19. See *The Indian Evidence Act*, Ss. 37, 57 and 81; also, The *Civil Procedure Code*.
20. *Narsing v. Shankar*, AIR 1958 All 775.
Also, *Panna Lal Umediram v. Narhari S. Narvekar*, AIR 1968 Goa 1; *Moloji Nar Singh Rao v. Shankar Saran*, AIR 1962 SC 1737 : (1963) 2 SCR 577; *Narhari v. Pannalal*, AIR 1977 SC 164 : (1976) 3 SCC 203.
21. See, Ch. V; Ch. IX, Sec. A, *supra*, for "Union Territories".
22. *Narhari, ibid*, at 169-170.

It appears from the above that the Council is envisaged to be an advisory body having no authority to give a binding decision. The Council's function to inquire and advise upon Inter-State disputes is complimentary to the Supreme Court's jurisdiction under Art. 131 to decide a legal controversy between the governments.[23]

The Council can deal with any controversy whether legal or not, but its function is advisory unlike that of the Court which gives a binding decision. The Council is envisaged to be a mechanism of intergovernmental consultation. The Supreme Court can decide intergovernmental disputes of a legal nature. But there may arise inter governmental disputes of a non-legal character and the Council can play a role in settling such disputes.

The Council can play a role in promoting vertical (Centre-State) and horizontal (Inter-State) Intergovernmental cooperation and co-ordination.

The Council may be appointed either on a permanent basis or from time to time on an *ad hoc* basis. It is also possible to appoint not only one but any number of such bodies to deal with various matters as Art. 263 is of a general nature. Such a Council could deal with any matter whether of a legal or a non-legal character in which the States themselves or the Centre and the States may be interested. The function of the Council to inquire and advise upon interstate disputes might be regarded as complimentary to Art. 131 under which the Supreme Court can decide a legal controversy among the governments.[24]

The main idea underlying the provision is to enable the creation of a regular and recognised machinery of inter-governmental consultation so that coordination may be maintained amongst the various governments in such matters as agriculture, forestry, irrigation, education, etc.

Not much use has been made of Art. 263 so far and only a few bodies of minor importance have been created under it. The Central Council of Health, created by a Presidential Order under Art. 263, consists of the Central Health Minister as the Chairman, and the State Health Ministers as members. The Council is an advisory body. Its function is to consider and recommend broad lines of policy in regard to all matters concerning health; to make proposals for legislation in this area; to examine the whole field of possible co-operation in regard to inter-State quarantine during festivals and outbreaks of epidemics; to recommend to the Central Government the method of distribution of grants-in-aid for health purposes to the States; to review the work accomplished with the help of these grants, and to establish organisations invested with appropriate functions to maintain and promote co-operation between the Central and State Health Administrations. All questions are decided by a majority of members present at a meeting.

Another similar body is the Central Council of Local Self-Government which consists of the Union Minister of Health as Chairman, and the State Ministers for Local Self-Government as members. It is an advisory body and performs the following duties: to consider and recommend broad lines of policy in regard to matters concerning local self-government; to make proposals for legislation in

23. *Supra*, Ch. IV, Sec. B.
24. For discussion on Supreme Court's jurisdiction under Art. 131, see, *supra*, Ch. IV, Sec. C(iii)(b).

the area of local self-government; laying down the pattern of development for India as a whole; to examine the whole field of possible co-operation in regard to local self-government matters and to draw up a common programme of action; to recommend to the Central Government allocation of available financial assistance to local bodies including village panchayats, and to review periodically the work accomplished in the area with the Central assistance. It meets once a year and takes decisions by a majority vote.

Under Art. 263, four regional councils have been set up for making recommendations for the better co-ordination of policy and action with respect to sales tax, a State subject.[25] A regional council has been established in each of the four zones—Northern, Eastern, Western and Southern. Each regional council is to consist of the Secretary in charge of sales tax, and the Commissioner of Sales tax in each of the States and Union Territories concerned; the Deputy Secretary to the Government of India in charge of sales tax and the Deputy Secretary to the Government of India, in the Ministry of Home Affairs, in charge of the Union Territories concerned. The Under Secretary to the Government of India, in the Ministry of Finance, in charge of sales tax is to function as the Secretary of each regional council and convene its meetings. All administrative work relating to the regional councils is to be attended to by the Sales-tax Branch of the Ministry of Finance of the Government of India.

A decision taken at a meeting of a council is recommendatory in nature and is to be forwarded to the Governments concerned for implementation. If a recommendation made by a council is not implemented by a State or a Union Territory, and if the council thinks that its non-implementation would adversely affect the interests of any other State or Union Territory, the council may recommend that the matter may be discussed at a meeting of the Ministers in charge of sales tax in the States and the Union Territories comprised in the zone to be presided over by the Union Minister of State in the Ministry of Finance. A council considers matters relating to the levy of sales-tax (including Central sales-tax)[26] in any State or Union Territory in the zone.

A council is to meet at least once in six months. All questions are to be decided by a majority of votes of the members. Joint meetings of two or more regional councils can also be held if necessary. The main purpose in establishing these councils is to secure a measure of uniformity in the rates of sales tax and other matters pertaining thereto in respect of the States in each zone. Sales tax has a very close relationship with, and an indiscriminate exercise of power to levy sales tax may injure, movement of commodities in inter-State trade and commerce and hence the great need for co-ordinating the State sales taxation to the extent possible.[27]

A study team of the Administrative Reforms Commission suggested the establishment of an Inter-State Council under Art. 263 with a view to strengthen co-operation and co-ordination, and evolution of common policies, among the Central and State Governments in many areas where the measures taken by these

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25. *Supra*, Ch. XI, Sec. D.
26. *Supra*, Ch. XI, Sec. D; Ch. XI, Sec. J(i).
27. S.N. JAIN, Freedom of Trade and Commerce, and Restraints on the State Power to Tax Sale in the course of Inter-State Trade and Commerce, 10 *JILI*, 547, 582, (1968).
For the order of the Government of India setting up the councils see *Gazette of India*, Extraordinary, Pt. II, Sec. 3(1), dated Feb. 1, 68, p. 43.

governments from time to time are mutually interactive.[28] The economy of the country being indivisible, it exerts constant pressure towards administrative unity. This process of co-operation among the governments can be strengthened by evolving a proper apparatus for mutual consultation.

Consultation among the Central and State Governments goes on even at present, but most of the time it is carried on through *ad hoc* bodies like the conferences of the Central and State Ministers dealing with various subjects. These conferences meet at irregular intervals, without much preparatory work, and often with a heavy agenda to transact within a short period. Then, there is no instrument to pursue the follow-up action on the decisions taken at these conferences. The study team, therefore, suggested that the present-day numerous *ad hoc* bodies should be replaced by one standing body to which issues of national importance can be referred and which can advise on them authoritatively after taking all aspects of the problem into account. A single body can look at various problems in the perspective of the whole.

The proposed council should consist of the Prime Minister, a few Central Ministers, State Chief Ministers or their nominees, and others who may be co-opted, or invited to its meetings. All issues of national importance in which States are interested can be placed before this forum except the inter-State boundary disputes, and the appointment of federal officers like the State Governors, the Chief Justice of India, the Chief Election Commissioner, etc.

The Commission endorsed the suggestion of establishing the Inter-State Council so that the inter-State or Centre-State differences may be settled by mutual discussion.[29] The Commission did not work out the details of the types of functions which such a council can discharge. It only made a general statement that "the establishment of an Inter-State Council would be conducive to better understanding."

There has been a demand for the setting up of such a council by some State Chief Ministers so that federal problems may be discussed on a formal basis. The Central Government, however, remains cool to the idea and is diffident about the advisability of creating such a body. Presumably, its misgivings are that once such a body is appointed, the States will seek to use it to intrude into those matters which fall within the decision-making area of the Central Cabinet, *e.g.*, appointment of State Governors, application of Art. 356, etc., matters on which Centre-State controversies arise now and then.

Because of its apprehensions that some States may seek to use the council to undermine its position, the Central Government prefers to keep the processes of consultation more or less *ad hoc* and makes use of the provisions of Art. 263 to set up only such bodies as have well-defined and narrow terms of reference. For consultation in regard to economic matters there is the National Development Council. Nevertheless, there appears to be a good case for appointment of a non-political, advisory body under Art. 263 to keep the intergovernmental relationship under constant review, study problems in that area on an objective and dispassionate basis and project solutions of major issues. Being free of politics, its recommendations may receive a greater acceptability.[30]

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28. REPORT OF THE STUDY TEAM, A.R.C., ON CENTRE-STATE RELATIONSHIPS, I, 294-305 (1967).
29. *A.R.C.*, REPORT ON CENTRE-STATE RELATIONSHIPS, 32-35 (1969).
30. Such an attitude is reflected in the Report of the Rajmannar Committee appointed by the Tamil Nadu Government in 1971 to review Centre-State Relationship, *Report*, 24.

A model for the purpose is furnished by the Advisory Commission on Intergovernmental Relations set up in the U.S.A. in 1959 with the following purposes and functions: to bring together representatives of various governments to consider common problems; to provide a forum for discussion of the administration and co-ordination of federal grant programmes requiring intergovernmental co-operation; to give critical attention to controls involved with administration of federal grant programmes; to make available technical assistance to the executive and legislative branches of the federal government in the review of proposed legislation to determine its over-all effect on the federal system; to encourage discussion and study of emerging public problems likely to require inter-governmental co-operation; to recommend within the framework of the Constitution, the most desirable allocation of governmental functions, responsibilities and revenues among several levels of government; to recommend methods for co-ordinating and simplifying tax laws and administrative practices to achieve a more orderly and less competitive fiscal relationship between the governments. The commission functions in an advisory capacity and its main task is to increase the effectiveness of the federal system by debating various alternatives. A similar body to suggest and study various alternative solutions to the issues causing friction in the inter-governmental relationship is called for in India as well.[31]

The Sarkaria Commission has again recommended the setting up of an all-embracing Inter-State Council under Art. 263. Since 1967, parties or coalition of parties other than the one running the Central Government, have come in power in the States. These State Governments of diverse hues have different views on regional and inter-State problems. In such a situation, the setting up of a standing Inter-State Council with a comprehensive charter under Art. 263 has become an imperative necessity. The council is to consist of the Prime Minister as the Chairman, all State Chief Ministers and all Union Cabinet Ministers dealing with subjects of common interest to the Union and the States as members.

The Council is to be a recommendatory body. It should be charged with duties in broad terms embracing the entire gamut of clauses (b) and (c) of Art. 263. The Council should have such investigative, deliberative and recommendatory functions as would fall within the ambit of cls. (b) and (c) of Art. 263.[32]

In 1990, in *Dabur India Ltd. v. State of Uttar Pradesh*,[33] the Supreme Court suggested the setting up of a Council under Art. 263 to discuss and sort out problems of Central-State taxation.

D. ZONAL COUNCILS

In between the Centre and the States, Zonal Councils have been introduced in India by the States Re-organisation Act, 1956. Great heat and passion was generated in the country at the time of re-organisation of the States on the linguistic basis which imperilled the unity of the country. Therefore, Zonal Councils were created as instruments of intergovernmental consultation and co-operation mainly

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31. WRIGHT, Advisory Commission on Intergovernmental Relations, *Public Adm. Review*, 193 (1965).
32. *Report*, 237-241.
33. AIR 1990 SC 1814 : (1990) 4 SCC 113.

in socio-economic fields and also to arrest the growth of controversies and particularistic tendencies among the various States.[34]

There exist the following five Zonal Councils:

(1) Northern—comprising the States of Punjab, Haryana, Himachal Pradesh, Rajasthan, Jammu and Kashmir, and the Union Territories of Delhi and Chandigarh.

(2) Eastern—comprising the States of Bihar, West Bengal, Orissa and Sikkim.

(3) Western—comprising the States of Gujarat, Maharashtra, Goa and the Union Territories of Daman and Diu and Dadra and Nagar Haveli;

(4) Central—comprising the States of Uttar Pradesh and Madhya Pradesh;

(5) Southern—comprising the States of Andhra Pradesh, Tamil Nadu, Karnataka and Kerala and the Union Territory of Pondicherry.

A Zonal Council consists of a Union Minister to be nominated by the Central Government, and the Chief Minister and two other Ministers from each State to be nominated by the State Government. A Union Territory in the Zone has only two members (and not three as in the case of a State) to be nominated by the Central Executive.

The Union Minister is to be the Chairman of the Zonal Council. A Chief Minister of a member-State acts as its Vice-Chairman for a year by rotation. A Zonal Council has the following advisers to assist it in the performance of its duties: a person nominated by the Planning Commission; the Chief Secretary to the Government of each State in the Zone; the Development Commissioner or any other officer nominated by the Government of each State in the Zone. An adviser is entitled to participate without the right of vote in the discussions of the Council.

A Zonal Council meets in each State in the Zone by rotation. All questions at a meeting of the Zonal Council are decided by a majority of the members present. The presiding officer has a casting vote in case of an equality of votes. Proceedings of every meeting of a Zonal Council are to be forwarded to the Central Government and also to each member-State. A Zonal Council may have a secretariat of its own. The office of the Secretary of the Council is to be held by a Chief Secretary of a member-State, by rotation, for a year at a time. The office of the Zonal Council is to be located within a member-State as determined by the Council. The administrative expenses of each Council's office are to be borne by the Central Exchequer.

A Zonal Council has rule-making power conferred on it by various sections of the Act. It may lay down rules of procedure, with the approval of the Central Government, transact business at its meetings. A Zonal Council may discuss any matter in which some State represented in it, or the Union and one or more of such States, have a common interest. It may advise the Centre and the member-States as to the action to be taken on any such matter. More particularly, a Zonal Council may discuss the following matters and make recommendations—(a) a matter of common interest in the field of economic and social planning; (b) a

34. LOK SABHA DEBATES, *December* 23, 1955, Vol. I, 880.

matter concerning water disputes, linguistic minorities or inter-State transport; (c) a matter connected with, or arising out of, the re-organisation of the States under the States Re-organisation Act.

Joint meetings of several Zonal Councils may be held to discuss matters of common interest to the States included therein. The Central Government may make rules for regulating the procedure at joint meetings of the Zonal Councils.

Adequate provisions have been made for providing a liaison between the Centre and the Zonal Councils. The techniques adopted with this end in view are: (1) appointment of a Central Minister as the Chairman of the Council; (2) submission of the proceedings of a meeting of a Zonal Council to the Central Government; (3) appointment of the Joint Secretary of a Zonal Council by the Chairman, *i.e.*, the Central Minister; (4) approval of the Central Government being made compulsory for the framing of the rules of procedure by a Zonal Council for its own meetings as well as those of its committees. An important feature of the present-day arrangements is that the Central Home Minister is the Chairman of all the Five Councils. This helps in fostering a uniformity of approach to common problems on the Central-Zonal and inter-Zonal basis.

Each State included in a Zonal Council enjoys a complete equality of status, as is evident from the following provisions: (1) each State has an equality of representation in the Council; (2) each Chief Minister is to act as the Vice-Chairman of the Council in rotation for a year; (3) meetings of the Council are to be held in each member State by rotation; (4) The Chief Secretary of a member State is to act as the Secretary of the Council in rotation for one year.

A significant point to note is that voting at the Council meetings is held member-wise and not State-wise, *i.e.*, a State does not vote as a unit, but each member from a State has a right to vote. It is thus possible that representatives of a State in the Council may vote differently on a question instead of following a common line. In practice, however, this may not mean much and all members from a State would often vote the same way, because the members are the Ministers, and all Ministers should have a common approach to problems facing their State owing to the principle of collective responsibility of the Cabinet.[35]

A Zonal Council is an advisory body and has no executive or legislative function to discharge. But, perhaps, its advisory character is its strong point for, otherwise, the States might have felt that the Zonal Council was being designed to reduce their autonomy. The way the Zonal Councils have been designed does not derogate from the State autonomy in any manner. It does not impinge on the legislative or executive authority either of the Centre or of the States.

The sole aim of a Zonal Council is to promote interstate co-operation and consultation by bringing together the States in a region so that they may discuss their common problems and take co-operative action to solve them and pool their resources for the common good. The association of a Central Minister with each Council helps in promoting co-operation and consultation between the Centre and the States and evolution of common policies for the common good of the nation as a whole.

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35. *Supra*, Ch. III, Sec. B.

However, in practice, so far the Councils do not have many spectacular achievements to their credit. Nevertheless, they have helped in developing some common approach to some regional problems. For example, the Southern Council has generally agreed on the question of safeguards for linguistic minorities in the States in the Zone. The Northern Council has been devoting its attention to the development of the crucial hilly areas in the region, to introducing uniform rates of sales tax and to promote inter-State trade and commerce within the Zone. The Eastern Zonal Council has agreed to form a common reserve police and set up a standing committee to review implementation of minority safeguards.

These bodies provide forums for development of a community of interests transcending differences and rivalries amongst the neighbouring States, especially when governments of different political complexion are in power in different States. It is perhaps possible to activate these bodies, and use them for promoting much more fruitful regional co-operation and in toning down causes of friction among the States than has been possible so far.

Reference may also be made here to the North-Eastern Council, discussed earlier, which has been set-up by Parliament under the North Eastern Council Act, 1971. This Council consists of Assam, Manipur, Meghalaya Nagaland, Tripura, Arunachal Pradesh and Mizoram. It has its own secretariat. The underlying idea is to promote co-operation among the various units in Eastern India.[36]

The Sarkaria Commission has expressed the view that the Zonal Councils have not been able to fulfil their aims and objections. The Commission has recommended that these Councils should be reactivated. The Commission has suggested that these Councils be appointed under Art. 263 so that they get the status of constitutional bodies functioning in their own right. The meetings of the Zonal Councils should be held in camera and at regular intervals, in any case not less twice a year.[37]

E. RIVER WATER DISPUTES

India has a number of inter-State rivers and river valleys. The Constitution makers anticipated that with the accent on development of irrigation and power resources, some inter-State disputes would arise regarding sharing of river-waters. The waters of an inter-State river pass through several States. Such waters cannot be regarded as belonging to any single riparian State. The waters are in a state of flow and, therefore, no State can claim exclusive ownership of such waters. No State can legislate for the use of such waters since no State can claim legislative power beyond its territory.[38] Accordingly, the Constitution confers legislative power over such rivers to Parliament. The Constitution makes special provisions for creating a suitable machinery for resolving such disputes.

Article 262(1) empowers Parliament to provide by law for adjudication of any dispute or complaint with respect to the use, distribution or control of the waters of any inter-State river or river valley.[39] This provision confers an exclusive leg-

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36. *Supra*, Ch. IX, Sec. C.
37. *Report*, 240-243.
38. In re *Cauvery Water Disputes Tribunal*, AIR 1992 SC 522, 550 : 1993 Supp (1) SCC 96(II); *supra*, Ch. IV, Sec. F(h).
39. See under entry 56, List I, *supra*, Ch. X, Sec. D.

islative power on Parliament to enact a law providing for the adjudication of disputes relating to use, distribution or control of waters of any inter-State river or river valley. The words "use, distribution and control" are of wide import and may include regulation and development of the said water. "The provisions clearly indicate the amplitude of the scope of adjudication was much as it would take within its sweep the determination of the extent, and the manner, of the use of the said waters, and the power to give directions in respect of the same.

Under Art. 262(2), Parliament may also provide that, notwithstanding anything in the Constitution, neither the Supreme Court nor any other court shall exercise jurisdiction in respect of any such dispute or complaint. Art. 131 provides for the decision of inter-State disputes by the Supreme Court,[40] but Art. 262 provides that the class of disputes mentioned therein may be excluded by Parliament from the purview of the Supreme Court.

The River Boards Act, 1956, enacted by Parliament under entry 56, List I, provides for the establishment of river boards for the purpose of regulation and development of inter-State rivers and river valleys. Water is a State subject.[41] Therefore, the initiative and responsibility for development of inter-State rivers and river-valleys should primarily rest on State Governments. But, in practice, river valley projects were considerably hampered by conflict of interests among the concerned State Governments. The Act was enacted to meet this situation.

A river board may be established by the Central Government for advising the governments interested in relation to matters concerning the regulation or governance of an inter-State river or river valley. A board is appointed, however, only after consulting interested governments regarding the proposal to establish the board, the persons to be appointed as its members and the functions which it may be empowered to discharge. Persons having special knowledge and experience of irrigation, electrical engineering, flood control, navigation, water conservation, soil conservation, administration and finance are to be appointed members of a river board.

The powers and functions of such a board may be: (*a*) to advise the governments interested on any matter concerning the regulation or development of a specified river or river valley; (*b*) to advise them to resolve their conflicts by coordination of their activities; (*c*) to prepare schemes for regulating or developing the inter-State river or river valley; (*d*) to allocate among the governments the costs of executing any such scheme; (*e*) to watch the progress of the measures undertaken by the governments interested; (*f*) any other matter supplementary to the above.

The Inter-State Water Disputes Act, 1956, which has been enacted under Art. 262, provides for adjudication of disputes relating to the use, distribution or control of waters of inter-State rivers and river valleys among the concerned State Governments. When such a dispute arises, a State Government may request the Central Government to refer it to a tribunal for adjudication [S. 3] and if the Central Government is of opinion that it cannot be settled by negotiations, it would constitute a tribunal for the purposes [S. 4]. Thus, S. 4 while vesting

40. *Supra*, Ch. IV, Sec. B.
41. Entry 17, List II, *Supra*, Ch. X, Sec. E.

power in the Central Government for setting up a Tribunal has made it conditional upon the forming of the requisite opinion by the Central Government.

The tribunal is to consist of a chairman and two other members nominated by the Chief Justice of India from amongst those who are Judges of the Supreme Court or the High Courts. The tribunal may appoint two or more assessors to advise it. The tribunal submits its report to the Central Government which on publication becomes binding on the parties concerned. A matter referable to a river board is not to be referred to the tribunal. Notwithstanding anything contained in any other law, neither the Supreme Court nor any other court shall have any jurisdiction in respect of an inter-State water dispute which may be referred to a Tribunal [S. 11]. This provision read with Art. 262 bars the jurisdiction of all courts including the Supreme Court, to entertain adjudication of disputes which are referable to a tribunal under S. 3.

The Act also prohibits a State, within whose limits any works for the conservation, regulation or utilisation of water resources of any inter-State river have been constructed, from levying additional rate or fee in respect of the use of such water by any other State or inhabitants thereof.[42]

A lacuna in the scheme of Inter-State Water Disputes Act is that it lays down no principles or guidelines to be followed by the tribunal. The reason to take these disputes out of the purview of the courts and appoint tribunals to solve them is that rules of law based on the analogy of private proprietary interests in water do not afford a satisfactory basis for settling these disputes where the interests of the public at large in the proper use of water supplies are involved.

In spite of these statutory provisions, several disputes concerning inter-State rivers have remained pending for long among the various States, and surprisingly the machinery provided by these Acts has not been used effectively. The Central Government took the view that it was preferable to decide matters by an amicable settlement among the various Goverments and that arbitration should be invoked only as a last resort. But when this approach did not succeed, the Government of India appointed several tribunals for adjudication of inter-State disputes regarding the sharing of the waters of Krishna, Godavari and Narmada Rivers.[43]

The Centre has recently created two more bodies to promote river water development. The National Water Development Agency is a non-statutory body with all State irrigation ministers as its members. The function of the Agency is to carry out surveys, investigations and studies for the peninsular rivers development component of the national water plan. The Agency is to promote optimum utilisation of the country's water resources. This envisages the use of surplus waters of all rivers in the country. The other body is the Water Resources Development Council with Prime Minister as the chairman and all State Chief Ministers as members. The Agency will submit its reports to the Council for clearance.[44]

In the matter of Cauvery Water Disputes Tribunal[45] constitutes an important judicial pronouncement in the area of Indian Federalism. The matter came before

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42. Also see, Art. 288; *supra*, Ch. X, Secs. E and K; Ch. XI, Sec. D.
43. JAIN & JACOB, Centre-State Relations in Water Resources Development, XII *JILI*, 1 (1970); ILI., *Inter-State Water Disputes in India* (1971).
44. *The Hindu Int'l, December* 25, 1982.
45. AIR 1992 SC 522 : (1993) Supp (1) SCC 96(II).

the Supreme Court for an advisory opinion by way of reference by the President under Art. 143 of the Constitution.[46]

There has been a long standing dispute between the States of Tamil Nadu and Karnataka (Pondicherry as well) for the distribution of waters of the Cauvery River. In 1990, on a writ petition being filed by the Tamil Nadu Ryots Association, the Supreme Court taking into consideration the course of negotiations between the various States, and the length of time which had passed, held that the negotiations between the two States had failed and, therefore, directed the Central Government to constitute a tribunal under S. 4 of the Inter-State Water Disputes Act, 1956.[47]

Accordingly, the Central Government constituted a tribunal, known as the Cauvery Water Disputes Tribunal, and referred the interstate water disputes to it for adjudication. The Tribunal made an interim award as regards distribution of Cauvery waters between the concerned States.

This award was not acceptable to Karnataka. With a view to make it ineffective, Karnataka issued an ordinance (which was later converted into an Act) charging the State Government with the duty to abstract every year such quantity of water as it may deem requisite from Cauvery notwithstanding anything contained in any order or decision of a tribunal. The purpose of the Act was to override the decision of the Tribunal and its implementation. The Act thus sought to defy and nullify the interim order of the Tribunal set up under an Act of Parliament. The Act also had the effect of reserving to Karnataka exclusively the right to appropriate as much water from Cauvery as it deemed necessary pending the final adjudication by the Tribunal.

It was the question of constitutional validity of this Act which was raised before the Supreme Court in the present reference. After referring to entry 56 in the Union List[48] and entry 17 in the State List[49] and several other entries in the three Lists, the Court concluded that no entry in either of the Lists refers specifically to the adjudication of interstate water disputes. Entry 56 speaks of regulation and development of inter-State rivers and river valleys and does not relate to the disputes between the riparian States with regard to the same and adjudication thereof. It is Art. 262 which gives an exclusive power to Parliament to enact a law providing for adjudication of such disputes. The provisions of Art. 262 are of wide amplitude. In the words of the Court:[50]

> "The provisions clearly indicate the amplitude of the scope of adjudication inasmuch as it would take within its sweep the determination of the extent, and the manner, of the use of the said waters, and the power to give directions in respect of the same."

Article 262 authorises Parliament by law to exclude the jurisdiction of any court including the Supreme Court in respect of any dispute or complaint for the adjudication of which provision is made in such law. The Interstate Water Dis-

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46. See, *supra*, Ch. IV, Sec. F(h).
47. *Tamil Nadu Cauvery Neerppasana Vilaiporulgal V.N. UP Sangam v. Union of India*, AIR 1990 SC 1316 : (1990) 3 SCC 440.
Also see, 1991 AIR SCW 1286.
48. *Supra*, Ch. X, Sec. D.
49. *Supra*, Ch. X, Sec. E.
50. Reference was made to Entry 14, List II and Entry 97, List I: AIR 1992 SC at 547.

putes Act, ruled the Court, has been enacted only under Art. 262 and not under entry 56, List I.

The Court held the Karnataka Act as unconstitutional as it affected the jurisdiction of the Tribunal appointed under the Central Act. By enacting the said Act, Karnataka arrogated to itself the power to decide unilaterally whether the Tribunal had jurisdiction to pass the interim order or not and whether the order was binding on it or not. A Legislature cannot set aside an individual decision *inter partes* and affect their rights and liabilities alone. As the Act in question sought to interfere directly with the Tribunal Order, it was *ultra vires* the Constitution.

The State of Karnataka also presumed that until the Tribunal passes a final order, it could appropriate Cauvery waters to itself without caring for the consequences of such action on the lower riparian States. Karnataka presumed that the lower riparian States had no equitable rights and that it was the sole judge as to the share of other riparian States in the Cauvery waters. "What is further, the State of Karnataka has assumed the role of a judge in its own cause."

The Act also had an extra-territorial operation inasmuch as it interfered with the equitable rights of Tamil Nadu and Pondicherry to the Cauvery waters. The Supreme Court criticised the Karnataka Act as being against the "basic tenets of the rule of law" inasmuch as, in the words of the Court:[51]

> "The State of Karnataka by issuing the ordinance has sought to take law in its own hand and to be above the law. Such an act is an invitation to lawlessness and anarchy, inasmuch as the ordinance is a manifestation of a desire on the part of the State to defy the decisions of the judicial authorities. The action forebodes evil consequences to the federal structure under the Constitution and open doors for each State to act in the way it desires disregarding not only the rights of other States, the orders passed by instrumentalities constituted under an Act of Parliament but also the provisions of the Constitution. If the power of a State to issue such an ordinance is upheld it will lead to the breakdown of the constitutional mechanism and affect the unity and integrity of the nation."

The Court also ruled that the Tribunal could grant interim relief when the question of granting interim relief forms part of the reference. The Tribunal could pass interim orders on such material as according to it was appropriate to the nature of the interim order. On being published by the Central Government under S. 6 of the Act, such an order would become effective and binding on the parties.

There was an agreement between the States of Punjab and Haryana to share the water of River Sutlej. The Punjab Government was to construct the Sutlej-Yamuna Link canal to carry this water to the State of Haryana but it defaulted in doing so. The State of Haryana filed a suit against the State of Punjab under Art. 131[52] of the Constitution to pass a decree directing the Punjab Government to construct the canal. The Punjab Government objected to the suit pleading that it was barred by the Inter-State Water Disputes Act. The Supreme Court negatived the contention arguing that there was no water-dispute between the States as they had already agreed to share the water. The question was regarding the obligation of the Punjab Government to construct the canal as part of the agreement be-

51. AIR 1992 SC at 552.
52. On Art. 131, see, *supra*, Ch. IV. Sec. C(iii)(b).

tween the two States. The Court directed the Punjab Government to fulfil its obligation by completing the canal within a year.[53]

F. OTHER STATUTORY BODIES

A number of statutory bodies have been set up for promoting Centre-State co-operation and co-ordination. A few of these are mentioned here.

(a) UNIVERSITY GRANTS COMMISSION

A body of great importance in the field of university education is the University Grants Commission. According to the Constitution, university education is a concurrent subject, but co-ordination and maintenance of standards in this area is a Central charge,[54] and it is to fulfil this function that Parliament has created the Commission under the University Grants Commission Act, 1956.

The functioning of this body is of great significance in the context of Indian Federalism. The Commission functions in the area of university education and cuts across Central and State lines. It gives grants to the State Universities and thus seeks to influence their working to some extent.

Generally, the Commission is charged with the duty to take all such steps as it may think fit for promotion and co-ordination of university education and for determination and maintenance of standards of teaching, examination and research in the universities. It can enquire into financial needs of the universities, allocate grants to the Central and the State universities, recommend measures to improve university education and advise a university upon action to be taken for this purpose, advise the Central or State Governments on allocation of any grant to universities for any general or specified purpose out of the Central or State funds, advise on estabishing a new university, collect information regarding university education in India and abroad, require a university to furnish it with information regarding its financial position, standards of teaching, examination and courses of study, and perform other functions to advance the cause of higher education.

The funds of the Commission come entirely from the Centre. A distinction is drawn for purposes of grants between the Central and the State universities; for the former, the Commission grants funds both for maintenance and development, but for the latter it can do so only for development, maintenance being a charge on the concerned State Government. The Commission is an autonomous body, and ensures maintenance of minimum standards by each university.

The Commission plays the role of co-ordination and maintenance of standards in the area of university education. Its working is of interest to a student of Indian Federalism because of fragmentation of authority in the Constitution to control university education. It is also an instrument through which the Centre can supplement the financial resources of the State universities.

In the ultimate analysis, the sanction behind the Commission is financial as it can give money to a university, or withhold grants from a defaulting university, and, therefore, the efficacy of the Commission depends on the funds at its dis-

53. *State of Haryana v. State of Punjab*, AIR 2002 SC 685 : (2002) 2 SCC 507.
54. *Supra*, Ch. X, Sec. G(iii).

posal. Paucity of funds has been a limiting factor on the Commission. Further, its efficacy has also been compromised somewhat by the requirement that it can give funds to the State universities only for development. These universities have, therefore, to look to the State Governments for sizeable funds, and even the Commission's grants can be frustrated by a State not matching the grants which is usually a condition attached by the Commission to its grants to the State universities. The influence of the Commission in the area of university education can be strengthened if these constraints on its functioning are removed.

(b) OTHER BODIES TO CO-ORDINATE HIGHER EDUCATION

Under entry 66, List I, maintenance of standards in institutions of higher education falls exclusively within the preserve of the Central Government and no State can impinge in this area. Besides, the University Grants Commission, mentioned above, a few more bodies have been established by Parliament to maintain standards in higher education.

Parliament has enacted the Indian Medical Council Act, 1956, to set up the Medical Council of India which seeks to maintain standards in the area of medical education.[55]

For maintenance of standards in the area of technical education, Parliament has enacted the All India Council for Technical Education Act, 1987, setting up the All India Council for Technical Education. The Council grants permission to establish new technical institutions and approves starting of new technical institutions and approves starting of new courses or programmes in the country. No State Government can have a policy of its own outside the AICTE Act. If the Council grants permission to set up a technical institution, no state Government can then refuse permission for setting up that institution.[56]

(c) DAMODAR VALLEY CORPORATION

The Damodar Valley Corporation, a joint enterprise of the Centre and the two States of Bihar and West Bengal, has been established under a Central law enacted under Art. 252, to develop the inter-State valley of the Damodar River for irrigation, power and flood control.[57] The corporation consists of three members appointed by the Central Government in consultation with the two State Governments. In discharing its functions, the corporation is to be guided by instructions issued by the Centre on questions of policy. The corporation's annual reports are laid before Parliament and the concerned State Legislatures.

(d) DRUGS CONSULTATIVE COMMITTEE

S. 7 of the Drugs Act, 1940, empowers the Central Government to constitute the Drugs Consultative Committee to advise the Central and State Governments on any matter tending to secure uniformity throughout India in the administration of the Act. The committee consists of two representatives of the Central Government and one representative of each of the State Governments.

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55. *Preeti Srivastava (Dr.) v. State of Madhya Pradesh,* AIR 1999 SC 2894 : (1999) 7 SCC 120; *supra*, Ch. X, Sec. G(iii).
56. *Jaya Gokul Educaional Trust v. Commr. & Secy. to Govt. Higher Education Deptt.,* AIR 2000 SC 1614 : (2000) 5 SCC 231.
57. *Supra*, Ch. X, Sec. J(c).

This is only an illustrative, and not an exhaustive, list of statutory bodies set up to promote inter-governmental co-operation.

G. PLANNING

Since Independence, planning has been a major occupation of the Central and State Governments, and this has made a deep impact on the evolution of the Indian Federalism.

India is economically an under-developed country. With the resources being low, and demands for development being practically insatiable, it becomes incumbent that a planned effort be made to use the available resources to achieve the maximum effect. This, therefore, leads to planning and formulation of five year plans.

Planning makes intergovernmental co-operation very necessary, for in a federal structure, the governments are not arranged hierarchically. There is no line of command, but decisions have to be arrived at through discussion, agreement and compromise amongst the Centre and the States.

Planning was in the air at the time of Constitution-making and some provisions have been incorporated for the purpose in the Constitution. The Indian Constitution lays down no articulate economic philosophy, but its main thrust, as is evidenced by some of the Directive Principles[58], is towards economic democracy, economic empowerment of the weaker sections of the society, and a welfare state without which political democracy does not have much meaning for large segments of the poor people in the country. The Directive Principles obligate the Central and State Governments to play a creative role to promote socio-economic welfare of the people.

In List III, there is entry 20 which runs as: "Economic and Social Planning".[59] Planning being a matter of common interest to the Union and the States, the entry has been appropriately placed in the Concurrent List. The Constitution lays emphasis on planning. For example, the preamble to the Constitution lays emphasis on securing to all citizens "Justice, social, economic and political".[60] Then there are several Directive Principles spelling out directions and principles for the state to secure a social order for the promotion of welfare of the people, such as, Arts. 38 to 42, 43A, 45 to 48A.[61]

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

The three Lists have a number of subjects having relevance to planning. Planning being a multi-faceted subject, it spans or touches upon the socio-economic aspects of several matters in the three Lists.[62] A few items like railways, airways, defence industries, posts, telegraph and telephones, atomic energy, industries de-

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58. *Infra*, Chap. XXXIV.
59. *Supra*, Ch. X, Sec. F.
60. *Supra*, Ch. I.
61. See, *infra*, Ch. XXXIV.
62. For these Lists, see, Ch. X, *supra.*

clared to be centrally controlled and a few commodities like tea, coffee and coir, etc. fall in the exclusive Central sphere. Then, there are a number of matters in the exclusive State sphere—public health, relief of the disabled and unemployable education, agriculture, land, etc. A few items fall in the Concurrent List, *e.g.*, labour, social security and social insurance relief, rehabilitation of the displaced persons.

In 1950, the Government of India set up the Planning Commission with the Prime Minister as its Chairman. The following functions have been assigned to the Planning Commission: (1) to make an assessment of material, capital and human resources of the country and investigate the possibilities of augmenting such of these resources as are found to be deficient in relation to the nation's requirements; (2) to formulate a plan for the most effective and balanced utilisation of the country's resources; (3) on a determination of priorities, to define the stages in which the plan should be carried out and propose the allocation of resources for the due completion of each stage; (4) to indicate the factors which are tending to retard economic development and determine the conditions which in view of the current social and political situation, should be established for the successful execution of the plan; (5) to determine the nature of the machinery which will be necessary for securing the successful implementation of each stage of the plan in all its aspects; (6) to appraise from time to time the progress achieved in the execution of each stage of the plan and recommend the adjustments of policy and measures that such appraisal might show to be necessary; and (7) to make such interim and ancillary recommendations as might on a consideration of the prevailing economic conditions, current policies, measures and development programmes, or on an examination of such specific problems as may be referred to it for advice by the Central or State Governments.

The Planning Commission has a Vice-President and a few Central Ministers and a few non-official experts as members. There is no State representative as such on the Commission which can thus be regarded as a purely Central organ. The role of the Commission is advisory. It makes recommendations to the Central Government and the National Development Council. The responsibility for taking final decisions rests with these bodies and the implementation of the plan rests with the Central and the State Governments.

There exists a close co-operation between the Commission and the Central Government because of the fact that the Prime Minister heads both these organs. Other Central Ministers are invited to the Commissioner's meetings from time to time when matters concerning their departments are being discussed. Conversely, members of the Commission may attend meetings of the Central Cabinet when economic matters are discussed there. Important economic proposals of the Central Ministries are considered by the Commission as well before these are discussed by the Cabinet. The Commission prepares the draft five years plans. The Commission is not a statutory body and has been set up by an executive order of the Government of India.

Planning in India has been unified and comprehensive in so far as the plans deal with both the Central and the State subjects. Planning by its very nature postulates a cooperative and coordinated approach between the Centre and the States. The States in India have a large field of decision-making and action, as many matters of socio-economic planning fall within their legislative sphere and

implementation of most of the plan programmes fall within their administrative sphere. It therefore becomes necessary to have some mechanism to give a sense of participation to the States as well in the planning processes. With this end in view, in 1952, the National Development Council (NDC) was established.

NDC consists of the Prime Minister, the State Chief Ministers, representatives of the Union Territories, and members of the Planning Commission. In October, 1967, the membership of the NDC was enlarged by addition of all Ministers of the Union Cabinet and the Chief Ministers of the Union Territories. The functions of the Council are "to strengthen and mobilise the efforts and resources of the nation in support of the plans; to promote common economic policies in all vital spheres and to ensure the balanced and rapid development of all parts of the country."

The Council reviews the working of the plan from time to time, considers important questions of social and economic policy affecting national development, and recommends measures for the achievement of the aims and targets set out in the national plan. At times, other State Ministers whose presence may be considered necessary may also be invited to the Council's meetings. The Council is envisaged to be the supreme body in regard to planning and development; it promotes mutual consultation between the Centre and the States; it plays a significant role in reconciling the views of the Central and State Governments and in securing full co-operation and co-ordination between them in planning matters and thus ensure development of a uniform approach and outlook towards the working of the national plan.

Although the NDC is not a statutory body, its very composition gives it a unique character. It imparts a national character to the entire process of planning. It has assumed, in a way, the role of a super-decision-making body in planning matters in the entire Indian Federation.

Taking an over-all view of planning, undoubtedly, it has to be a cooperative effort between the Centre and the States right from the formulation to the stage of implementation of plans. The implementation of the five year plans is largely the responsibility of the States in regard to matters falling in Lists II and III. As regards the matters falling exclusively in List I, plans may be carried into execution either wholly by the Central agencies or through cooperative action of the Union and the State agencies. Even in regard to the matters falling within the exclusive executive jurisdiction of the Centre, executive functions can be delegated by the Centre to the States via Arts. 258(1) and 258A, discussed earlier.[63]

A very significant feature of the planning processes in India is that the Planning Commission and the National Development Council are based not on any law but on administrative decisions of the Central Government. Though there is in the Concurrent List the entry 'social and economic planning,'[64] no legislation has so far been enacted under it to set up the planning machinery. The Commission has not been given a statutory basis because of the fear that that would reduce flexibility and close relationship between the Commission and the Central Government—the two requisites necessary for successful planning.

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63. *Supra*, Ch. XII, Sec. B.
64. *Supra*, Ch. X, Sec. F.

The Planning Commission, though envisaged to be only advisory, has, in course of time, become much more than that and has been characterised as the 'super economic cabinet of the country'.[65] It exercises a decisive influence on economic decisions taken by the various governments. The Planning Commission is the major agency for achieving economic and social reconstruction of the Indian society and, though not based on any statutory provision, yet profoundly influences inter-governmental relations. The State Governments get Central grants on the Commission's advice.[66] The emergence of the Commission into such a powerful body has been made possible because of the association with it of the Prime Minister and a few Central Ministers.

Because of the centralised planning, the role hitherto played by the Centre in this area has been much more significant than that of the States. Even the National Development Council, which is supposed to be the supreme body in planning matters, has not been able to pull much weight and has invariably followed the lead given by the Central Government and the Planning Commission. The Centre, on the other hand, has been able to exert influence even in the area reserved to the States under the Constitution. In some of the matters falling in this area, *e.g.*, education, health, agriculture, co-operation, housing, etc., there are not only State programmes, but even Centrally-sponsored programmes. Then, the Centre gives large sums of money to the States in the form of grants under Art. 282[67] and loans,[68] and this helps in extending the influence of the Central Government.

The planning mechanism worked for long on an informal basis because of the co-ordinating influence exercised through one and the same political party controlling the Central and State Governments. But, with a change in the political situation, and various political parties assuming power in the States and at the Centre, certain adjustments have taken place in the planning process. The States claim a more active participation in the formulation of the plans and the laying down of priorities for themselves. This has led to some decentralisation of planning in certain areas, and an activisation of the National Development Council so that its discussions become more meaningful. Suggestions have in fact been made to give to the NDC a statutory or a constitutional basis under Art. 263.[69]

The Sarkaria Commission has suggested that the NDC be renamed as National Economic and Development Council (NEDC) and it be constituted under Art. 263. The NEDC will then have adequate flexibility and a measure of authority as it will have the constitutional sanction.

The States want more, and not less, of the Central assistance but with less strings attached. The States' insistence against Centrally-sponsored programmes had led to some shrinkage therein, but the Centre is not willing to shed these programmes completely, for in its view these are so important, like family planning, that if not nourished by it, they would languish and national interests would suffer.

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65. A.K. CHANDRA, INDIAN ADMINISTRATION*;* The Estimates Committee of the Lok Sabha, *XXI* REPORT, 4 (1957-58); *ADMINISTRATIVE REFORMS COMMISSION*, *MACHINERY FOR PLANNING*, 1, 2, (1968).
66. See, *supra*, Ch. XI, Sec. M, under "Specific Purpose Grants".
67. *Ibid.*
68. *Supra*, Ch. XI, Sec. N.
69. *Supra*, Sec. C, this Chapter.

The areas of stresses and strains in the planning process can be identified as follows. Each State demands a big plan for itself; no State is willing to make a tax-effort commensurate with the needs of the envisaged plan and, therefore, each State wants more and more Central assistance; no State is happy that Central assistance should be on a matching basis or tied to particular programmes; each State wants freedom to spend the Central money according to its own needs and ideas; backward States want the Centre to give them much larger funds so that their comparative backwardness may be removed at an early date; on what basis should Central funds be distributed among the States is a question on which States have divergent views, each putting forward a basis which suits it most. On the other hand, complaints are made that the State administration is weak, that there is laxity at the State end in implementing plan programmes and that Central funds are not properly utilised by the States.

Although, there is scope for greater State initiative and participation in the planning processes, it is inevitable, if the country is to make rapid strides, that the various problems are attacked from a national, rather than a regional angle, that there exists close Centre-State co-operation and co-ordination, and that the Centre's role necessarily remains dominant. This is in line with the developments in other federations as has been discussed above. It, however, needs to be emphasized that so far there is no historical parallel in federal planning on such a scale as is being attempted in India. In this respect, India's experiment is unique and it has to adjust its federal system to the demands and pressures of socio-economic planning.[70] The country has embarked on a stupendous programme of economic and social reconstruction with a view to ameliorate the conditions of the masses and create a social order based on social justice. This has neessitated a complete mobilisation of the country's resources. Indian five year plans cover practically all aspects of national life.

CO-ORDINATION BETWEEN FINANCE AND PLANNING COMMISSIONS

A problem arises in the present-day Indian Federalism because of the Planning Commission exercising some overlapping functions in the area of Centre-State fiscal relationship which makes it necessary to find ways to co-ordinate their activities. A substantial amount of money flows from the Centre to the States for execution of the Five Year Plan on the recommendation of the Finance Commission. This is done in the form of grants under Art. 282 and loans under Art. 293. Because of the exigencies of the Five Year Plans, the plan grants under Art. 282 have assumed a dominant position in the scheme of Central-State fiscal relations. This has consequently enhanced the status of the Planning Commission as well.

The Finance Commission is created by the Constitution while the Planning Commission has been established by an executive decision of the Central Government.[71] Nevertheless, since the Planning Commission is a continuous body and deals with large sums of money by way of grants under Art. 282 and loans to the States for planning purposes, while the Finance Commission comes on the scene once in five years, is an *ad hoc* body, and deals only with tax-sharing and

70. On Planning, see, REPORT OF THE SARKARIA COMMISSION, 361-388.
71. *Supra*,Ch. XI, Sec. L.

fiscal need grants,[72] the Planning Commission has come to exert a much more profound impact on the Indian Federalism than the Finance Commission.

The present-day position is that the Finance Commission does not take into account the Centre-State fiscal relationship under the plan. After the Finance Commission has made its recommendations regarding tax-sharing and grants, the Planning Commission takes over, assesses the needs and resources of the States and the Centre and plan programmes and then decides how much money should be given to each State by way of loan and grants under Art. 282.[73] The funds flowing to the States through the Planning Commission are more massive than the grants being given to the States through the Finance Commission. This development has given a new orientation to the constitutional provisions. Whereas the Constitution envisages the Finance Commission as the balance wheel of the Indian Federalism, the emergence of the Planning Commission has somewhat reduced the importance of that body.

A few suggestions have been made from time to time to co-ordinate the roles of the two bodies. It is not feasible to enlarge the functions of the Finance Commission so as to bring within its ambit the plan grants as well, because it will have serious repercussions on the planning processes. Allocation of plan assistance is intimately connected with the formulation of the plan and Planning Commission must take an active part in this process. Then, plan grants to the States are assessed annually while the Finance Commission sits once in five years. If the achievements of the plan targets by the States were to be assessed by the Finance Commission once in five years, that will leave the States free to spend the money as they like for five years and, thus, the whole planning process will go awry. Nor is it possible to entrust the functions of the Finance Commission to the Planning Commission, for the Planning Commission has no statutory or constitutional basis and the Government does not want to formalize this body otherwise the flexibility in planning processes may be lost. Also, its composition has a political element in so far as the Prime Minister is its chairman, and a few Central Ministers are amongst its members, while the Finance Commission is envisaged to be a non-political body, and the States may not like this arrangement.

It is also not feasible to restrict the Finance Commission to tax-sharing, and give the question of fixing the grants—both under the fiscal need and Art. 282—to the Planning Commission, for it is not possible to consider tax-sharing in isolation from fiscal need grants and *vice versa*. The common purpose of both is to close the ordinary revenue gap of the States. On the whole, therefore, it appears that the present arrangement of the Finance Commission not interesting itself in the plan grants and leaving that to the Planning Commission would have to continue.[74] The Sarkaria Commission has also come to the conclusion that the two bodies be maintained as they are. The Commission has observed:[75]

> "We are of the view that the present division of responsibilities between the two bodies, which has come to be evolved with mutual understanding of their

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72. *Ibid.*
73. *Supra*, Ch. XI, Secs. M and N.
74. A.R.C., MACHINERY FOR PLANNING, *op. cit.*, 31; JAIN, JAHRBUCH, note 1, on 823, at pp. 505-510.
75. REPORT, 284.

comparative advantage in dealing with various matters in their respective spheres, should continue".

Some co-ordination between the two Commissions has however been achieved. The five-year period for which the Finance Commission makes its recommendations now coincides with the period of the five-year plan and so it is easy for the Planning Commission to make necessary adjustments in the plan grants in the light of the recommendations of the Finance Commission. Further, a member of the Planning Commission is now nominated to the Finance Commission.

H. CAN THE INDIAN CONSTITUTION BE CHARACTERISED AS FEDERAL?

An academic question raised time and again is whether the Indian Constitution can be characterised as federal. Some scholars hesitate to consider the Indian Constitution as 'truly' federal and they use such epithets for it as '*quasi*-federal', 'unitary with federal features' or 'federal with unitary features.'[76] According to WHEARE, the Constitution of India is '*quasi*-federal,' and not 'strictly federal'.[77] WHEARE'S view is that federalism involves that the general and regional governments should each, within a sphere, be 'co-ordinate' and 'independent.'[78] JENNINGS has characterised it as a 'federation with a strong centralizing tendency.'[79] A few scholars, however, accept it as a federal constitution.[80] Austin describes it as a co-operative federation.[81]

How has the judiciary characterised the Constitution? The attitude of the Supreme Court towards the federal portion of the Constitution has been rather twofold. In contests between a government and an individual (and most of the cases have been of this type), the Court has invariably given an expansive interpretation to the government's legislative power (whether of the Central or the State Government) and has upheld the law.[82] On the other hand, in contests between the Centre and a State, the court has shown its strong predilection for a strong Centre and has, consequently, underplayed the federal aspects of the Constitution.

The Court adopted this strategy to counter the exaggerated claims of the States regarding their position, status and powers *vis-a-vis* the Centre. For instance, in *West Bengal v. India*,[83] the Supreme Court projected the traditional view of federalism and characterised the Indian Constitution as not being "true to any traditional pattern of federation." The Court said so to counter the State claim for sovereignty and applying the doctrine of immunity of instrumentalities to the fullest

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76. *Supra*, Ch 1, Sec. E(l).
Also see, P.K. TRIPATHI, FEDERALISM, THE REALITY AND THE MYTH, (1974) *Jl. Bar Council of India*, 251.
77. WHEARE, FEDERAL GOVERNMENT, 27-8 (1964); 48 All LJ 21.
78. WHEARE, *ibid*., 10, 33. WHEARE, MODERN GOVERNMENT, 18 (1971).
79. SOME CHARACTERISTICS OF THE INDIAN CONSTITUTION, 1.
80. NICHOLAS, The Constitution of India, 23 *Australian LJ* 639; ALEXANDROWICZ, CONSTITUTIONAL DEVELOPMENTS IN INDIA, 155-70; GLEDHILL, REPUBLIC OF INDIA, COMM. SERIES, 74 (1964).
81. THE INDIAN CONSTITUTION—CORNERSTONE OF A NATION, 187.
82. *Supra*, Ch X, Sec. G(i).
83. *Supra*, Ch. XI, Sec. J(ii)(d).

extent in their favour and against the Centre. The Court could have possibly reached the same result, *e.g.*, upholding the validity of the impugned Central Act by taking the prevailing balanced view of federalism as explained below. On the other hand, SUBBA RAO, J., in his bid to bolster the position of the States against the Centre, took recourse to the extreme view of competitive and dual federalism which has long been discarded in the older federations.

In *State of Rajasthan v. Union of India*,[84] BEG, C.J., sought to judge the Indian federalism by the yardstick propounded by WHEARE (which is not generally accepted now) and characterised the Constitution as "more unitary than federal," and having the 'appearances' of a federal structure. He also went on to say:[85]

> "In a sense, therefore, the Indian Union is federal. But, the extent of federalism in it is largely watered down by the needs of progress and development of a country which has to be nationally integrated, politically and economically co-ordinated, and socially, intellectually, and spiritually uplifted."

These observations were made to justify the exercise of Central powers under Art. 356. And, again, in *Karnataka v. Union of India*,[86] BEG, C.J., said: "Our Constitution has, despite whatever federalism may be found in its structure, so strongly unitary features also in it...." This argument was adopted to counter the State argument that instituting inquiries by the Centre into the conduct of State ministers violated the federal principle.

In *Bommai*,[87] several Judges have characterised the Indian Federalism in different ways. The case concerned the exercise of the power of the Central Government under Art. 356. AHMADI, J., described the Indian Constitution, following K.C. WHEARE, as "*quasi*-federal" because "it is a mixture of the federal and unitary elements, leaning more towards the latter".[88] But other Judges have expressed a more balanced view. Thus, SAWANT, J., has observed:[89]

> "Democracy and federalism are essential features of our Constitution and are part of its basic structure."

JEEVAN REDDY, J., has observed:[90]

> "The fact that under the scheme of our Constitution, greater power is conferred upon the Centre *vis-a-vis* the States do not mean that States are mere appendages of the Centre. Within the sphere allotted to them, States are supreme. The Centre cannot tamper with their powers. More particularly, the courts should not adopt an approach, an interpretation, which has the effect of or tends to have the effect of whittling down the power reserved to the States."

Federalism in India 'is not a matter of administrative convenience, but one of principle'.

Accordingly, as already discussed earlier, in *Bommai*, the Supreme Court has developed a more balanced approach to Art. 356.[91]

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84. *Supra*, Ch. XIII, Secs. C & D.
Also see, Ch. IV, Sec. C(iii)(b).
85. AIR 1977 SC at 1382 : (1997) 3 SCC 592.
86. *Supra*, Ch. XIII, Sec. C.
87. *S.R. Bommai v. Union of India*, AIR 1994 SC 1918 : (1994) 3 SCC 1.
88. *Ibid.*, 1951.
89. *Ibid*, 1977.
90. *Ibid.*, 2053.
91. *Supra*, Ch. XIII, Sec. D.

It is, therefore, worthwhile to consider the nature of the Indian Constitution *vis-a-vis* the other federal constitutions and to see how far the views expressed above are justified.

The U.S. Constitution has been regarded as the epitome of the classical federalism. America started on its federal career with a weak Centre and an accent on States' rights. The reason was that the U.S. Constitution came into being as a result of a voluntary compact among the pre-existing States which conceded rather limited powers to the Centre. Naturally, the Centre born of such a historical process could only get limited powers. A similar process occurred in Australia. Also, the U.S. Constitution was the product of the *laissez faire* era which signified minimum government and maximum private enterprise. In course of time, however, things have changed. The powers of the Centre have expanded phenomenally since 1787 and correspondingly the powers of the States have shrunk. This has been achieved without any explicit amendment of the Constitution but through ingenious legislative devices and judicial tolerance thereof and also through judicial activism.

The courts have interpreted the constitutional provisions liberally in favour of the Centre. The judicial activism in the USA has played a sterling role in the expansion of the Centre's powers over time. The courts through their liberal interpretation of the Constitution have helped in substantial extension of the legislative power into fields which were originally regarded as belonging to the States. The courts have played the significant role as the balance wheel for harmonious adjustment of Centre-State relations.

The Centre's vast financial resources have led to the emergence of the system of grants-in-aid; centripetal forces have been generated and the Centre has become very powerful.[92] Today it can not plausibly be asserted that the States in the U.S.A. are co-ordinate with the Central Government as their position is definitely weaker *vis-a-vis* the Centre. The process has been aided by such factors as tense international situation, wars, vast economic and technological developments, replacement of the *laissez faire* by the social welfare era, etc.

This trend may be strikingly illustrated by referring to an interesting case. As a result of the Depression during the 30's, the U.S. Government desired to introduce a scheme of unemployment compensation. The U.S. Constitution confers no legislative power on the Centre for the purpose. What the Centre, therefore, did was to impose a tax on the pay rolls of the employers, granting a credit up to 90% if a State imposed a similar tax; provision was also made for grants to the States for assisting them to administer the scheme of unemployment compensation. The fund to be collected by the States was to be used for affording unemployment compensation. The Centre, thus, placed enormous economic pressure on the States to adopt the scheme.[93]

The truth is that overtime there has been a continuous expansion of the functional role of the Federal Government. This has completely altered the balance of powers in favour of the Central Government. No longer can it be asserted that the States have a coordinate status with the Centre. It is the Central Government which play a dominant role in the governance of the country so much so that a

92. *Supra*, Ch. XI, Secs. K(b); M.
93. *Steward Machine Co. v. Davis*, 301 US 548 (1937); Also, *Helvering v. Davis*, 301 US 619 (1937).

constitutional scholar has suggested that the "surge" in the USA is towards 'organic federalism' "similar to the surge towards cooperative federalism" of the late 1930s". He characterises 'organic federalism' as "federalism in which the Centre has such extensive powers, and gives such a strong lead to Regions in the most important areas of their individual as well as their cooperative activities, that the political taxonomist may hesitate to describe the result as federal at all."[1]

The Canadian Constitution, to start with, definitely laid an accent on the Centre. In course of time, however, the Privy Council, by its process of interpretation weakened the Centre and exalted the Provinces.[2] This was the result of the assertion of bilinguism and bi-culturism by Quebec—a French majority Province. The Central power to veto provincial legislation has also come to be used sparingly as a result of growth of conventions. On the whole, therefore, the Provinces in Canada have greater freedom of action than the units in other Federations, and this has at times been inconvenient and embarrassing to the Centre, primarily in the area of foreign relations and economic matters.

During the war, however, the Centre acquires vast powers as a result of a liberal interpretation of the general clause. A system of conditional grants-in-aid is now emerging and other expedients of Central-Provincial collaboration are being created. Frequent Central-Provincial Conferences are held to discuss issues pertaining to their relations *inter se*. In the wake of the demise of the *laissez faire* era, the powers of the Central Government have been strengthened. By a constitutional amendment in 1940, the Centre was given power to provide unemployment insurance; and, in 1950, old age pension was made a subject of concurrent jurisdiction.

The Australian Constitution although characterised judicially as a true federation, as in the beginning the Centre's powers were limited and the accent was on the States, has, in course of time, undergone a significant metamorphosis and has moved towards centralization. The Centre has become very powerful as a result of the process of judicial interpretation of its powers,[3] conditional grants-in-aid, fiscal need grants to the deficit States on the recommendation of the Grants Commission,[4] emergence of the financial agreement amongst the Centre and the States under which the Centre has assumed extensive financial powers. Borrowing powers of the States are controlled through the Loan Council.[5]

The enormous Central power was manifested in 1942 when the Centre unilaterally excluded the States, without their consent, from the field of income-tax. Under the Constitution, both can levy the tax.[6] During the war, the Centre desired the States to vacate the field *in lieu* ofgrants. The States did not agree. Thereupon, the Centre passed a number of statutes imposing a very high rate of income-tax (18 s. in the £); Central tax dues were given a priority over State taxes; grants were to be given to those States which desisted from levying the income-tax; and the Centre requisitioned the State income-tax staff. The States found it impossible to levy the tax and so they had to vacate the field.[7] The war-time

1. SAWER, MODERN FEDERALISM, 125-126.
2. *Supra*, Ch. X, Sec. L.
3. *Ibid.*
4. *Supra*, Ch. XI, Secs. M; K(b).
5. *Supra*, Ch. XI, Sec. N.
6. *Supra*, Ch. XI, Sec. I.
7. *South Australia v. The Commonwealth*, 65 CLR 373 (1942).

scheme has now become a permanent feature in Austraila and has been judicially sanctioned in peace-time.[8] After the demise of *laisser faire era*, the powers of the Centre increased because of the needs to provide social welfare to the people. For example, in the *Pharmaceutical Benefits* case,[9] a Central scheme to provide free pharmaceutical benefits to the people was judicially invalidated. This led to the amendment of the Constitution empowering Parliament to provide a number of social services to the people.

From the above brief description of the developments in the three federations, it becomes clear that the classical concept of a federation envisaging two parallel governments of coordinate jurisdiction, operating in water-tight compartments is nowhere a functional reality now. There is no fixed, static or immutable format of a federal constitution. Each country adapts and moulds the federal idea to its peculiar circumstances, conditions and needs.

It is thus clear from the above discussion that all the older federations have also exhibited centralising and centripetal tendencies and the constituent units do not enjoy a co-equal status with the Centre. In each of these federations, in course of time, the Centre has assumed a very dominant position. During the last several decades, an inevitable trend the world over has been the strengthening of the Central Government.

Undoubtedly the accent of the Indian Constitution is on the Centre which has been made more powerful *vis-a-vis* the States. This has been done for some very good indigenous reasons.

First, there is the historical background. In India, the historical process to create the federal system was different from what happened in the other federations as stated above. For long, before 1935, British-India had been administered on a unitary basis. There existed a unitary system. In 1935, the unitary system was replaced by a federal system. The present federal system was built on the foundation of the 1935 system. It was therefore inevitable that because of its lineage the federal system had a unitary bias.

The Indian federalism was not a result of a compact between several sovereign units but a result of conversion of a unitary system into a federal system. Here the movement has been from unity to union, from unitarism to federalism, unlike other countries where the historical process has been for separate units to come together to form the federal union.[10] In India, it was rather the reverse process, *viz*. to convert a unitary Constitution into a federal Constitution. In *West Bengal v. Union of India*, the Supreme Court took note of this process and rejected the claim of the States that they shared sovereignty with the Centre.[11]

Secondly, the past history of India conclusively establishes that in the absence of a strong Central Government, the country soon disintegrates. This belief was

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8. *Victoria and New South Wales v. The Commonwealth*, 99 CL R 575 (1957).
9. *Attorney General for Victoria v. The Commonwealth*, 71 CLR 223.
10. Until the passage of the Government of India Act, 1935, British India formed a completely unitary government and the Provinces derived their powers from the Central Government. The Act of 1935 then provided for a federal structure, but this part of the Act did never really function. Because of the Second World War, India was governed more as a unitary State rather than a federal State. So far as the pre-Constitution princely States are concerned, the process has been one of integration by agreement: *Supra*, Ch 1.
11. *Supra*, Ch. XI, Sec. J(ii)(d).

strengthened by the recent partition of the country. Therefore, adequate precautions have to be taken against any such future contingency by making the Centre strong. Owing to its vastness of territory and variety of people, India could not be governed efficiently as a unitary state and so a unitary Constitution was out of question. The second best alternative, therefore, before the framers of the Constitution was to adopt the federal principle with a strong Centre. Their approach was not theoretical or that of constitutional puritanism but pragmatic and was conditioned by considerations of unity and welfare of the country as the guiding objectives. India had already undergone one partition on the eve of the Constitution-making and its memories were very fresh in their minds and, therefore, they put a great stress on promoting unity in the country so as to ensure that fissiparous tendencies were kept in check.

In this connection, the following observation of the Sarkaria Commission may be taken note of:[12]

> "The primary lesson of India's history is that, in this vast country, only that polity or system can endure and protect its unity, integrity and sovereignty against external aggression and internal disruption, which ensures a strong Centre with paramount powers, accommodating, at the same time, its traditional diversities. This lesson of history did not go unnoticed by the framers of the Constitution. Being aware that, notwithstanding the common cultural heritage without political cohesion, the country would disintegrate under the pressure of fissiparous forces they accorded the highest priority to the ensurance of the unity and integrity of the country".

Thirdly, being an underdeveloped country, India had to force the pace of economic development in order to compress into decades the progress of the centuries. This could be achieved by mobilising and judiciously using the national resources and this could be done best only under Central direction and leadership.

Lastly, a common feature of all the modern federations is an accent on the Centre. As discussed above, such countries as Australia and America, which started on their federal career with an emphasis on the States, with the Centre having been assigned a limited role, have seen the transformation of the Centre becoming very powerful and the States having relatively gone down. Need has been felt in these federations for a strong Centre so that the defence, and complex socio-economic problems of an industrialised society, may be tackled effectively. Each of the three federations, in varying degrees, has exhibited this tendency, and this provides a justification to make the Centre strong in India.

There has been a continuous expansion of the functional role of the Central Government. Such expansion has completely altered the federal balance of powers in favour of the national government. The framers of the Indian Constitution took due note of these changing concepts and functional realities in other federations. They consciously designed the federal portion of the Indian Constitution with a strong Centre partly because of the experiences of the other federal systems and partly because of the needs of the country, *viz*., security and development.

The framers did not adopt a doctrinaire approach based on the out-moded concept of classical federalism but adopted a functional approach and devised a system in tune with the peculiar needs, traditions and aspirations of the Indian people. Indian federalism is a *sui generis* system. In devising the federal system, the

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12. REPORT, 7.

framers of the Constitution sought to ensure its vitality as well as its adaptability to the changing needs of a dynamic society.

Merely because the Centre enjoys predominance over the States to some extent, the Indian Constitution does not cease to be federal. Federal form of government has no fixed connotation. No two federal constitutions are alike. Each federal government has its own distinct character. Each is the culmination of certain historical processes. One basic feature of each federation however is that there is a division of powers between the Centre and the regional units by the Constitution itself. If the essence of federalism is the existence of units and a Centre, with a division of functions between them by the sanction of the Constitution, then these elements are present in India. In normal times, the States in India have a large amount of autonomy and independence of action. The Indian federal scheme seeks to reconcile the imperatives of a strong Centre with the need for State autonomy.

The States have substantial legislative powers and have control over most of the nation-building activities.[13] They have a full-fledged parliamentary form of government.[14] At no time are they regarded as delegates or agents of the Centre. They subsist not at the sufferance of the Centre but derive their sanction and powers from the same Constitution from which the Centre draws its sanction and powers. In course of time, many conventions have been evolved making the States more autonomous in practice than what it looks to be in theory. An independent judiciary acts as an umpire between the Centre and the States. The process of amending the Constitution is not unilateral so far as the federal portion is concerned, and at least half the States must agree before a proposed amendment can become effective.[15]

Within the sphere assigned to the States by the Constitution, the State Legislatures have plenary power. No fetter or limitation can be read on the legislative power of a State Legislature outside the Constitution.[16] The States have independent and substantial sources of revenue;[17] they have executive power in the exclusive field (List II) and in the Concurrent field.[18] On the whole, the Indian Union is never so closely knit as a unitary polity, nor, it is so loose as a confederation.

What are the provisions in the Constitution which are supposed to go against the principle of federalism? Parliament has power to re-organise the States but here also the States are to be consulted and, further, India being a Union of States, the States have to exist as component units.[19] The existence of several inter-State boundary disputes for long, as between Mysore and Maharashtra, or Punjab and Haryana, prove that Parliament does not act unilaterally in such matters but only after consensus has been reached between the contending parties

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13. *Supra*, Ch. X, Secs. E and F.
14. *Supra*, Chs. VI and VII.
15. *Infra*, Ch. XLI.
16. The State Legislature's competence to legislate on an entry in List II is plenary and it cannot be circumscribed by any assurances given by the government: *Umeg v. Bombay*, AIR 1955 SC 540 : (1955) 2 SCR 164; *State of Kerala v. Gwalior Rayon Silk Mfg. Co*., AIR 1973 SC 2734 : (1973) 2 SCC 713; *supra*, Ch II, Sec. M.
17. *Supra*, Ch, XI, Sec. D.
18. *Supra*, Ch. XII, Sec. A.
19. *Supra*, Ch. V.

themselves. In actual practice, today, the power to re-organise the States is proving to be a source of embarrassment rather than of strength to the Central Government. Then, there is the provision relating to the appointment of the Governor by the Centre. But here a convention has grown to consult the State Chief Minister.[20]

There are the provisions in the Constitution requiring in some cases Central assent to State legislation. But whatever the letter of the Constitution, in practice, by and large, Central assent is accorded to State legislation as a formality and there are not many instances of the Centre vetoing the State legislation. The one conspicuous example of this has been that of the Kerala Education Bill, over which public sentiment in the State ran high, but here also the Centre obtained the advisory opinion of the Supreme Court before remitting it back to the State Legislature for suitable amendments in the light of the Court's opinion.[21]

The Central financial support to the States, as already pointed out, is provided largely under the Constitution and through the Finance Commission, an independent body, and this does not compromise State autonomy.[22] The aid given by the Centre to the States for fulfilment of the plans is on the advice of the Planning Commission, and the National Development Council in which all the States are represented.[23] Further, provision of Federal grants-in-aid to the units is now a common feature of every federation and India is no exception to this trend.[24]

The emergency provisions of the Constitution have at times been held as constituting a major deviation from pure federalism.[25] These provisions are designed for temporary use only; by their very nature they cannot be of normal occurrence. Art. 352 is to be invoked only when its need is demonstrable,[26] and this is much more so now after the 44th Amendment. Further, in an emergency, the behaviour of each federal Constitution is very different from that in peace-time.[27]

Article 356, as has already been discussed,[28] is meant to be used only when constitutional machinery is not functioning properly in a State, and that is an exceptional, not a normal, situation. It may be hoped that with the passage of time people will get the necessary training, outlook and discipline to work democratic institutions, and then the States will have stable Ministries and the provision will fall into desuetude. In *Bommai*,[29] the Supreme Court has now spelled out a few restrictions on the invocation of Art. 356. Further, the composition of the two Houses presently is such, that it is not possible to invoke Art. 356 in relation to a State unless there is national consensus to do so.[30] On the whole, the Central power has weakened in this respect.

Under Art. 252, which introduces a kind of flexibility in the distribution of powers, the States come into picture as the Centre cannot take over the State

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20. *Supra*, Ch. VII, Sec. A(i).
21. AIR 1958 SC 956 : 1959 SCR 995; *Supra*, Ch. IV, Sec. F(c).
22. *Supra*, Ch. XI, Sec. L.
23. *Supra*, Sec. G, this Chapter.
24. *Supra*, Ch, XI, Secs. K(i) and (ii); M.
25. *Supra*, Ch. XIII, Secs. A and B.
26. *Ibid.*
27. *Supra*, Ch. X, Sec. L.
28. *Supra*, Ch. XIII, Sec. D.
29. *Supra*, Ch. XIII, Sec. E(b).
30. *Supra*, Ch. II.

matter without their co-operation and initiative.[31] Only under Art. 249, the Centre acts unilaterally, but it is for an extremely short period and in national interest,[32] and if the theory that the Rajya Sabha represents the States is tenable,[33] then even in this case it can be said that the States' consent is there, if not directly at least indirectly. In any case, so far, this provision has been used very sparingly.

The States Re-organisation Commission has put the matter in the right perspective. "These special provisions", observes the Commission, "however, are primarily remedial in character and are meant to prevent a breakdown in the States and to safeguard the powers of the Union within its own sphere. They do not detract from the fact that under the Constitution the States constitute cornerstones of the political and administrative structure of the country with a real measure of autonomy."[34]

As regards the Centre-State administrative relationship, it has already been pointed out that the Centre depends too much on the States for administrative purposes.[35]

The Constitution introduces mechanism for intergovernmental cooperation. Many more bodies have emerged for this purpose through legislation and administrative orders and practices.

It may also not be out of place to mention here that a good deal of what is explicitly stated in the Indian Constitution in the area of the Centre-State relations is found to be implicit in other federal constitutions. For example, the mechanism of conditional grants mentioned in Art. 282 has come into vogue in all federations although not stated explicitly in the constitutions. In the U.S.A. and Australia, the system is based on the Centre's spending power.[36] The concept of emergency is expressly mentioned in the Indian Constitution in Art. 352. By and large, the same effect is achieved in the USA and Australia under their war power and in Canada under the general power."[37] Art. 355 has its parallel in the USA in Art. IV, Sec. IV.[38]

Thus, considering the whole of the constitutional process—not only the letter of the Constitution but the practices and conventions that have grown thereunder—the Indian Constitution can justifiably be called federal. It is not necessary to use such an inarticulate term as '*quasi*-federal' to characterise it. The term '*quasi*-federal' is extremely vague as it does not denote how powerful the Centre is, how much deviation there is from the *pure* federal model, or what kind of special position a particular *quasi*-federation occupies between a unitary State and a federation proper?

The fundamental principle of federalism is that the legislative and executive authority is partitioned between the Centre and the States not by means of an ordinary law passed by the Centre, but by something more enduring, *viz*., the Con-

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31. *Supra*, Ch. X, Sec. J(c).
32. *Supra*, Ch. X, Sec. J(a).
33. *Supra*, Ch. II, Sec. B.
34. REPORT, 42.
35. *Supra*, Ch. XII.
36. *Supra*, Ch. XI, Sec. M.
37. *Supra*, Chs. X, Sec. L and XIII, Sec. A.
38. *Supra*, Ch. XIII, Sec. C.

stitution.[39] That is what the Indian Constitution does. The States do not depend upon the Centre, for in normal times, the Centre cannot intrude in their domain. It may be that the Centre has been assigned a larger role than the States, but that by itself does not detract from the federal nature of the Constitution, for it is not the essence of federalism to say that only so much, and no more, power is to be given to the Centre. There is also no immutable line of demarcation in any other federation between the Centre and the States, and the balance of power has always been shifting in favour of the Centre as has been pointed out above.

The concept of 'dual federalism', *viz*., that, in a federation, the general and regional governments are 'co-ordinate and independent' and competitors for power, is based on a reading of the 18th century version of the U.S. Constitution. In its operation today, this Constitution is very different from what it was in the past. Similar is the case in Australia. The truth is that the old orthodox theory of 'dual federalism', as propounded by WHEARE, does not accord with contemporary realities and is no longer tenable or viable.[40] It is extremely difficult to sustain the argument, in the light of the evolution of the so-called true federal constitutions, that federalism must necessarily accord with a fixed, standard or immutable mould.

There is nothing static about the federal concept. Today there is no country which may be said to have 'pure' federalism in the sense of there being a complete dichotomy of functions, or a complete equality of status, between the Centre and the States.[41] In fact, in all federations, as pointed out above, the modern accent is on 'co-operation' between the Centre and the States, rather than on 'independence' of the States.[42] And for successful working of a 'co-operative federalism', it is necessary that the Central Government be in a position to provide leadership to the regional governments, to co-ordinate their activities, to guide them, to help them and, perhaps, on occasions to pressurize them to act in a particular direction if the national interest so demands.

An appraisal of the whole constitutional process including the latest developments in the field of Federal-State financial relations in the U.S.A., Australia and Canada, will make it clear that each of these countries is Centre-oriented today, and the centre of gravity has definitely moved in favour of the Centre. So is the

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39. SAWER, MODERN FEDERALISM, 127, suggests that the most important feature of federalism "is the creation of an area of guaranteed autonomy of each unit of the system. Since the secular trend is towards the increase of authority of the Centre, the question of federalism or no federalism becomes in practice whether the area of autonomy is sufficient to be worth considering and whether the guarantee is sufficiently effective."

40. WHEARE, MODERN GOVERNMENT, 18 (1971).

As SCHWARTZ points out, the doctrine of dual federalism was based upon the notion of two mutually exclusive, reciprocally limiting, fields of power, the governmental occupants of which confronted each other as absolute equals: AMERICAN CONSTITUTIONAL LAW, 42; also, 163, 184-185 (1955).

41. According to FRIEDRICH, federalism should not be seen 'only as a static pattern or design, but defined in 'dynamic' terms. "Federal relations are fluctuating relations in the very nature of things." Federalism is a "process, an evolving pattern of changing relationships rather than a static design regulated by firm and unalterable rules." He maintains that 'dual federalism' is no longer "a realistic description of the actual working of American federalism in which co-operation has replaced competition to a considerable extent." "More and more, the States appear as administrative subdivisions of the nation, government survivals of another day which must be supported by grants-in-aid, supervised and co-ordinated by growing federal bureaucracy."

CARL J. FRIEDRICH, TRENDS OF FEDERALISM IN THEORY AND PRACTICE, 7, 24, 173, (1968).

42. *Supra*, Sec. A, this Chapter.

case in India. Although the accent on the Centre appears to be more pronounced, yet this is mainly because, being the latest member of the federal family, much of what happens elsewhere underneath the surface of the Constitution, has been explicitly incorporated in its fabric. It may, however, be noted that the centralising trends in other federations have not yet ceased or been contained; they continue to operate and are bound to change the constitutional complexion further in course of time.

In India itself, apart from the constitutional provisions the centralising tendencies were also accentuated by the fact that one national party held sway both at the Centre and in the States. But now the State Governments belong to different political parties. The monopoly of power by the Congress Party was broken in 1967 and this has become accentuated since then. This development has thrown an apple of discord in the Central-State relationship.

Within the last few years, a significant change has occurred in the complexion of the Central Government itself. The Central Government to-day is not constituted by a single all India political party; it is now a coalition of several political parties-national as well as regional parties. Accordingly, the policies evolved by the Central Government is the product of the balance of national and regional aspirations and perceptions.

Demands have been raised from time to time for re-ordering of the Indian federalism. This trend became pronounced as various political parties came on the scene and the Centre and the States fell under the sway of several political parties rather than remain under a single party. It is inevitable, therefore, that in course of time, the States gain in stature and improve their bargaining position *vis-a-vis* the Centre.

It is interesting to note in this connection that the Government of Tamil Nadu, dissatisfied with the Constitution, appointed a Committee in 1969, known as the Rajamannar Committee, "to examine the entire question regarding the relationship that should subsist between the Centre and the States in a federal set up, with reference to the provisions of the Constitution of India, and to suggest suitable amendments to the Constitution so as to secure to the States the utmost autonomy."

The Committee in its report issued in 1971 criticised certain aspects of the Indian Constitution because they were not reconcilable, in the opinion of the Committee, with the standard set by it, *viz*., co-ordinate and dual federalism.[43] But the Committee accepted the position that the power vested in the Centre "does not reduce the status of the States to that of administrative units in a unitary government as in the days of the British Rule."[44] The Committee suggested some modifications in the Constitutional provisions relating to the distribution of legislative and taxing powers, emergency, etc.

While no harm is done by raising a public debate on the issues involved, and by making necessary adjustments in the Constitution, if found necessary, the point remains that the theoretical, *a priori*, criticism of the Constitution by in-

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43. *Report*, 16.

44. M.C.J. KAGZI, A Critique of the Rajamannar Committee Report, in I.L.I., CONSTITUTIONAL DEVELOPMENTS SINCE INDEPENDENCE, 255 (1975).
Also, M.P. JAIN, *Background Paper, supra*, note 1 on 690.

voking the orthodox concept of 'dual federalism' is not tenable as that concept is no longer valid in modern federalism. Amendments in the Constitution can only be justified if they better serve, and promote, public interest and welfare, and not merely because of any theoretical considerations. It will be necessary to evaluate any proposed amendment from the point of view of its impact on other States as well. The proposals made by the Rajamannar Committee suffer from an extreme over-statement of the case for State autonomy. These proposals did not evoke much public enthusiasm and were endorsed neither by any State Government nor by any All India political party, and the report became a dead letter.

The matrix of Centre-State relationship was also considered by the Administrative Reforms Commission. In its report issued in 1969, the Commission came to the conclusion that "the basic Constitutional fabric of ours is quite sound and must remain intact." Further, in the opinion of the Commission: "No constitutional amendment is necessary for ensuring proper and harmonious relations between the Centre and the States, inasmuch as the provisions of the Constitution governing Centre-State relations are adequate for the purpose of meeting any situation or resolving any problems that may arise in this field." The Commission rightly observed that the Constitution was flexible enough to ensure its successful working irrespective of whichever party may be in power, provided that those who are in power mean to work it and not wreck it.[45] The Government of India agreed with this view of the Commission.[46]

These exercises did not give a quietus to the demand for revising the Central-State relationship. The demand for the same has been made from time to time.[47] The demand became more voiceferous with the emergence of several State governments (Tamil Nadu, Karnataka, Andhra Pradesh, West Bengal and Jammu and Kashmir) belonging to the regional political parties other than the national political party in power at the Centre.

In 1983, in response to an insistent demand to review the Centre-State relations, the Central Government appointed the Sarkaria Commission under the Chairmanship of Justice R.S. SARKARIA, a retired Judge of the Supreme Court, with the following terms of reference: to examine and review the working of the existing arrangements between the Union and States in regard to powers, functions and responsibilities in all spheres and recommend such changes or other measures as may be appropriate keeping in view "the social and economic developments that have taken place over the years and have due regard to the scheme and framework of the Constitution which the founding fathers have so sedulously designed to protect the independence and ensure the unity and integrity of the country which is of paramount importance for promoting the welfare of the people." Thus, the terms of reference for the Commission specifically laid emphasis that the Commission would in making its recommendations give due regard to the need for maintaining the unity and integrity of the country.

The Commission presented its report in 1988. In its report while the Commission suggested some adjustment in the Centre-State relationship in several ways,

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45. *ARC Rep 7*. Also see, SETALVAD, *Union-State Relations*, 226-236 (1974).
46. THE TIMES OF INDIA, dated April 18, 1975.
47. See, ALICE JACOB, New Pressures on Indian Federalism: Demand for State Autonomy in ILI, INDIAN CONSTITUTION: TRENDS & ISSUES, 370.

it did not make any suggestion for any fundamental change in the structure of the constitutional provisions relating to federalism.

Several problems have become apparent in the practical working of the Indian Federalism over the years. The crucial fact that has emerged is that there is an imbalance between the functions and resources at the State level. Their tax resources have proved to be inelastic while all the money-consuming social services fall within their purview. It is also true that not all States utilize their taxing powers fully because of political pressures. Economic conditions vary from State to State. While the tax raising capacity of the poor States is low, their fiscal needs are very high. There exist vast differences in the scale of social services from State to State. In some States, the expenditure on social services is pitifully low. Then there occur national calamities like famines and floods from time to time taxing the resources of the States. The States are being kept solvent because of the massive transfer of funds from the Centre by way of tax-sharing, grants and loans. The fact also remains that most of the States do not use their financial resources prudently.

Some of the opposition-ruled States want more powers and more autonomy. They want more legislative powers. One drastic suggestion made in this connection is that the Centre should confine itself only to four subjects, *viz*., defence, external affairs, communications and currency, and leave all the rest of the functions (including the residuary) to the States. The States are clamouring for more taxing powers and more central assistance. They want funds to flow to them through the Finance Commission instead of the Planning Commission because the former funds are non-discretionary and untied and the latter funds are discretionary and tied to specific purposes, and some States have a feeling that there is discrimination against them in allocation of such funds. They want a share in the corporation tax which is non-sharable at present; they want full autonomy to use the power to levy sales tax and do not like the scheme of levying additional excise in lieu of sales tax on selected commodities.[48] It is being suggested that the Finance Commission be made a permanent body instead of being appointed, as at present, after five years. Another suggestion is that the role of the Finance Commission be enlarged so as to enable it to deal both with the plan and the non-plan expenditure as well as with total central assistance to the States. It is being argued that the States should get the bulk of funds from the Centre under Art. 275 and that Art. 282 should only play a residuary role unlike the present situation when bulk of the funds for planning purposes pass to the States from the Centre under Art. 282.[49]

Some States want greater economic freedom to develop the States faster and criticise the expansive use made by the Centre of its power under entry 52, List I. They would like the Centre to confine itself only to such industries as may be vital to national development.

The opposition-ruled States have a grievance that the ruling party at the Centre misuses the institution of Governor to further its own political interests in the States.[50] No healthy precedents have been set so far as to how the Governor

48. *Supra*, Ch. XI, Sec. L.
49. *Supra*, Ch. XI, Sec. L.
50. *Supra*, Ch. VII, Secs. A and C.

should conduct himself in different situations.[51] It is being suggested that the position of the Governor should not be different from that of the President.

The States do not like Art. 356 which hangs on their heads as the democle's sword. It is being said that the Central government uses Art. 356 at times to further its own political interests by removing governments of different political complexion from office.[52]

It is also being claimed that over the years, the Planning Commission has just become an appendage of the Central government and to introduce objectivity in planning, it should be made an autonomous body, that the State planning machinery be strengthened and that an inter-State Council consisting of the Prime Minister and the Chief Ministers be established under Art. 263.[53]

It is true that during the last fifty years, strong centralising tendencies emerged in India. To a great extent, this was due to the fact that for long one political party, the Congress Party, was in power at the Centre as well as in all the States. The dominance of one political party for long did inevitably generate centralising trends. But now things have changed. The Congress Party has lost its pre-eminent position; it has lost its monopoly of power. Many political parties having regional, rather than national, perspective have emerged having different political ideologies and some of them have assumed power in some of the States. Further, even the Central Government is composed of a coalition of several political parties. This political development has checked the generation of centripetal forces.

The States to-day are in a much stronger position to assert themselves, to exert pressure on, and to bargain with, the Centre. This is resulting in the emergence of a more balanced federal system in India. The Supreme Court has also helped this process through its decision in *Bommai* by putting some restraints upon the exercise of its power under Art. 356.[54] The Court has declared federalism as the basic feature of the Constitution.[55] Thus, whatever the constitutional provisions, the evolution of the Indian federalism for some time now has been towards a more balanced system with accent on State autonomy.

While there may be a case for some re-adjustment in the Central-State relationship in India, a drastic re-orientation of the Indian federalism is neither feasible, nor desirable, nor called for. There are many practical reasons militating against too much devolution of power on the States, against too much decentralisation.

For one, the economic conditions of all the States is not uniform. Whatever the scheme of division of taxing powers may be, while some States may benefit, others may lose and they will not be able to raise enough resources for themselves. The need for Central help to the States will thus continue. This is the experience of all other federations. This means that the Centre's financial capacity cannot be too much impaired.

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51. See the White Paper on The office of the Governor issued by the Karnataka Government, THE HINDU INT'L, Oct. 1, 83.
52. See, ILI, PRESIDENT'S RULE IN THE STATES, 176-81.
53. *Supra*, Sec. C, this Chapter.
54. For *Bommai*, see, *supra*, Ch. XIII, Sec. E(b) and (c).
55. For discussion on this doctrine, see, Ch. XLI, *infra.*

Two, national calamities will continue to arise from time to time needing massive funds which only the Centre can manage. Three, the administrative infrastructure in the States is weak and is not capable of carrying a greater load unless there is a wholesale effort made to improve it. As already pointed out, the Finance Commission makes provision in its scheme of devolution of Central grants for funds to improve the State administrative machinery. Then, there are the demands of industry, trade and commerce which have national and not local dimensions. State taxing powers such as sales tax, octroi, tax on roads and motor vehicles come in the way of free flow of national trade and traffic and the businessmen constantly make demands for abolition of octroi, integration of sales tax with excise and so on.[56] The States oppose these demands because it will reduce their capacity to raise revenue. Sales tax is the main source of revenue for the States.

It may be of interest to note that over the years, efforts have been made to improve the financial capacity of the states in several ways. First, as already noted, the Finance Commissions have been progressively suggesting larger devolution of Central funds to the States. Two, the courts have progressively interpreted State taxing powers liberally. Three, the Centre has itself by amending the Constitution enhanced the State taxing powers, *e.g.*, in the area of sales tax. Fourthly, devolution of large funds takes place from the Centre to the States through the medium of the Planning Commission.

Many claims and demands have been made from time to time to re-orient Indian Federalism, but most of them have been exaggerated and unrealistic. Many of these demands are politically-motivated rather than based on pragmatic considerations. The Sarkaria Commission has rejected many of the claims made by the States in their favour for reordering the federal system. The inherent soundness of the constitutional provisions concerning Centre-State relations has been vindicated by the Sarkaria Commission's report as no major amendment of any of these provisions has been suggested. Some of the major recommendations of the Commission are:

(1) The Commission has rejected the suggestion that residuary powers be transferred from the Centre to the States.[57]

(2) The Commission has emphasized that the rule of federal supremacy is indispensable for the successful functioning of any federal system. "It is the kingpin of the federal system."[58]

(3) The Commission has rejected the demand for repeal of the most contentious provision in the Constitution, *viz.*, Art. 356. The Commission has however suggested that Art. 356 should be used very sparingly.[59]

(4) The Commission has rejected the demand for the merger of the Finance Commission and the Planning Commission.[60]

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56. See S.N. JAIN & ALICE JACOB, Tax Rental Agreement: Replacement of Sales Tax by Additional Duties of Excise in I.L.I., INDIAN CONSTITUTION: TRENDS & ISSUES, 379 (1978).
57. REPORT, 31.
58. *Ibid.*, 28.
59. *Ibid*, 177.
60. *Ibid*, 284.

(5) The Commission has maintained that it is necessary to retain Art. 365 though it should be used with great caution and invoked only in extreme cases.[61]

(6) The Commission has recommended the creation of the Intergovernmental Council under Art. 263.[62]

The only touch-stone for any re-orientation of Central-State relationship can be the provision of better services to the people, improvement of socio-economic conditions and promotion of national unity, stability and integrity. No *a priori*, dogmatic or doctrinaire approach, no approach based on the old and discarded view of competitive federalism, can serve the purpose in the modern context.

As has already been stated, such a view prevails in no modern federalism now. A strong Centre and strong States are not incompatible with each other. A strong Centre does not imply that the States must necessarily be weak. Both ought to be strong within the constitutional framework. Both are inter-dependent and the Centre could not be strong without strong States and *vice versa*.

There is a lot which the States can do to help themselves and improve their strength and position. They can, for instance, improve their administrative infrastructure and make it more efficient; they can improve their financial position by improving their tax collecting machinery; the condition of such social services as education and health is pitiable in some of the States and they have to make up a lot of leeway in this area; they can improve the working of their electricity boards, road transport services, public enterprises and irrigation projects. The way these bodies are functioning at present in the States does not inspire confidence that things will be much better if more powers were to devolve on the States.[63]

It is very necessary to ensure that neither the federal set-up becomes unitary nor that it becomes too loose and weak affecting the unity of India.

Federalism is not a static but a dynamic concept. It is always in the process of evolution and constant adjustments from time to time in the light of the contemporary needs and the demands being made on it. Constant discussions and negotiations between, the Centre and the States in various fora can help in removing the frictions and difficulties in the area of inter-governmental co-operation and for sorting out these differences with a view to making the Indian Federalism a more robust and viable system so that India may successfully meet the great challenges of defence, external and internal security and socio-economic development.

61. *Ibid*, 107.
62. *Ibid*, 237-240.
63. See the REPORT of the SEVENTH FINANCE COMMISSION.

CHAPTER XV

TRADE, COMMERCE AND INTERCOURSE

SYNOPSIS

A. INTRODUCTORY

Trade, commerce and intercourse may be domestic or foreign or international. Arts. 301-305, discussed in this Chapter, deal with domestic trade and commerce, *i.e.*, within the territory of India. Such commerce may be of two types—(i) intra-State, *i.e.*, commerce which is confined within the territory of a State; (ii) inter-State, *i.e.*, trade and commerce which overflows the boundary of one State and which extends to two or more States.

No federal country has an even economy. Some of its constituent units may be agricultural while others may be industrial. Some States may produce raw mate-

rials while the processing and manufacturing industries may be located in other States because of several favourable factors, like availability of cheap labour or electric energy. This circumstance creates the possibility that the constituent units which have legislative powers of their own may, to serve their own narrow and parochial interests, seek to create trade barriers by restricting the flow of commodities either from outside or to other units.

Creation of such regional trade barriers may prejudicially affect national interests as it may hamper the economic growth of the country as a whole, and this would be disadvantageous to all the units in the long run. Besides, the resources and industries of the units may be complimentary to each other. Free flow of trade, commerce and intercourse within a federal country having a two-tier polity is a pre-requisite for promoting economic unity of the country. An attempt has, therefore, been made in all federations, through adopting of suitable constitutional formulae, to create and preserve a national economic fabric, transcending State boundaries, to minimise the possibility of emergence of local economic barriers, to remove impediments in the way of inter-State trade and commerce and thus help in welding the whole country into one single economic unit so that the economic resources of all the various regions may be exploited, harnessed and pooled to the common advantage and prosperity of the country as a whole.[1]

Federalism, therefore, has come to connote one big common internal market and an economic area irrespective of the State boundaries. This preferred national goal has provided the motive force, in part, for the creation of the federations of the U.S.A. Canada and Australia.[2]

B. POSITION IN OTHER COUNTRIES

The most significant provision in the U.S.A., for this purpose, is the Commerce Clause,[3] which provides *inter alia* that the Congress shall have power to regulate commerce among the several States. The clause does not in terms restrict State protectionism, but by a process of judicial interpretation, it has come to have a restrictive effect on the States in those matters in which the Supreme Court considers that uniformity is necessary for national economic well being, and, thus, the capacity of the States to interfere with inter-State commerce has been very much restricted.[4] The Commerce Clause has also bestowed on the Central Government necessary power to regulate the country's economy. The Courts have interpreted the words 'inter-State commerce' in a broad sense, and have held that the Congress can regulate not only inter State commerce but even those intra-State activities which so affect inter-State commerce as to make their regulation appropriate.[5]

In Canada, the Provinces have been deprived of the power to levy indirect taxes so that they may not be able to create interprovincial trade barriers.[6] This

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1. Bowie, *Studies in Federalism*, 296-357 (1954).
2. Also see, *supra*, Ch. X, Sec. L; Ch. XI, Sec. I; Ch. XI, Sec. J(ii).
3. Art. 1, Sec. 8, Cl. 3 of the U.S. Constitution.
4. *Cooley v. Port Wardens*, 12 How 299; *Southern Pacific Co v. Arizona*, 325 US 761 (1945); *Bibb v. Navajo Freight Lines*, 359 US 520.
5. *Supra*, Ch. X.
6. Royal Comm., *Report*, 30 (1939).
Also, *supra*, Ch. XI, Sec. I.

has been further strengthened by making "regulation of trade and commerce" a Central matter, but as already seen, this Central power has not played much meaningful role so far.[7] Then, Sec. 121 of the BNA Act, which provides that "articles of growth, produce or manufacture of any province shall be admitted free into each of the other provinces", also curtails the provincial power to put restrictions on entry of goods from other provinces.

In Australia, with a view to promoting the economic unity of the country, and discouraging the States from raising trade barriers, the States have been debarred from levying excises.[8] The crucial provision, however, for the purpose in the Australian Constitution is Section 92 according to which trade, commerce, and intercourse among the States shall be absolutely free. The clause applies only to inter-State and not to intra-State commerce, and restricts both the States and the Centre from interfering with trade and commerce.[9]

Literally, the scope of Section 92 is unlimited and unqualified, but, as no freedom can be absolute, Courts have evolved some limitations on this freedom as well. It has therefore been laid down that some regulation of inter-State trade, commerce and intercourse is compatible with its absolute freedom, and that Section 92 is violated only when a legislative or executive act operates to restrict inter-State trade, commerce and intercourse directly and immediately and not when it creates "some indirect or inconsequential impediment which may fairly be regarded as remote."[10] Thus, laws to ensure public health and honesty and fairness in commercial dealings are not voided by the concept of freedom of inter-State trade and commerce.[11] But such a law should not have an impact which is "reasonably unnecessary" upon the activities of the individual in inter-State trade and commerce. Legislation of a regulatory nature has generally been upheld, but not prohibitory legislation. Thus, a State law requiring a person operating in inter-State commerce to apply for a licence, but conferring on the concerned officer an uncontrolled discretion to grant or refuse the licence has been held to be bad, as giving uncontrolled discretion to the licensing authority is prohibitory and not regulatory.[12]

The same approach is seen in the judicial attitude towards nationalization. The Central Government's attempt to create a monopoly for the government airline by prohibiting private airlines from operating inter-State,[13] the prohibition on private banking from engaging in inter-State commerce,[14] have been held to be bad. Section 92 guarantees the freedom of the individuals. The Courts have rejected the argument that the test of 'volume of trade' flowing from State to State should be adopted to adjudge whether a restriction is bad under Section 92, or that it protects only the passage of goods, or that it would apply only when the freedom is impaired at the frontier. A restriction applied not at the State borders

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7. *Supra*, Ch. X, Sec. L.
8. *Ibid.*
9. *Jindal Stainless Ltd. (2) v. State of Haryana*, (2006) 7 SCC 241, at page 263 : AIR 2006 SC 2550.
10. *Commonwealth of Australia v. Bank of New South Wales*, 1950 AC 235.
Also, *Permewan Wright Consolidated Pty. Ltd. v. Trewhitt*, 27 ALR 182.
11. *S.O.S. (Mowbray) Pty. Ltd. v. Mead*, (1972) 124 CLR 529; *Clark King v. Australian Wheat Board*, (1978) 21 ALR 1.
12. *Hughes and Vale Proprietary Ltd. v. New South Wales*, 1955 AC 241.
13. *Australian National Airways v. The Commonwealth*, 71 CLR 29.
14. *Supra*, footnote 10.

but at a prior or subsequent stage of inter-State trade, commerce or intercourse, can also offend against Section 92.

The test of 'directness' of restraints applied in earlier cases[15] in Australia was rephrased in some later cases, *viz.*, a law which imposes a restriction, burden or liability by reference to, or in consequence of, a fact or an event or a thing itself forming part of inter-State trade, commerce, or intercourse, or forming an essential attribute of that concept, essential in the sense that without it you cannot bring into being the particular example of inter-State trade, commerce or intercourse, contravenes Section 92 if it creates a real prejudice or impediment to inter-State transactions. For applying the test, it is necessary to distinguish an 'essential' of inter-State trade, commerce, or intercourse from a 'non-essential' or a mere incident. This is a technical distinction and at times it may be very difficult to distinguish between the 'essential' and the 'incidental'. The test however is somewhat flexible and vague for such terms as 'essential', 'incidental', 'real prejudice' have a variable and not a fixed connotation and are difficult to apply in specific situations.[16]

In a later case,[17] the High Court of Australia reverted to the test laid down in *Bank of New South Wales*[18] and held that economic consequences of a law operative upon inter-State trade and commerce cannot be ignored. The proposition that the economic result produced by an Act is not within its direct operation is not valid. Economic results produced by an Act cannot be held to be irrelevant in determining whether the Act leaves trade and commerce free. The Courts have also propounded the thesis that inter-State commerce must pay for the facilities it uses, such as bridges, aerodromes, highways etc. But a distinction is drawn between a charge for the facility provided and one which would be a deterrent to trade. The charge levied should be a 'fair' recompense for the actual use made of the facility. For example, in case of highways, the charge can be levied only for their maintenance, and not to meet the capital cost of their construction, and the charge should be computed with reference to such factors as mileage for which the highway is used, and the weight and load-capacity of the vehicle.[19]

C. POSITION IN INDIA

The Constitution-makers desired to promote free flow of trade and commerce in India as they fully realized that economic unity and integration of the country provided the main sustaining force for the stability and progress of the political and cultural unity of the federal polity, and that the country should function as one single economic unit without barriers on internal trade.

Economic unity of India is one of the constitutional aspirations and safeguarding its attainment and maintenance of that unity are objectives of the Indian

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15. As for example, the *Bank Nationalization case*, note 9, *supra*.

16. See, *Hospital Prov. Fund v. Victoria*, 87 CLR 1 (1953); *Hughes and Vale case*, (II), 93 CLR 127 (1955); *Russell v. Walters*, 96 CLR 177 (1957); Ross Anderson, Freedom of Interstate Trade: Essence, Incidence and Device under S. 92 of the Constitution, 33 *Australian LJ* 294 (1959); Sawer, *Cases on the Constitution of the Commonwealth of Australia*, 232-423 (1982); Coper, *Freedom of Interstate Trade under the Australian Constitution* (1983).

17. *North Eastern Dairy Co. v. Dairy Industry Authority*, 50 ALJR 121, 129 (1976).

18. *Supra*, footnote 10.

19. *Commonwealth Freighters v. Sneddon*, 102 CLR 280; *Armstrong v. State of Victoria*, 99 CLR 28.

Constitution. In order to ensure that the State Legislatures subjected to local and regional pulls do not create trade barriers in future, Arts. 301-305 have been incorporated into the Constitution. These provisions deal with trade, commerce and intercourse within the territory of India—whether intra-State or inter-State. The main provision is Art. 301.

The Supreme Court has explained in detail the motivations and aspirations of the framers of the Constitution in drafting Arts. 301-305 in *Atiabari*[20] in the following words:

> "In drafting the relevant Articles [Arts. 301-305] the makers of the Constitution were fully conscious that economic unity was absolutely essential for the stability and progress of the federal polity which had been adopted by the Constitution for the governance of the country. Political freedom had been won, and political unity which had been accomplished by the Constitution, had to be sustained and strengthened by the bond of economic unity. It was realised that in course of time different political parties believing in different economic theories or ideologies may come in power in the several constituent units of the Union and that may conceivably give rise to local and regional pulls and pressures in economic matters. Local or regional fears or apprehensions raised by local or regional problems may persuade the State legislatures to adopt remedial measures intended solely for the protection of regional interests without due regard to their effect on the economy of the nation as a whole. The object of [Arts. 301-305] was to avoid such a possibility. Free movement and exchange of goods throughout the territory of India is essential for the economy of the nation and for sustaining and improving living standards of the country."

The Court has again dilated on this theme in *Automobile Transport*:[21]

> "There were differences of language, religion, etc. Some of the Provinces were economically more developed than the others. Even inside the same province there were under-developed, developed and highly developed areas from the point of view of industries, communications, etc. The problem of economic integration with which the Constitution-makers were faced was a problem with many facets. Two questions, however, stood out. One question was how to achieve a federal, economic and fiscal integration, so that economic policies affecting the interests of India as a whole could be carried out without putting an ever increasing strain on the unity of India, particularly in the context of a developing economy. The second question was how to foster the development of areas, which were under-developed without creating too many preferential or discriminative barriers."

The scheme of Arts. 301-305 is somewhat complex. There is a mix up of exceptions upon exceptions in these provisions. Therefore, to have an idea of the extent of freedom granted to trade and commerce, and the limitations imposed thereon, all these constitutional provisions must be considered together. According to the Supreme Court,[22] in evolving these provisions, the framers of the Constitution seem to have kept three main considerations in their view. One, in the larger interests of the country, there must be free flow of trade, commerce and intercourse, both inter-State and intra-State. Two, the regional interests must not be ignored altogether. Three, the Centre should have power of intervention in any

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20. *Atiabari Tea Co. Ltd. v. State of Assam*, AIR 1961 SC 232, 247 : (1961) SCR 809.
21. *Automobile Transport (Rajasthan) Ltd. v. State of Rajasthan*, AIR 1962 SC 1406 : 1963 (1) SCR 491.
22. *Ibid.*, at 1416.

case of crisis to deal with particular problems which may arise at times in any part of India.

According to Art. 301, "trade, commerce and intercourse throughout the territory of India shall be free."[23] This constitutional provision imposes a general limitation on the exercise of legislative power, whether of the Centre or of the States, to secure unhampered free flow of trade, commerce and intercourse from one part of the territory to another. The purpose underlying Art. 301 is to promote economic unity of India and that there should not be any regional or territorial economic barriers.

The origins of Art. 301 may be traced directly to Section 92 of the Austalian Constitution, but there are some significant differences between the two provisions.

(1) Section 92 of the Australian Constitution immunizes inter-State trade only as the words used therein are "among the States". On the other hand, Art. 301 uses the words "throughout the territory of India". This means that Art. 301 covers both inter-State and intra-State trade. Therefore, the coverage of Art. 301 is broader than that of Section 92.

A reason to include both 'inter-State' and 'intra-State' commerce within Art. 301 may be that at times it becomes difficult to draw a line of demarcation between the two as these may be so inextricably mixed up that control of one may result in the control of the other as well.[24]

(2) Section 92 makes freedom of trade 'absolutely' free, whereas Art. 301 omits the word 'absolutely'. This is for a good reason *viz.* that no freedom can be absolute. Even in Australia, the freedom is not 'absolute' but 'regulated' and 'relative'.

(3) Section 92 is worded generally and contains no exceptions. It has been for the Courts to spell out the restrictions on it. In India, on the other hand, the exceptions to Art. 301 have been laid down in Arts. 302-305. The total impact of these exceptions is to make the position in India quite different from that in Australia in the area of freedom of trade and commerce.

(4) In Australia, the restriction applies both to the Centre as well as the States. In India, on the other hand, while the restraint applies formally both to the Centre and the States, the scheme of the constitutional provisions (Arts. 302-304) is

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23. See, generally, Derham, Some Constitutional Problems arising under Part XIII of the Indian Constitution, 1 *JILI*, 523, 551; A note in the same journal at 190; Rice, Division of Powers to control Commerce, 1 *JILI*, 151 (1959); Ramaswami, Indian Constitutional Prov. against Barriers to Trade and Commerce, 2 *JILI*, 320 (1960); VII CAD, 800-803; X CAD, 348; IX CAD, 1126 et seq.; Ebb, *Interstate Barriers in India and American Constitutional Experience*, 11 *Stan, LR.*, 37 (1958-59); S.N. Jain, Freedom of Trade and Commerce and Restraints on the State Power to tax Sale in the course of Interstate Trade and Commerce, 10 *JILI*, 547 (1968); M.P. Singh, Prohibition against preference on Discrimination in Trade and Commerce, 3, *JI. Bar Council of India*, 278 (1974); D.K. Singh, Trade, Commerce, and Intercourse in India; A Reappraisal of Constitutional Problems, 14 *JILI*, 39 (1972). See further *Jindal Stainless Ltd. (2) v. State of Haryana (supra)*, at page 263 "Article 301 is inspired by Section 92 of the Australian Constitution when it refers to freedom of trade and commerce, however, Article 301 is subject to limitations and conditions in Articles 302, 303 and 304 which are borrowed from the commerce clause under Article 1 of the US Constitution".

24. *Supra*, pp. 1052-53.

such that, in effect, the Centre can dilute the restraint by its own legislative action but the States remain subject to the control of the Centre in this respect.

In Australia, the commerce clause has hampered the governments in pursuing many economic programmes so very essential in a modern country for promotion and expansion of economy. India steers clear of such difficulties, as the scope of the freedom of trade and commerce can by and large be adjusted by legislative action.

Besides Art. 301, the concept of economic unity is also strengthened by the scheme of allocation of powers between the Centre and the States.[25] The Centre has been given broad powers in the economic field. Inter-State trade and commerce is an exclusive Central matter and the States have power only on intra-State trade and commerce which again is subject to entry 33, List III.[26] Further, inter-State sales tax belongs to the Centre and the States' power is confined to levying tax only on intra-State sales.[27] The excise duties can also be levied largely by the Centre and not the States.[28]

INTER-RELATION BETWEEN ARTS. 19(1)(G) AND 301

Article 19(1)(g), a fundamental right, confers on the citizens the right to practise any profession or carry on any occupation, trade or business subject to reasonable restrictions in public interest.[29] The question of inter-relationship between Arts. 19(1)(g) and 301 is somewhat uncertain.

One view is that while Art. 19(1)(g) deals with the right of the individuals, Art. 301 provides safeguards for the carrying on trade as a whole distinguished from an individual's right to do the same.[30] This view, however, is hardly tenable. Art. 301 is based on Section 92 of the Australian Constitution which has been held to comprise rights of individuals as well,[31] and the same should be the position in India. In actual practice, this view has never been enforced and individuals have challenged legislation on the ground of its effect on their right to carry on trade and commerce. The Supreme Court has denounced the theory that Art. 301 guarantees freedom "in the abstract and not of the individuals."[32]

Another way of projecting the same idea is to say that Art. 301 aims at preventing restrictions on the volume of trade flowing and, therefore, the effect of a law on individuals is irrelevant. Under this view, if ample provision is made for carrying on trade, and the volume of the trade remains as before, the mere fact that certain individuals have been prohibited from taking part therein would not contravene Art. 301.

But this view creates many difficulties. To ascertain the volume of trade before and after the impugned statute, it would be necessary to refer to various

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25. *Supra*, Ch. X.
26. *Supra*, Ch. X, Sec. F.
27. *Supra*, Ch. XI, Secs. D and J(i).
28. *Supra*, Ch. XI, Secs. C and D.
29. *Infra*, Ch. XXIV, Sec. H.
30. Reference has been made to this view, without finally deciding, by Mukherjea, J., in *Saghir Ahmad v. State of U.P.*, AIR 1954 SC 728, 742 : 1955 (1) SCR 707; Das, CJ., in *State of Bombay v. Chamarbaugwalia*, AIR 1958 SC 699; Wanchoo, C.J., in *Automobile Transport v. State of Rajasthan*, AIR 1958 Raj 114.
31. *Commonwealth of Australia v. Bank of New South Wales*, 1950 AC 235.
32. *Dist. Collector, Hyderabad v. Ibrahim*, AIR 1970 SC 1275 : (1970) 1 SCC 386.

complicated socio-economic factors, data and statistics, and the Courts avoid such questions as they are hardly the proper forum to go into these matters. The test of total volume has been criticised in Australia as "unreal and unpractical", for it is "unpredictable whether by interference with the individual flow the total volume will be affected, and it is incalculable, what might have been the total volume but for the individual interference."[33] Therefore, the volume of trade theory is also untenable.

A difference between Arts. 19(1)(*g*) and 301, it has been said, is that Art. 301 could be invoked only when an individual is prevented from sending his goods across the State, or from one point to another in the same State, while Art. 19(1)(*g*) can be invoked when the complaint is with regard to the right of an individual to carry on business unrelated to, or irrespective of, the movement of goods,[34] *i.e.*, while Art. 301 contemplates the right of trade in motion, Art. 19(1)(*g*) secures the right at rest.[35]

It is true that the 'movement' aspect of commerce is of great importance, and that one of the dominant purposes underlying Art. 301 is to keep inter-State movement of goods and persons free and unhampered. It is also true that the Supreme Court has placed emphasis on the movement aspect.[36] Nevertheless, it is difficult to accept the theory that Art. 301 is limited only to movement and not to trade at rest. The concept of 'trade at rest' has been countered by the Statement that "there is no rest for the businessmen; the essence of intercourse is coursing not sitting....."[37] There have been quite a few cases in which Courts have scrutinised under Art. 301 such aspects of trade, commerce and intercourse which may be regarded as "commerce at rest" and not "in motion".[38]

There thus appears to be no satisfactory way to explain the relation of the two Articles. A restriction on trade and commerce can be challenged under both these constitutional provisions. However, Art. 301 covers many interferences with trade and commerce which may not ordinarily come within Art. 19(1)(*g*), as for instance, levy of octroi. Freedom of trade and commerce is a wider concept than that of an individual's freedom to trade guaranteed by Art. 19(1)(*g*).

Article 19(1)(*g*) can be taken advantage of by a citizen, while Art. 301 can be invoked by a citizen as well as a non-citizen. Also, while Art. 19(1)(*g*) is not available to a corporate person, Art. 301 may be invoked by a corporation and even by a State on complaints of discrimination or preference which are outlawed by Art. 303, discussed below. In emergency,[39] Art. 19(1)(*g*) is suspended and so Courts may take recourse to Art. 301 to adjudge the validity of a restriction on commerce. In certain situations, only one of the two may be relevant, as for example, when there is no direct burden on a trade but it may be a restriction in terms of Art. 19(1)(*g*) read with Art. 19(6).

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33. *Supra*, footnote 30 above.
34. *Bapubhai v. State of Maharashtra*, AIR 1956 Bom 21; *Usman v. State*, AIR 1958 MP 33.
35. *Motilal v. State of U.P.*, AIR 1951 All 257. Also, *Saghir v. State of U.P.*, AIR 1954 All 257 and AIR 1954 SC 728 : (1955) 1 SCR 707; *Hotel Association of India v. Union of India (UOI)*. In The High Court of Delhi (Writ Petition (Civil) No. 4692/1999 -decided On: 12.01.2006).
36. *Atiabari Tea Co. v. State of Assam*, AIR 1961 SC 232 : (1961) 1 SCR 809; *Hansa Corp., infra*.
37. Rice, footnote 23, *supra*.
38. See, Sec. D., *infra*, under "*Trade, Commerce and Intercourse.*"
39. *Supra*, Ch. XIII, Secs. A and B.

In some other situations, both provisions may become applicable and it may be possible to invoke them both. Economic situations and conditions being unpredictable, it is not necessary to evolve any conceptualistic differentiation between the two Articles. Art. 301 is a mandatory provision and a law contravening the same is *ultra vires*, but it is not a Fundamental Right and hence is not enforceable under Art. 32.[40] But if the right under Art. 19(1)(*g*) is also infringed, then Art. 32 petition may lie.

There are three alternative situations:

(*i*) A provision may be valid under Arts. 301 to 304, but may be invalid under Art. 19(1)(*g*); or

(*ii*) it may be invalid under Arts. 301 to 304 as well; or

(*iii*) it may be invalid under Arts. 301-304, but not under Art. 19(1)(g) situations.

Article 32 petition will lie in situations (*i*) and (*ii*), but not in situation (iii).[41]

D. CONTENT OF ART. 301

Commenting on Art. 301, the Supreme Court has observed in *Atiabari*[42] that Art. 301 "is not a declaration of a mere platitude, or the expression of a pious hope of a declaratory character; it is not also a mere Statement of a Directive Principle of State Policy;[43] it embodies and enshrines a principle of paramount importance that the economic unity of the country will provide the main sustaining force for the stability and progress of the political and cultural unity of the country….."

The makers of the Constitution were fully conscious that it was absolutely essential to promote economic unity for the stability and progress of the federal polity in India.

The framers of the Constitution realized that in course of time different political parties having different economic programmes may come in power in different States. This may generate local and regional pulls and pressures in economic matters. The State Legislatures may be swayed, in response to local pressures, to take measures to take care of regional interests without any regard to their impact on the national economy as a whole. The object of Art. 301 is to obviate any such possibility and to ensure free movement of goods throughout the Indian territory which is essential for developing a national economy.

The scope and content of Art. 301 depends on the interpretation of three expressions used therein, *viz.*, 'trade, commerce and intercourse', 'free' and 'throughout the territory of India'.

(a) TRADE, COMMERCE AND INTERCOURSE

Explaining the word 'commerce' in the Commerce Clause of the U.S. Constitution, MARSHALL, C.J., Stated as early as 1824 in *Gibbons v. Ogden*[44] that

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40. *Ram Chandra Palai v. State of Orissa*, AIR 1956 SC 298 : 1956 SCR 28.
41. *S. Ahmad v. State of Mysore*, AIR 1975 SC 1443 : (1975) 2 SCC 131.
42. *Atiabari Tea Co. Ltd. v. State of Assam*, AIR 1961 SC 232 : 1961 (1) SCR 809.
43. See, *infra*, Ch. XXXIV, for discussion on Directive Principles of State Policy.
44. 5 Wheat, 1 (1824).

"commerce, undoubtedly, is traffic but it is something more; it is intercourse". The framers of the Indian Constitution, instead of leaving the idea of 'intercourse' to be implied by the process of judicial interpretation, expressly incorporated the same in Art. 301.

The words trade and commerce have been broadly interpreted. In most of the cases, the accent has been on the movement aspect. For example, in the *Atiabari* case, the Court emphasized: "Whatever else it (Art. 301) may or may not include, it certainly includes movement of trade which is of the very essence of all trade and is its integral part," and, further, that "primarily it is the movement part of the trade" which Art. 301 has in mind, that "the movement or the transport part of trade must be free," and that "it is the free movement or the transport of goods from one part of the country to the other that is intended to be saved."

Again, in *Madras v. Nataraja Mudaliar*,[45] the Court Stated that "all restrictions which directly and immediately affect the movement of trade are declared by Art. 301 to be ineffective." Nevertheless, cases are not wanting where movement has not been involved but other aspects of trade and commerce have been involved.

The view now appears to be well settled that the sweep of the concept 'trade, commerce and intercourse' is very wide and that the word trade alone, even in its narrow sense, would include all activities in relation to buying and selling, or the interchange or exchange of commodities and that movement from place to place is the very soul of such trading activities. In *Koteswar v. K.R.B. & Co.*,[46] the Supreme Court has held that a power conferred on the State Government to make an order providing for regulating or prohibiting any class of commercial or financial transactions relating to any essential article, clearly permits imposition of restrictions on freedom of trade and commerce and, therefore, its validity has to be assessed with reference to Art. 304(*b*).[47] In this case, a restriction on forward contracts was held to be violative of Art. 301. In *District Collector v. Ibrahim*,[48] the Supreme Court has invalidated under Art. 301 an attempt by a State to create by an administrative order a monopoly to deal in sugar in favour of co-operative societies. The order was issued while the proclamation of emergency was operative and so Art. 19(1)(*g*) could not be invoked.[49] The Court therefore took recourse to Art. 301. Price-control of a commodity may also amount to restriction on trade.[50]

Certain activities may not be regarded as trade, commerce or business although the usual forms and instruments are employed therein, as for example, gambling, and thus an Act restricting betting and gambling is not bad under Art. 301.[51] In this case, the Supreme Court held that the protection afforded by Art. 301 is confined to such activities as may be regarded as lawful trading activities and does not extend to activity which is *res extra commercium* and cannot be said to be trade.

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45. AIR 1969 SC 147 : (1968) 3 SCR 829.
46. AIR 1969 SC 504 : (1969) 1 SCC 255.
47. *Infra*, 1091 *et seq*.
48. AIR 1970 SC 1275 : (1970) 1 SCC 386.
49. *Supra*, Ch XIII, Sec. B; *infra*, Ch. XXXIII, Sec. F; *infra*, Ch. XXIV, Sec. H.
50. *Shree Meenakshi Mills v. Union of India*, AIR 1974 SC 366 : (1974) 1 SCC 468.
51. *State of Bombay v. R.M.D.C.*, AIR 1957 SC 699 : 1957 SCR 874; *supra*, Chs. X and XII.

The question raised in this case was concerned with the validity of a State law regulating lotteries *vis-a-vis* Art. 301. In this case, the Court expressed some sentiments suggesting that unlawful activities opposed to public morality and safety would not be regarded as trade and commerce. But the Court then resiled from this broad proposition saying that the wide proposition that a dealing against morals would not be business, involves the position that the meaning of the expression 'trade or business' would depend upon, and vary with, the general standards of morality accepted at a particular point of time in the country. Such an approach would lead to incoherence in thought and expression. The standards of morality can afford guidance to impose restrictions, but cannot limit the scope of the right.[52]

But again the Court has gone back to the proposition that no one has a right to trade in intoxicating liquors.[53]

Regulation by imposition of levies has recently been held liable to be imposed on the liquor trade more than any other activity since the former is considered inherently noxious, pernicious and res extra commercium. The Court went as far as saying that such levy was "necessary to regulate, by keeping out and excluding persons entering the liquor trade.[54] The Supreme Court has again asserted recently that lotteries contain an element of chance and not skill, and, thus, are of gambling nature. Accordingly, sale of lottery tickets cannot be regarded as 'Trade and Commerce' under Art. 301 so as to claim it as a 'free' trade like any other trade, even when it has the authority of law. "The authorisation under the Act [The Lotteries (Regulation) Act, 1998 enacted by the Centre] is solely for the purpose for the States to earn revenue."[55] The Court has observed:

> "….. we have no hesitation to hold that sale of lottery tickets organised by the State could not be construed to be trade and commerce and even if it could be construed to be so, it cannot be raised to the status of 'trade and commerce' as understood at common parlance or 'trade and commerce" as used under Art. 301."[56]

This means if restrictions are imposed on carrying of lotteries, no breach of Arts. 301 to 304 takes place.

In *Fatehchand v. State of Maharashtra*,[57] the Supreme Court considered the question whether the Maharashtra Debt Relief Act, 1976, was constitutionally valid *vis-a-vis* Art. 301. This depended on the further question whether money-lending to poor villagers which was sought to be prohibited by the Act could be regarded as trade, commerce and intercourse. The Court answered in the negative although it recognised that money-lending amongst the commercial community is integral to trade and is, therefore, trade. In relation to village people, the Court took into consideration the 'anti-social, usurious, unscrupulous' nature of money-lending. The Court thus Stated:

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52. *Krishna Kumar v. State of Jammu & Kashmir*, AIR 1967 SC 1368 : (1967) 3 SCR 50.
53. *P.N. Kaushal v. Union of India*, AIR 1978 SC 1457 : (1978) 3 SCC 558; *Khoday Distilleries Ltd. v. State of Karnataka*, AIR 1996 SC 911 : (1996) 10 SCC 304; *State of Punjab v. Devans Modern Breweries Ltd.*, (2004) 11 SCC 26, at page 83 : (2003) 10 JT 485.
54. *State of Punjab v. Devans Modern Breweries Ltd.*, (2004) 11 SCC 26, at page 105 : (2003) 10 JT 485.
55. *B.R. Enterprises v. State of Uttar Pradesh*, AIR 1999 SC 1867 : (1999) 9 SCC 700.
56. *Ibid.*, at 1903.
57. AIR 1977 SC 1825 : (1977) 2 SCC 670.

> "In short, State action defending the weaker sections from social injustice and all forms of exploitation and raising the standard of living of the people, necessarily imply that economic activities, attired as trade or business or commerce, can be de-recognised as trade or business."

The Court refused to accept the thesis that for purposes of Art. 301, the element of 'movement' was essential. The Court ruled that "dealings of banks and similar institutions having some nexus with trade, actual or potential, may itself be trade or intercourse."

(b) 'FREE'

The Supreme Court emphasized in *Atiabari*[58] that Art. 301 provides that the flow of trade shall run smooth and unhampered by any restriction either at the boundaries of the State, or at any other point inside the States themselves. The majority judgment emphasized that free movement and exchange of goods throughout the territory of India is essential for sustaining the economy and living standards of the country. Art. 301 guaranteeing freedom of trade and commerce and intercourse embodies and enshrines a principle of paramount importance that the economic unity of the country would provide the main sustaining force for the stability and progress of the political and cultural unity of the country.

The Court also ruled that Art. 301 includes freedom from tax laws as well. The Court emphasized that though the power to levy tax is essentially for the existence of the government, its exercise must inevitably be controlled by constitutional provisions and the taxing power is not outside the purview of any constitutional limitations. As the Supreme Court has observed in *India Cement v. State of Andhra Pradesh*:[59] "There can be no dispute that taxation is a deterrent against free flow. As a result of favourable or unfavourable treatment by way of taxation, the course of flow of trade gets regulated either favourably or adversely." Tax laws are not excluded from the scope of Art. 301. A tax which directly and immediately restricts trade will fall within the purview of Art. 301.

The word 'free' in Art. 301 cannot mean absolute freedom or that each and every restriction on trade and commerce is invalid. The Supreme Court has held in *Atiabari* that freedom of trade and commerce guaranteed by Art. 301 is freedom from such restrictions as directly and immediately restrict or impede the free flow or movement of trade.[60] Thus, a restriction which is indirect or inconsequential impediment on trade, commerce, or intercourse is not hit by Art. 301.

The test of direct and immediate restriction has been taken from Australia.[61] Therefore, Art. 301 would not be attracted if a law creates an indirect or inconsequential impediment on trade, commerce and intercourse which may be regarded as remote. In the words of GAJENDRAGADKAR, J., "…. it would be reasonable and proper to hold that restrictions to freedom from which is guaranteed by Art. 301, would be such restrictions as directly and immediately restrict or impede the free flow or movement of trade. Taxes may and do amount to restrictions; but it

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58. AIR 1961 SC 232 : (1961) 1 SCR 809; see, *infra*, note 58.
59. AIR 1988 SC 567 : (1988) 1 SCC 743, at 574.
60. *Atiabari*, *supra*, footnote 42.
61. *The Bank Nationalization case*, *supra*, footnote 9.

is only such taxes as directly and immediately restrict trade that would fall within the purview of Art. 301".[62]

The Supreme Court rejected the broad argument that all taxes should be governed by Art. 301 whether or not their impact on trade was mediate or immediate, direct or remote. The Court characterised the argument as "extreme". The Court emphasized that a "rational and workable" test to apply under Art. 301 would be: "Does the impugned restriction operate directly or immediately on trade or its movement?"

One of the arguments raised in *Automobile Transport* was that Arts. 301 and 303 must be read together. Art. 303 uses the words "by virtue of any entry relating to trade and commerce etc." It was argued that these words must be read into Art. 301. This would mean that Art. 301 should be construed as a fetter on the commerce power, *i.e.*, the power given to the Legislature to make laws under entries relating to trade and commerce only. This would mean that Art. 301 would not include taxing powers. The argument was that the freedom guaranteed by Art. 301 would not mean freedom from taxation. The Supreme Court rejected the contention that Arts. 301-305 applied only to legislation in respect of entries relating to trade and commerce and ruled that taxation was included therein.

The State of Karnataka enacted an Act to acquire transport carriages. The Act was challenged on the ground that it impugned on the subject of inter-State trade and commerce as it provided also for acquisition of transport carriages running on inter-State routes. The Supreme Court rejected the contention in *State of Karnataka v. Ranganatha Reddy*[63] saying that the incidental encroachment on the topic of inter-State trade and commerce, even assuming there is some, cannot invalidate the Act. The Supreme Court has emphasized that Art. 301 guarantees freedom from such restrictions as "directly and immediately" restrict or impede free flow of or movement of trade. A rule banned award of leases for quarrying black granite in favour of private parties. The rule was held not violative of Art. 301 as it did not "directly and immediately" restrict or impede "the free flow or movement of trade."[64] A provision would be bad if it imposes a restriction "directly and immediately" on the trade or commerce movement.

Tax laws are not excluded from the scope of Art. 301. A tax which directly and immediately restricts trade would fall within the purview of Art. 301.[65] As was observed by the Supreme Court in *Kalyani Stores v. State of Orissa*,[66] imposition of a duty or tax in every case does not tantamount *per se* to any infringement of Art. 301 of the Constitution. Only such restrictions or impediments which directly or immediately impede free flow of trade, commerce and intercourse fall within the prohibition imposed by Art. 301. A tax in certain cases may directly and immediately restrict or hamper the flow of trade, but every imposition of tax does not do so. Every case must be judged on its own facts and its own setting of time and circumstances.

The State of West Bengal levied a tax on despatches of tea from the State. The Supreme Court declared the tax to be invalid on constituting "a direct and imme-

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62. AIR 1961 SC 232 at 253-54 : (1961) 1 SCR 809.
63. AIR 1978 SC 215 : (1977) 4 SCC 471.
64. *State of Tamil Nadu v. Hind Stone*, AIR 1981 SC 711 : (1981) 2 SCC 205.
65. *Atiabari, supra; Khyerbari, infra.*
66. AIR 1966 SC 1686 : (1966) 1 SCR 865.

diate restriction on flow of trade and commerce in tea throughout the territory of India". The tax thus violated Art. 301 and could have been levied in accordance with the provisions of Art. 304(b). The Court also ruled that there was no entry in Lists II or III under which the State could have levied the tax in question. Further, the Court also ruled that the Centre had taken the tea industry under its control under the Tea Act, 1953. The Centre had also imposed a cess on tea produced in India. Therefore, the impugned State Legislation would be bad as it fell in a covered field.[67]

Commenting on Art. 301, the Supreme Court has observed in a recent case:[68]

> "Suffice it to say that it is only when the intra-State or inter-State movement of the persons or goods are impeded directly and immediately as distinct from creating some indirect or consequential impediment, by any legislative or executive action, infringement of the freedom envisaged by Art. 301 can arise. Without anything more, a tax law, *per se*, may not impair the said freedom. At the same time, it should be Stated that a fiscal measure is not outside the purview of Art. 301 of the Constitution."

From the trend of the case-law it appears that there is a greater readiness on the part of the Courts to characterise an impediment on movement of commerce as 'direct' and so hold it bad under Art. 301,[69] than the one not on movement which is usually held to be indirect or remote and so valid, *e.g.*, octroi,[70] sales tax,[71] purchase tax,[72] etc.

The Supreme Court has ruled that the imposition of sales tax on goods sold within the State cannot be considered as contravening Art. 301.[73] A question was raised whether levy of tax on sale or purchase of tendu leaves in the State of Madhya Pradesh at a higher rate than in the neighbouring States violated Art. 301 as it impeded free trade and commerce in tendu leaves throughout India. The Supreme Court rejected the contention with the remark that "an increase in rate of tax on a particular commodity cannot *per se* be said to impede free trade and commerce in that commodity." A tax may in certain cases directly and immediately restrict or hamper the flow of trade, but every imposition of tax does not do so. Each case has to be judged on its own facts and in its own setting of time and circumstances. In the instant case, no material was placed before the Court to show that the sales tax on tendu leaves had caused any decline in sales or purchase of tendu leaves.

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67. *Automobile Transport Ltd. v. State of Rajasthan*, AIR 1962 SC at 1424.
68. *Amrit Banaspati Co. Ltd. v. Union of India*, AIR 1995 SC 1340, 1343 : (1995) 3 SCC 335.
69. *Khyerbari Tea Co. v. State of Assam*, AIR 1964 SC 925 : (1964) 5 SCR 975.
70. *Transport Corp. of India v. Municipal Corp.*, AIR 1963 MP 253; *Orissa Ceramic Industries v. Jharsuguda Municipality*, AIR 1963 Ori 171; *City Municipality v. Mahado*, AIR 1967 AP 363.
Octroi is levied mostly by municipalities and it has been criticised on the ground that it creates trade barriers: *Financial Resources of Urban Local Bodies*, 48 (1965). Rajasthan High Court held octroi invalid in *Gauri Shanker v. Municipal Board*, AIR 1958 Raj 198.
Also see, Ch. XI, Sec. D.
71. *Andhra Sugars Ltd. v. Andhra Pradesh*, AIR 1968 SC 599 : (1968) 1 SCR 705.
Cf. *Derham*, *supra*, n. 22; also, *G.K. Krishnan v. State of Tamil Nadu*, AIR 1975 SC 583, 590 : (1975) 1 SCC 375.
72. *Walker Anjaria v. State of Rajasthan*, AIR 1969 Raj 162.
73. *Sodhi Transport Co. v. State of Uttar Pradesh*, AIR 1986 SC 1099 : (1986) 2 SCC 486.

But sales tax discriminating between goods of one State from those of another, may affect the free flow of trade and so offend Art. 301.[74] A tax levied by Parliament on inter-State sale would have offended Art. 301 as such a tax, in its essence, encumbers movement of trade or commerce because by its very definition an inter-State sale is one which occasions movement of goods from one State to another. Nevertheless, it was held valid because of Art. 302.[75]

Imposition of luxury tax on charges for accommodation provided in hotel or a lodging house does not infringe Art. 301. The tax in question was neither discriminatory nor it had any direct and immediate effect of impeding the freedom of intercourse. Only such taxes are hit by Art. 301 as have a direct and immediate effect of restricting the free flow of trade, commerce and intercourse. Not all taxes have such an effect. Art. 301 is against the creation of economic barriers and/or pockets which would stand against the free flow of trade, commerce and intercourse.[76]

It is well settled by a catena of decisions that trade in liquor is not a Fundamental Right. It is a privilege of the State. The State parts with this privilege for revenue consideration. The freedom guaranteed by Article 301 is not available to liquor because it is a noxious substance injurious to public health, order and morality. Therefore regulation in the interest of public health and order takes the case out of Art. 301; regulation for the purpose of Arti. 301 is not confined to such regulations which alone will facilitate the trade.[77]

The Supreme Court has emphasized that the freedom envisaged by Art. 301 can be infringed only when the intra-State or inter-State movement of persons or goods are impeded directly and immediately as distinct from creating some indirect or inconsequential impediment, by any legislative or executive action. Without any thing more, a tax law, *per se*, may not impair the freedom of trade. At the same time, it is to be noted that a fiscal measure is not outside the purview of Art. 301. A tax may, in certain cases, directly and immediately impede the movement or flow of trade, but the imposition of a tax does not do so in every case. It depends on the context and circumstances. Measures impeding the freedom of trade, commerce and intercourse may be legislative or executive and may be fiscal or non-fiscal. Freedom may be impeded by impediments on the individuals carrying on trade or business, on the business itself, or on the vehicles, carriers, instruments and labour used in trade and commerce.

Any one aggrieved by infringement of Art. 301 can seek his remedy from the Court against the offending legislative or executive action.

(c) THROUGHOUT THE TERRITORY OF INDIA

The view is definitely held now that Art. 301 applies not only to inter-State, but also to intra-State, trade and commerce as well, *i.e.*, trade within a State.[78]

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74. *Mehtab Majid & Co. v. State of Madras,* AIR 1963 SC 928; see, Sec. G(ii), *infra; A. Hajee Abdul Shukoor & Co. v. State of Madras,* AIR 1964 SC 1729 : (1964) 8 SCR 217.
75. *State of Madras v. Nataraja Mudaliar,* AIR 1969 SC 147 : (1968) 3 SCR 829; *Infra,* for Art. 302, Sec. G(i).
76. *Express Hotels (P.) Ltd. v. State of Gujarat,* AIR 1989 SC 1949 : (1989) 3 SCC 677.
77. *State of Punjab v. Devans Modern Breweries Ltd.,* (2004) 11 SCC 26 : (2003) 10 JT 485.
78. Shah, J., in *State of Madras v. Nataraja Mudaliar,* AIR 1969 SC 147 at 154 : (1968) 3 SCC 829.

This view is also supported by the wordings of Arts. 302 and 304 as is discussed below.[79]

The words "territory of India" in Art. 301 removes all inter-State or intra-State barriers, and bring out the idea that for the purpose of the freedom of trade and commerce, the whole country is one unit. Trade cannot be free throughout India if barriers exist in any part of India, be it inter-State or intra-State.

E. REGULATORY AND COMPENSATORY TAX

It has been Stated that Art. 301 does not confer absolute freedom from taxation in respect of trade, commerce and intercourse. A number of entries in the three Lists, *e.g.*, entries 89 and 92A in List I, entries 52, 54, 56 to 60 in List II and entry 35 in List III, confer taxing powers on the Centre and the States in relation to different aspects of trade, commerce and intercourse.[80] But taxation should not be used to erect barriers, tariff walls or impede free flow of trade and commerce. To reconcile the freedom of trade and commerce and the power of taxation, the Supreme Court has evolved the concept of regulatory and compensatory tax. This means that a regulatory or compensatory tax is not hit by Art. 301.

To smoothen the movement of inter-State trade and commerce, the State has to provide many facilities by way of roads etc. The concept of regulatory and compensatory taxation has been evolved with a view to reconcile the freedom of trade and commerce guaranteed by Art. 301 with the need to tax such trade at least to the extent of making it pay for the facilities provided to it by the State, *e.g.*, a road net-work and other infrastructural facilities.

The concept of regulatory and compensatory taxation has been applied by the Indian Courts to the State taxation under entries 56 and 57 of List II. Measures which impose compensatory taxes, or, are purely regulatory, do not fall with the purview of restrictions contemplated in Art. 301. The reason is that they facilitate, rather than hamper, the flow of trade and commerce.

In *Atiabari*,[81] a tax was levied by the State of Assam on the carriage of tea by road or inland waterways under entry 56, List II.[82] The Supreme Court held the tax bad for "the transport or movement of goods is taxed solely on the basis that the goods are thus carried or transported," and, thus, "directly affects the freedom of trade as contemplated by Art. 301." The purpose and object of the State Act in question was "to collect taxes on goods solely on the ground that they are carried by road or by inland waterways within the area of the State. That being so the restriction placed by the Act on the free movement of the goods is writ large on its face".[83]

The Supreme Court by majority took the view that the freedom guaranteed by Art. 301 would become illusory if the movement, transport, or the carrying of

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79. *State of Bombay v. R.M.D.C.*, AIR 1957 SC 699 : 1957 SCR 874; *Atiabari Tea Co. v. State of Assam, supra; State of Madras v. Nataraja Mudaliar, supra; Koteswar v. K.R.B.Co., supra.*

80. For these various entries, see, *supra*, Ch. X.

81. AIR 1961 SC 232 : (1961) 1 SCR 809.

82. See, *supra*, Ch. XI, Sec. D.

83. AIR 1961 SC at 254.

goods were allowed to be impeded, obstructed or hampered by the taxation without satisfying the requirements of Art. 302 to 304.[84] The Court did not take into consideration the quantum of the tax burden which by no means was excessive. Simply because the tax was levied on 'movement' of goods, from one place to another, it was held to offend Art. 301. The State could have passed the Act in question by following the procedure laid down in Art. 304(b).

The view propounded in *Atiabari* was bound to have great adverse effect upon the financial autonomy of the States. It would have rendered their taxing power under entries 56 and 57, List II, otiose. Accordingly, the matter came to be reconsidered by the Supreme Court in *Automobile Transport v. State of Rajasthan.*[85]

The State of Rajasthan levied a tax on motor vehicles (Rs. 60 on a motor car and Rs. 2,000 on a goods vehicle per year) used within the State in any public place, or kept for use in the State. The validity of the tax was challenged on the ground that it constituted a direct and immediate restriction on the movement of trade and commerce with and within Rajasthan as the tax placed a pecuniary burden on commercial activity, and so was hit by Art. 301.

The Supreme Court ruled by majority that the tax was not hit by Art. 301 as it was a compensatory tax having been levied for use of the roads provided for and maintained by the State. Taking the view that freedom of trade and commerce under Art. 301 should not unduly cripple State autonomy, and that it should be consistent with an orderly society, the Supreme Court now ruled that regulatory measures or compensatory taxes for the use of trading facilities were not hit by Art. 301 as these did not hamper, but rather facilitated, trade, commerce and intercourse. The Court observed that "regulatory measures or measures imposing compensatory taxes for the use of trading facilities do not come within the purview of restrictions contemplated by Art. 301…."

The Court emphasized that without compensatory taxes, the State cannot effectively maintain roads, waterways and airways, and the freedom declared by Art. 301 may then turn out to be an empty one. Similarly, regulations enabling free movement of traffic cannot be described as restrictions impeding the freedom.

A working test to decide whether a tax is compensatory or not would be to enquire whether the trades people are having the use of certain facilities for the better conduct of their business and paying not patently much more than what is required for providing the facilities. A tax does not cease to be compensatory because the precise or specific amount collected is not actually used in providing facilities.[86]

It is not necessary to put the money collected from the tax into a separate fund so long as the facilities for the trades people who pay the tax are provided and the expenses incurred in providing them are borne by the State out of whatever source it may be. Thus, to this extent, the majority view in *Atiabari* was now overruled by *Automobile*.

The concept of compensatory tax evolved in this case was something new as in *Atiabari*, the Court had dismissed the argument that the money realised

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84. See below.
85. AIR 1962 SC 1406 : (1963) 1 SCR 491.
86. *Sharma Transport v. Government of A.P.*, AIR 2002 SC 322 : (2002) 2 SCC 188.

through the tax would be used to improve roads and waterways rather curtly by saying that there were other ways, apart from the tax in question, to raise the money, and that if the said object was intended to be achieved by levying a tax on the carriage of goods, the same could be done only by satisfying Art. 304(*b*). Had the concept of compensatory tax been applied in *Atiabari*, it was possible that the tax might have been held valid.[87] Had the concept of direct restriction evolved in *Atiabari* been applied in *Automobile*, the tax in question would have been held invalid as there is no difference between a tax on carriage of goods as such and one on the instrumentalities used for the carriage of goods and passengers.

Since then the concept of regulatory and compensatory taxes has become established in India. This concept has been applied in several cases[88] and progressively the Courts have liberalised the concept so as to permit State taxation at a higher level. According to *Bolani*,[89] a compensatory tax is levied to raise revenue to meet the expenditure for making roads, maintaining them and for facilitating the movement and regulation of traffic.[90] Taxation on motor vehicles under entry 57, List II,[91] cannot exceed the compensatory nature which must have some nexus with the vehicles using the roads. The Courts have emphasized again and again that under this entry, tax on motor vehicles has to be compensatory in nature for the purpose of raising revenue to meet expenditure for making roads and maintaining them so as to facilitate movement of traffic.[92]

The regulatory and compensatory nature of the tax is that taxing power should be used to impose taxes on motor vehicles which use the roads in the State or are kept for use thereon. Thus, vehicles which do not use the roads (such as tractors, dumpers and rockers), or in any way form part of the flow of traffic on the roads which is required to be regulated cannot be taxed so long as they are working solely within the premises of their owners. Registration of such vehicles under the Motor Vehicles Act is not decisive for the purpose of levy of tax.

The State of Tamil Nadu increased the motor vehicles tax from Rs. 30 to 100 per seat per quarter and this was challenged as being violative of Art. 301. But the Supreme Court upheld the tax in *G.K. Krishnan v. State of Tamil Nadu*.[93] The Court Stated that "a compensatory tax is not a restriction upon the movement part of trade and commerce." The tax should not however go beyond "a proper recompense to the State for the actual use made of the physical facilities provided in the shape of a road".

The State of Gujarat imposed a tax on omnibuses used or kept for use in the State. If the vehicle in respect of which the tax had been paid in advance was not used for some time for reasons "beyond the control of the owner", the tax was to

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87. See S.N. Jain, *supra*, footnote 23.
88. See, *State of Assam v. Labanya Probha*, AIR 1967 SC 1575 : (1967) 3 SCR 611 and other cases mentioned here.
89. *Bolani Iron Ores v. State of Orissa*, AIR 1975 SC 17 : (1974) 2 SCC 777.
90. *Hardev Motor Transport v. State of M.P.*, (2006) 8 SCC 613, at page 621 : AIR 2007 SC 839.
91. See, *supra*, Ch. XI, Sec. D.
92. *Travancore Tea Co. Ltd. v. State of Kerala*, AIR 1980 SC 1547 : (1980) 3 SCC 619; *State of Karnataka v. K. Gopalakrishna Shenoy*, AIR 1987 SC 1911 : (1987) 3 SCC 655; *Kaushikbhai K. Patel v. State of Gujarat*, AIR 1999 Guj 84.
93. *G.K. Krishnan v. State of Tamil Nadu*, AIR 1975 SC 583 : (1975) 1 SCC 375.

be refunded on a proportionate basis. The High Court clarified that the tax on motor vehicles is a compensatory tax levied for use of the road and it is not a tax on ownership or possession of the motor vehicle. This means that the State cannot impose tax on motor vehicles for the purpose of raising revenue. The liability to pay tax cannot exceed the compensatory nature. The tax must have correlation with the use of the road by the vehicle. If a vehicle does not use the road, whatever the reason, it cannot be taxed. If the vehicle is not used, its owner can claim refund of tax paid by him in advance. An omnibus owner who pays the tax in advance is entitled to get refund of the tax for the period during which the vehicle was not put on the road. "The owner need not show that the non-user was on account of reason beyond his control. The insistence on proof of reasons beyond the control of the registered owner….. is beyond the legislative competence of the State".[1]

If a charge is imposed not for the purpose of obtaining a proper contribution to the maintenance and upkeep of the road, but for the purpose of adversely affecting trade or commerce, then it would amount to a restriction on the freedom of trade, commerce and intercourse. A meticulous equivalence between the facilities enjoyed by trade and the levy thereon is not necessary so long as the trade enjoys facilities for the better conduct of their business and they are paying not patently much more "nor is it necessary that there should be a separate fund or express allocation of money for the maintenance of roads to prove the compensatory purpose when such purpose is proved by alternative evidence."

In the instant case, the tax collections amounted to over Rs. 16 crores while the expenditure for the year amounted to Rs. 19.51 crores and this amount did not include the grants to local governments for the repair and maintenance of roads within their jurisdiction. The tax was thus held to be compensatory and hence valid.

An interesting point referred to by the Court in *Krishnan* was that, strictly speaking, a compensatory tax ought to be based on the nature and extent of the use made of the roads, *e.g.*, a mileage or a ton-mileage charge. But the Court did not insist on this approach because of the practical administrative difficulties in imposing a tax at a rate per mile. It is difficult to evolve a formula which will in all cases ensure exact compensation for the use of the road by vehicles having regard to their type, weight and mileage. "Rough approximation, rather than mathematical accuracy, is all that is required."[2] Validity of a tax must be determined not by way of a formula but rather by the result.

The Supreme Court somewhat liberalised the concept of a compensatory tax by upholding a State tax on passengers and goods carried on national highways. Haryana levied a tax on transporters plying motor vehicles between Delhi and Jammu and Kashmir. These vehicles use national highways which are maintained by the Centre, pass through Haryana without picking up or setting down any passenger in the State. The responsibility for constructing and maintaining of national highways rests on the Centre. It was therefore argued by the transporters that the tax levied by the State could hardly be regarded as compensatory. But the Court rejected the contention.[3]

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1. *Kaushikbhai K. Patel v. State of Gujarat, supra*, footnote 92.
2. This is also the approach adopted in the U.S.A.: see, *Howard Marf. v. Bingaman*, (1935) 298 US 407; *Aero Mayflower Transit Co. v. Board of R.R. Commrs.*, (1947) 332 US 497.
3. *International Tourist Corporation v. State of Haryana*, AIR 1981 SC 774 : (1981) 2 SCC 318. Also, *Manmohan Viz. v. State of Haryana*, AIR 1981 SC 1035 : (1981) 2 SCC 334.

The Court ruled that a State incurs considerable expenditure for maintenance of roads and providing facilities for transport of goods and passengers. Even in connection with national highways, a State incurs considerable expenditure not directly by constructing or maintaining them but by facilitating the transport of goods and passengers along with them in various ways such as lighting, traffic control, amenities for passengers, halting places for buses and trucks. That part of a national highway which lies within municipal limits is to be developed and maintained by the State. The Court thus found *sufficient nexus* between the tax and the passengers and goods carried on the national highways to justify the imposition.

However, the Court went on to state that to say that a tax is compensatory and regulatory is not to say that "the measure of the tax should be proportionate to the expenditure incurred on the regulation provided and the services rendered." If the tax were to be proportionate to the expenditure on regulation and service it would not be a tax but fee.[4] While fee is leviable according to the benefits received and the expenditure incurred, in case of a regulatory and compensatory tax it is practically impossible "to identify and measure, with any exactitude, the benefits received and the expenditure incurred and levy the tax according to the benefits received and the expenditure incurred.". What is necessary to uphold a regulatory and compensatory tax is "the existence of a specific, identifiable object behind the levy" and a 'nexus' between the 'subject and the object of the levy.' If that be so, then it is enough; it is not necessary to put the money realised from such a tax into a separate fund or that the levy be proportionate to the expenditure. There can be no bar to an intermingling of the revenue realised from regulatory and compensatory taxes and from other taxes of a general nature. There can be no objection to "more or less expenditure being incurred on the object behind the compensatory and regulatory levy than the realisation from the levy.[5]"

Again, the Supreme Court has asserted in the case noted below:[6] "The concept of 'regulatory and compensatory" tax does not imply mathematical precision of *quid pro quo*." The Court has thus relaxed the connection between the revenue raised from the tax and money spent on the activity.

In *Malwa Bus Service v. State of Punjab*,[7] the Supreme Court has further relaxed the concept of compensatory tax. In this case, in the year 1981, the State of Punjab substantially increased the rate of tax on every stage carriage plying for hire and transport of passengers. The rates adopted were Rs. 500 per seat per year subject to a maximum of Rs. 35,000 per bus irrespective of the distance over which it operated daily. According to the budget figures for 1981-82, the revenue receipts of the government from motor vehicles tax was Rs. 50 crores as against the expenditure of Rs. 34 crores. The tax was challenged on the ground that it

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4. *Supra*, Ch. XI, Sec. H.

5. However in *Jindal Stainless Ltd. (2) v. State of Haryana,* (2006) 7 SCC 241, at page 264 : AIR 2006 SC 2550.

Compensatory tax was described as a sub-class of fees (*infra*).

6. *State of Maharashtra v. Madhukar Balkrishna Badiya,* AIR 1988 SC 2062 : (1988) 4 SCC 290.

7. AIR 1983 SC 634 : (1983) 3 SCC 237.

In *Ambala Bus Syndicate (Pvt.) Ltd. v. State of Punjab*, AIR 1983 P&H 220, the High Court upheld the same tax.

Also see, *B.A. Jayaram v. Union of India,* AIR 1983 SC 1005 : (1984) 1 SCC 168; *K. Mahadevappa v. State of Karnataka,* AIR 1982 Kant 113.

was not compensatory as the government was using it for augmenting its general revenues. But the Supreme Court upheld the tax as compensatory. A charge which is compensatory in nature is not inconsistent with the concept of freedom of trade and commerce.

Describing the principle underlying such a tax, the Court said: "What is essential is that the burden should not disproportionately exceed the cost of the facilities provided by the State." An exact correlation between tax receipts and expenditure incurred on providing facilities for smooth transport service cannot be insisted upon because "such exact correlation is in the very nature of things impossible to attain." There may be in some cases a little excess recovery by way of taxes. "That by itself should not result in the nullification of the law imposing the tax if the extent of such excess is marginal having regard to the total cost involved."

In the instant case, however, the budget expenditure on the roads and bridges did not include the expenditure incurred by the State on other heads connected with road transport, such as, the directorate of transport, transport authorities, provision for bus stands, lighting, traffic police, grants to local authorities. Taking all this expenditure into account, it became clear that a substantial part of the levy on motor vehicles was being spent annually on providing facilities to motor vehicles operators. The Court also pointed out that in later years, the government expenditure on roads and bridges had substantially increased. It also said that the figures of income and expenditure for only one year might present a distorted picture. In this case, cumulative figures of receipts and expenditure for nine years (1973-1982) presented a truer picture. Ultimately, the Court asserted that it has "the ultimate power to decide" whether in truth and substance a tax is compensatory in nature or not.

A further dimension has been given to the concept of compensatory tax by the Supreme Court in *Meenakshi v. State of Karnataka*.[8] Karnataka enhanced tax on passenger vehicles and it was challenged under Art. 301 on the ground that the underlying purpose behind the enhancement was to make good the loss in general revenue suffered as a result of the abolition of octroi and not to collect more revenue for facilitating trade, commerce and intercourse. The Supreme Court rejected the contention arguing that abolition of octroi facilitates movement of goods and passengers and gives a fillip to trade, commerce and intercourse. Abolition of octroi was welcome in trade and business circles. Therefore, the enhanced tax not only 'does not lose the character of being compensatory on the ground that it was enhanced to compensate the loss suffered by the State in its revenues on account of abolition of octroi but as a matter of fact on this very ground it acquires the character of being compensatory." Thus, abolition of octroi was in itself regarded as a facility granted by the State for free flow of inter-State and intra-State trade, commerce and intercourse.

The Bombay Motor Vehicles Tax Act, 1958, levied one time tax at 15 times the annual rate on all motor cycles used or kept for use in the State. Provision was made for refund of the tax in cases where (a) the vehicle was removed outside the State, and (b) the registration of vehicle is cancelled due to scrapping of the vehicle, or for a similar reason. The Supreme Court held the tax to be valid as being "the regulatory and compensatory" in nature. The Court emphasized that

8. AIR 1983 SC 1283 : 1984 Supp SCC 326.

the concept of "regulatory and compensatory" tax "does not imply mathematical precision of *quid pro quo*".[9]

A tax was levied in Gujarat on all omnibuses which were exclusively used or kept for use in the State as contract carriages. The Supreme Court upheld the tax as being compensatory in nature. The Supreme Court has explained in *Maharaja Tourist Service v. State of Gujarat*[10] that to uphold a tax on the basis of its being compensatory, existence of *nexus* between the subject and object of the levy is necessary. However, it is not necessary to show that the whole or a substantial part of the tax collected is utilised. The State is free to determine the rate of tax keeping in view the guideline that the tax is compensatory or regulatory.

The above judicial pronouncements do however show that, in practice, it is very difficult to successfully challenge a levy on motor vehicles. The Supreme Court will invalidate such a levy only when the tax receipts are far in excess of the permissible expenditure. The nature of the tax has also changed. To begin with, the tax was justified on the ground of being a fair recompense for the use of facilities provided by the State. Now anything which smoothens inter-State trade and commerce falls within the compass of 'compensatory' tax. The States have thus secured a good deal of freedom to impose taxation on motor vehicles under entries 56 and 57 of List II.[11]

It may be of interest to know that in Australia, the cost of road-construction is not to be met from a compensatory tax.[12] This is to keep the incidence of taxation on inter-State commerce very low. But the same is permissible in the U.S.A.[13] In India, such capital cost has been included in the concept of a compensatory tax. Also, in India, so far no argument of excessive taxation on trade and commerce has been successful with the Supreme Court.

The Supreme Court progressively liberalized the concept of a "compensatory and regulatory" tax in course of time in *Bhagatram*,[14] the Court has observed "The concept of compensatory nature of tax has been widened and if there is substantial or even some link between the tax and the facilities extended to such dealers, directly, or indirectly the levy cannot be impugned as invalid."

The Supreme Court further liberalized the concept in its pronouncement in *State of Bihar v. Bihar Chamber of Commerce*.[15] The Bihar Legislature levied a tax on entry of goods into a local area for consumption, use or sale therein at a rate, not exceeding 5%, as may be specified by the State Government. The tax fell under Entry 52, List II. The question was whether the tax was hit by Art. 301. As the tax was levied upon the entry of goods into a local area, it was a tax on the movement of goods so the question was raised whether the tax was compensatory in nature. The Supreme Court held the tax valid as being compensatory in nature.

The significant point to note is that nowhere such a nexus between the levy and the provisions of such facilities was mentioned. The State produced no mate-

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9. *State of Maharashtra v. Madhukar Balkrishna Badiya*, AIR 1988 SC 2062 : (1988) 4 SCC 290.
10. AIR 1991 SC 1650 : 1992 Supp (1) SCC 489.
11. *Supra*, Ch. XI, Sec. D.
12. *Hughes & Vale Pty. Ltd. v. New South Wales*, (1955) 93 C LR 127.
13. *Capital Greyhound Lines v. Brice*, 339 US 542 (1950); *Interstate Transit Inc. v. Dick Lindsay*, 283 US 183 (1930).
14. *Bhagatram Rajeev Kumar v. Commr. of Sales Tax*, (1995) 96 STC 645.
15. AIR 1996 SC 2344 : (1996) 9 SCC 136.

rial to establish that the levy was of a compensatory and regulatory in nature. But the Court held this circumstance as being of "no consequence" for the reason that the Court can take "notice" of the fact that the State does provide several facilities to the trade including laying and maintenance of roads, water-ways and markets, etc. The Court observed in this connection:

> "As a matter of fact, since the levy is by the State, we must also look to the facilities provided by the State for ascertaining whether the State has established the compensatory character of the tax. On this basis it must be held that the State has established that the impugned tax is compensatory in nature."[16]

The Court also ruled:

> "It is not and it cannot be stipulated that for the purpose of establishing the compensatory character of the tax it is necessary to establish that every rupee collected on account of the entry tax should be shown to be spent on providing the trading facilities. It is enough if some connection is established between the tax and the trading facilities provided. The connection can be a direct one or an indirect one…"[17]

The Court further maintained that judicial notice can be taken of the fact that the State does provide general facilities to the trade including laying and maintenance of roads, waterways and markets, etc.

On this basis, it became difficult to challenge any tax as being invalid under Art. 301 as the Court can assume that there exists, an "indirect" "nexus" between the tax and the facilities provided by the State to trade and commerce.

The concept of 'compensatory tax' has been borrowed from Australia where it has been evolved to dilute somewhat the rigours of Section 92.[18] Now there is one basic difference between the Indian and the foreign models. In Australia, Section 92 admits of no exception; if a law imposes a restriction on trade, it is just unconstitutional. In this context, the Courts have evolved the test of compensatory tax to loosen the rigours of Section 92. Similarly, in the U.S.A., the States have conceded some power to tax inter-State commerce as against the constitutional protection given to such commerce to help them to raise some funds to maintain roads, etc. Therefore, the concept of compensatory tax has been adopted to make inter-State commerce pay its way.[19]

In India, on the other hand, Art. 301 is not absolute in the sense that Arts. 302 to 304 provide exceptions to it. A State wishing to restrict freedom of trade has only to follow the conditions laid down in Art. 304(b). The question, therefore, arises: when the Constitution itself provides a mechanism to impose restrictions on freedom of trade, is it necessary to adopt other concepts for the same purpose from foreign systems which operate in a very different context? The basic reason for propounding the theory of compensatory taxes appears to be to free the States, to some extent, from the restraints of Art. 304(b). One of these requirements is to have Central consent to their laws restricting trade and commerce.

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16. *Ibid*, at 2349.
17. *Ibid.* See also *State of H.P. v. Yash Pal Garg*, (2003) 9 SCC 92 : (2003) 4 JT 413; *Widia (India) Ltd. v. State of Karnataka*, (2003) 8 SCC 22 : AIR 2003 SC 3095; *Geo Miller & Co. (P) Ltd. v. State of M.P.*, (2004) 5 SCC 209 : AIR 2004 SC 3552; *State of Bihar v. Shree Baidyanath Ayurved Bhawan (P) Ltd.*, (2005) 2 SCC 762 : AIR 2005 SC 932.
18. *Freightlines ad Construction Holding Ltd. v. New South Wales*, (1968) AC 625.
19. *Aero Mayflower Transit Co. v. Board of R.R. Commrs*., 33 2 US 497 (1947).

This has been done on the ground that otherwise State autonomy would be greatly compromised. This is, therefore, a judicial attempt to make the Indian Constitution more federal than what its framers had envisaged it to be.

In the *Krishnan* case,[20] the Court raised the question whether a non-discriminatory tax levied by a State should be regarded as a restriction on trade and commerce because of the feeling that this would curtail State autonomy to levy taxes falling in the State legislative sphere. In the last edition of this book, it was stated:[21]

> "The danger however is that the States may be tempted to impose high taxes on inter-State commerce under regional pressures thus injuring the national economic fabric. The Courts may find it difficult to police the area of State taxation of trade and commerce. The way for a high level of taxation on road transport will be cleared if, in assessing whether a tax is compensatory or not, it relates the revenue accrued to the total expenses on construction and maintenance of roads. Nevertheless, the danger of high taxation on road transport looms large on the horizon. Requirement of Presidential assent would have contained this danger to some extent as the Centre at the time of assenting to State bills could consider whether the road transport could bear the proposed tax or not. It could have also secured a co-ordination in the State taxation by using this power. As it is, the Centre can now achieve any desired results in the area of taxation of road transport not under Art. 304(*b*) but only by enacting a law under entry 35, List III."[22]

This danger turned out to be true as the above cases show. Road transport was heavily taxed in some of the States.

Since the concept of compensatory tax has been judicially evolved as an exception to the provisions of Article 301 and as the parameters of this judicial concept had become blurred, particularly by reason of the decisions in *Bhagatram* and *Bihar Chamber of Commerce*, the Constitution Bench in *Jindal Stainless Ltd. (2) v. State of Haryana*[23] clarified the differences between exercise of taxing and regulatory Power and between "a tax", "a fee" and "a compensatory tax", and held that the test of "some connection" as propounded in Bhagatram case is not applicable to the concept of compensatory tax and accordingly, overruled the judgments of this Court in *Bhagatram Rajeevkumar v. CST and State of Bihar v. Bihar Chamber of Commerce* to that extent. The decision lays down the parameters of the concept of compensatory tax *vis-a-vis* Article 301 as follows:

(i) Compensatory tax is a compulsory contribution levied broadly in proportion to the special benefits derived to defray the costs of regulation or to meet the outlay incurred for some special advantage to trade, commerce and intercourse.[24]

(ii) The quantifiable benefit is represented by the costs incurred in procuring the facility/services, which costs in turn become the basis of reimbursement/ recompense for the provider of the services/facilities…It is a sub-class of "a fee".

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20. *G.K. Krishnan v. State of Tamil Nadu*, AIR 1975 SC 583 : (1975) 1 SCC 375.
21. III ed. (1978) at 361.
22. For entry 35, List III, see, *supra*, Ch. XI, Sec. E.
23. (2006) 7 SCC 241 : AIR 2006 SC 2550.
24. (*Ibid*) at page 268.

(iii) The impugned enactment must facially or patently indicate quantifiable data on the basis of which the compensatory tax is sought to be levied and indicate the benefit which is quantifiable or measurable. If it does not, the burden will be on the State as a service/facility provider to show by placing the material before the Court, that the payment of compensatory tax is reimbursement/ recompense for the quantifiable/measurable benefit provided or to be provided to its payer(s).[25]

F. REGULATORY MEASURES

Regulatory measures are not regarded as violative of the freedom guaranteed by Art. 301. The word 'free' in Art. 301 does not mean freedom from such regulation as is necessary for an orderly society. Regulatory measures do not fall within the purview of the restrictions contemplated by Art. 301. As the Supreme Court has observed: "There is a clear distinction between laws interfering with freedom to carry out the activities constituting trade and laws imposing on those engaged therein rules of proper conduct or other restraints directed to the due and orderly manner of carryingout the activities".[26]

As regards regulatory measures, these may be of diverse nature or of various kinds such as traffic regulations, filing of returns, making of declarations, regulation of hours equipment, weight, size of load, lights, traffic laws, etc. These are some examples of regulatory laws which are not hit by Art. 301.[27] Regulations like rules of traffic facilitate exercise of freedom of trade and commerce whereas restrictions impede that freedom. It is for the Court to decide whether a provision purporting to regulate trade and commerce is in fact regulatory or restrictive of the freedom guaranteed under Art. 301. Similarly, regulation in the interest of public health and order takes the case out of Article 301, and regulation for the purpose of Article 301 is not confined to such regulations alone which will facilitate the trade.[28] Such measures cannot be challenged unless they are shown to be of a colourable nature designed to restrict the free flow of trade, commerce and intercourse.

In the case noted below,[29] the State of Bihar made a law introducing a system of declarations to be made by transporters of goods through the State. This was done to prevent evasion of sales tax. The Supreme Court ruled that the measure was merely of a regulatory nature and does not prohibit or impede transportation

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25. *(Ibid)*, at page 268. See also *Hardev Motor Transport v. State of M.P.*, (2006) 8 SCC 613 : AIR 2006 SC 839; Opportunity was given to the States to bring relevant material on record to justify the levy, *Jindal Stainless Ltd. (3) v. State of Haryana*, (2006) 7 SCC 271 : AIR 2006 SC 3127*; K.A. Jose v. R.T.O.*, 2008(1) KLJ 128; *Bharat Earth Movers Ltd. v. The State of Karnataka*, 2007(3) MPHT 69.

26. *G.K. Krishnan v. State of Tamil Nadu*, AIR 1975 SC 583, 587 : (1975) 1 SCC 375.
Also, *Automobile Transport v. State of Rajasthan*, AIR 1962 SC 1406 : (1963) 1 SCR 491; *Assam v. Labanya Probha*, AIR 1967 SC 1575 : (1967) 3 SCR 611; *S. Ahmed v. State of Mysore*, AIR 1975 SC 1443 : (1975) 2 SCC 131. See also *Jindal Stainless Ltd. (2) v. State of Haryana*, (2006) 7 SCC 241 : AIR 2006 SC 2550.

27. *G.K. Krishnan, supra.*

28. *State of Punjab v. Devans Modern Breweries Ltd.*, (2004) 11 SCC 26, at page 103 : (2003) 10 JT 485.

29. *State of Bihar v. Harihar Prasad*, AIR 1989 SC 1119 : (1989) 2 SCC 192.

of goods. On the other hand, it was designed to facilitate the movement of goods throughout the State.[30]

The word "regulation" does not have any fixed or inflexible meaning. It is difficult to define this word as it has no precise meaning. It is a word of broad import, having a broad meaning and is very comprehensive in scope. Every case has to be judged on its own facts and in its own setting of time and circumstances. It may be that in some situations even a 'prohibition' may be regarded as being regulatory in nature and not hit by Art. 301.

A rule banning movement of forest produce within the State between 10 p.m. and sunrise was held to be void under Art. 301 as it was held to be "restrictive" and not "regulatory" in time.[31]

In a number of cases, prohibitions imposed under the Essential Commodities Act, 1955, on the movement of "essential commodities" from the State to any place outside have been validated by being characterised as "regulatory" in nature. In *Ramanathan*,[32] a total ban imposed on the movement of paddy from a few districts in Tamil Nadu to any place outside was held to be "regulatory" in nature and so it was not hit by Art. 301. The Court justified the ban as follows:

> "The placing of such ban on export of food stuffs across the State or from one part of the State to another with a view to prevent outflow of food stuffs from a State which is a surplus State prevents the spiral rise in prices of such foodstuffs by artificial creation of shortage by unscrupulous traders."

In *Bishamber Dayal*,[33] the Supreme Court held that complete prohibition on movement of wheat from one State to another under S. 3(2)(d) of the Essential Commodities Act, 1955, was regulatory in character and did not amount to restriction within Arts. 301 or 304 of the Constitution.[34]

The State of Tamil Nadu declared timber as an "essential" commodity and prohibited its movement from the State to any place outside under the Essential Commodities Act. Characterising the prohibition as regulatory in nature and not restrictive so as to attract Arts. 301 or 304 of the Constitution, the Supreme Court observed:[35]

> "According to us, the expression 'free trade' cannot be interpreted in an unqualified manner. Any prohibition on movement of any article from one State to another has to be examined with reference to the facts and circumstances of that particular case—whether it amounts to regulation only, taking into consideration the local conditions prevailing, the necessity for such prohibition and what public interest is sought to be served by imposition thereof."

Under the Essential Commodities Act, imposition of complete prohibition on the movement of the essential commodities from one State to another in some

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30. Also see, *Sodhi Transport Co. v. State of Uttar Pradesh,* AIR 1986 SC 1099 : (1986) 2 SCC 486.

31. *State of Mysore v. Sanjeeviah,* AIR 1967 SC 1189 : (1967) 2 SCR 361. However it is doubtful whether this decision is still good law. See *State of Tripura v. Sudhir Ranjan Nath,* (1997) 3 SCC 665, at page 677 : AIR 1997 SC 1168.

32. *K. Ramanathan v. State of Tamil Nadu,* AIR 1985 SC 660 : (1985) 2 SCC 116.

33. *Bishaber Dayal Chandra Mohan v. State of Uttar Pradesh,* AIR 1982 SC 33 : (1982) 1 SCC 39.

34. Also see, *Krishan Lal Praveen Kumar v. State of Rajasthan,* AIR 1982 SC 29 : (1981) 4 SCC 550.

35. *State of Tamil Nadu v. Sanjeetha Trading Co.,* AIR 1993 SC 237, 243 : (1993) 1 SCC 236.

circumstances may be treated as regulation and not restriction for "the situations prevailing in any particular State may require complete prohibition on the movement of any essential article or commodity outside the State".

The matter may however be different when a total prohibition is imposed on the movement of goods or articles from one State to another which have not been declared to be essential commodities. In such a case, the State imposing the ban "has to satisfy the Court that in spite of total prohibition it amounts only to regulation of the trade in such articles or even if it was restriction it was reasonable within the meaning of Art. 304(b) of the Constitution and has been imposed by law as required by Art. 304(b)."

Protection of regional interests for political end and not in public interest is not permissible. In *Sanjeetha,*[21] the prohibition was imposed for arranging the supply of timber at fair price and for equitable distribution thereof.

G. EXCEPTIONS TO FREEDOM OF TRADE AND COMMERCE

No freedom can be absolute as absolute freedom of trade, commerce and intercourse may lead to economic confusion and it may degenerate into a self-defeating licentiousness in trade and commerce. The framers of the Constitution realised that under some circumstances freedom of trade and commerce may have to be curbed or curtailed. Therefore, the wide amplitude of the freedom granted by Art. 301 is expressly limited by Arts. 302 to 305. The exceptions to Art. 301 are:

(1) Parliament is given power to regulate trade and commerce in public interest under Art. 302 subject to Art. 303.

(2) The State Legislatures are given power to regulate trade and commerce under Art. 304 subject to Art. 303.

(3) Art. 305 protects existing laws from the operation of Arts. 301 and 303.

(4) Art. 305 also saves nationalization laws from the operation of Art. 301.

The purport of these provisions is two-fold. One, Parliament is entitled by itself to impose restrictions on trade and commerce. Two, the power of the States to do so is restricted. The Centre can prevent a State from imposing a restriction if it is against national interest.

Before, however, Arts. 302 to 304 come into play, the Court has to decide whether the 'restriction' imposed is of a 'regulatory' nature or not. As Stated above, if it is of a regulatory nature, its validity need not be assessed with respect to any of the constitutional provisions contained in Arts. 302 to 304.

(i) PARLIAMENTARY POWER TO REGULATE TRADE AND COMMERCE

(a) ARTICLE 302

Article 302 empowers Parliament to impose by law such restrictions on the freedom of trade, commerce and intercourse between one State and another, or within any part of the territory of India, as may be required in the public interest.

By virtue of Art. 302, Parliament is, notwithstanding the protection conferred by Art. 301, authorised to impose restrictions on the freedom of trade, commerce and intercourse in the public interest. Thus, Art. 302 relaxes the restriction imposed by Art. 301 in favour of Parliament.

The reference in Art. 302 to restriction on the freedom of trade within any part of the territory of India as distinct from freedom of trade between one State and another clearly indicates that the freedom granted by Art. 301 covers both intra-State as well as: inter-State commerce and trade, as Art. 302 is in the nature of an exception to Art. 301.

As the Supreme Court has observed in *Nataraja Mudaliar*: "Art. 301 does not merely protect inter-State trade or operate against inter-State barriers: all trade is protected whether it is inter-State or intra-State by the prohibition imposed by Art. 301". Accordingly, under Art. 302, Parliament can impose restrictions on both inter-State as well as intra-State commerce. Inter-State and intra-State trading activities often have intimate inter-relationship.

A question has been raised whether Parliament should have power to regulate intra-State commerce and whether or not this matter should belong exclusively to the States. The Sarkaria Commission has justified the present position in the following words:[36]

> "The need for empowering Parliament to place restrictions on trade and commerce even within a State is obvious. Ours is a vast country with varying economic potentiality and considerable differences in regard to existing levels of development. The Union's responsibility in respect of certain matters may, therefore, entail regulating trade and commerce even within a State for achieving national objectives. For example, there is the need to protect the interests of the weaker sections of our community like the tribal people etc. Indiscriminate exploitation of natural resources in one State, for example, denudation of forests, may have far reaching implications for other States which may be affected by floods, silting up of reservoirs, etc. Such situations may require imposition of restrictions on trade even within the State. The importance of Parliamentary control over intra-State trade is also significant where centres of production of certain commodities are situated entirely within a State but the centres of consumption are located outside the State."

The requirement of 'public interest' in Art. 302 would not present any serious problem in the way of Parliament regulating trade and commerce because of the strong presumption in favour of Parliamentary legislation being in public interest. The majority judgment in *Atiabari*[37] even suggested that *prima facie* the question of public interest underlying a Parliamentary law imposing restrictions on the freedom of trade 'may not be justiciable'. If this be the correct approach, then Parliament's power to decide what restrictions need be imposed under Art. 302 may be said to be practically unlimited. But the correctness of this view was doubted later by the Supreme Court in *Khyerbari*.[38] In case of Art. 19(1)(g),[39] the concept of public interest is justiciable and there appears to be no reason why Art. 302 should be treated differently. From a practical point of view, however, to hold 'public interest' as justiciable may not mean much for it is rare for a

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36. *Sarkaria Commission Report*, 502 (1988).
37. *Atiabari Tea Co. v. State of Assam*, AIR 1961 SC 232 : (1961) 1 SCR 809; *supra.*
38. *Khyerbari Tea Co. v. State of Assam*¸AIR 1964 SC 925 : (1964) 5 SCR 975; *supra.*
39. *Infra*, Ch. XXIV, Sec. H.

Court to hold that a legislation lacks public interest. A person challenging the law will have to show to the Court why it is not required in the public interest, and this, indeed, is a difficult task except in the rare case where the law is seen on its face to have been passed for a private purpose.[40]

In *Nataraja*[41], the Supreme Court has asserted that "there can be no doubt that exercise of the power to tax may normally be presumed to be in the public interest." It thus means that the presumption can be rebutted by a person challenging a particular tax but the onus is indeed extremely difficult to discharge. In *Nataraja*, the Court said that the presumption was that the imposition of the tax was in public interest. This had not been offset by any contra material in the instant case.

Under the Central Sales Tax Act, an inter-State sale to an unregistered dealer is to be taxed at 10 per cent, or at the rate applicable in the concerned State to intra-State sales whichever is higher. This was challenged under Art. 301. It was argued in *State of Madras v. Nataraja Mudaliar*[42] that the provision in the Central Sales Tax Act authorised the imposition of varying rates of taxation in different States on similar inter-State transactions; this resulted in inequality in tax burden which impeded inter-State trade, commerce and intercourse, and, therefore, it infringed Art. 301. The Supreme Court rejected the argument and observed:

> "The Central Sales tax though levied for and collected in the name of the Central Government is a part of the sales tax levy imposed for the benefit of the States. By leaving it to the States to levy sales tax in respect of a commodity on inter-State transactions no discrimination is practised: and by authorising the State from which the movement of goods commences to levy on transactions of sale Central Sales Tax, at rates prevailing in the State…. no discrimination can be deemed to be practised."

Again, the validity of S. 8(2)(b) of the Central law was challenged which authorises levy of 10% or at the rate prevailing in the State. The challenge was mounted under Arts. 301 and 303.

But the Central Sales Tax Act was justified under Art. 302 under which "the Parliament is, notwithstanding the protection conferred by Art. 301, authorised to impose restrictions on the freedom of trade, commerce or intercourse in the public interest."

The Supreme Court again rejected the challenge in *State of Tamil Nadu v. Sitalakshmi Mills*[43] saying that the provision was made to prevent evasion of tax and so it was "a measure in the public interest," and, therefore, Parliament was competent to make it under Art. 302, even if it imposed restrictions on inter-State commerce. Even if it be assumed that the tax at the higher rate levied by Parliament imposed restrictions on freedom of trade and commerce as Parliament was competent to impose restrictions on that freedom in public interest, and "as the imposition of a tax is normally presumed in the public interest," the provision was not bad as violating Art. 301.

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40. Derham, Problems in Part XIII of the Const., 1 *JILI*, 523, 526.
Also see, *infra*, Sec. G(ii), under Art. 304.
41. *State of Madras v. Nataraja*, AIR 1969 SC 147 : (1968) 3 SCR 829; *supra.*
42. AIR 1969 SC 147 : (1968) 3 SCR 829.
43. AIR 1974 SC 1505, 1509 : (1974) 4 SCC 408.

The Essential Commodities Act has been held to impose reasonable restrictions on the right to carry on trade and commerce as guaranteed by Arts. 19(1)(*g*) and 301.[44] Payment of statutory minimum bonus even when the management has sustained a loss has been held to be reasonable and in public interest within Art. 19(6) and Art. 302. Directive Principles of State Policy are fundamental to the governance of the country and, therefore, what is ordained as State policy cannot be regarded as unreasonable or contrary to public policy. Payment of bonus being in implementation of Arts. 39 and 43 is reasonable.[45]

Article 302 does not speak of 'reasonable' restrictions, yet it has been observed by the Supreme Court in *Prag Ice Mills*[46]: "Although Article 302 does not speak of reasonable restrictions yet it is evident that the restrictions contemplated by it must bear a reasonable nexus with the need to serve public interest."

In several cases,[47] where the constitutional validity of a law imposing restrictions under Art. 302 has been challenged, the Supreme Court has applied the test of reasonableness to uphold the validity of those restrictions. Therefore, the concept of reasonableness has been impliedly introduced into Art. 302. Further, whenever a restriction is challenged, an additional ground raised is that it is inconsistent with Art. 19(1)(*g*).[48] This inevitably brings in the question of reasonableness of the restriction.

Acting under rule 8C of the Tamil Nadu Minor Mineral Concessions Rules, 1959, formulated under the Mines and Mineral (Regulation and Development) Act, 1957, a parliamentary law, the Tamil Nadu Government banned leases for quarrying black granite in favour of private persons. The Central Act and the Concession Rules were challenged under Art. 301 as violating the freedom of trade and commerce. In *State of Tamil Nadu v. Hind Store*,[49] the Supreme Court upheld both. The Act being a regulatory measure for the conservation and discriminate exploitation of the mineral resources of the country and so was outside the purview of Art. 301. Even otherwise, under Art. 302, Parliament is enabled to impose restrictions on freedom of trade and commerce necessary in the public interest and the impugned Act was a law enacted in the public interest. The rule in question was made by the State Government under the said Act and so became its 'part and parcel'. Consequently, said the Court, "statutory rules made pursuant to the power entrusted by Parliament are law made by Parliament within the meaning of Article 302."[50]

Parliament enacted the Municipal Corporation Act, 1957, and empowered the Corporation to levy terminal tax on all goods carried by railway or road in the Union Territory of Delhi from any place outside thereof. The Supreme Court declared the levy valid on two alternative grounds, *viz.*,

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44. *Bishamber Dayal Chandra Mohan v. State of Uttar Pradesh*, *supra*. Similarly a law prohibiting the manufacture of and trade in electrical items without conforming to specified standards is not violative of Articles 302 and 303.See *Sri Balaji Industries v. Union of India (UOI)*, AIR 2007 Kant 118.
45. *Jalan Trading Co. (P) Ltd. v. D.M. Aney*, AIR 1979 SC 233 : (1979) 3 SCC 220.
46. *Prag Rice & Oil Mills v. Union of India*, AIR 1978 SC 1296, 1302 : (1978) 3 SCC 459.
47. *Manick Chand Paul v. Union of India*, AIR 1984 SC 1249 : (1984) 3 SCC 65.
48. For discussion on Art. 19(1)(g), see, *infra*, Ch. XXIV, Sec. H.
49. AIR 1981 SC 711 : (1981) 2 SCC 205.
50. *Ibid*, at 720.

(1) It does not impose any direct and immediate impediment on the inter-State movement of goods and so was not hit by Art. 301 which only hits direct and immediate impediments on intra-State or inter-State movement of goods or persons. "It is true that a tax may in certain cases, directly and immediately impede the movement or flow of trade, but the imposition of a tax does not do so in every case."

(2) Even if the Act "directly and immediately" impedes the movement of the goods, the statutory provision is saved by Art. 302. There is a presumption that the imposition of the tax is in public interest.[51]

The Court has stated that only when the intra-State or inter-State movement of the persons or goods are impeded "directly and immediately as distinct from creating some indirect or inconsequential impediment by any legislative or executive action, infringement of the freedom envisaged by Art. 301 can arise, "without anything more, a tax law, without anything more, may not impair the said freedom. At the same time, it should be Stated that a fiscal measure is not outside the purview of Art. 301 of the Constitution."

(b) ARTICLE 303

Article 303(1), is in terms an exception to Art. 302. It restricts the power of Parliament to impose restrictions on trade and commerce under Art. 302. Art. 303(1) lays down that notwithstanding anything in Art. 302, Parliament shall not pass any law giving any preference to any one State over another, or discriminate between the States *"by virtue of any entry relating to trade and commerce"* in any of the three Lists.[52]

But, then, Art. 303(2) engrafts an exception to the restriction placed by Art. 303(1) on the powers of Parliament. Art. 303(2) says that nothing in Art. 303(1) shall prevent Parliament from making any law, or authorising the giving of, any preference or making, or authorising the making of, any discrimination if it is declared by such law if it is necessary to do so for the purpose of dealing with a situation arising from scarcity of goods in any part of the territory of India. This exception applies only to Parliament and not to the State Legislatures.

Article 303(1) expressly forbids discrimination relating to trade and commerce. The words in *italics* in Art. 303(1) give rise to difficulties of interpretation. One possible view may be that this expression refers to such entries only as 41 and 42 in List I, 26 and 27 in List II and 33 in List III, and not to other general entries affecting trade and commerce, or to tax entries.[53] A broader view would include within the expression all those entries in the various Lists which "deal with the power to legislate directly or indirectly in respect of activities in the nature of trade and commerce."[54] In the former case, discrimination among the States will not be barred by Parliamentary tax legislation; in the latter case, it will be, as a tax operating on trade and commerce would be covered by Art. 303(1). Obviously, the latter view is the better of the two, for it bars preferential treat-

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51. *Amrit Banaspati Co. Ltd. v. Union of India,* AIR 1995 SC 1340, 1343 : (1995) 3 SCC 335. Also see, *Meera Khandelwal v. State of Madhya Pradesh,* AIR 1997 MP 163.

52. *Supra,* Ch. X.

53. Dissent of Sinha, C.J., in the *Atiabari* case. For tax entries, see, Ch. XI, *supra.*

54. SHAH. J., in the *Atiabari* case, at 262; Subba Rao, J., in the *Automobile* case, at 1434. Also, *infra,* 839, under the State's power to regulate trade and commerce.

ment of a State through any legislation affecting trade and commerce, and many a time the effect of a tax measure may be much more pervasive on the economy than that of a *non-tax* legislation.

In *Automobile*,[55] the Supreme Court did not express any conclusive opinion on this question arguing that the limitation introduced in Art. 303(1) cannot circumscribe the scope of Art. 301. In *State of Madras v. Nataraja Mudaliar*,[56] the Supreme Court again refused to express an opinion on this general question, or even on the limited question whether, for purposes of Art. 303, entries relating to tax on sale of goods (entry 92A, List I or entry 54 of List II) are entries relating to trade and commerce.

The rigours of the limitation imposed on Parliament by Art. 303(1) are relaxed somewhat by Art. 303(2). Under Art. 303(2), Parliament may prefer one State over another, or discriminate between the States, if it is declared by law made by Parliament that it is necessary so to do for the purpose of dealing with a situation arising from scarcity of goods in any part of India. In other words, when Parliament is faced with the task of meeting an emergency created by the scarcity of goods in any particular part of India, Parliament may enact a law making discrimination, or giving preference, in favour of the part thus affected. Such a declaration by Parliament would be conclusive and not justiciable.

The words 'preference to one State over another' and 'discrimination between one State and another' in Art. 303 occur as well in Ss. 51(ii) and 99 of the Australian Constitution. The Australian cases have held that not all differences in treatment amount to preferences and discriminations between the States.[57] The prohibition is attracted when the preference and discrimination is in relation to localities considered as States, or by virtue of their character as States. Further, at times, a law applied uniformly may in effect result in differential treatment of the States owing to economic conditions prevailing therein but this is not prohibited.

Under the Central Sales Tax Act, Parliament has levied a tax on inter-State sales. The tax payable by a dealer is to be assessed by the Sales-tax authorities of each State. The Act does not even fix a uniform rate of tax; in case of a sale to an unregistered dealer, the tax is to be levied at the rate of 7%, or at the rate applicable to the sale of such goods in the State concerned, whichever is higher. It thus happens that the rates of Central sales tax vary from State to State according as the rates of sales tax vary. The tax under the Act is collected by each State and retained by it for its own use.

It was argued in *State of Madras v. Nataraja Mudaliar*[58] that as it hampered trade and commerce by giving preference to one State over another, or by making discrimination between one State and another, Arts. 301 and 303(1) were infringed. The Court rejected the argument holding that an Act enacted for the "purpose of imposing tax which is to be collected and retained by the State" does not amount to a law giving any preference to one State over another, or making

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55. *Automobile Transport v. State of Rajasthan*, *supra.*

56. AIR 1969 SC 147 : (1968) 3 SCR 829; *supra*.

57. *Elliott v. The Commonwealth*, 54 CLR 657; *Colonial Sugar Refining Co. v. Irving*, 1906 AC 360.

58. Footnote 57, *supra*.

Also, *M.L. Agrawal & Sons v. Asstt. Commrs.*, AIR 1971 All 1; *State of Tamil Nadu v. Sitalakshmi Mills*, AIR 1974 SC 1505 : (1974) 4 SCC 408.

any discrimination between one State and another, merely because of varying rates of tax prevailing in different States. Several reasons were adduced in support of this view.

First, the flow of trade does not necessarily depend upon the rates of sales tax and various other factors also are relevant.

Secondly, referring to the Australian cases,[59] the Court derived the principle applicable in the present case, *viz.*, "where differentiation is based on considerations not dependent upon natural or business factors which operate with more or less force in different localities that the Parliament is prohibited from making a discrimination."[60]

Thirdly, by leaving it to the State from which the movement of goods commences to levy Central sales tax on sale, at rates prevailing in the State, no discrimination can be deemed to be practised. "It is clear that the legislature has contemplated that elasticity of rates consistent with economic forces is clearly intended to be maintained."

The approach of the Court in *Nataraja* appears to have been influenced by the fact that the Central sales tax is to be levied by the State of export; that it is in the interest of such a State to fix such rates of sales tax as may not discourage prospective buyers, and this would discourage the State from imposing an unduly high rate of sales tax. The question of a State of import is, however, specifically covered by Art. 304(a).[61]

Though the scheme of the Central Act was held valid in the *Nataraja* case, nevertheless, there appears to be little doubt that if the Central Act had itself levied differential rates of sales tax (and not left it to the States to fix the rate) then it would have been invalid because of Art. 303. As the Act itself did not do anything like this, and merely left the matter to the States, it could be argued that the Centre was not indulging into any discrimination between State and State. And by equating intra-State and inter-State commerce as to the rates of taxation, even a State could not be said to be discriminating against inter-State commerce.[62]

In *Kannadasan*,[63] the Supreme Court has envisaged the possibility of Parliament imposing different rates of taxation in different States provided there is justification for the same, and that such a distinction does not amount to discrimination and that it is reasonable in the circumstances and has a purpose behind. When the Supreme Court declared invalid the cess imposed on minerals by vari-

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59. *King v. Barger*, 6 CLR 41; *W.R. Moran v. Dy. Fed. Commr. of Tax*, 63 CLR 338.
In Australia, the Centre cannot levy a tax so as to discriminate among the several States. How can this restriction be by-passed in practice is illustrated by the fact-situation in the *Moran* case. The Centre imposed a flour tax and out of the money so collected, payments were made to the wheat-growers. This was done to ensure a reasonable price to wheat-growers. Tasmania being deficit in, and importer of wheat, had no use for the scheme. To compensate the State for the flour tax paid by its residents, the Centre agreed to pay back to Tasmania all that was collected through the tax. The scheme was judicially upheld. It illustrates an effort at achieving not a geographical, but intrinsic, uniformity.

60. *Infra*.

61. AIR 1969 SC at 157.

62. Also see, *Rattan Lal & Co. v. Assessing Authority*, AIR 1970 SC 1742 : 1969 (2) SCR 544; *Associated Tanneries v. Commercial Tax Officer*, AIR 1987 SC 1922 : (1986) 2 SCC 479.

63. *P.Kannadasan v. State of Tamil Nadu*, AIR 1996 SC 2560 : (1996) 5 SCC 670; see, *supra.*

ous States, Parliament enacted a law validating the State levies. This Act was challenged *inter alia* on the ground that Parliament had thus levied the cess at different rates in the various States. But the Supreme Court rejected the contention and upheld the Central Law on the ground of "historical justification". "It is really not a case where the Parliamentary enactment is creating the distinction or different treatment." Differential treatment was already there for long as the States levied the cess at different rates on the same mineral. In such a situation, there was no other way in which Parliament could have validated the State cess.

It has been plausibly argued that Arts. 301 and 303 should be read as independent provisions, and that a law infringing Art. 303 may or may not infringe Art. 301.

Article 302 thus authorises Parliament to mitigate the effect of Art. 301, and Art. 303 does not cut into Art. 302 much. In the end result, Parliament is left with an abundant capacity to regulate trade and commerce and it is more akin to the American Congress in this respect than to the Australian Parliament. Art. 301 is worded on the model of S. 92 of the Australian Constitution, and both provisions restrict Parliament, but then Art. 302, to a very large extent, frees the Indian Parliament from the restraints of Art. 301.

(ii) STATES' POWER TO REGULATE TRADE AND COMMERCE

(a) ARTICLE 303(1)

Like Parliament, Art. 303(1) prohibits the State Legislatures as well from passing any law giving, or authorising the giving of, any preference to one State over another, or making, or authorising the making of, any discrimination between one State and another, "by virtue of any entry relating to trade and commerce in any of the Lists in the Seventh Schedule."[64]

(b) ARTICLE 304

Article 304, consists of two clauses, and each clause operates as a proviso to Arts. 301 and 303.

Article 304 empowers the States, notwithstanding anything in Arts. 301 and 303, to make laws to regulate and restrict the freedom of trade and commerce to some extent. A restriction imposed by a State law on freedom of trade and commerce declared by Art. 301 cannot be valid unless it falls within Art. 304.

(c) ARTICLE 304(A)

Article 304(*a*) imposes no ban, but lifts the ban imposed by Arts. 301 and 303, subject to one condition. Art. 304(a) is thus enabling and prospective. According to Art. 304(a), a State Legislature may by law impose on goods imported from other States any tax to which similar goods manufactured or produced within that State are subject, so, however, as not to discriminate between goods so imported and goods so manufactured or produced.

This provision is limited to one subject-matter only, *viz.*, tax on goods imported in a State from outside. This clause permits the levy on goods from sister States any tax which similar goods manufactured or produced in that State are subject to. In other

64. For these entries, see, Ch. X, *supra.*

words, goods imported from sister States are placed on par with similar goods manufactured or produced inside the State in regard to State taxation within the State allocated field. A State cannot treat imported goods worse than it treats its own goods. This is the demand of the concept of economic unity of India.

A State is debarred from treating goods of other States any the worse than it treats its own goods. Art. 304(a) does not prevent levy of tax on goods; what is prohibited is such levy of tax on goods as would result in discrimination between goods imported from other States and similar goods manufactured or produced within the State. The object is to prevent imported goods being discriminated against by imposing a higher tax thereon than on local goods.

What Art. 304(a) demands is that the rate of taxation on local as well as imported goods must be the same. This is designed to discourage the States from creating "tax barriers" or "fiscal barriers" at the boundaries.[65] Economic unity of India demands that no State levies a discriminatory tax on goods imported from other States: at the same time, imported goods have not been completely immunized from local taxation, for that would have placed the comparable local goods at a disadvantage.

What Art. 304(*a*) thus ensures is that a State may not impose on goods imported from sister-States a tax higher than what is levied on similar goods manufactured or produced in the State itself so that there is no discrimination against inter-State commerce in favour of intra-State commerce. Art. 304(*a*) is satisfied if the rate of tax is the same on goods imported and similar goods locally manufactured.[66] Art. 304(a) thus places goods imported from sister-States on a par with similar goods manufactured or produced inside the State in regard to State taxation within the allocated field.

Madhya Pradesh imposed a sales tax on sale of tobacco sold in the State by an importer. Import of tobacoo by itself was not subject to tax, and if the imported tobacco was not sold in the State, no tax was payable. Still the Supreme Court held that the tax in question directly impeded trade and commerce between Madhya Pradesh and other States. The tax was not saved by Art. 304(*a*) because tobacco manufactured or produced within Madhya Pradesh was not subject to any tax, and so that tax was unconstitutional.[67]

Madras imposed sales tax on tanned hides or skins imported from the other States on their sale price, while the tax on hides or skins tanned within the State was payable on the price of purchase in the raw condition which was substantially lower than their sale price in the tanned form. Similarly, on the hides and skins purchased in the raw form from outside the State, and then tanned within the State, the tax was on the sale price of the tanned hides or skins. But on hides or skins purchased in raw form and tanned within the State, the tax was on the sale price of the raw hides or skins. The result of this provision was to subject tanned hides and skins imported from outside the State to a higher rate of tax than the tax imposed on hides and skins tanned and sold within the State. The Supreme Court declared the rule bad as discriminatory of inter-State trade and

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65. *Shree Mahavir Oil Mills v. State of Jammu & Kashmir*, (1996) II SCC 39.

66. *State of Madras v. Nataraja Mudaliar, supra*; *Rattan Lal & Co. v. Assessing Authority*, AIR 1970 SC 1742 : (1969) 2 SCC 544.
Also, *Laxmi Cotton Traders v. State of Punjab*, AIR 1969 Punj 12.

67. *State of Madhya Pradesh v. Bhailal Bhai*, AIR 1964 SC 1006 : (1964) 6 SCR 261.

commerce as compared to intra-State trade and commerce.[68] The effect of the sales tax on tanned hides or skins imported from the other States was higher than the tax on the local product, and so the tax was discriminatory.

The Court stated that sales tax which has the effect of discriminating between goods of one State and goods of another, may affect the free flow of trade and it will then offend against Art. 301 and will be valid only if it comes within the terms of Art. 304(a). The Court also rejected the contention that Art. 304(*a*) would be attracted only when the import was at the border, *i.e.*, when the goods entered the State on crossing the border of the State. Art. 304(*a*) which allows a State Legislature to impose taxes on goods imported from other States, does not support the contention that the imposition must be at the point of entry only.

The discrimination in the instant case was not visible on the surface, but could be detected only by a study and analysis of the legal provisions and their effect. It is one of those few cases where the utility of constitutional provisions regarding freedom of trade and commerce becomes vivid. The situation dealt with in the instant case proves the wisdom of the constitutional provisions in Articles 301-304. In the absence of such provisions, the States could have raised all kinds of barriers against the free flow and movement of goods across State boundaries.

Raw hides and skins purchased locally in the State were subjected to a sales tax of 3 per cent at the point of last purchase in the State. No tax was to be levied when sold after tanning. As against this, hides and skins imported from other States in raw form and then sold after tanning as dressed hides and skins, were subjected to a tax of 1½% at the point of first sale in the State. This scheme was challenged as discriminatory but the Supreme Court answered in the negative in *Guruviah*.[69] The Court argued that the lower rate of tax on dressed hides and skins would offset the difference between the higher price of dressed hides and skins and the lower price of raw hides and skins. Art. 304(*a*) prevents discrimination against imported goods. The levy of 1½% on dressed hides and skins was not discriminatory as it took into account the higher price of dressed hides and skins.

The Court explained the purport of Art. 304(*a*) as follows:

> "Art. 304(a) does not prevent levy of tax on goods; what it prohibits is such levy of tax on goods as would result in discrimination between goods imported from other States and similar goods manufactured or produced within the State. The object is to prevent discrimination against imported goods by imposing tax on such goods at a rate higher than that borne by local goods since the difference between the two rates would constitute a tariff wall or fiscal barrier and thus impede the free flow of inter State trade and commerce. The question as to when the levy of tax would constitute discrimination would depend upon a variety of factors including rate of tax and the item of goods in respect of the sale of which it is levied."[70]

In *India Cement*,[71] to meet the situation arising from surplus production of cement, the Government of Andhra Pradesh issued a notification reducing the

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68. *A.T.B. Mehtab Majid & Co. v. State of Madras*, AIR 1963 SC 928 : 1963 Supp (2) SCR 435. Also, *A. Hajee Abdul Shakoor & Co. v. State of Madras*, AIR 1964 SC 1729 : (1964) 8 SCR 217.

69. *V. Guruviah Naidu & Sons v. State of Tamil Nadu*, AIR 1977 SC 548 : (1977) 1 SCC 234.

70. *Ibid.*, at 551.

71. *India Cement v. State of Andhra Pradesh*, AIR 1988 SC 567 : (1988) 1 SCC 743.

rate of sales tax on sale of locally produced cement to bulk consumers to 4%. As against this, the sales tax imposed on sale of cement imported from other States was levied at 13.75%. Thus, under the Andhra notification in regard to the local tax, the indigenous cement producers had a benefit of 9.75%. This was designed to benefit local cement manufacturers. The Supreme Court held the notification invalid as it was hit by Art. 304(a). The Court also ruled that the restriction imposed by Art. 301 can be limited, within the constitutional ambit, only by a law made by Parliament or the State Legislature. "No power is vested in the executive authority to act in any manner which affects or hinders the very essence and thesis contained in the scheme of Part XIII (Arts. 301-305) of the Constitution."

The State of Orissa levied a duty on foreign liquor. No such liquor was produced within the State and the whole of it was imported from other States. The Supreme Court ruled in *Kalyani*[72] that if the goods of a particular description were not produced within a State, the power to legislate under Art. 304(*a*) would not be available to it. In the instant case, as no liquor was produced within the State, the State could not use its legislative power under Art. 304(*a*).

But in *State of Kerala v. Abdul Kadir*,[73] the Supreme Court seems to have diluted the impact of *Kalyani*. The State of Kerala imposed a tax on tobacco which was imported into the State from outside. No tobacco was produced within the State. The question was : when no tobacco was produced within the State, could the State tax imported tobacco? Could Art. 304(a) apply in such a situation? The Court now ruled that unless there was infringement of Art. 301, the further question whether it was saved under Art. 304(a) could not arise. Explaining the *Kalyani* ruling, the Court said that ruling was based on the assumption that the enhanced duty on foreign liquor infringed the guarantee under Art. 301 and it could be saved only if it fell within Art. 304(a). This means that before invoking Art. 304(a), the first question to be decided is whether the tax in question directly and immediately hampers free flow of trade and, thus, falls within the prohibition of Art. 301.

In *State of Karnataka v. Hansa Corporation*,[74] the Supreme Court said that a tax levied within the constraints of Art. 304(*a*) would not be violative of Art. 301. "If a State tax law accords identical treatment in the matter of levy and collection of tax on the goods manufactured within the State and identical goods imported from outside the State, Art. 304(a) will be complied with." The effect of Art. 304(a) is to treat imported goods on the same basis as goods manufactured or produced in a State. The State tax was held valid in the instant case under Art. 304(a) as it was levied both on manufactured goods and similar goods imported from outside in a local area.[75]

The appellant purchased iron scrap from local registered dealers as well as from dealers outside the State. He manufactured ingots and sold them mostly within the State. The sale of ingots manufactured from locally purchased was not subjected to any tax, but sale of ingots manufactured out of scrap purchased from

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72. *Kalyani Stores v. State of Orissa*, AIR 1966 SC 1686 : (1966) 1 SCR 865. See also *The Pondicherry Generators Manufacturers' Association v.Union of India,* (2007) 6 MLJ 927.
Also see, *supra*, under entry 51, List II, Ch. XI, Sec. D.

73. AIR 1970 SC 1912 : (1969) 2 SCC 363.

74. AIR 1981 SC 463 : (1980) 4 SCC 697.

75. *Eagle Corporation Pvt. Ltd. v State of Gujarat,* (2007) 1 GLR 213; In Re, *Reliance Industries Limited,* 2008 (I) OLR 620 : Decided On 18-02-2008.

outside the State was subjected to sales tax. Applying the ratio of *Mehtab's* case,[76] the Supreme Court ruled the provision *ultra vires* in the instant case.[77]

The State of Gujarat imposed sales tax at 15% on all electronic goods whether locally manufactured or imported from outside. No distinction was made between the goods produced within the State, or imported from outside. But then, the State reduced the tax to 10% on goods imported from outside and to 1% on locally manufactured goods with a view to give incentive to encourage local manufacturing units. In *Weston Electronics v. State of Gujarat,*[78] the Supreme Court declared that an exception to the mandate declared in Art. 301 and the prohibition contained in Art. 303(1) can be sustained on the basis of Art. 304(a) if the conditions contained therein are fulfilled. In the instant case, the Court declared "the discrimination effected by applying different rates of tax between goods imported into the State of Gujarat and goods manufactured within that State must be struck down."

Accordingly, the Court quashed the notification imposing lower rate of sales tax on locally manufactured electronic goods. While a State Legislature may enact a law imposing tax on goods imported from other States as is levied on similar goods manufactured within that State, the imposition must not be such as to discriminate between goods so imported and goods so manufactured. The Court was of the view that the reduction in the sales tax in the case of goods manufactured locally in order to provide an incentive for encouraging local manufacturing units cannot be sustained if it adversely affects the free flow of inter-State trade and commerce.

In *H. Anraj v. State of Tamil Nadu,*[79] sale of lottery tickets in the State was subjected to a tax of 20% but the sale of Tamil Nadu lottery tickets was exempt. This was challenged in the Supreme Court. The Court ruled that lottery tickets could be treated as "goods" and could thus be subjected to sales tax under entry 54 List II. But, in the instant case, there was discriminatory taxation on "imported goods", *i.e.,* lottery tickets from other States whereas the "indigenous goods" *i.e.,* local lottery tickets were tax exempt. This hampered free flow of trade and commerce and was thus hit by Art. 304(a). It may be noted that in the *RMDC* case,[80] the Supreme Court had ruled that sale in lottery tickets did not amount to trade and commerce. In *Anraj* no reference was made to the ruling in the *RMDC* case.[81] This shows the judicial tendency to seek to uphold, as far as possible, the legislation impugned.

Over the years, the Supreme Court has softened its approach regarding application of Art. 304(a) to State taxation.

A very significant pronouncement has been made by the Supreme Court on the scope of Art. 304(a) in *Video Electronics Pvt. Ltd. v. State of Punjab,*[82] The U.P.

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76. *Supra*, 890, footnote 69.
77. *Andhra Steel Corporation v. Commissioner of Commercial Taxes, Karnataka,* AIR 1990 SC 1912 : 1990 Supp SCC 617.
78. AIR 1988 SC 2038 : (1988) 2 SCC 568.
79. AIR 1986 SC 63 : (1986) 1 SCC 414. Overruled on another point in *Sunrise Associates v. Govt. of NCT of Delhi*, (2006) 5 SCC 603 : AIR 2006 SC 1908.
80. *State of Maharashtra v. RMDC,* AIR 1957 SC 699 : 1957 SCR 874; *supra.*
Also see, *infra*, Ch. XXIV, Sec. H.
81. Also see, *B.R. Enterprises v. State of Uttar Pradesh,* AIR 1999 SC 1867; see, *supra,* Sec. C, under Art. 301.
82. AIR 1990 SC 820 : (1990) 3 SCC 87.

Government issued a notification exempting goods manufactured by a new industrial unit starting production between October 1, 1992, and March 31, 1990, from the levy of sales tax. The notification was challenged under Arts. 304 and 304(a) on the ground that the goods imported into Uttar Pradesh from out of the State thus became subject to a higher tax than goods produced locally.

The Supreme Court rejected the contention. The Court pointed out that the taxes which do not directly or immediately restrict or interfere with trade, commerce and intercourse throughout the territory of India are excluded from the ambit of Art. 301. Sales tax has only an indirect effect on trade and commerce. Normally a tax on sale of goods does not directly impede the free flow of goods.[83] Free flow of trade between the two States does not necessarily or generally depend on the rate of tax alone. Many factors including the cost of goods play an important part in the movement of goods from one State to another. Art. 304 is an exception to Art. 301. The need to take recourse to the exception will arise only if the tax impugned is hit by Arts. 301 and 303. If it is not then Art. 304 does not come into the picture at all.

Commenting on Art. 304(a), the Court has observed that its object is to prevent discrimination against the imported goods at a rate higher than that borne by local goods. "Every differentiation is not discrimination". In the instant cases, the general rate applicable to the goods locally made and on those imported from other States is the same. The question is whether the power to grant exemption to specified class of manufacturers for a limited period on certain conditions is violative of Art. 304(a). Replying in the negative, the Court has observed:

> "In a federal polity, all the States having powers to grant exemption to specified class for limited period, such granting of exemption cannot be held to be contrary to the concept of economic unity."[84]

The Court distinguished *Weston Electronics* by saying that that was a case of differential rates whereas in the instant case, rates of tax are the same for goods imported or produced within the State; what has been done in the instant case is only to give exemption from sales tax for the purpose of ensuring economic development of the State. This shows that the Court satisfied itself by looking at formal equality and ignored the discrimination in effect between imported and locally produced goods. It can hardly be denied that by giving exemption from sales tax, the tax burden was in effect reduced on locally produced goods as burden compared to the imported goods.

The Punjab Government issued a notification levying sales tax on electronic goods at 12% but an electronic manufacturing unit existing in Punjab was to pay only 1% sales tax. The Court upheld this differentiation on the ground that it was necessary to boost the local industry and to stop it from shifting to the neighbouring States.

Commenting on such cases as *Indian Cement*,[85] *Weston Electronics*[86] *and West Bengal Hosiery*,[87] the Court said that there was "naked blanket preference in fa-

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83. See, *Andhra Sugar Ltd. v. State of Andhra Pradesh,* AIR 1968 SC 599 : (1968) 1 SCR 705; *State of Madras v. N.K. Nataraja Mudaliar,* AIR 1969 SC 147 : (1968) 3 SCR 829.
84. AIR 1990 SC at 833.
85. Note 57 on 891.
86. Note 63 on 892.
87. *West Bengal Hosiery Assn. v. State of Bihar,* AIR 1988 SC 1814 : (1988) 4 SCC 134.

vour of locally manufactured goods as against goods coming from outside the State". In these cases exemption was granted without any reason or concession in favour of indigenous manufactured goods which was not available in respect of the goods imported into that State. This therefore amounted to hostile discrimination. But, in the instant case, there was valid, justifiable and rational reason for differentiation.

This judicial approach reduces the efficacy of Art. 304(a). If a State proposes to support local industries, it should take recourse to other expedients, rather than adopt a discriminatory tax regime Art. 304(a) bars discrimination, as such. It does not permit discrimination against imported goods to promote local industry.

(d) ART. 304(B)

Notwithstanding anything in Arts. 301 or 303, Art. 304(*b*) authorises a State Legislature to impose by law such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in public interest. The proviso to Art. 304(b) says that no bill or amendment for this purpose shall be introduced in the State Legislature without the previous sanction of the President.

Though Art. 304(b) requires prior Presidential assent before the bill is introduced in the legislature yet, due to Art. 255, if prior assent is not secured, the infirmity can be cured by subsequent assent of the President after the bill has been passed by the Legislature.[88]

Art. 304(b), therefore, means that if a State Legislature enacts a law which imposes such reasonable restrictions on the freedom of trade, commerce and intercourse with or within that State as may be required in public interest, and if the Bill has been introduced in the State Legislature with the previous sanction of the President, then the State Act would not offend Art. 301. A restriction on the freedom of trade and commerce which is guaranteed by Art. 301 cannot be justified unless the procedure prescribed in Art. 304(b) has been followed.

For application of Art. 304(b) to a tax on trade, three conditions need to be fulfilled:

(a) The Bill has to be introduced or moved in the State Legislature with the prior sanction of the President, or that the Bill has been assented to by the President.

(b) The tax in question constitutes a reasonable restriction.

(c) The tax has been levied in public interest.

The requirement of Presidential assent ensures that a State legislation enacted under pressure of regional economic interests is duly examined by the Centre from the point of view of national economy.[89] This mechanism draws a balance between national and regional economic interests and it makes the Central Government, rather than the Courts, the arbiter of what restrictions the States may be allowed to impose on trade and commerce. This would thus avoid the emergence

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88. *State of Karnataka v. Hansa Corp., supra,* footnote 75 on 1088.

89. Only a letter from the Government of India stating that the Government of India have no objection to the introduction of the levy under Article 304(b) of the Constitution is not the assent or previous sanction of the President. *K. A. Jose v. RTO,* (2008) 1 KLJ 128.

of confusing case-law which has been the feature of the U.S.A. and, to some extent, of Australia.

In *Automobile Transport*,[1] the Supreme Court has compared Art. 304(b) with Art. 302 in the following words :

> "This provision [Art. 304(b)] appears to the State analogue to the Union Parliament's authority defined by Article 302. Leaving aside the pre-requisite of previous Presidential sanction for the validity of State legislation under cl. (b) provided in the proviso thereto, there are two important differences between Article 302 and Article 304(b)... The first is that while the power of Parliament under Article 302 is subject to the prohibition of preferences and discriminations decreed by Article 303(1) unless Parliament makes the declaration contained in Article 303(2), the State's power contained in Art. 304(b) is made expressly free from the prohibition contained in Art. 303(1), because the opening words of Article 304 contain a non-obstante clause both to Article 301 and Article 303. The second difference springs from the fact that while Parliament's power to impose restrictions upon Article 302 upon freedom of commerce in the public interest is not subject to the requirement of reasonableness, the power of the States to impose restrictions on the freedom of commerce in the public interest under Article 304 is subject to the condition that they are reasonable."

In *Atiabari*, a State law imposing a tax on movement of goods in inter-State commerce was held invalid because of lack of Presidential assent. Since Art. 301 covers both inter-State and intra-State commerce, Presidential assent under Art. 304(b) is needed even when a State imposes a restriction only on intra-State commerce, although intra-State commerce falls within the exclusive State legislative domain.

The Supreme Court has ruled that unless the Court first comes to the finding on the available material whether or not there is an infringement of the guarantee under Art. 301, the further question as to whether the statute is saved under Art. 304(b) does not arise.[2]

A State tax levied on dispatches of tea is hit by Art. 301 as it constitutes a direct and immediate restriction on the flow of trade and commerce through the country. As the State Act had not been enacted in accordance with the requirement laid down in Art. 304(b), the Act was held to be invalid.[3]

Article 304 opens with the words "notwithstanding anything in Art. 301 and Art. 303." Art. 304 therefore constitutes an exception not only to Art. 301 but also to Art. 303. Now, Art. 303(1), considered above, prohibits a State (along with Parliament) from discriminating between the States, or from giving preference to one State over another by making laws by virtue of "any entry relating to trade and commerce."[4] Therefore, it appears that a State may discriminate against

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1. AIR 1962 SC 1406 : (1963) 1 SCR 491.
2. *Kalyani Stores v. State of Orissa*, AIR 1966 SC 1686 : (1966) 1 SCR 865.
3. *Buxa Doars Tea Co. v. State of West Bengal*, AIR 1989 SC 2015 : (1989) 3 SCC 211.
4. *Supra*, 889.
Reference has already been made to the conflict of judicial opinion regarding the exact significance of the words 'any entry relating to trade and commerce'. In *Fernandez v. State*, AIR 1955 TC 126, a tax on sale or purchase was held non-challengeable under Art. 303(1) as it fell under entry 54, List II, and not 26, List II. However, in *Bherulal v. Rajasthan*, AIR 1956 Raj 161, it was held that the State could levy an export duty on the export of commodities to other States while exempting from duty commodities meant for local consumption as it was not prohibited by Art. 303.

other States under Art. 304(b) if all the above stated conditions, *viz*., Presidential assent, reasonableness and public interest are fulfilled.[5] But it remains doubtful whether a discriminatory law can be regarded as reasonable or valid *vis-a-vis* Art. 14.[6]

The requirements of Art. 304(*b*) apply to all State laws which impose restrictions on the freedom of trade, commerce and intercourse irrespective of the legislative entries under which they fall.[7] The Supreme Court taking recourse to the words 'Legislature of a State' in Art.304 has Stated that Art. 304 would protect laws made by a State Legislature but not the rules made by the executive government in exercise of delegated legislation.[8] If an Act has already received Presidential assent then an amendment thereof, which does not impose any additional restriction, does not need fresh Presidential assent. The Supreme Court has expressed doubt whether increase in punishment by the amending Act already existing under the original law could really be looked upon as additional restriction upon freedom of trade and commerce.[9]

Tax laws fall within the inhibition of Art. 301. A tax law having a direct and immediate impact on trade and commerce would be barred by Art. 301 unless it satisfies the requirements of Art. 304(*b*).[10] As the Supreme Court explained in *Abdul Kadir*,[11] not all taxes would be tantamount *per se* to an infringement of Art. 301. Some may be. Only such taxes as directly or immediately impede the free flow of trade, commerce or intercourse fall within the prohibition of Art. 301.[12] If so, the question will then be whether such a tax is saved by Art. 304(b). Thus, a tax on entry of goods in a local area infringes Art. 301 as it has a direct and immediate impact on movement of goods.[13] Payment of a luxury tax on storage and vending of tobacco in the shape of a licence-fee as a condition precedent to bringing the goods in the State would constitute a direct impediment on the free flow of goods and therefore on trade and is thus hit by Art. 301. In this case, licensees were required to pay the licence fee in advance before they could bring tobacco within the State.

The State of Rajasthan issued a notification under the Central Sales Tax Act reducing sales tax from 16% to 4% on the inter-State sale of cement. A cement manufacturer in Gujarat which imposed sales tax at 16% challenged the Rajasthan notification on the ground that it created artificial barriers and gave preference in the matter of inter-State trade and commerce to the manufacturers and dealers of cement in Rajasthan over the manufacturers and dealers of cement in Gujarat.

It was established as a fact that the despatches of cement from Rajasthan to Gujarat increased considerably and that the cement produced in Gujarat was placed in a disadvantageous position. The Rajasthan notification had the effect of

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5. See on this, S.N. Jain, *supra*, footnote 23 on 1057 and references cited therein.
6. See, *infra*, Ch. XXI, Sec. B, for discussion on Art. 14.
7. *State of Maharashtra v. Chamarbaugwala*, AIR 1956 Bom 1.
8. *State of Mysore v. H. Sanjeeviah*, AIR 1967 SC 1189 : (1967) 2 SCR 361; *supra*.
9. *Ahmed v. State of Mysore*, AIR 1975 SC 1443 : (1975) 2 SCC 131.
10. *State of Karnataka v. Hansa Corp.*, AIR 1981 SC 463 : (1980) 4 SCC 697.
11. *State of Kerala v. Abdul Kadir*, AIR 1970 SC 1912 : (1969) 2 SCC 363; *Abdul Kadir v. State of Kerala*, AIR 1976 SC 182 : (1976) 3 SCC 219.
12. *State of Bihar v. Bihar Chamber of Commerce*, AIR 1996 SC 2344 : (1996) 9 SCC 136.
13. *Hansa Corp., supra*, footnote 10.

creating a preference to cement manufactured and sold in Rajasthan to the disadvantage of sale of cement manufactured and sold in Gujarat and thus had direct and immediate adverse effect on the free flow of trade. The notification was held to be void. The Supreme Court pointed out that every differentiation is not discrimination but if differentiation is made without a valid reason, *i.e.*, if there are not justifiable and reasonable reasons for differentiation, then that would amount to hostile discrimination.[14] In the instant case, the Court found no valid reason to issue the notification.

This case has now been overruled by the Supreme Court in *Digvijay (II)*.[15] The Court has now ruled that lowering of tax by the State of Rajasthan has had the direct effect of increasing the flow of trade. The mere fact that the local sale of cement in Gujarat has been adversely affected cannot result in the impugned notification being regarded as affecting the free flow of trade and being violative of Art. 301. This provision is concerned with the movement of goods from one State to another and, as far as the present case goes, with the lowering of tax, the movement has increased rather than diminishing.

It was suggested to the Sarkaria Commission that the proviso to Art. 304(b) imposing Central control over State laws may be deleted. The Commission rejected the suggestion with the following remarks:[16]

> "State laws though purporting to regulate intra-State trade may have implications for inter-State trade and commerce. They may impose discriminatory taxes or reasonable restrictions, impeding the freedom of inter-State trade and commerce. If clause (b) of Art. 304 is deleted the commercial and economic unity of the country may be broken up by State laws setting up barriers to free flow of trade and intercourse through parochial or discriminatory use of their powers."

The Commission pointed out that the suggestion arose from the "antiquated and obsolete" theory of federalism which prevailed no longer.[17]

The scheme of Arts. 301 to 304 is well-balanced. "It reconciles the imperative of economic unity of the Nation with interests of State autonomy by carrying out in clauses (a) and (b) of Art. 304, two exceptions in favour of State legislatures to the freedom guaranteed under Art. 301."[18]

(e) JUSTICIABILITY OF REASONABLENESS AND PUBLIC INTEREST

The power of the States to regulate freedom of trade and commerce under Art. 304, when compared with the parallel power of Parliament under Art. 302, would appear to be circumscribed by three additional restrictions, *viz.*, Presidential assent; reasonableness of restrictions; and in the public interest. The requirement of public interest is a common element in both the provisions.

The question arises whether the element of 'public interest' is justiciable. The majority opinion suggested in the *Atiabari* case that the requirement of 'public interest' may be deemed to be non-justiciable as it may be said to be satisfied by

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14. *Shri Digvijay Cement Co. (I) v. State of Rajasthan*, AIR 1997 SC 2609 : (1997) 5 SCC 406.
15. *Shri Digvijay Cement Co. (II) v. State of Rajasthan*, AIR 2000 SC 680 : (2000) 1 SCC 688.
16. *Report, 502.*
17. *Supra*, Ch. XIV.
18. *Report* of the *Sarkaria Commission*, 503.

the Presidential assent. But in *Khyerbari*,[19] the Court called the view as not an expression of a definite opinion that the requirement of "public interest" does not become the subject-matter of adjudication in Court-proceedings when the validity of a law passed under Art. 304(b) is questioned. So, the element of "public interest" appears to be justiciable.[20]

The test of "public interest", however, appears to be the same as in Art. 19(1)(g)[21].

A State may validly impose restrictions under Art. 304(b) which seek to protect public health, safety, morals and property within the State.[22] Thus, a tax on liquor is in public interest as it seeks to protect the health and morals of the people. Similarly, a levy of luxury tax relating to tobacco may be regarded in public interest as consumption of tobacco involves a health hazard.[23] In this case, no tobacco was grown within the State. All tobacco was imported from outside the State. In such a case, taxing imported tobacco could not be regarded as discriminatory between tobacco brought from outside and locally grown tobacco.

Octroi has many defects and there have been constant demands from traders that it be abolished. Therefore, the Supreme Court ruled in *Hansa*[24] that a State tax on entry of goods into local areas for consumption, use or sale therein levied to augment municipal resources which suffered a dent as a result of abolition of octroi was in public interest as it was levied to replace octroi duty which had many obnoxious features. The levy was very modest and was imposed to compensate the loss suffered by abolition of Octroi. The Court went on to observe:

> "…..the taxes generally are imposed for raising public revenue for better governance of the country and for carrying out welfare activities of our welfare State envisaged in the Constitution and, therefore, even if a tax to some extent imposes an economic impediment to the activity taxed, that by itself is not sufficient either to stigmatise the levy as unreasonable or not in public interest."

The question is: does the above Statement mean that every tax is to be presumed to be in public interest, or whether the State should produce some material to show that the tax was levied in public interest.

As regards unreasonableness, the test is the same as is applied to determine reasonableness under Art. 19(6).[25] The test of reasonableness prescribed by Art. 304(b) is justiciable.[26] It may be noted that in Art. 302 the word "reasonable" does not precede the word "restriction" but it does in Art. 304(b).

The levy in *Hansa* was also regarded as not imposing an unreasonable restriction on the freedom of inter-State trade, commerce and intercourse.

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19. AIR 1964 SC 925 : (1964) 5 SCR 975; *supra*.
20. Also see, *Rai Ramakrishna v. State of Bihar*, AIR 1963 SC 1667 : (1964) 1 SCR 897.
21. *Tika Ramji v. State of U.P.*, AIR 1956 SC 676 : 1956 SCR 393; *Vrajlal & Co. v. State of Madhya Pradesh*, AIR 1970 SC 129 : (1969) 2 SCC 248.
Also, *supra*, Sec. C this Chapter; *infra*, Ch XXIV, Sec. H.
22. *Kalyani Stores v. State of Orissa*, AIR 1966 SC 1686 : (1966) 1 SCR 865. Also see, *supra*, 891, footnote 2.
23. *Abdul Kadir v. State of Kerala*, *supra*, 1093, footnote 11.
24. *State of Karnataka v. Hansa Corporation*, *supra*, 1092, footnote 2.
25. *Infra*, Ch. XXIV, Sec. *H: Khyerbari Tea Co.*, *supra*; *Abdul Kadir*, *supra*, footnote 11.
26. *Rai Ramkrishna v. State of Bihar*, AIR 1963 SC 1667 : (1964) 1 SCR 897.

Some examples of unreasonable taxes are: discriminatory tax; confiscatory tax; where no machinery is provided for assessment and levy of the tax. If the burden imposed by a tax on trade and commerce is too onerous, then it can be held to be unreasonable.

In the *Khyerbari* case, the Supreme Court held the Assam tax on the movement of tea as being both reasonable and in public interest. In holding the tax in public interest, a factor considered relevant by the Court was that the tax was levied not merely to raise general revenue for the State, which itself was a public purpose, but that it was to be utilised also for keeping the waterways and roads in good condition in the State. The tax was sought to be justified not on the ground of being compensatory, but that it was used to maintain roads and waterways and, therefore, it was in public interest. On a review of the provisions of the Act in question, the Court found the tax to be reasonable as well. The Court even went to the extent of saying that a tax levied by the State must be presumed to be a reasonable restriction inasmuch as taxes are levied to raise money in order to carry on the governmental functions and manifold activities. The Court also suggested that when the President gives his asset it can be presumed that the Central Government has applied its mind and come to the conclusion that the proposed tax constitutes a reasonable restriction and is required to be imposed in public interest. These are however only presumptions.

Reference has already been made to *State of Bihar v. Bihar Chamber of Commerce*.[27] There the Court ruled the entry tax as compensatory. On the assumption that the tax was not compensatory, the Supreme Court also ruled the levy to be valid under Art. 304(5). The Bill had received the prior assent of the President. The levy was held to be reasonable as it imposed a very modest burden on the taxpayer. Also, it would not impede trade and commerce in the taxed services in the State. The levy was held in public interest as the revenue was needed to compensate the loss arising out of the invalidations of a State tax and the revenue arising from the tax was to be spent on public welfare.

The Court rejected the contention in *Khyerbari* that under Art. 304(*b*), a law could not impose a tax with retrospective effect. A statute may be passed under Art. 304(*b*) retrospectively, though the fact that it has retrospective effect may be an element in considering whether it is reasonable or not. In *Atiabari*, the Orissa Taxation (on Goods carried by Road or Inland Waterways) Act was held invalid because of lack of previous sanction of the President as required by Art. 304(*b*). The Orissa Legislature re-enacted the Act in 1968 after securing the previous sanction of the President making it retrospective in operation. The Supreme Court in *Misrilal Jain v. State of Orissa*[28] held the Act valid saying that the laws passed under Art. 304(*b*) need not always be prospective. Power to legislate carries with it the power to legislate retrospectively as well as prospectively. The power to pass a validating Act is essentially subsidiary to the legislative competence to pass a law under an appropriate entry of the relevant list.[29]

The Presidential assent cannot be regarded as affording a tax immunity from such a challenge for it is only one of the three conditions which must be fulfilled for a law to be valid under Art. 304(*b*).

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27. AIR 1996 SC 2344 : (1996) 9 SCC 136; *supra*, footnote 12.
28. AIR 1977 SC 1686 : (1977) 3 SCC 212.
29. Also see, *Rai Ramkrishna v. State of Bihar*, AIR 1963 SC 1667 : (1964) 1 SCR 897.

The guarantee under Art. 301 cannot be taken away by mere executive action. When power of legislation is restricted by Art. 301, but within limits provided by Arts. 302 to 305, it would be impossible to hold that the State by an executive order can do something which it is incompetent to do by legislation.[30]

H. SAVING OF EXISTING LAWS

Article 305 saves the laws enacted before the commencement of the Constitution from the operation of Arts. 301 to 303, except in so far as the President may by order otherwise direct.[31]

The rules made after the commencement of the Constitution under a pre-Constitution Act, cannot be deemed to be 'existing law'. The mere fact that there was authority in the State under a pre-Constitution Act to make rules which may impose restrictions on trade and commerce, but which power was not exercised, will not render the rule made in exercise of the authority after the Constitution an "existing law."[32]

The existing laws are saved until the President by order otherwise directs. Therefore, so long as the President does not act in this matter, burdens on trade and commerce that were existing on the eve of the Constitution would continue to operate. From this it is also clear that the conditions laid down in Art. 304 apply only to those State laws which are enacted after the Constitution.

I. NATIONALIZATION LAWS SAVED

In *Saghir Ahmad v. State of U.P.*,[33] the Supreme Court left undecided the question whether a state monopoly would conflict with Art. 301. As a matter of caution, so that the laws creating state monopolies may not be declared invalid as infringing Art. 301, both retrospectively and prospectively, by reference to Art. 19(6)(*ii*),[34] Art. 305 was amended by the Constitution (Fourth Amendment) Act, 1955.[35]

Article 305 saves from Art. 301, all state monopolistic laws which provide for "the carrying on by the state, or by a corporation owned or controlled by the state, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise."

The term 'state' includes the Centre as well the States. Thus, a State or the Centre can now run any business on a monopolistic basis without infringing Art. 301.

A law providing for acquisition of banks by the government is protected under Art. 305 and so cannot be challenged under Art. 301.[36]

Article 305 protects a law and not a mere executive action unsupported by law. A monopoly in favour of the State or the Centre cannot be created by a mere

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30. *Dist. Collector v. Ibrahim*, AIR 1970 SC 1275 : (1970) 1 SCC 386.
31. *Bangalore W.C. & S. Mills Co. v. Bangalore Corp.*, AIR 1 962 SC 562 : (1961) 3 SCR 707.
32. *State of Mysore v. H. Sanjeeviah*, AIR 1967 SC 1189 : (1967) 2 SCR 361; *supra*, footnote 8.
33. AIR 1954 SC 728, 742 : (1955) 1 SCR 707.
34. *Infra*, Ch XXIV, Sec. H.
35. *Infra*, Ch. XLII.
36. *R.C. Cooper v. Union of India*, AIR 1970 SC 564 : (1970) 1 SCC 248.

administrative order. Also, Art. 305 does not protect creation of monopoly in favour of a corporation which the state neither owns nor controls.[37]

J. AUTHORITY TO CARRY OUT THE PURPOSES OF ARTICLES 301 TO 304

Problems concerning trade and commerce are more economic in content than legal. A body consisting of economist, businessmen, and lawyers may be able to do a much better job in this area than a Court having merely legal expertise. It is with this idea that Art. 307 has been incorporated in the Constitution.

Article 307 authories Parliament to appoint by law such authority as it considers appropriate for carrying out the purposes of Arts. 301, 302, 303 and 304, and confer on such authority such powers and duties as it thinks necessary.[38]

The origins of the idea contained in Art. 307 can be traced to Ss. 101-104 of the Australian Constitution which contemplate the establishment of an Inter-State Commission "with such powers of adjudication and administration as the Parliament deems necessary for the execution and maintenance within the Commonwealth, of the provisions of this Constitution relating to trade and commerce, and of all laws thereunder." The establishment of such a Commission was directly suggested by the creation of the Inter-State Commerce Commission in the U.S.A. in 1877. A commission was actually established in Australia in 1912 by the Inter-State Commission Act, 1912, but the High Court held that no judicial power could be conferred on it in view of the strict separation of judicial from non-judicial power envisaged by the Australian Constitution. As the Commission could not play any effective role in the absence of judicial power, it was allowed to lapse.[39]

No body as envisaged in Art. 307 has been set up so far. The Sarkaria Commission reporting in 1988 strongly recommended the setting up of an expert body under Art. 307. The Commission argued in favour of such a body as follows:[40]

> "The whole field of freedom of trade, commerce and intercourse bristles with complex questions not only in regard to constitutional aspects but also in respect of the working arrangements on account of impact of legislation of the Union on the powers of the States and the effect of legislation of both the Union and the States on free conduct of trade, commerce and intercourse. Trade, commerce and intercourse cover a multitude of activities. Actions of the Union and State Governments have wide-ranging impact on them. Legislative and executive actions in the field of licensing, tariffs, taxation, marketing regulations, price controls, procurement of essential goods, channelisation of trade, and controls over supply and distribution, all have a direct and immediate bearing on trade and commerce. Innumerable laws and executive orders occupy the field today. This has led to an immensely complex structure. Many issues of conflict of interests arise everyday."

Such a body being free from the pressures of day to day administration would be able to formulate objective views, taking into account the long term perspec-

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37. *Dist. Collector, Hyderabad v. Ibrahim*, AIR 1970 SC 1275 : (1970) 1 SCC 386.
38. Also see, *supra*.
39. *New South Wales v. Commonwealth*, 20 CLR 54 (1915). Collin Howard, *Australian Federal Constitutional Law*, 107-8 (1968).
40. *Report*, 503.

tive, in regard to various intricate problems relating to trade, commerce and intercourse. Being an expert constitutional body it would also inspire confidence among the various States and other interests. Such an expert body would be eminently suited to strike a proper balance between freedom of trade and the need for restrictions in order to foster development with social justice. The ambit of Art. 307 is wide enough to bring all matters relevant to freedom and regulation of trade, commerce and intercourse within the purview of such an authority.

In independent India, inter-State differences have usually arisen on issue of permits for inter-State transport. To sort out these difficulties. Parliament has provided for the creation of an Inter-State Transport Commission under Ss. 63A(1) & (2) of the Motor Vehicles Act, 1939, in pursuance of Art. 307.[41] The Commission consists of a chairman and two members. Its functions are to develop, co-ordinate and regulate the operation of transport vehicles in an inter-State area or route; to prepare schemes for the purpose; to settle disputes and to grant, revoke and suspend permits for an inter-State route or area and to issue directions to the interested State Transport Authorities for the purpose. The Central Government may confer any other functions on the Commission. The Commission can associate with itself a representative of each of the States interested in an area or route.

The Commission thus acts as an instrumentality to promote, and seeks to deal with the problems arising in the way of, co-ordination of the policies of the States in respect of transport on inter-State routes.

It has been decided to introduce the system of national transport permits.[42] Such a permit will enable a public carrier to operate throughout India and will result in better co-ordination of inter-State road transport. Before this, a scheme of zonal permits had been introduced. Gradually, therefore, road transport is being given an inter-State character and is being freed from the restrictions of State boundaries.

The Motor Vehicles Act, 1988, has now abolished the Commission. Under s. 88 of the Act, a State authority has power to issue inter-State transport permits subject to agreement among the States.

41. Also see, *Road Transport Re-organization Committee Report*, 50 (1959).
42. This scheme has received a set back. The circumstances are narrated by the Supreme Court in *B.A. Jayaram v. Union of India*, AIR 1983 SC 1005 : (1984) 1 SCC 168.

CHAPTER XVI

OFFICIAL LANGUAGE

SYNOPSIS

A. THE ISSUES

India is a multilingual country having numerous languages. This creates various problems and tensions in the country. Federalism in India is subjected to a unique challenge, the like of which it has not been faced by any other country, for here it has to bind together a much larger number of linguistic and cultural groups than are to be found in any other federation. In the U.S.A. and Australia, there is lingual homogeneity, as English is the language of administration and education in these countries. Though in Canada racial and linguistic problems arise, yet even here there are only two language groups and both English and French languages are recognised as the official languages.

In Switzerland, there is polyglot population, and three official languages—German, French and Italian—but it is a small country both in territory and population as compared to India, economically very highly developed and the number of languages is much smaller than those prevailing in India.

The USSR has a multilingual population and has nearly 200 languages and dialects, but the Russian language enjoys a primacy over all other languages as it is the mother-tongue of nearly 100 million people, and has always been used as the only official language for politics, education and administration throughout the country since the Czarist period.

India thus faces a *sui generis* language problem as the situation here does not approximate to any other federal model mentioned above. India cannot, therefore, adopt any readymade solutions from outside for its linguistic problem but has to hammer out its own solutions consistent with the national perspective and regional pressures.

India has two major linguistic families:[1] Indo-Aryan[2] and Dravidian.[3] The Indo-Aryan languages, eleven in number, are derived from Sanskrit, are spoken by nearly 75 per cent people, of whom Hindi is spoken by nearly 42 per cent people. The Dravidian languages, spoken by nearly 24 per cent people, prevail in the South of India and of these, Telugu is spoken by the largest group. Some of the Indian languages are very old and have a rich cultural and literary heritage. All these languages are prevalent in fairly compact areas.

The languages in both the groups have, in spite of their separate origins, a good deal in common in so far as one family is derived from Sanskrit while the other has been influenced by it. None of these languages occupied any important place during the British rule as English had been accepted as the language of administration, instruction and examination for the whole country. It was the sole medium of communication among the elite on the all-India level. The indigenous languages could not thus properly develop and prosper. Consequently, all the indigenous languages are presently deficient to serve as an adequate linguistic tool to fulfil the requirements of modern administration. But in spite of the pre-eminent position given to the English language in the past, it could never become the mass language in India.

The over-all literacy in the country itself being only about 8 to 10 per cent during the British period, the English language could be spoken fluently only by a microscopic minority of the people. Therefore, when India became independent and adopted the democratic form of government based on adult suffrage, retention of the English Language for purposes of administration appeared to be incongruous and anachronistic. A language which the vast majority of people do not understand could not be the language of administration in a democratic society, as it will cut off the masses from any real participation in the affairs of the country and thus denude democracy of much of its content. Only one of the Indian languages could be adopted as the language of the administration at the Centre.

At the time of the constitution-making, the language controversy came to the forefront. The debates of the Constituent Assembly reveal that there was a substantial amount of consensus on two basic points: (1) at some stage, the English language should be displaced from its pre-eminent position; and (2) its place should be taken by Hindi.

The major bone of contention, however, was regarding the time-limit within which this process should be culminated. There were many difficulties in the way

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1. There are two minor families as well, Austro-Asiatic and Tibeto-Chinese, spoken respectively by 1.5 per cent and 0.75 per cent people in the country.

2. The following languages fall in this group: Assamese (1.39 per cent), Bengali (7.03 per cent), Gujarati (4.5 per cent), Hindi (42 per cent), Marathi (7.5 per cent), Oriya (3.68 per cent), Punjabi (1 per cent), Sanskrit, Urdu, Kashmiri and Sindhi (all 8 per cent nearly).

3. This family consists of 4 languages, *viz.*, Telugu (9.2 per cent), Tamil (7 per cent), Malayalam (3.7 per cent) and Kannada (4 per cent).

of adopting Hindi immediately. It was not so well developed as to replace English as the language of the administration and so it needed time to develop properly; the country's intelligentsia felt a genuine difficulty in taking to Hindi at once, accustomed as it was to thinking and speaking in the English-language for a long time; the non-Hindi-speaking people apprehended that adoption of Hindi would give to the Hindi-speaking people an edge over them in the administration and the Central services. How long should the period for the change-over be? This thus became a controversial question in the Constituent Assembly.[4]

B. CONSTITUTIONAL PROVISIONS

The Constitution contains detailed provisions regarding the language problem. These provisions represent a compromise between the conflicting views held by the Hindi enthusiasts and others. The Constitutional formula has a number of inter-related elements, *viz.*:

(1) English would continue as the official language for 15 years;

(2) Hindi is to take its place thereafter;

(3) steps are to be taken to promote the growth of Hindi in the meantime;

(4) any State may adopt any other language as its official language.

According to Art. 343(1), Hindi written in Devanagari script is to be the 'official' language of the Union. The reason for designating Hindi as the 'official', and not the 'national', language is that not only Hindi but all regional languages are regarded as the national, and not foreign, languages. Art. 343(1) lays down the ultimate goal to be reached in course of time.

As the Constitution makers did not want to institute Hindi immediately, but only after a period of transition, the Constitution specified a period of 15 years for this purpose. It was thus envisaged that from January 26, 1965, Hindi would be installed as the official language at the Centre and that, in the meantime, the English language would continue to be used for that purpose. Therefore, Art. 343(2), *inter alia*, provides for the continued use of English for all official purposes of the Union for a period of 15 years from the commencement of the Constitution.

The Constitution does not, however, regard the 15 year period as an absolute deadline; some flexibility has been introduced in the arrangement. Thus, Art. 343(3)(*a*) authorises Parliament to provide by law for the continued use of the English language for such purposes as may be specified in the law even after that period. Parliament could thus permit the use of the English language beyond the 15 year period for some or all official purposes of the Union.

Commenting on Art. 343(3), the Supreme Court has observed in *Murasoli Maran*:[5]

> "Art. 343(3) provides merely for extension of time for the use of English language after the period of 15 years. The progressive use of the Hindi language is thereby not to be impaired. Extending the time for the use of the Eng-

4. For discussion on the language problem in the Constituent Assembly, see, AUSTIN, *THE INDIAN CONSTITUTION*, 265-307 (1966).

5. See, *infra*, footnote 22.

lish language does not amount to abandonment of progress in the use of Hindi as the official language of the Union."

In respect of numerals again, the Constitution adopts a compromise formula. For the first fifteen years after the commencement of the Constitution, the international form of numerals are to be used for official purposes of the Union. But, thereafter, Art. 343(3)(*b*) authorises Parliament by law to provide for specific purposes for use of Devanagari form of numerals.

The adoption of the Hindi as the distant goal, and the period of transition of 15 years, raised two related questions for the Constitution framers to solve: (1) the use of Hindi during the period of transition, and (2) smoothening the process of change-over from the English to the Hindi language.

If Hindi were not encouraged and promoted during the transition period, then it could not be ready to replace English on the appointed date. Recognising the logic of the argument, the Constitution provided for a limited and optional use of Hindi during the transition period. According to the proviso to Art. 343(2), during the initial period of 15 years, the President could, by order, authorise the use of Hindi, in addition to the English language, and Devanagari form of numerals in addition to the international form, for any of the official purposes of the Union. Here the words 'in addition to' are significant as these clearly indicate that during the period of transition, Hindi would be used in *addition* to, and not in substitution of, the English language.

The scheme of the Constitution would thus appear to be that while Hindi was to be used in *addition* to the English language during the period of transition, English may be used in *addition* to Hindi thereafter. In this way, a reconciliation between the Hindi and non-Hindi views was sought to be established.

An interesting point to note in this connection is that while the use of English, after the transitory period, has been left to Parliament, prescribing the use of Hindi in the interim period in *addition* to the English language has been left to the executive. This indicates that greater significance was attached to the extension of the 15 year time-limit for continued use of English than to using Hindi during the interim period. Another explanation for this is that the Constitution has made a provision for the appointment of an Official Language Commission and on its advice the Central executive could decide the purposes for which Hindi should be used *additionally* to the English language during the 15 year limit.

(a) OFFICIAL LANGUAGE COMMISSION

Art. 344(1) provides for the appointment by the President of a Commission on Official Language after five years from the commencement of the Constitution, and thereafter at the expiry of ten years from such commencement. The Commission is to consist of a Chairman and such other members representing the various regional languages mentioned in the VIII Schedule to the Constitution as the President may appoint. According to Art. 344(2), the duty of the Commission is to make recommendations as to—

(*a*) the progressive use of the Hindi language for the official purpose of the Union;

(*b*) restrictions on the use of the English language for all or any of the Union official purposes;

(*c*) the language to be used for proceedings in the Supreme Court and the High Courts, for Central and State legislation and delegated legislation made thereunder etc.;

(*d*) form of numerals to be used for the official purposes of the Union;

(*e*) any other matter which the President may refer to it regarding the official language of the Union and the language of communication between the Union and a State, or between one State and another.

In making its recommendations, according to Art. 344(3), the Commission is to keep in view the industrial, cultural and scientific advancement of India, and the just claims and the interests of the non-Hindi speaking people in regard to public services.

The constitutional provision shows plainly that the Commission was envisaged to facilitate the use of Hindi during the transition period in *addition* to English so that the process of change-over from English to Hindi on the appointed day could be smooth. A good deal of say was given to the non-Hindi speaking people in deciding upon the pace of progressive transition from the English to the Hindi language, because they were to be in a majority in the Commission. The directive to the Commission to keep in view the industrial and cultural advancement of the country and to recognise the claims of the non-Hindi speaking people in the services would rule out any hasty change-over from English to Hindi.

The Commission's recommendations were to be screened by a Parliamentary committee consisting of 20 members from the Lok Sabha and ten members from the Rajya Sabha elected by the system of proportional representation by means of a single transferable vote [Art. 344(1)]. This meant that all linguistic groups in Parliament would get representation on the committee. After examining the Commission's recommendations, the committee would make its report to the President [Art. 344(5)]. The President could then issue directions in accordance with the whole or any part of the committee's report, notwithstanding anything in Art. 343 *i.e.*, to restrict the use of English and to promote the use of Hindi during the 15 year period [Art. 344(6)].

There were so many built-in safeguards in favour of the non-Hindi speaking people that no precipitate action towards introducing Hindi during the interim period in *addition* to the English language could be taken. It may be seen that Arts. 343 and 344 deal with the process of transition. The ultimate aim is laid down in Art. 351. Art. 344(6) takes into account the objective laid down in Art. 351, and seeks to determine the pace of progress and to achieve the same.

The Supreme Court has emphasized that Art. 344(6) is not exhausted by using it once; the President can use it on more than one occasion. The Presidential order issued under Art. 344(6) is supreme because of the *non-obstante* provisions in Art. 344(6).

(b) DEVELOPMENT OF HINDI

At the time of the Constitution-making, an argument used for having a long transitory period for change-over from the English to the Hindi language was that

it was an underdeveloped language and that it needs to be developed before it could be ready to take the place of the English language. Therefore, Art. 351 places the Central Government under an obligation to take steps to promote the spread and development of Hindi.

Art. 351 also lays down the future form which Hindi should take, *viz.*, Hindi should be developed so that it may serve as a medium of expression for all elements of the composite culture of India and to secure its enrichment by assimilating, without interfering with its genius, the forms, style and expressions used in Hindustani and in the other languages mentioned in the VIII Schedule to the Constitution, and by drawing for its vocabulary, wherever necessary or desirable, primarily on Sanskrit and secondarily on other languages.

This provision contains too many compromises and seeks to draw a balance between the purists and the liberalists as regards the development and enrichment of Hindi. The purists desire to draw upon Sanskrit, and Sanskrit alone, for new words necessary to develop Hindi as a language of administration and education, while the liberalists want to use all regional languages and Hindustani for the purpose.

There is no doubt however that Hindi developed on the lines laid down in Art. 351 would be very different from its present form. The idea of assimilating terms from regional languages into Hindi is expedient as it would allay apprehensions and misgivings of those linguistic groups whose languages do not have a Sanskrit base.

(c) REGIONAL LANGUAGES

The framers of the Constitution were also faced with the important question regarding the future role of the regional languages. They took the view that these languages should be promoted and developed so as to be able to play a meaningful role in the future set-up in the country. Articles 350A and 350B were inserted by the Constitution (7th Amendment) Act 1956 to ensure the protection of linguistic minorities.[6] To achieve these objectives, the Constitution lists in the VIIIth Schedule twenty-two regional languages, *viz.*, Assamese, Bengali, Bodo, Dogri, Gujarati, Hindi, Kannada, Kashmiri, Konkani, Maithili, Malayalam, Manipuri, Marathi, Nepali, Oriya, Punjabi, Sanskrit, Santhali, Sindhi, Tamil, Telugu and Urdu.

There appears to be two purposes underlying this enumeration of the regional languages:

(1) These are the languages to be represented on the Official Language Commission to be appointed under Art. 344(1); and

(2) From these languages, words are to be drawn for developing Hindi as envisaged in Art. 351.

An unstated idea underlying the VIII Schedule may be that the languages named therein need to be developed. The mention of these languages in the Con-

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6. See further under Ch.XXXV (*infra*).

stitution however gives a psychological and emotional satisfaction to the proponents of these languages.[7]

Further, Art. 345 authorises a State to adopt, by making a law, any regional language or languages in use in the State, or Hindi, for its official purposes. The choice of the State is not limited to the languages mentioned in the VIII Schedule. Till such a law is made, the English language is to continue to be the official language of the State.

Art. 345 is permissive. It does not say that, after adoption of Hindi or any other language by a State, use of the English language would be barred altogether so as to render void an order made, or any other official proceedings done, in the English language. That can happen only if the State Legislature makes a specific provision barring the use of the English language altogether.[8]

(d) INTERGOVERNMENTAL COMMUNICATION

Another problem, peculiarly a federal problem, faced by the Constitution-makers was to devise a formula concerning the language to be used in inter-governmental communications. This became necessary in view of the possibility of different States adopting different official languages.

Art. 345 therefore lays down that for purposes of communication between two States, or between the Centre and a State, the official language of the Centre should be used, although two or more States may agree to use Hindi for the purpose.

(e) LANGUAGE OF LAW & COURTS

Difficult problems arise when the question of language is considered in the context of law and the courts. The English common law is the basis of the Indian legal system and, to this end, the English language has been a very useful medium of thought and expression. India has a unified judicial system; there exists a basic unity in the laws prevailing in the country, and decisions of one High Court are freely cited in the other High Courts. The problem of the language of the law thus assumes a special significance. If a High Court adopts the local language, then it would be difficult to cite precedents from this Court in other High Courts. Difficulties would also arise in the functioning of the Supreme Court if the High Courts were to adopt different languages.[9]

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7. The rights of linguistic minorities assumed special significance and the coercive imposition of Hindi as a 'unifying language' led not to unity but to an assertion of differences. States were formed on linguistic bases showing the apparent paradox that allowing for and protecting differences leads to unity and integrity and enforced assimilation may lead to disaffection and unrest.

8. *Dayabhai v. Natwarlal*, AIR 1957 MP 1; *Harihar Pd. v. District Magistrate*, AIR 1961 All 365.

9. Quoted with approval in *Shri Satish Dattatray Nadgauda v. The State of Maharashtra*, 2007(109) Bom LR1089. This extract is taken from *Usha Mehta v. State of Maharashtra*, (2004) 6 SCC 264, at page 274.

A policy decision made by the Maharashtra State Government whereby Marathi language study was made compulsory throughout the schools in that State. As a result, the English-medium schools run by Gujarati linguistic minorities were compelled to teach four languages (Hindi, English, Marathi and mother tongue Gujarati) as against the accepted "three-language formula".

Similar problems arise in regard to the language of legislation. How would the law enacted in one State in its own official language be known in other parts of the country, and how would the Supreme Court interpret the same? The compulsions of the situation therefore demand that so far as possible there exists a basic unity in the language of the law and the courts throughout the country. Accordingly, the Constitution makes special provisions concerning the language problem in the areas of judicial and legislative processes, the idea implicit therein being that the question of the courts' language should take its own time to settle.

As regards the language of the courts, Art. 348(1) lays down that until Parliament otherwise provides, proceedings in the Supreme Court and in a High Court are to be in the English language.[10]

As an exception to the above-mentioned general rule, however, Art. 348(2) provides that the Governor of a State, with the previous consent of the President, may authorise the use of Hindi, or any other official language of the State, in proceedings in the High Court, but not with respect to the judgements, decrees and orders passed by it, which shall be in the English language as required by Art. 348(1).[11]

The effect of Art. 348(2) has been explained by the Supreme Court in *Vijay Laxmi Sadho v. Jagdish*.[12] The M.P. High Court rules required that the election petition to be filed in the Court should be drawn up in the English language. Accordingly, the High Court dismissed an election petition drawn up in Hindi. The Supreme Court has ruled that the High Court could not do so. The High Court rules are only of a procedural nature and do not constitute "substantive law". The rules have to be read subject to Art. 348(2).

Under Art. 348(2), the State Governor, with the previous consent of the President, may authorise the High Court to use Hindi or any other language in its proceedings, save that any judgment, decree or order passed or made by the High Court shall be in the English language as required by Art. 348(1). Under Art. 348(2), the State Governor by a notification has authorised the use of the Hindi language in all proceedings of the High Court except for drawing up decrees, orders and judgments. Accordingly, under the said notification, appeals, petitions etc. could be presented in the High Court in the Hindi language. The High Court rules could not override Art. 348(2). The High Court rules must be read along with the notification issued by the Governor. When so construed, it follows that an election petition may be filed in Hindi.

The rules framed by the High Court in exercise of powers[13] under Art. 225 are only rules of procedure and do not constitute substantive law. These rules cannot effect the import of constitutional provisions contained in Art. 348(2). Therefore, as an election petition in Hindi could be presented in the M.P. High Court, it

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10. In *Madhu Limaye v. Ved Murti*, AIR 1971 SC 2608 : (1970) 3 SCC 738, the Supreme Court asserted that the language of the Court is English.
11. For language in Parliament and a State Legislature, see, *supra*, Chs. II and VI.
12. AIR 2001 SC 600 : (2001) 2 SCC 247.
13. *Supra*, Ch. VIII, Sec. C(b).

could not be dismissed by the Court at the threshold on the ground of non-compliance of the High Court rules.[14]

The important point to note in this connection is that the time-limit of 15 years for change-over from the English to the Hindi language in case of the Union official language was not to apply to the proceedings in the Supreme Court and the High Courts. The matter is to be regulated by Parliamentary legislation. Parliament can make a law prescribing the language of the Supreme Court and the High Courts.

The Constitution adopts a cautious approach as regards the language of the Supreme Court and the High Courts. Even if Hindi were to become the official language of the Centre after January 26, 1965, it would not become the language of the Supreme Court and the High Courts *ipso facto*. To effectuate such a change-over, Parliament would have to make a law, otherwise, English would continue to be the language of these courts till such time as Parliament sees it fit to change the *status quo*.

As regards the language of legislation, Art. 348(1)(*b*) provides that until Parliament by law provides otherwise, the authoritative texts of all Bills introduced and all Acts passed by Parliament, or a State Legislature, and of all ordinances promulgated by the President, or a State Governor, and all rules made thereunder, shall be in the English language. The main purpose of this provision is to prescribe an authoritative text of the law.

Art. 348(3) provides an exception to Art. 348(1)(b). Art. 348(3) provides that a State Legislature can prescribe use of any language, other than English, for purposes of legislation—Bills, Acts, Ordinances and delegated legislation, but a translation of the same in the English language is to be published in the official gazette under the authority of the State Governor and that would be the authoritative text in English.

The idea of having English translations of Acts enacted in Hindi, or the regional languages, by the States, and to treat their English versions as authoritative, is a sound one. India is a federal country; there is a diversity of languages but there is unity of law; for quite sometime English is to remain as the language of the Supreme Court and the High Courts and, therefore, it is necessary to keep one language of the law even when the State Legislatures opt for various official languages. Therefore, in a non-English State, legislation will be made in a regional language but its English translation is the authoritative one. This means that there are two versions of the same law. The Courts have held that though they can use both versions, and even use one to remove ambiguities in the other,

14. It is difficult to understand how Rules framed by a State under Article 348(2) could override the provisions of Article 348(1). The reasoning of the Bombay High Court on the issue in *Shri Satish Dattatray Nadgauda v. The State of Maharashtra*, 2007 (109) Bom. L.R.1089 is unexceptionable.

yet in case of conflict between the two versions, the English version must prevail over the other.[15]

Reading Arts. 348(1) and 348(3), it becomes clear that, as regards the language of legislation, a State Legislature is free to adopt a language other than English. A few problems have arisen out of the interpretation of Arts. 348(1) and 348(3). Art. 348(1), it has been ruled, means that the authoritative text of a law enacted by a State Legislature has to be in English unless Parliament by law otherwise provides. "The power to declare that the authoritative text of any bill, Act or ordinance of a State Legislature shall be in a language other than the English language has been vested exclusively in Parliament." But it does not mean that a State Legislature cannot adopt any language other than English without a parliamentary law. Under Art. 348(3), a State Legislature is entitled to prescribe any language other than English as the language of legislation though the authoritative text of the law will be in English.[16]

The Bihar Legislature has prescribed Hindi in Devanagari Script as the language of legislation as provided in Art. 348(3). An ordinance was issued in Hindi but no English translation thereof was published. It was argued that in the absence of the English translation of the ordinance, there was no authoritative text and so the Hindi version must be deemed to be *non est.* But the High Court rejected this extreme contention. The Court ruled that the ordinance made in Hindi was a valid piece of legislation even without the English translation.[17] The Court observed:

> "Under the scheme of Article 348 of the Constitution, all ordinances made in Hindi where the Legislature has so authorised will be a valid piece of legislation even without its English translation and where an English translation has been published as laid down therein, the said translation shall also be considered to be a valid piece of legislation and both can be looked into as the authorised versions of the Ordinance".

Again, in Bihar, the Hindi version of an ordinance was published on 5-12-75. Action under the Ordinance was initiated on 8-12-75, and the English translation of the Ordinance was published only on 22-12-75. The argument was that the Ordinance could not be deemed to have come into force until its English version

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15. *Sagir Ahmed v. State of U.P.,* AIR 1954 All 257; *Jaswant Sugar Mills v. Presiding Officer, I.T.,* AIR 1962 All 240; *Govindram Ramprasad v. Assessing Authority,* AIR 1958 MP 16; *J.K. Jute Mills Co. v. State of U.P.,* AIR 1961 SC 1534; *Ram Rati v. Gram Samaj,* AIR 1974 All 106. This extract is taken from *Usha Mehta v. State of Maharashtra,* (2004) 6 SCC 264, at page 280:

Policy decision is not violative of the linguistic minority rights guaranteed under Articles 29 and 30 or any other provisions of the Constitution. *Nityanand Sharma v. State of Bihar,* 1996 3 SCC 576 ; *Prabhat Kumar Sharma v. U.P.S.C.,* (2006)10 SCC 587 : (2006) 10 JT 587.

Difficulties often arise as a result of discrepancies (due to clerical mistakes or for any other reason) between Hindi and English versions. In *Medical Officer of Health v. Gulzari,* AIR 1965 All 170, the English version was followed. In *Asghar Ali v. State of U.P.,* AIR 1959 All 792, the English version of a notification was ignored in favour of the Hindi version because it was published under the authority of the Collector. These cases show that some confusion in the law and even in the administration is bound to arise when a State adopts Hindi, or a regional language, because of the Constitutional provision making the English version of the law as authoritative.

16. *Raichand Amichand v. Sanchalak Gramodhar,* AIR 1957 MB 26.

17. *Mathura Prasad Singh v. State of Bihar,* AIR 1975 Pat 295.

was published and, therefore, no proceedings thereunder could be instituted before 22-12-75. But the High Court rejected the argument holding that the Ordinance came into force on 5-12-75.[18]

Reading Arts. 345, 348(1) and (3) together, the High Court argued that a State has discretion to adopt by law Hindi as the language to be used for all or any of the purposes of the State. If that is done, it becomes the official language of the State. It cannot be argued that the publication of the English translation is a condition precedent for the enforcement of any Act or ordinance made in the State language. The High Court clarified the implications of Arts. 348(1) and (3) as follows:[19]

> "The only consequence of the absence of an English translation will be that there will be no authoritative text, but on that account it cannot be held that in the absence of the publication of the authoritative translation, the ordinance itself will not be effective…. It is, no doubt, true that if the English translation is published, then in case of any conflict between the State language and the English translation, the latter will prevail, and if the English translation is published, it will be considered as a valid piece of legislation and both the Hindi and the English publication can be looked into. In my judgment, what is meant by clause (1) of Article 348 in making a law by Parliament is that unless the Parliament by law otherwise provides, the authoritative texts of all Bills, Acts or Ordinances of a State Legislature cannot be in a language other than the English language. The power to declare that the authoritative text of any bill, Act or ordinance of a State Legislature shall be in a language other than the English language has been vested exclusively in Parliament but it does not mean that the authority of a State Legislature to adopt any language other than the English language can be given only by a law made by the Parliament."

It will also be clear from the above that the Constitution seeks to give a place of importance to the regional languages in several ways, *viz.*:

(1) The States can adopt these languages as their official languages as well as for purposes of legislation;

(2) These languages can also be used in the High Courts;

(3) Representatives of the regional languages are to sit on the Official Language Commission[20] to decide the pace of change-over from the English to the Hindi language at the Central level; and (4) these languages are to be used for purposes of assimilation of their words and phrases in the Hindi of the future.

C. FURTHER DEVELOPMENTS

The Constitutional provisions, mentioned above, failed to solve the language problem once and for all, and controversies have arisen from time to time in this regard.

The Official Language Commission, as envisaged by Art. 344(1) of the Constitution, was duly appointed on June 7, 1955. The Commission reported in 1957. The Commission emphasized that English could not remain as the official language of the Union for very long as that would be against national self-respect

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18. *Alok Kumar v. State of Bihar*, AIR 1976 Pat 392.
19. *Ibid.*, 394.
20. *Supra*.

and that only through an Indian language could there be a massive resurgence of the national life. The main thrust of its recommendations was that effective steps should be taken forthwith to ensure a change-over to Hindi on the appointed day, *i.e.,* January 26, 1965.

The Commission was of the opinion that if experience showed that no adequate results were forthcoming under the arrangements made by the Government of India for training of its employees on a voluntary basis in Hindi, then necessary steps should be taken by the Government making it obligatory on government servants to qualify themselves in Hindi within the requisite period, to the extent requisite for the discharge of their duties.

The recommendations of the Commission were placed before a Parliamentary Committee as envisaged by Art. 344(4), mentioned above.[21] The Committee was of the opinion that the Government should prescribe obligatory requirements on the Government servants to qualify themselves in the Hindi language.

After considering the report of the Committee, the President issued an order on April 27, 1960.[22]

The report of the Commission raised a controversy in the non-Hindi speaking area. To assuage the feelings of these people, Prime Minister Nehru gave an assurance that the English language would continue to be the "associate" official or link language of the Union for as long as they wanted.

(a) THE OFFICIAL LANGUAGES ACT, 1963

The recommendations of the Commission, after being examined by a Parliamentary Committee, led to the enactment by Parliament of the Official Languages Act, 1963, in exercise of the powers conferred on the Parliament by Art. 343(3).

The Act enacts that the English language may continue to be used, in *addition* to Hindi, even after Jan. 26, 1965, *i.e.*, after the 15-year deadline, for all official purposes of the Union for which it was being used before, and for transaction of business in Parliament.

Two points need be noted with respect to this crucial provision. First is the use of the word "may", and the second is that the English language is to be used 'in addition to' Hindi. These words denote that English is to enjoy the status of an "associate" official language. The Act therefore makes a very clear change in emphasis. While before 1965, Hindi could be used in *addition* to English, now English is to be used in addition to Hindi.

To reconsider the language problem at a future date, the Act provides for the appointment of a Parliamentary committee on official language after Jan. 26, 1975, on a resolution to that effect being moved in either House of Parliament with the previous sanction of the President and passed by both Houses. The committee consisting of 20 members from the Lok Sabha and 10 members from the Rajya Sabha is to be elected on the basis of proportional representation by means of single transferable vote by the two Houses of Parliament. After re-

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21. *Supra.*

22. The Order was challenged in *Union of India v. Murasoli Maran,* AIR 1977 SC 225 : (1977) 2 SCC 416, see, *infra,* Sec. D.

viewing the progress made in the use of Hindi for the official purposes of the Union, it will submit its report to the President who, with his recommendations, would cause it to be laid before each House of Parliament and to be sent to all State Governments. After considering the views of the State Governments on the report, the President would issue directions in accordance with the whole or any part of the report.

The Act also makes provisions for the language of the law. It provides for making of Hindi translation of laws enacted in English, and English translation of laws enacted in the regional languages. A Hindi translation published in the official gazette, under the authority of the President, of any Central Act, by-law, rule etc., is to be regarded as the authoritative Hindi text thereof. The authoritative text in the English language of all Bills to be introduced in Parliament should be accompanied by a Hindi translation authorised in such manner as may be prescribed by rules made under the Act. This provision is to come into force from a day to be fixed for the purpose by the Central Government. This provision in the Act is to be read along with Art. 348 which lays down that authoritative texts of Central legislation are to continue to be in the English language unless Parliament provides otherwise.

Parliament has not said unequivocally in the Act that all legislation in Parliament is to be in Hindi, or the authoritative texts of all Central Acts are to be in Hindi. There is a lot of built-in vagueness and difficulty of interpretation in this provision as it uses the term 'authoritative text' both in relation to the Hindi version, as well as the English version. Perhaps, what is implicitly envisaged is a three stage process of change-over as follows.

First, for the time being, legislation is to continue at the Centre in English and the English texts of laws are to be treated as the authoritative texts.

Second, at some later stage, steps will be taken to have both English as well as Hindi versions of all Bills, but legislation and authoritative texts of laws would still continue to be in English.

Lastly, from a date in the distant future, the authoritative text would be the 'Hindi' version of the law even though legislation in Parliament may continue to be in English or Hindi.

India has now reached the second stage.

Coming to the State Legislation, the Act says that where a State has prescribed a language, other than Hindi, for purposes of legislation, translations of the Acts in Hindi as well as in the English languages, as envisaged in Art. 348(3), may be published in the State Gazette under the authority of the Governor and the Hindi version would be deemed to be the authoritative Hindi text of the law.

It still is not made clear whether in case of discrepancies, which of the texts—English, Hindi or regional language—are the Courts to go by. This is bound to create difficulties in interpreting the law. For, the lower courts, in practice, would take into consideration the text in the regional language, while the Supreme Court would go by the English (or the Hindi) version of that law, and the differences in language may result in differences of interpretation of the same law creating a good deal of confusion and generating a good deal of litigation.

As regards the language of the courts, the Act provides for the use of Hindi, the State official language, and English at the High Court level. Art. 348(1)(*a*) read with Art. 348(2) provides for the language of the High Courts to be English; change to any other language for proceedings of the High Court may be effected by the Governor with the consent of the President; the judgments of a High Court may be delivered in any language other than English only when Parliament so provides by law. So, the Official Language Act provides that the Governor of a State, with the previous sanction of the President, may authorise the use of Hindi, or the State official language, in *addition* to English, for purposes of judgments etc., delivered by the High Court. A judgment delivered by a High Court in a language other than English, is to be accompanied by an English translation issued under the High Court's authority.

This provision again raises the conundrum that in case of a disparity, which of the versions of the judgment—English, Hindi or the State language—would be recognised by the Supreme Court. As the English version is only a translation, perhaps, the basic judgment will be treated as the one in the State language or in Hindi, as the case may be. The Centre is to decide finally whether or not a change-over from English to Hindi or a State language is to be permitted in a particular High Court. The Act effects no change regarding the Supreme Court where the English language would continue.

All the provisions of the Official Languages Act, 1963, were not to come into force at once. Only Section 3 which permits use of the English language even after the 26th January, 1965, became operative immediately and other provisions would be effective as and when the Central Government notifies. This means that the change-over in the language of law and courts would take place sometime in future and not immediately.

Even the effects of Section 3 have not been visible so far and the work of the Government of India proceeds much in the same way as before, *i.e.,* primarily in the English language. The key-note of the Official Languages Act, 1963, is caution. Its basic provision (S. 3) may be said to be favourable to the non-Hindi speaking people in so far as it provides for the continuous use of the English language for an indefinite period after January 26, 1965. It does, however, set the distant goal of promoting Hindi along with English at the Central level and gradually replacing English by the regional languages or Hindi at the State level.

(b) THE OFFICIAL LANGUAGES (AMENDMENT) ACT, 1967

As January 26, 1965, drew near, a controversy erupted again centring around the issue whether the Act of 1963 was categorical enough regarding the continued use of the English language for an indefinite period as Nehru had assured. The use of the word 'may' in S. 3 appeared to be too weak, and it did not specify as to how long would the English language continue to be used at the Centre.

A demand was, therefore, made that Nehru's assurance regarding the continued use of English as an 'associate' language at the Centre should be given a specific and unequivocal statutory recognition, or rather a constitutional guarantee by amending the Constitution. To meet this demand, Parliament passed the Official Languages (Amendment) Act, 1967, to give statutory recognition to the assurance held out in 1963. The Amendment Act enacts as follows:

(1) The English language may continue to be used after January 26, 1965, in addition to Hindi, for all official purposes of the Union for which it was being used immediately before this date and also for the transaction of business in Parliament;

(2) The English language is to be used for the purpose of communication between the Centre and a non-Hindi State;

(3) If Hindi is used for communication between a Hindi and a non-Hindi State then an English translation of the communication is to accompany the Hindi version;

(4) A non-Hindi State is not prevented from using Hindi for purposes of communication with the Centre or a Hindi State, or by agreement with any other State, and in such a case, the English language need not be used;

(5) Where Hindi or the English language is used for purposes of interdepart-mental communication at the Centre, a translation of the communication in the other language is to be provided;

(6) Both Hindi and the English languages are to be used for:

(*a*) resolutions, general orders, rules, notifications, administrative or other reports or press communiques issued by the Central Government;

(*b*) administrative and other reports and official papers laid before Parliament;

(*c*) contracts and agreements executed, licences, permits, notices, etc., issued, by the Central Government or by a corporation or a company owned or controlled by the Central Government;

(7) Without prejudice to the foregoing, the Central Government can frame rules to provide for the language or languages to be used for the official purposes of the Centre.

In framing the rules, due consideration is to be given to the quick and efficient disposal of business and interests of the general public and the rules have to ensure that the Central Government servants having proficiency either in Hindi or in the English language may function effectively and are not placed at a disadvantage because of their lack of proficiency in both the languages;

(8) The foregoing provisions would remain in force until resolutions for the discontinuance of the use of the English language have been passed by all the non-Hindi State Legislatures and also by the two Houses of Parliament.

The last provision is of the greatest significance, as it furnishes a statutory guarantee for the continuance of the English language at the Central level as an 'associate' language so long as the non-Hindi States desire. The decision to continue English has now been left not to the legislatures of the Hindi-speaking States but to the legislatures of other States which have not adopted Hindi as their official language.

The Act also seeks to make use of the English language obligatory for certain purposes in addition to Hindi so as to protect the interests of the non-Hindi or non-English speaking servants of the Central Government and it ensures smooth communication between the Centre, the Hindi and the non-Hindi States.

Detailed provisions for intergovernmental communication became necessary because the Centre was adopting two official languages, Hindi and English; under Art. 346, any of them could be used for intergovernmental communication, but while the non-Hindi States were apathetic to using Hindi, the Hindi States did not want to use English for that purpose. A careful reading of these provisions shows that they are weighted in favour of the non-Hindi States which can correspond in English, but a Hindi State has also to send an English translation of a Hindi communication.

A resolution passed by the two Houses of Parliament along with the Official Languages (Amendment) Act, 1967, requires the Government of India to accelerate the spread and development of the Hindi language, as well as of the regional languages mentioned in the VIII Schedule, to implement the three languages formula so as to teach one of the Southern languages to the Hindi-speaking students and Hindi to the non-Hindi Speaking students along with the English language.

The resolution also says that compulsory knowledge of Hindi would not be required at the stage of selection to the Central Services, and that all the VIII Schedule-languages along with English would serve as the media for the competitive examinations for the Central Services.

On the basis of a review of the compliance of the section 3(3) of the Official Languages Act, the Committee submitted the eighth part of its Report to the President on 16-8-2005 making several recommendations. One of the recommendations was that Art. 348 of the Constitution may be amended to enable the Legislative Department to undertake the original drafting in Hindi. After the amendment of Art. 348 of the Constitution, High Courts/Supreme Court should be asked to start delivering their judgments, decrees etc in Hindi. This recommendation was accepted by a Presidential Order with the modification that the Department of Official Language may take appropriate decision after consulting the Legislative Department and the 18th Law Commission of India. The Centre then passed a resolution on 2 July, 2008 communicating this to *inter alia* the Supreme Court. The matter is now pending consideration before the Law Commission.

(c) MEDIUM OF EDUCATION

A difficult question arises regarding the medium of education at various levels. The Constitution prescribes no policy or principle, and makes no provision, in this regard.

To begin with, the matter was left to the legislative power of the States as 'Education' was a State subject. The States enjoyed full right to prescribe the media of instruction at the primary and the high school levels. But, their right to prescribe the media of instruction at the university level was not unrestricted, as has been discussed earlier.[23]

Education is now a concurrent subject.[24] However, in the prevailing atmosphere in the country, it is doubtful if the Centre would lay down conditions to be fulfilled before a switch-over to the regional languages takes place at the university level. In fact, the Centre is itself encouraging the switch-over, and a policy

23. *Supra*, Ch. X, Sec. G(iii).
24. *Supra*, Ch. X, Sec. F.

decision has been taken that regional languages should replace English at all levels of education.

This change-over to, and too much stress on, regional languages as media of instruction may create a kind of isolationism in the country and weaken the channels of communication between the various language groups. To mitigate this difficulty, a three language formula has been evolved according to which each student has to study three languages—the regional language, Hindi and an international language, *i.e.*, English, and the students whose mother-tongue is Hindi should study some other regional language.

The language problem may be contained a great deal if the three language formula is implemented sincerely but there remains a question mark whether all the States will act in the right spirit. Some State Governments devalue the English language by declaring that failure therein in the examination would not affect their results; some devalue Hindi while others devalue other regional languages by promoting Sanskrit.

Sometime back, the University Education Commission has gone into all facets of the university education including the question of media of instruction and has supported the three language formula.

In a controversial decision,[25] the Supreme Court upheld a policy decision made by the Maharashtra State Government making the study of Marathi compulsory in all schools in that State. As a result, the English-medium schools run by Gujarati linguistic minorities were compelled to teach four languages (Hindi, English, Marathi and mother tongue Gujarati) as against the accepted "three-language formula".

It may also be pointed out that the prescription of medium of instruction at the university level also raises the question of "maintenance of standards"—a matter which falls under entry 66, List I, and is thus a matter for exclusively Parliamentary legislation.[26]

D. JUDICIAL RESPONSE

The Government of Tamil Nadu granted pension to anti-Hindi agitators. In *R.R. Dalavai v. State of Tamil Nadu*,[27] the Supreme Court held the scheme unconstitutional as it contained "the vice of disintegration and fomenting fissiparous tendencies." If any State engages in exciting emotions against Hindi, or any other language, "such provocation has to be nipped in the bud because these are anti-national and anti-democratic tendencies." The State had set aside the fund to meet the pension scheme through an executive order without any legislative sanction. The Court ruled that the government could not authorise payment of pension by an executive order.

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25. *Usha Mehta v. State of Maharashtra*, (2004) 6 SCC 264, at page 280 : (2004) 5 SCALE 800. See *supra*. See also *Associated Managements of Primary and Secondary Schools in Karnataka v. The State of Karnataka*, ILR 2008 KAR 2895; 2008 (4) KarLJ 593 which holds that the Government policy compelling children studying in non-aided Government recognized schools to have primary education only in the mother tongue or the regional language is violative of Article 19(1)(g), 26 and 30(1) of the Constitution of India.

26. *Supra*, Ch. X, Sec. G(iii).

27. AIR 1976 SC 1559 : (1976) 3 SCC 748.

A Presidential order made training in Hindi compulsory for employees of the Central Government below the age of 45 years. The order emanated from the recommendations of the Parliamentary Committee (Art. 344)[28] appointed to consider the recommendations of the Official Language Commission. The constitutional validity of the order was challenged, on the ground that it was inconsistent with Section 3 of the Official Languages Act, 1963, as amended in 1968, in as much as the order placed the non-Hindi speaking people at a disadvantage.

The Central Government supported the order on the ground that it was aimed at promoting the policy of the constitutional provisions making Hindi as the official language of the Union, and that the order placed no one at a disadvantage even if one failed to qualify in Hindi because no penalty was attached thereto. On the other hand, those who completed the training were given incentives.

The Supreme Court upheld the order in *Union of India v. Murasoli Maran.*[29] The order had been issued on the recommendation of the Parliamentary Committee appointed under Art. 344(4) and it kept in view the ultimate object to make Hindi as the official language, and also took into account the circumstances prevailing in the country and, therefore, sought to provide for a gradual change. The order was not inconsistent with the Official Languages Act, 1963, which merely continues the use of the English language in addition to Hindi. The Act places no limitation on the power of the President to issue directions under Art. 344(6).[30]

The Act and the order operate in different fields and have different purposes. The Act continues the use of the English language after the expiry of 15 years and, thus, extends the transitional period of 15 years. The Presidential order provides for the progressive use of the Hindi language. It keeps in view the steps to replace the use of the English Language.

The Court also pointed out that the training in Hindi was being provided free of cost and during office time and no penalty was attached for failing to complete the training and so it placed no one at a disadvantage.

E. VIII SCHEDULE TO THE CONSTITUTION

Reference has been made to the VIII Schedule in Arts. 344(1) and 351.[31]

At present, the following 18 languages are mentioned in this Schedule *viz.*: Assamese, Bengali, Gujarati, Hindi, Kannada, Kashmiri, Konkani, Malayalam, Manipuri, Marathi, Nepali, Oriya, Punjabi, Sanskrit, Sindhi, Tamil, Telugu and Urdu.

Sindhi was added to the VIII Schedule by the Constitution Twenty-first Amendment Act, 1967.[32]

Konkani, Manipuri and Nepali languages were added by the Constitution Seventy-first Amendment in 1992.[33]

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28. *Supra*.
29. AIR 1977 SC 225 : (1977) 2 SCC 416.
30. *Supra*.
31. See, *supra*.
32. *Infra*, Ch. XLII.
33. *Infra*, Ch. XLII.

Bodo, Dogri, Maithili and Santhali were introduced by the Constitution (Ninety-second Amendment) Act, 2003.

The Supreme Court has ruled in *Kanhaiya Lal Sethia v. Union of India*[34] that to include or not to include a particular language in the VIII Schedule is a policy matter of the Central Government and the Court cannot interfere in the matter. Further no one has any Fundamental Right to compel the Centre to include any particular language in the Schedule.

F. HINDI TRANSLATION OF THE CONSTITUTION

The Constitution (Fifty eight Amendment) Act, 1987 has made provisions for publishing a Hindi Translation of the Constitution.[35]

34. AIR 1998 SC 365 : (1997) 6 SCC 573.
35. For provisions of the Amendment Act, see, *infra*, Ch. XLII, at pp. 1987-1988.

CHAPTER XVII

CONSTITUTIONAL POSITION OF JAMMU AND KASHMIR

SYNOPSIS

A. ART. 370 OF THE CONSTITUTION

Jammu and Kashmir is a constituent State of the Indian Union, but its constitutional position, and its relation with the Central Government, somewhat differ from that of the other States.

The instrument of accession signed by the Ruler of Jammu and Kashmir was accepted by the Governor-General of India on 27-10-1947. Under this instrument, only three subjects—external affairs, defence and communications—were surrendered by the State to the Dominion.

The two characteristic features of the special relationship are:

(1) the State has a much greater measure of autonomy and power than enjoyed by the other States; and

(2) the Centre's jurisdiction within the State is more limited than what it has with respect to the other States.

Due to these special features not all the provisions of the Indian Constitution apply to the State; some of the provisions apply, some do not apply at all, while others apply in a modified form.

The constitutional position of the State has not remained static since it became a constituent unit of the Indian Union. It has been growing with time towards a closer affinity of the State with the Indian Union,[1] and more and more provisions of the Constitution have been applied to it in course of time.

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1. See, JAGOTA, Development of Constitutional Relations between Jammu and Kashmir and India : 1950-1960, 2 *JILI*, 519 (1960); A.S. ANAND, THE CONSTITUTION OF JAMMU & KASHMIR, (III Ed., 1998).
Also, *Md. Maqbool v. State of J.K.*, AIR 1972 SC 963 : (1972) 1 SCC 536.

In 1950, when the Indian Constitution was on the anvil, the future picture of the relationship between India and the State was not very clear due to many complications existing at the time. Therefore, the Constitution contains Art. 370 which enables the constitutional position of the State *vis-a-vis* the Indian Union to be defined from time to time without much difficulty.[2]

Art. 370 makes "temporary provisions" with respect to the State. Art. 370 clearly recognises the special position of the State of Jammu and Kashmir. Art. 370 makes Art. 1 of the Constitution which defines the territory of the Union, and Art. 370 itself, applicable to the State at once.

Art. 370(1)(*b*) limits the power of Parliament to make laws for the State to the following:—

(*i*) Those matters in the Union List[3] and the Concurrent List,[4] as correspond to the subjects specified in the State's Instrument of Accession.

The elaboration of these subjects in terms of the entries in the two Lists is to be done by the President by order in consultation with the State Government.

In the Instrument of Accession three major heads have been mentioned, *viz.*, defence, foreign affairs and communications. Each of these broad heads has a number of items which are also listed in the Instrument.

Besides the three major heads, a number of ancillary matters have also been mentioned in the Instrument of Accession, *e.g.*, election of the President. It was necessary to identify those items in the Union and Concurrent Lists and this task was left to the President to be performed by him in consultation with the State Government.

(*ii*) Such other subjects in the Union or Concurrent Lists as the President may by order specify with the concurrence of the State Government.

This clause means that subjects other than those mentioned in the Instrument of Accession [as envisaged in (*i*) above] can be brought within the purview of Parliament. But while in (*i*) above, only *consultation* with the State Government is required, in (*ii*), the *concurrence* of the State Government has been stipulated.

Art. 370(1)(*d*) lays down that other provisions of the Constitution, besides the above, can be applied to the State with or without *modifications* by order of the President. Such an Order is not to be issued by the President—

(1) without consulting the State Government if matters to be specified in the Order relate to those mentioned in the Instrument of Accession;

(2) without the concurrence of the State Government if the matters to be specified in the Order relate to matters other than those mentioned in the Instrument.

Art. 370(2) further provided that if the State Government gave its concurrence, as mentioned above, before the convening of the State Constituent Assembly, "it shall be placed before such Assembly for such decision as it may take on". As the Constituent Assembly exists no more, Art. 370(2) has exhausted itself.

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2. For comments on Art. 370, see, *S.M.S. Naqishbandi v. ITO, Salary Circle*, AIR 1971 J & K 120.
3. *Supra*, Ch. X, Sec. D.
4. *Supra*, Ch. X, Sec. F.

In a way, Art. 370 empowers the President to define the constitutional relationship of the State in terms of the provisions of the Indian Constitution, subject to the stipulation that he can do so with reference to the matters in the Instrument of Accession in *consultation* with, and with reference to other matters with the concurrence of, the State Government.

The word 'modification' in Art. 370 is to be given the widest amplitude. Thus, the President has power to vary, amend or modify a constitutional provision, in any way he deems necessary, while applying it to the State. The power to 'modify' is co-extensive with the power to amend and is not confined to minor alterations only.

Art. 370 is a special provision for amending the Constitution in its application to the State of Jammu and Kashmir. Art. 368[5] does not curtail the power of the President under Art. 370. Even a radical alteration can be made in a constitutional provision in its application to the State.

The Supreme Court has refused to interpret the word 'modification' as used in Art. 370(1) in any "narrow or pedantic sense". The Supreme Court has observed on this point:[6]

> "We are therefore of opinion that in the context of the Constitution we must give the widest effect to the meaning of the word "modification" used in Art. 370(1) and in that sense it includes an amendment. There is no reason to limit the word "modifications" as used in Art. 370(1) only to such modifications as do not make any "radical transformation".

Further, Art. 370 authorises the President to modify a constitutional provision not only when it is applied to the State for the first time, but even subsequently after it has been applied.[7]

An amendment made to the Constitution does not automatically apply to the State of Jammu and Kashmir. It can apply only with the concurrence of the State Government, and when the President issues an order under Art. 370.[8]

Thus, Art. 370 empowers the President to adapt the constitutional provisions applied or to be applied to the State of Jammu and Kashmir in the light of the situation existing in the State from time to time. This is a flexible arrangement under which the constitutional position of the State can be defined from time to time.

B. THE CONSTITUTION (APPLICATION TO JAMMU & KASHMIR) ORDER, 1954

Under Art. 370(1)(b)(ii), the Constitution (Application to Jammu and Kashmir) Order, 1950, was promulgated by the President of India in consultation with the Government of Jammu and Kashmir. The Order specified the matters with respect to which the Union Parliament was to be competent to make laws for the State.

The Order of 1950 was then replaced by an Order with the same title in 1954. This is the basic Order which, as amended and modified from time to time, regulates the constitutional status of the State.

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5. For discussion on Art. 368, see, *infra*, Ch. XLI.
6. *Puranlal Lakhanpal v. Union of India*, AIR 1961 SC 1519, 1521 : (1962) 1 SCR 688.
7. *Sampat Prakash v. State of Jammu & Kashmir*, AIR 1970 SC 1118 : (1969) 1 SCC 562.
8. *Ibid.*, at 1124.

Today not only those provisions of the Indian Constitution which pertain to the matters mentioned in the Instrument of Accession, but many other provisions relating to several matters not specified in the Instrument, apply to the State. Briefly, the essentials of the constitutional position of the State are as follows.

(*a*) Provisions of the Constitution relating to the Central Government apply to the State with a few modifications. The State has six members in the Lok Sabha elected directly by the people of the State.

(*b*) The jurisdiction of the Supreme Court extends over the State except for Arts. 135[9] and 139.[10]

(*c*) The State is governed under a Constitution of its own drafted by its Constituent Assembly. This Constitution came into force on January 26, 1957, and it is patterned closely on the model of the Indian Constitution. Therefore, the provisions of the Indian Constitution relating to the State Governments (Legislature, Executive and High Court) do not apply to the State except for the following provisions concerning the High Court Judges:

(*i*) The Judges of the State High Court can be removed from office in the same manner as the Judges of any other High Court.[11]

(*ii*) Restriction on retired High Court Judges to plead and act before any Court or authority except the Supreme Court and other High Courts apply to the Judges of the State High Court.[12]

(*iii*) A Judge may be transferred to or from the State High Court after consultation with the Governor.[13]

(*iv*) The State High Court has been given power along with the Supreme Court of India to issue writs for the enforcement of the Fundamental Rights.[14] This power is in *pari materia* with the power of other High Courts under Art. 226 with this difference, however, that the State High Court can issue writs only for the enforcement of the Fundamental Rights and not 'for any other purpose.'[15]

(*d*) In the field of the Centre-State relationship, the legislative power of Parliament *vis-a-vis* the State extends to the matters specified in List I excluding entries 8, 9, 34, 60, 79, 97.[16] In a few other entries, such as (3, 67, 81), some modifications have been made in their application to the State.

Parliament has no residuary power *vis-a-vis* the State.[17]

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9. Art. 135 refers to the Federal Court : *supra*, Ch. IV, Sec. I(b).
10. Art. 139 refers to conferment to writ jurisdiction on the Supreme Court in addition to Art. 32 : *supra*, Ch. IV, Sec. I(i).
11. *Supra*, Ch. VIII, Sec. A
12. *Ibid*.
13. *Ibid*.
14. Art. 32(2A).
15. *Supra*, Ch. VIII.
16. *Supra*, Ch. X, Sec. D.
17. *Supra*, Ch. X, Sec. I.

Originally List III was also made not applicable to the State under the Order of 1954.[18] But, subsequently, through amendments of the 1954 order,[19] the Concurrent List has been made applicable to the State to some extent.[20]

Parliament can legislate for the State in the Concurrent List except for entries 2, 3, 5 to 10, 12 to 15, 17, 20, 21, 27, 28, 29, 31, 32, 37, 38, 40, 44. In entries 1, 30 and 45, slight modifications have been effected.[21]

The State List has been dropped in the State.[22]

It means that Parliament can legislate with reference to the entries in List I and List III (except those excluded) and all the rest of the legislative power vests in the State Legislature.

Parliament's power to legislate to enforce a treaty is subject to the limitation that no decision affecting the disposition of the State is to be made by the Government of India without the consent of the State Government.

(*e*) A Proclamation of Emergency under Art. 352(1) cannot have any effect in relation to the State (except in regard to the distribution of revenue) unless it has been made at the request or with the concurrence of the State Government.[23]

A Proclamation can be made by the President under Art. 356 if he is satisfied that the Government of the State cannot be carried on in accordance with the provisions of the Constitution of India, or the Constitution of the State. When a Proclamation under Art. 356 is in operation, Parliament becomes entitled to legislate for matters not enumerated in the Union List.[24]

No Proclamation under Art. 360 applies to the State.[25]

(*f*) The power of Parliament to re-organise the boundaries, etc., of the State is conditioned by the restriction that no Bill for such a purpose is to be introduced in Parliament without the consent of the State Legislature.[26]

(*g*) The executive power of the Centre *vis-a-vis* the State extends to the matters within the Parliamentary legislative field.[27]

The State is to exercise its executive power so as to ensure compliance with the laws made by Parliament and as not to impede or prejudice the exercise of the executive power of the Union.

(*h*) Art. 365 does not apply to the State.[28]

(*i*) The State is also bound to acquire or requisition property for the Union if required.

(*j*) Within the ambit of its administrative power, Centre can do all those things in the State which it can do in relation to the other States.

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18. *Supra*.
19. The Constitution (Application to Jammu and Kashmir) Amendment Order, 1963; The Constitution (Application to Jammu and Kashmir) Amendment Orders issued subsequently from time to time.
For the text of these Orders, see, App. IX to ANAND, A.S., THE CONST. OF J & K, 472-508.
20. ANAND, A.S., THE CONSTITUTION OF J&K 145.
21. *Supra*, Ch. X, Sec. F.
22. *Supra*, Ch. X, Sec. E.
23. *Supra*, Ch. XIII.
24. *Supra*, Ch. X, Sec. D.
25. *Supra*, Ch. XIII.
26. *Supra*, Ch. V.
27. *Supra*, Ch. XII, Sec. A.
28. *Supra*, Ch. XII., Sec. E.

(*k*) As regards the sharing of revenue between the Centre and the State, the general scheme applies.[29]

(*l*) Provisions relating to freedom of trade and commerce,[30] services[31] and citizenship[32] apply to the State.

(*m*) The Election Commission has jurisdiction over elections held in the State under its Constitution.[33] Like the rest of India, election petitions in the State are heard by the High Court from where an appeal lies to the Supreme Court.

(*n*) No provisions regarding Minorities apply to the State except those for the Scheduled Castes and Backward Classes; seats are to be reserved in the Lok Sabha for the Scheduled Castes.[34]

(*o*) Provisions of the Constitution relating to the Official Language apply to the State only in so far as they relate to—(*i*) the Official Language of the Union; (*ii*) the Official Language of inter-State and Central-State communication; and (*iii*) the language of the Supreme Court proceedings.[35]

(*p*) An amendment made to the Constitution under Art. 368 does not take effect in the State unless applied by a Presidential order under Art. 370(1).[36]

(*q*) Directive Principles of State Policy do not operate in the State.[37]

(*r*) Fundamental Rights operate in the State with slight modifications,[38] some of the important ones being:

(*i*) the power of legislation regarding preventive detention vests in the State Legislature alone and not in Parliament, and Art. 22 stands modified to this extent.[39]

(*ii*) The State Legislature, notwithstanding any Fundamental Right, has power to define persons who may be permanent residents of the State and to confer on them any special rights, or impose on others any restrictions, as respects employment under the State Government, acquisition of property within the State, settlement in the State and right to scholarships provided by the State.

It will be apparent from the above that from time to time through Presidential orders passed under Art. 370, a large number of the provisions of the Constitution have already become applicable to the State of Jammu and Kashmir. The only condition precedent for the exercise of this power by the President is the concurrence of the State Government. There is no limitation on the exercise of the power by the President in relation to one or more of the remaining provisions of the Constitution. The process of extending the various provisions of the Constitution to the State has been gradual and as a result of consensus between the

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29. *Supra*, Ch. XI, Sec. K.
30. *Supra*, Ch. XV.
31. *Infra*, Ch. XXXVI.
32. *Infra*, Ch. XVIII
33. *Infra*, Ch. XIX.
34. *Infra*, Ch. XXXV.
35. *Supra*, Ch. XVI.
36. *Infra*, Ch. XLI.
37. *Infra*, Ch. XXXIV.
38. *Infra*, Chs. XX-XXXIII.
39. *Infra*, Ch. XXVII, Sec. B.

Government of India and the State as dictated by experience and mutual advantage of both.

On February 24, 1975, Prime Minister Indira Gandhi made a Statement on the future relationship between the State and the Indian Union.[40] The highlight of the Statement is that this constitutional relationship will continue as hitherto, and that the extension of further provisions of the Constitution to the State will continue to be governed by the procedure prescribed in Art. 370.

C. STATUS OF ART. 370

Art. 370 has been characterised in the Constitution as being of a temporary nature. Art. 370(3) says that the President, by public notification, may declare that Art. 370 shall cease to be operative, or shall be operative only with such exceptions, and modifications, and from such date as he may specify. But before the President can issue any such notification, the recommendation of the Constituent Assembly of the "shall be necessary".

Since the Constituent Assembly of the State exists no more, Art. 370(3) is no longer operative. Therefore, if any modification is to be made to Art. 370, recourse will have to be had to Art. 368 regarding amendment of the Constitution.

But, a moot point is whether any amendment made to Art. 370 under Art. 368, without the concurrence of, or consultation with, the State Government will be effective. The Constitution (Application to J & K) Order, 1950, lays down that any amendment to the Constitution does not apply to the State unless it is extended there- to by a Presidential Order under Art. 370(1) which again involves "concurrence of", or "consultation with", the State Government.

40. THE TIMES OF INDIA, Feb. 25, 1975, p. 7.

PART V

POLITICAL AND CIVIL RIGHTS

CHAPTER XVIII

CITIZENSHIP

SYNOPSIS

A. CONSTITUTIONAL PROVISIONS

Though India is a Federation having two levels of government,[1] Centre and the States—there is only single citizenship, *viz.*, the Indian citizenship, and no separate State citizenship.

1. *Supra*, Chs. X—XVII.

Articles 5 to 11 in the Constitution lay down as to who are the citizens of India at the commencement of the Constitution, *i.e.*, on January 26, 1950. These citizens have been classified into:

(1) citizens by domicile;
(2) citizens by migration, and
(3) citizens by registration,[2]

(a) CITIZENS BY DOMICILE

Under Art. 5, every person having domicile in India at the commencement of the Constitution, and fulfilling *any* of the following conditions, is a citizen of India, *viz,*:

(*a*) he was born in India;
(*b*) either of whose parents was born in India;
(*c*) who has been ordinarily resident in India for not less than five years immediately preceding the commencement of the Constitution.

Conditions (*a*), (*b*) and (*c*) are not cumulative but alternative and, therefore, any one of them needs to be fulfilled by a person having domicile in India to be an Indian citizen.[3]

The term 'domicile' is not defined in the Constitution. Domicile is a complex legal concept in the area of the Conflict of Laws.[4] Art. 5 draws a distinction between 'domicile' and 'residence', for neither 'domicile' nor mere 'residence' is sufficient to make a person an Indian citizen. Domicile and five years' residence are necessary to make a person a citizen.

The basic idea of 'domicile' is permanent home. A person's domicile is the country which is considered by law to be his permanent home. Residence in the country, and the intention to make it his home are necessary to constitute a domicile. The residence in a place by itself is not sufficient to constitute it his domicile. It must be accompanied by the intention to make it his permanent home.

As the Supreme Court has observed in *Central Bank of India v. Ram Narain*,[5] an intention to reside for ever in a country where one has taken up his residence is an essential constituent element for the existence of domicile in that counrty. The Supreme Court has expounded this theme in *Louis De Raedt v. Union of India*[6] as follows:

> "For the acquisition of a domicile of choice, it must be shown that the person concerned had a certain state of mind, the *animus manendi*. If he claims that he acquired a new domicile at a particular time, he must prove that he had formed

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2. On this topic see, R.B. Sethi, *The Law of Foreigners and Citizenship* (1981). See also, *Izhar Ahmed Khan v. Union of India*, AIR 1962 SC 1052 : 1962 Supp 3 SCR 235.
3. *Abdul Sattar v. State of Gujarat*, AIR 1965 SC 810 : (1965) 1 CriLJ 759.
4. The Indian Succession Act, 1925, lays down some rules on this topic for the purposes of the Act. The courts may seek guidance therefrom to determine the question of 'domicile' under Art. 5.
On domicile, see generally, Graveson, *The Conflict of Laws*, 145 et seq. (1965).
For a discussion on domicile in India see, *Joshi v. Madhya Bharat*, AIR 1955 SC 334; *Central Bank of India v. Ram Narain*, AIR 1955 SC 36 : (1955) 1 SCR 697; *Mohd. Reza Debstani v. State of Maharashtra*, AIR 1966 SC 1436 : (1966) 3 SCR 441.
5. AIR 1955 SC 36.
6. AIR 1991 SC 1886, 1889 : (1991) 3 SCC 554. Also see, *Kedar Pandey v. Narain Bikram Sah*, AIR 1966 SC 160 : (1965) 3 SCR 793.

> the intention of making his permanent home in the country of residence and of continuing to reside there permanently. Residence alone, unaccompanied by this state of mind, is insufficient."

An Indian who lived for thirty years in England and died there was held to have retained his domicile in India as he had expressed a desire to come back to India in some of his letters.[7] But, on appeal, the Supreme Court held that he had no definite intention to return to India and he died domiciled in England.[8]

In *Louis De Raedt*,[9] a foreigner had been living in India since 1937 and for more than five years immediately preceding the Constitution. He claimed Indian citizenship under Art. 5(e). But the Supreme Court rejected his claim. The Court held that, on facts, it could not said that he had his domicile in India for more than five years at the commencement of the Constitution. Mere residence is not enough.

The question was whether the petitioner had an intention of staying here permanently. The burden to prove such an intention lay on the petitioner. Louis was staying in India on the basis of a foreign passport with the permission of the Indian authorities. There was nothing to even remotely suggest that he had formed any intention of permanently residing in India.

A minor takes the domicile of his father.[10] A married woman takes the domicile of her husband.[11]

As stated above, India has one citizenship only and no separate State citizenship. A question has, however, arisen whether the same is true of domicile; whether there is one Indian domicile only or there can be a separate State domicile as well.

In *Joshi v. Madhya Bharat*,[12] a majority of the Supreme Court expressed the view that it was theoretically possible to have a separate State domicile, because domicile has reference to the system of law by which a person is governed. Domicile and citizenship are two different concepts. Art. 5 makes this clear because under it domicile alone is not sufficient to confer citizenship on a person. "When we speak of a person as having a domicile of a particular country, we mean that in certain matters such as succession, minority and marriage he is governed by the law of that country." If, therefore, in one country different laws relating to succession and marriage prevail in different places and areas, then each area having a distinct set of laws can itself be regarded as a country for the purpose of domicile.

The Representation of the Peoples Act, 1951 initially required "domicile" in the State concerned for getting elected to the Council of States. This was deleted in 2003.[13]

Under the Indian Constitution, the power to legislate on succession, marriage and minority has been conferred on both the Union and the State Legislatures,[14]

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7. *Sankaran Govindan v. Lakshmi Bharathi*, AIR 1964 Ker 244. Also, *Abdus Samad v. State of West Bengal*, AIR 1972 SC 505 : (1973) 1 SCC 451.
8. *Sankaran v. Lakshmi*, AIR 1974 SC 1764 : (1975) 3 SCC 351.
9. *Supra*, footnote 6.
10. *Dawood Mohd. v. Union of India*, AIR 1969 Guj 79; *Malkiat Singh v. State of Punjab*, AIR 1969 Punj 250; *Sharafat v. State of Madhya Pradesh*, AIR 1960 All 637; *Vishal Nilesh Mandlewala v. Justice R.J. Shah (Retd.)*, 2007 (2) GLR 1764.
11. *Karinum Nisa v. State of Madhya Pradesh*, AIR 1955 Nag 6.
12. *Supra*, footnote 4.
13. *Kuldip Nayar v. Union of India*, (2006) 7 SCC 1 : AIR 2006 SC 3127.
14. Entry 5, List III; *supra*, Ch. X, Sec. F.

and so it is quite conceivable that until the Centre intervenes and enacts a uniform code for the whole of India, each State may have its own laws on these subjects, and, thus, there could be different domiciles for different States.

JAGANNADHADAS, J., dissenting from the majority, however, pointed out that since the personal laws in India are mostly on religious affiliations, that statutory modifications introduced therein have been almost entirely of an all-India character and not on a regional basis, that there is very little State legislation on any matter of personal laws and that, too, within an extremely small compass, there is not much scope in India for the growth of any concept of State domicile as distinct from the Indian domicile.

In *Pradeep Jain v. Union of India*,[15] the Supreme Court has repudiated the notion of State domicile. The Court has asserted that there is only one domicile, namely domicile in India. Art. 5 recognises only one domicile, namely, "domicile in the territory of India". The Court has now emphasized that the Indian Federation has not emerged as a result of a compact of sovereign States and so it is "not a federal State in the traditional sense of that term".[16] India has one single indivisible system with a single unified justicing system having the Supreme Court at the apex of the hierarchy.[17]

(b) CITIZENS BY MIGRATION

The Independence of India was accompanied by a large scale migration of people from Pakistan. As these people belonged to the territory which ceased to be a part of India after the Independence, they could not be regarded as Indian citizens under Art. 5 and, therefore, special provisions had to be made for them in the Constitution.

Under Art. 6, an immigrant from Pakistan became a citizen of India if he, or either of his parents, or any of his grandparents, was born in India (as it was prior to the Independence), and, in addition, fulfilled *either* of the following two conditions:

(1) in case he migrated to India before July 19, 1948,[18] he had been ordinarily resident in India since the date of his migration; or

(2) in case he migrated on or after July 19, 1948, he had been registered as a citizen of India.

A person could be so registered only if he had been resident in India for at least six months preceding the date of his application for registration.

The migration envisaged in Art. 6 only means coming to India from outside[19] and it must have taken place before, and not after, the commencement of the Constitution.[20]

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15. AIR 1984 SC 1420 : (1984) 3 SCC 654.
16. See Ch. XIV, Sec. H, *supra.*
17. In *State of Bombay v. Narayandas*, AIR 1958 Bom 68, the Bombay High Court held that a Sate Legislature could not claim jurisdiction on marriages performed outside the States on the ground that these were performed by those domiciled within the State as there was no State domicile as such in India apart from the Indian domicile.
18. On this date, the Influx from Pakistan (Control) Ordinance introduced a permit system to control the admission into India of persons from West Pakistan.
19. *Union of India v. Karam Ali*, AIR 1970 A. & N. 1416.
20. *Shanno Devi v. Mangal Sain*, AIR 1961 SC 58 : (1961) 1 SCR 576.

(c) CITIZENS BY REGISTRATION

According to Art. 8, a person who, or either of whose parents, or any of whose grandparents, was born in India (before independence) but who is ordinarily residing in any country outside India and Pakistan, may register himself as a citizen of India with the diplomatic or consular representative of India in the country of residence.

This provision confers Indian citizenship on a person who *prima facie* has no domicile in India and it seeks to cover the overseas Indians who may want to acquire Indian citizenship.

(d) TERMINATION OF CITIZENSHIP

Under Art. 7, a citizen of India by domicile (Art. 5), or by migration (Art. 6), ceases to be citizen if he has migrated to Pakistan after March 1, 1947. If, however, after migration to Pakistan, he has returned to India under a permit of resettlement, or permanent return, he can register himself as a citizen of India in the same manner as a person migrating from Pakistan after July 19, 1948.

Article 7 thus overrides Arts. 5 and 6. Art. 7 envisages only those persons who migrated to Pakistan between March 1, 1947, and January 26, 1950.[21] These persons lost their Indian citizenship. The question of citizenship of persons migrating to Pakistan after January 26, 1950, has to be decided under the provisions of the Indian Citizenship Act.[22]

A woman born and domiciled in India, going to Pakistan after March 1, 1947, would lose her Indian citizenship under Art. 7, even though her husband remained in India, as the rule of Private International Law that her domicile was the same as that of her husband, *viz.*, India, could not render Art. 7 nugatory as she did in fact migrate to Pakistan. Art. 7 is pre-emptory in its scope and makes no exception in favour of a wife who migrates to Pakistan leaving her husband in India.[23] The concept of domicile is contained in Art. 5, but as both Arts. 6 and 7 have been made operative 'notwithstanding Art. 5,' the concept of 'domicile' has been excluded from the scope of Arts. 6 and 7.

The word 'migration' has been used in the sense of people going from one territory to the other, whether or not with the intention of permanent residence there. In *Shanno*,[24] a narrow view of the word 'migration' used in Art. 6 was adopted by the Supreme Court. 'Migration' was envisaged to mean coming to India with the intention of residing there permanently. But the Court dissented from this view in *Kulathil*[25] and interpreted 'migration' (used in Arts. 6 and 7) in a broad sense and not in a narrow sense as meaning going or coming from one territory to another without bringing in the concept of domicile. The Court pointed out that Arts. 6 and 7 make special provisions for dealing with an abnormal situation created by large movement of population between India and Pakistan.

These Articles lay down special criteria of their own, in one case to decide who shall be deemed to be citizens of India (Art. 6), and in the other case who

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21. *State of Madhya Pradesh v. Peer Mohd.*, AIR 1963 SC 645 : 1963 Supp (1) SCR 429.
22. See, *infra*, Sec. B.
23. *State of Bihar v. Amar Singh*, AIR 1955 SC 282 : (1955) 1 SCR 1259.
24. *Supra.*
25. *Kulathil Mamma v. State of Kerala*, AIR 1966 SC 1614 : (1966) 3 SCR 706.

shall not be deemed to be such citizens (Art. 7). The Constitution-makers did not intend that "the concept of domicile should be brought into Articles 6 and 7."

But the movement should be voluntary and should not have been for a specific purpose and for a short and limited period. Therefore, a boy of 12 years' age who left for Pakistan in 1948, leaving behind his parents in India, came back to India on a Pakistani passport in 1954, again left for Pakistan and came back to India in 1956, was held to have lost his Indian citizenship because of migration.

(e) DUAL CITIZENSHIP

Under Art. 9, no person can be a citizen of India under Arts. 5, 6 and 8, if he has voluntarily acquired the citizenship of a foreign country. This provision thus recognises the principle that no Indian citizen can claim a dual or plural citizenship. However, this is subject to Parliament's power under Art. 11 to provide for *inter alia*, the acquisition of citizenship.

Article 9 thus applies only to those cases where foreign citizenship had been acquired before, and not after, the commencement of the Constitution. The latter type of situation has been dealt with under the provisions of the Indian Citizenship Act, 1955.[26]

B. THE CITIZENSHIP ACT, 1955

The above-mentioned provisions of the Constitution regarding citizenship are not exhaustive but fragmentary and skeletal. These provisions are confined mainly to defining who are citizens of India at the commencement of the Constitution but do not deal with the problem of acquisition of citizenship subsequent to that date. Nor is there any provision in the Constitution to deal with such matters as termination of citizenship (other than Arts. 7 and 9), or other matters concerning citizenship. Art. 11 expressly empowers Parliament to make a law to provide for such matters and, accordingly, Parliament has enacted the Citizenship Act, 1955, to provide for the acquisition and determination of Indian citizenship.

In this connection, reference may be made to entry 17, List I[27] which runs as "citizenship, naturalisation and aliens". Thus, Parliament has exclusive power to legislate with respect to "citizenship". Also, Art. 10 says that a person who is a citizen of India under Arts. 5 to 8 shall, subject to any law made by Parliament, continue to be such citizen. This means that the law enacted by Parliament can make changes even in Arts. 5 to 8.

The Act provides for acquisition of Indian citizenship after the commencement of the Constitution, makes necessary provisions for termination and deprivation of citizenship in certain circumstances and seeks to recognise formally the concept of Commonwealth citizenship. The Act does not apply to a company, association or body of individuals whether incorporated or not.

The Act provides for five ways for acquiring Indian citizenship, *viz.*,

(a) birth;

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26. *State of Madhya Pradesh v. Peer Mohd.*, AIR 1963 SC 645 : 1963 Supp (1) SCR 429; *Kulathil v. State of Kerala, op. cit.*; *State of Uttar Pradesh v. Shah Mohammad*, AIR 1969 SC 1234; *State of Assam v. Jilkadar Ali*, AIR 1972 SC 2166 : (1972) 3 SCC 320.

27. *Supra*, Ch. X, Sec. D.

(b) descent;

(c) registration;

(d) naturalisation and

(e) incorporation of some territory into India.

(a) CITIZENSHIP BY BIRTH

According to section 3, a person born in India on or after the 26th January, 1950, but before the commencement of the Citizenship (Amendment) Act, 1986, and those born in India on or after such commencement and either of whose parents is a citizen of India at the time of his birth is a citizen of India by birth except when—(1) his father possesses diplomatic immunity and is not an Indian citizen; or (2) his father is an enemy alien and his birth occurs at a place under enemy occupation.

(b) CITIZENSHIP BY DESCENT

S. 4 provides for citizenship by descent. A person born outside India on or after January 26, 1950, but before the commencement of the Citizenship (Amendment) Act, 1992, is a citizen of India by descent if at the time of his birth his father is an Indian citizen, or a person born outside India on or after such commencement shall be a citizen of India by descent if either of his parents is a citizen of India at the time of his birth provided that in the later case if either of the parents of such a person was a citizen of India by descent only, that person shall not be an Indian citizen by virtue of this provision unless his birth is registered at an Indian consulate, or either of his parents is, at the time of his birth, in service under Government in India.

(c) CITIZENSHIP BY REGISTRATION

S. 5 deals with citizenship by registration. The following categories of persons, if not already citizens of India, can be registered as Indian citizens, after taking an oath of allegiance:

(*a*) persons of Indian origin ordinarily resident in India and residing there for six months immediately preceding the application for registration;

(*b*) persons of Indian origin who are ordinarily resident outside undivided India;

(*c*) women married to the Indian citizens;

(*d*) minor children of Indian citizens;

(*e*) persons of full age and capacity who are citizens of a Commonwealth country.

Category (*a*), mentioned above, covers migrants from Pakistan who could not become Indian citizens under the provisions of the Constitution.

In prescribing conditions and restrictions subject to which citizens of a Commonwealth country may be registered as Indian citizens under head (*e*), mentioned above, the Central Government is to keep due regard to the conditions subject to which the Indian citizens may become citizens of that country by registration.

Cls. (*a*) and (*e*) of this section are mutually exclusive and a person of Indian origin who is a citizen of a Commonwealth country falls under (*e*) and not (*a*).[28]

Since 2003, citizenship can be granted to an overseas citizen of India right in accordance with the provisions of Sections 7A and 7B.[29]

The Citizenship Act does not have any provision providing for cancellation of a certificate of registration issued under s. 5.[30]

In spite of a certificate of registration under Section 5(1)(c) of the Citizenship Act, 1955 having been granted to a person and in spite of his having been enrolled in the voters' list, the question whether he is a citizen of India and hence qualified for, or disqualified from, contesting an election can be raised before and tried by the High Court hearing an election petition.[31]

The registration granted to an overseas citizen under Section 7A can be withdrawn/cancelled in terms of Section 7D by the Central Government.[32]

(d) CITIZENSHIP BY NATURALIZATION

S. 6 deals with citizenship by naturalisation. A person of full age and capacity who is a citizen of a non-Commonwealth country may become a citizen by naturalisation, if the Central Government is satisfied that he fulfils the conditions laid down in the Act. These conditions are:

(1) he is not a subject or citizen of a country where Indian citizens are prevented from becoming citizens by naturalisation;

(2) he renounces his citizenship of the other country;

(3) he has resided and/or been in government service for 12 months immediately preceeding the date of application;

(4) during 7 years prior to these 12 months, he has resided and/or been in government service for not less than four years;

(5) he is of good character;

(6) he has an adequate knowledge of a language recognised by the Constitution;

(7) after naturalisation he intends to reside in India, or enter into service with government international organisation, or a society or company in India.

If the Central Government is of the opinion that the applicant has rendered distinguished service to the cause of science, philosophy, art, literature, world peace or human progress generally, it may waive the conditions for naturalisation in his case. The applicant for citizenship must be communicated the grounds for refusing the grant and allowed to make a representation against the order.[33]

S. 6A was enacted in 1985 to give effect to the Assam accord.

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28. *Ghaurul Hasan v. State of Rajasthan,* AIR 1958 Raj 173.
29. See *infra* under "Dual Citizenship".
30. *Hari Shankar Jain v. Sonia Gandhi,* (2001) 8 SCC 233 : AIR 2001 SC 3689.
31. *Hari Shanker Jain v. Sonia Gandhi,* (2001) 8 SCC 233 at page 250 : AIR 2001 SC 3689.
32. *Satish Nambiar v. Union of India,* AIR 2008 Bom 158.
33. *Hasan Ali Raihany v. Union of India,* (2006) 3 SCC 705 at page 707 : AIR 2006 SC 1714. See also *K. Krishna M.A. Raihany v. Union of India,* (2007) 5 SCC 533 at page 534 : (2007) 7 JT 258.

(e) CITIZENSHIP BY INCORPORATION OF TERRITORY

S. 7 provides for citizenship by incorporation of territory. On any territory becoming a part of India, the Central Government may notify the persons who shall be citizens of India by reason of their connection with that territory.

(f) COMMONWEALTH CITIZEN

A citizen of a Commonwealth country has the status of a Commonwealth citizen in India. The Central Government may, by an order notified in the official gazette, make provisions, on a basis of reciprocity, for the conferment of all or any of the rights of an Indian citizen of a Commonwealth country.

(g) DUAL CITIZENSHIP

The Citizenship Act was twice amended to provide for dual citizenship. By the amending Act of 2003[34] provision was made for acquisition of overseas citizenship of India by persons of indian origin of 16 specified countries other than Pakistan and Bangladesh. The 2003 amendment provides for the manner and methods by which a person could acquire a citizenship of India and its revocation. In 2005, the Act was further amended[35] to (i) expand the scope of grant of overseas citizenship of India to persons of indian origin of all countries except Pakistan and Bangladesh; and (ii) reduce the period of residence in India from two years to one year for persons registered as overseas citizens of India to acquire Indian citizenship. However, this concept is distinct from Indian Citizenship, not only with regard to the procedure for grant of citizenship and the privileges consequent upon registration but also with regard to the cancellation of the citizenship.[36]

Section 8 provides that an Indian citizen of full age and capacity, who is also a citizen or national of another country, can renounce his Indian citizenship by making a declaration to that effect and having it registered. Registration of such a declaration is withheld when made during a war in which India may be engaged.

When a male person renounces his citizenship, every minor child of his also ceases to be an Indian citizen though such a child, within a year of his attaining full age, may resume Indian citizenship by making a declaration to that effect.

(h) CESSATION OF CITIZENSHIP

Section 9 provides for termination of Indian citizenship upon acquisition of citizenship of another country which event entails cessation of citizenship of India.[37]

According to S. 9, a citizen of India ceases to be so on his voluntarily acquiring citizenship of another country by naturalization, registration or otherwise. This provision does not apply during a war in which India may be engaged. If any question arises as to whether, when or how any person has acquired the citi-

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34. Citizenship (Amendment) Act, 2003 (6 of 2004).
35. Citizenship (Amendment) Ordinance, 2005 subsequently replace by Act 32 of 2005.
36. *Satish Nambiar v. Union of India,* AIR 2008 Bom 158; *Mr. Criag Maxwell Sterry v. Ministry of Home Affairs;* High Court of Bombay at Goa: Writ Petition No. 513/2009: Judgement dated 11-09-2009.
37. *Ibid.*

zenship of another country, it is to be determined by such authority and in such manner as may be prescribed by the rules.

Under Rule 30 of the Citizenship Rules, this authority is the Central Government which acts in a *quasi-judicial* capacity while discharging this function.[38] Voluntarily obtaining the passport of a foreign country is, according to the Citizenship Rules, conclusive proof of an Indian citizen having voluntarily acquired citizenship of that country.[39]

There is no automatic loss of Indian citizenship by acquisition of a foreign passport. Whether a person has lost his Indian citizenship or not is to be decided by the Central Government and it is only after such a decision that he can be dealt with as a foreigner.[40]

The child of Sri Lankan parents who were found guilty of assassinating the former Prime Minister Rajiv Gandhi, was held to be an Indian citizen since she was born while her mother was in an Indian prison. She did not cease to be an Indian citizen and was entitled to enter and live in this country till the status of her citizenship was determined by the Central Government under section 9(2), although soon after her parents were awarded the death penalty, her grandmother took her to Sri Lanka on a Sri Lankan passport and she had resided there ever since.[41]

The rule-making power conferred by the Act, and Rule 30 along with the rule of evidence, have been held to be valid as these provisions are based on the accepted principle that an Indian citizen cannot acquire a dual citizenship and the rule-making power covers cases of voluntary acquisition of foreign citizenship otherwise than by registration or naturalisation.[42]

These provisions become relevant only when the person concerned is, to start with, a citizen of India and has lost this citizenship thereafter.[43] The Supreme Court has observed that "the question whether a person is a foreigner is a question of fact which would require careful scrutiny of evidence since the inquiry is *quasi-judicial* in character. This question has to be determined by the Central Government".

In *Lal Babu Hussain*,[44] the name of a person entered in an electoral roll was deleted on the ground of his citizenship being suspect. The Supreme Court quashed the order on the ground that the procedure followed by the electoral registration officer was flawed. The Supreme Court emphasized that a person must be a citizen of India for his name to be included in the electoral roll. A non-

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38. *Ayub Khan v. Commr. of Police*, AIR 1965 SC 1623 : (1965) 2 SCR 884; *State of Uttar Pradesh v. Shah Mohammad*, AIR 1969 SC 1234; *State of Gujarat v. Ibrahim*, AIR 1974 SC 645 : (1974) 1 SCC 283.

39. *Izhar Ahmad Khan v. Union of India*, AIR 1962 SC 1052 : 1962 Supp 3 SCR 235; *S.K. Moinuddin v. Govt. of India*, AIR 1967 SC 1143 : (1967) 2 SCR 401; *Bhanwaroo Khan v. Union of India*, (2002) 4 SCC 346 at page 349 : AIR 2002 SC 1614.

40. *State of Andhra Pradesh v. Mohd. Khan*, AIR 1962 SC 1778; *State of Uttar Pradesh v. Rahmatullah*, AIR 1971 SC 1382; *Dipali Katia Chadha v. Union of India*, (1996) 7 SCC 432.

41. *S. Nalini Srikaran v. Union of India*, AIR 2007 Mad 187 : (2007) 2 MLJ 831.

42. *Izhar Ahmad v. Union of India*, AIR 1962 SC 1052 : (1962) Supp (3) SCR 295.
Also see, *Bhanwaroo Khan v. Union of India*, AIR 2002 SC 1614 : (2002) 4 SCC 346.

43. *Ibrahim v. State of Rajasthan*, AIR 1965 SC 618 : (1964) 7 SCR 441.

44. *Lal Babu Hussein v. Electoral Registration Officer*, AIR 1995 SC 1189 at 1194 : (1995) 3 SCC 100.

citizen cannot be registered in an electoral roll. When the name of a person is already entered in the electoral roll, his name can be removed only after giving him a reasonable opportunity of being heard.

(i) DEPRIVATION OF CITIZENSHIP

Under S. 10, citizens of India by naturalisation, marriage, registration, domicile and residence may be deprived of citizenship by an order of the Central Government, if it is satisfied that—

(*a*) the registration or naturalisation was obtained by means of fraud, false representation or concealment of any material fact,[45] or,

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

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

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

(*e*) he has been ordinarily resident out of India for seven years continuously.

This provision does not apply if he is a student abroad, or is in the service of a government in India, or an international organisation of which India is a member, or has registered annually at an Indian consulate his intention to retain his Indian citizenship.

Before making an order depriving a person of his citizenship, the Central Government is to give to the person concerned, a written notice containing the ground on which the order is proposed to be made. The person concerned may have his case referred to a committee of inquiry if the ground is not (*e*). The Central Government is bound to refer the case to a committee consisting of a chairman (a person who has held a judicial office for at least ten years) and two other members appointed by the Government. The committee holds the inquiry and the Central Government is to be ordinarily guided by its report in making the order.

(j) EXPULSION OF A FOREIGNER

The Supreme Court has asserted that the power of the Government to expel a foreigner is absolute and unlimited. There is no provision in the Constitution fettering this discretion of the Government.

The Government has an unrestricted power to expel a foreigner without assigning any reasons. A foreigner has no right to claim Indian citizenship. No foreigner can claim to stay in India as a matter of right. The Government has an unrestricted right to expel a foreigner.[46] A foreigner can claim the protection to his

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45. *Ghaurul Hasan v. State of Rajasthan*, AIR 1967 SC 107.

46. *Hans Muller of Nuremberg v. Superintendent, Presidency Jail, Calcutta*, AIR 1955 SC 367 : (1955) 1 SCR 1284; *Louis De Raedt v. Union of India, Supra; Gilles Preiffer v. Union of India*, 1996 Writ LR 386; *David John Hopkins v. Union of India*, AIR 1997 Mad 366; *Sarbananda Sonowal v. Union of India*, (2005) 5 SCC 665 at page 693 : AIR 2005 SC 2920.

life and liberty under Art. 21,[47] but the right to reside and settle in India as conferred by Art. 19(1)(d) is available only to the citizens of India and not to non-citizens.[48]

C. CORPORATION NOT A CITIZEN

There are certain Fundamental Rights conferred by the Indian Constitution on 'persons', and certain on 'citizens'. For example, the right to freedom of speech under Art. 19(1)(a) is conferred only on the citizens of India.[49] In this connection, a question of great interest has arisen, *viz.*, whether a statutory corporation, or a company registered under the Indian Companies Act, can be treated as a citizen and given the benefit of the Fundamental Rights which are available only to the citizens.

Till 1960, the Supreme Court, without specifically deciding this question, entertained a number of writ petitions[50] from companies and corporations under Art. 32[51] claiming Fundamental Rights under Arts. 19(1)(*f*) and 19(1)(*g*).[52] The question was left open whether an Indian Company could have the rights of a citizen under Art. 19.[53] But the Supreme Court gave a definitive opinion on this point in *State Trading Corporation v. Commercial Tax Officer*.[54] The question was whether the State Trading Corporation could claim the benefit of Art. 19(1)(*g*), *viz.*, right to carry on any trade or business.[55]

The Corporation is a government company registered under the Indian Companies Act and consists only of the President of India and the Secretary of the Ministry of Commerce as its shareholders. Its status is that of a private limited company. The Corporation moved the Supreme Court under Art. 32 to quash sales tax proceedings against it by a State on the ground that the imposition of the sales tax was illegal and infringed its Fundamental Right guaranteed by Art. 19(1)(*g*).[56]

The basic question which arose was whether the 'Corporation' was a 'citizen', for the freedom under Art. 19(1)(*g*) is available only to a citizen and to none else.

The Supreme Court answered the question in the negative. The Court argued that the Indian Constitution does not define citizenship. Arts. 5 to 9 of the Constitution deal with citizenship in certain circumstances only, but the tenor of these Articles is such that they cannot apply to a juristic person. The Citizenship Act specifically excludes a company, association, body or individuals, whether incor-

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47. See, Ch. XXVI, *infra.*
48. See, Ch. XXIV, Sec. F, *infra.*
49. See, for example, Art. 19, *Infra*, Ch. XXIV. Secs. C to H.
50. See, for example, *The Bengal Immunity* case, AIR 1955 SC 661 : (1955) 2 SCR 603; *The Sholapur Mills* case, AIR 1951 SC 41; *Express Newspaper Ltd. v. Union of India*, AIR 1958 SC 578 : 1959 SCR 12; *Lord Krishna Sugar Mills Ltd. v. Union of India*, AIR 1959 SC 1124 : (1960) 1 SCR 39.
In *Hamdard Dawakhana v. Union of India*, AIR 1960 SC 554 : (1960) 2 SCR 671, a petition by a Muslim wakf was entertained by the Supreme Court and some relief was given under Art. 19(1)(*a*) : see, *infra*, Ch. XXIV, Sec. C.
51. For Art. 32, see, Ch. XXXIII, Sec. A.
52. *Infra*, Ch. XXIV, Section H.
53. *Sewpujanrai v. Customs Collector*, AIR 1958 SC 845 : 1959 SCR 821.
54. AIR 1963 SC 1811 : (1964) 4 SCR 99.
55. For a detailed discussion on Art. 19(1)(*g*), see, *infra*, Ch. XXIV, Sec. H.
56. For a detailed discussion on Art. 32, see, *infra*, Ch. XXXIII, Sec. A

porated or not, from the concept of a person under the Act, and so from the concept of the Indian citizenship.

Thus, under the Constitution, or the Citizenship Act, only a natural person can be a citizen. Drawing a distinction between citizenship and nationality, the Court stated that while all citizens are nationals of a State, the reverse is not always true because nationality is a concept of international law while citizenship is a concept of municipal law. Therefore, while a company might have 'nationality', which ordinarily is determined by the place of its incorporation, it does not have 'citizenship'. Refusing to hold the State Trading Corporation as a citizen, the Court rejected its petition under Art. 32.[57]

The case could, however, have been decided on another ground, *viz.*, the State Trading Corporation is a government instrumentality composed of government officials; all its capital comes from the government. As a government body, it could not claim to enforce Fundamental Rights which are meant for the protection of private parties against the government or its instrumentalities.[58] If such a body could claim to enforce a Fundamental Right against a State, then, on a parity of reasoning, it could claim a similar right against the Centre. Suppose the Parliament passes a law to regulate trade carried on by the State Trading Corporation. Can it challenge the Act claiming that its rights under Art. 19(1)(*g*) have been infringed? The answer appears to be in the negative. And if it cannot enforce a Fundamental Right against the Centre, it cannot enforce the same against a State.

The *State Trading Corporation* case was concerned with a government company, whereas in the *Tata* case,[59] a public limited company having a majority of Indian citizens as shareholders was involved. The Court also denied to such a company the Fundamental Right claimed.

In the *Tata* case, along with the company, two shareholders had also joined in making the petition. The shareholders argued that the corporate veil of the Tata Company should be pierced and its substantial character determined without reference to the technical doctrine of the corporation's separate entity. The Court in a majority decision refused to accept this argument saying that piercing of the corporate veil has been done only in a very few cases and that this is an exception rather than the rule. The Court held that a company has a legal entity of its own which is entirely separate from that of its shareholders and to accept the plea of the shareholders would amount to enforcing indirectly what the company could not claim directly. Thus, even individual shareholders cannot claim a Fundamental Right so as to benefit the company.

These cases, in effect, withdraw the safeguard of Art. 19 from the corporate sector. Even if a corporation is Indian in every sense, *e.g.*, it is registered in India, has Indian capital and all of its shareholders and directors are Indians, it can

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57. The minority view in the instant case was that the word 'citizen' in Art. 19 included a corporation of which all the members were citizens of India and that the State Trading Corporation could claim Fundamental Rights.

58. For the concept of state instrumentality, see, Ch. XX, *infra.*

59. *Tata Engineering v. State of Bihar*, AIR 1965 SC 40 : (1964) 6 SCR 885.
For a comment on the case see, 7 *JILI*, 568-9; also, *S.S. Nigam*, Companies and the Fundamental Rights to Property, 3 *Benaras LJ 1* (1967); *State of Gujarat v. Sri Ambica Mills*, AIR 1974 SC 1300 : (1974) 4 SCC 656.

claim no right under Art. 19. So long as individuals carry on a business, they enjoy the freedoms under Art. 19(1)(*g*) but they lose this protection as soon as they are incorporated. The position is anomalous. The Court could have avoided the anomaly by resorting to the doctrine of piercing the corporate veil which has already been invoked in several situations.

The denial of the Fundamental Right to the shareholders does not appear to be justified since the shareholders have a direct interest in the property and business of the company. If the company's career is jeopardised, the value of their shares in the company is prejudicially affected. Thus, there was justification for piercing the corporate veil and for granting relief on the petition of the shareholders who were citizens of India.

The concept of separate entity of a company from its shareholders is a fiction of law evolved to protect the shareholders from liabilities beyond those which they had assumed by being shareholders. This doctrine has made the company a popular instrument to carry on vast commercial enterprises. The fiction of separate entity of the company, in course of time, has been subjected to a few exceptions by the evolution of the doctrine of piercing the corporate veil. The Supreme Court has taken the fiction of separate entity too far and what was once a shield has now become a handicap so far as Art. 19 is concerned.

It remains doubtful whether the framers of the Indian Constitution ever envisaged that the Fundamental Rights under Art. 19(1)(*g*) should not be available to a corporation which is Indian in every sense. The Court adopted a dogmatic view. If each one of the shareholders of a company carries on the business himself, he would be protected by Art. 19(1)(*g*). Could it be that as soon as these individuals incorporate, they lose the protection of Art. 19(1)(*g*)? As it was a case of enforcement of a Fundamental Right, the Court ought to have looked behind the corporate veil and taken notice of the fact that all shareholders of the corporation are citizens and thus bring the corporation within Art. 19(1)(*g*).

If a Fundamental Right, by its nature, is not one which must be confined to natural persons, then that must legitimately be extended to a corporate or a company having a majority of Indian shareholders. It may be noted that the minority view was that the word 'citizen' in Art. 19 includes a corporation of which all the members were citizens of India and that the State Trading Corporation could claim Fundamental Rights. This seems to be a rational view to take.

In course of time, the rigours of the above pronouncements have been diluted by resorting to the strategy of joining a natural person along with a company in the writ petition challenging violation of Art. 19(1)(*g*). Thus, in *Sakal Papers v. Union of India*,[60] a company and a reader of the newspaper filed writ petitions challenging the Daily Newspapers (Price & Page) Order, 1960, under Art. 19(1)(*a*). In the *Bank Nationalisation* case,[61] a Central law acquiring banks was challenged in writ petitions under Art. 32 by the concerned banking companies, a shareholder, a director and a holder of a current account in a bank. The argument was that the law in question infringed Arts. 19(1)(*f*) and 31(2). The Supreme Court held the petitions maintainable on the ground that the rights of the companies as well as the shareholders were involved, and "the Court will not, concen-

60. AIR 1962 SC 305 : (1962) 3 SCR 842.
Also *infra*, Ch. XXIV, Sec. C.

61. *Cooper v. Union of India*, AIR 1970 SC 564 : (1970) 1 SCC 248; *infra*, Ch. XXXI, Sec. C.

trating merely upon the technical operation of the action, deny itself jurisdiction to grant relief."

Then, in the *Bennett Coleman* case,[62] the Newsprint Control Order was challenged under Arts. 19(1)(*a*) and 14 in writ petitions filed by several newspaper companies and several readers, newspaper editors and shareholders. The petitions were held maintainable as the rights not only of the newspapers companies but also of the editors, readers and shareholders were also involved. These individuals exercised their right of freedom of speech through "their newspapers through which they speak."

In the *Statesman v. Fact Finding Committee*,[63] the Government of India appointed a fact finding committee to enquire into the economics of the newspaper industry. This was sought to be challenged through writ petitions filed by the Statesman, a company, and a shareholder of the company. The High Court held that though the company, as such, had no Fundamental Right, the shareholder had and so the petitions were maintainable. "The press reaches the public through the newspapers. The shareholders speak through their editors."[64] The fact that the company was the petitioner did not prevent the High Court from giving relief to the shareholder.

When an electric company was sought to be nationalised by the State Government, writ petitions to challenge the same were filed by the company and a shareholder. The shareholder's petition was held maintainable under Arts. 19(1)(*f*) and (*g*), as his right to carry on the business through the company, and his right to a divisible share in future of the property of the company, were being diminished by the take-over of the company.[65]

The Government of India issued an order fixing wage structure for working journalists. A petition by a shareholder of a company was held maintainable to challenge this order under Art. 19(1)(*f*). If a heavy burden is placed on the resources of the company, it will affect the shareholders also, and their rights will be infringed. A shareholder can thus validly challenge the order under Art. 19.[66]

The result of the above judicial pronouncements is that it is now an established practice to file writ petitions by the company concerned as well as by a shareholder to challenge the state action against the company, and, thus, invoke the Fundamental Rights granted only to the citizens. An effective method has thus been found to get over the disability otherwise imposed on the companies by judicial dicta.

In *D.C. & G.M. v. Union of India*,[67] the Supreme Court has stated that the law with regard to a company challenging the violation of its Fundamental Rights under Art. 19 is in a "nebulous state". The Court has gone on to say: "Thus apart from the law being in a nebulous state, the trend is in the direction of holding that in the matter of fundamental freedoms guaranteed by Art. 19, the rights of a shareholder and the company which the share-holders have formed are rather

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62. *Bennett Coleman & Co. v. Union of India*, AIR 1973 SC 106 : (1972) 2 SCC 788; *infra*, Ch. XXIV, Sec. C.
63. AIR 1975 Cal 14; *infra*, Ch. XXIV, Sec. C.
64. *Ibid.*, 38.
65. *Godhra Electric Co. v. State of Gujarat*, AIR 1975 SC 32 : (1975) 1 SCC 199.
66. *The P.T.I. v. Union of India*, AIR 1974 SC 1044; *infra*, Ch. XXIV, Sec. H.
67. AIR 1983 SC 937. See also *Star India P. Ltd. v. The Telecom Regulatory Authority of India*, 146 (2008) DLT 455.

co-extensive and the denial to one of the fundamental freedom would be denial to the other. It is time to put an end to this controversy....."

This statement could perhaps be read as implying that the Court was willing to concede to a company itself the right to challenge under Art. 19 the governmental action affecting its rights rather than adopting the fiction of a shareholder filing the writ petition.[68] But nothing seems to have happened since then and the old practice continues still.

To avoid confusion, the better thing to do may be to add an explanation to Art. 19 saying that the term 'citizen' will include a company registered in India and having a majority of the Indian shareholders.

A writ petition can be filed by a firm for enforcement of a Fundamental Right available to a citizen. Unlike a corporation which has a legal identity of its own separate from the shareholders, a firm stands for all the partners collectively and, therefore, the petition is deemed to have been filed by all the partners who are citizens of India.[69]

A municipal committee is not regarded as a citizen within the meaning of Art. 19.[70]

68. In *Divisional Forest Officer v. Bishwanath Tea Co. Ltd.,* AIR 1982 SC 1368 : (1981) 3 SCC 238, the company was the sole petitioner. The Supreme Court ruled that a company cannot complain of breach of a Fundamental Right under Art. 19(1)(*g*).

69. *A.I. Works v. Chief Controller of Imports,* AIR 1973 SC 1539 : (1974) 2 SCC 348.

70. *Amritsar Municipality v. State of Punjab,* AIR 1969 AC 1100.

CHAPTER XIX

ELECTIONS

SYNOPSIS

A. INTRODUCTORY

The Preamble to the Constitution declares India to be a Democratic Republic. Democracy is the basic feature of the Indian Constitution.[1]

Democracy is sustained by free and fair elections. Only free and fair elections to the various legislative bodies in the country can guarantee the growth of a democratic polity. It is the cherished privilege of a citizen to participate in the electoral processes which place persons in the seats of power.

India has been characterised as the biggest democracy in the world because of the colossal nature of the elections held in the country. At a general election, an electorate of millions goes to the polls to elect members for the Lok Sabha,[2] State Legislative Assemblies,[3] and the Legislatures of the Union Territories.[4] Free and fair election has been held to be a basic feature of the Constitution.[5]

B. FUNDAMENTAL PRINCIPLES OF ELECTIONS

A few fundamental principles underlie elections to the Lok Sabha and the State Legislative Assemblies. These principles are stated as follows:

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1. *Supra*, Ch. I, Sec. E.
Also see, *infra*, Ch. XXXIV, Sec. A.
2. *Supra*, Ch. II.
3. *Supra*, Ch. VI.
4. *Supra*, Ch. IX.
5. For discussion on this Doctrine, see, *infra*, Ch. XLI.

(1) There is one general electoral roll for every territorial constituency [Art. 325].

The Constitution abolishes separate electorates and communal representation which divided the Indian people and retarded the growth of Indian nationalism in the pre-Constitution era.

(2) No person is ineligible for inclusion in the electoral roll on the grounds only of religion, race, caste, sex or any of them [Art. 325].

Equality has thus been accorded to each citizen in the matter of franchise and the electoral roll is prepared on a secular basis.[6]

(3) No person can claim to be included in any special electoral roll for any constituency on grounds only of religion, race, caste, sex or any of them [Art. 325].

The principle underlying this provision is further fortified by Art. 15 which bans discrimination against any citizen on grounds of religion, sex, etc. in political as well as other Rights.[7]

The Supreme Court has emphasized that Art. 325 is of crucial significance insofar as it seeks to promote the secular character of the Constitution by outlawing any claim to vote, or denial to vote, on the ground of religion. Secularism is a basic feature of the Constitution.[8]

(4) Elections are held on the basis of adult suffrage, that is to say, every person who is (*i*) a citizen of India, (*ii*) not less than 18 years of age on a date prescribed by the Legislature, and (*iii*) not otherwise disqualified under the Constitution, or any law made by the Legislature, on the ground of non-residence, unsoundness of mind, crime, corrupt or illegal practice, is entitled to be registered as a voter at any such election [Art. 326][9].

Under this constitutional provision, Parliament has laid down a few conditions which a person has to fulfil to be enrolled as a voter, such as, a person is disqualified for registration in the electoral roll of a constituency for Assembly or the Lok Sabha if—(*i*) he is not a citizen of India, or (*ii*) has been declared to be of unsound mind by a competent court. or (*iii*) is disqualified from voting under a law relating to corrupt and illegal practices and other offences in connection with elections.

It is clear from these provisions that only a citizen of India can be enrolled as a voter. When the name of a person is to be entered in the electoral roll, he may be required to satisfy the Electoral Registration that he is a citizen of India. But, if the name of a person has already been entered in the electoral roll, his name cannot be removed from the roll on the ground that he is not a citizen of India unless the concerned officer has given him a reasonable opportunity of being heard according to the principles of natural justice.[10]

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6. *V.V. Giri v. D.S. Dora*, AIR 1959 SC 1318 : (1960) 1 SCR 426. Also see, Art. 14, *infra*, Ch. XXI.
7. For discussion on Art. 15, see, *infra*, Ch. XXII.
8. For discussion on the concept of secularism see, *infra*, Ch. XXIX, Sec. A; Ch. XIII, Sec. E(b), *supra.*
9. Also see, *supra*, Ch. II, Sec. D; Ch. VI, Sec. B(iii).
10. *Lal Babu Hussein v. Electoral Registration Officer*, AIR 1995 SC 1189, 1194 : (1995) 3 SCC 100.

No person is entitled to be registered in the electoral roll for more than one constituency, or of any constituency more than once. Further, any person convicted of any of the specified offences punishable with imprisonment, or who upon the trial of an election petition is found guilty of any corrupt practice, is disqualified for voting at any election for 6 years. This qualification may, however, be removed by the Election Commission for reasons to be recorded by it in writing. Subject to these conditions, every citizen of India, who is not less than 18 years of age, and is ordinarily resident in a constituency, is entitled to be registered in the electoral roll for that constituency.

(5) No reservation of seats has been made in any House for any community, section, or religious group of the Indian population except for the Scheduled Castes, Scheduled Tribes and Anglo-Indians.[11]

C. NATURE OF THE RIGHT TO VOTE OR CONTEST AN ELECTION

In *Ponnuswami*,[12] the Supreme Court has declared:

> "The right to vote or stand as a candidate for election is not a civil right but is a creature of statute or special law and must be subject to the limitations imposed by it."

In *Jamuna Prasad Mukhariya v. Lachhi Ram*[13], the Supreme Court has observed:

> "…..The right to stand as a candidate and contest an election is not a common law right. It is a special right created by statute and can only be exercised on the conditions laid down by the statute. The Fundamental Rights Chapter has no bearing on a right like this created by statute….."

Again, in *Jyoti Basu v. Debi Ghosal*[14], the Supreme Court has observed:

> "A right to elect, fundamental though it is to democracy, is, anomalously enough, neither a Fundamental right nor a common law right. It is pure and simple, a statutory right. So is the right to be elected. So is the right to dispute an election. Outside of statute, there is no right to elect, creations they are, and therefore, subject to statutory limitation".

The Supreme Court has observed in *Nalla Thampy*:[15]

> "Outside of statute, there is no right to elect, no right to be elected. Statutory creations they are, and, therefore, subject to statutory limitations".

S. 62(5) of the Representation of the People Act, 1951, debars a person from voting at an election if he is confined in a prison under a sentence of imprisonment, or is in the lawful police custody, but not if he is in preventive detention. In *Anukul Chandra Pradhan v. Union of India*,[16] the Supreme Court upheld the va-

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11. See under 'Safeguards to the Minorities,' *infra*, Ch. XXXV.
12. *N.P. Ponnuswami v. Returning Officer, Namakkal Constituency*, AIR 1952 SC 64 at 71 : 1952 SCR 218.
13. AIR 1954 SC 686 at 688 : (1955) 1 SCR 608.
14. AIR 1982 SC 983, at 986 : (1982) 1 SCC 691.
15. *P. Nalla Thampy Thera v. B.L. Shankar*, AIR 1984 SC 135 : 1984 Supp SCC 631.
16. AIR 1997 SC 2814 : (1997) 6 SCC 1.

lidity of the provision on two grounds. First, it was not hit by Art. 14.[17] Secondly, the Court ruled:[18]

> "….. the right to vote is subject to the limitations imposed by the statute which can be exercised only in the manner provided by the statute; and that the challenge to any provision in the statute prescribing the nature of right to elect cannot be made with reference to a Fundamental Right in the Constitution. The very basis of challenge to the validity of sub-sec. (5) of Section 62 of the Act is, therefore, not available and this petition must fail."

This author begs to differ from some of the assertions made by the Supreme Court in the above observations. It appears to the author that the Supreme Court has not given due regard to the provisions of Arts. 325 and 326. It may be true to say that the right to vote is neither a common law right nor a Fundamental Right. But it is also not purely a statutory right but much more substantive than that. The right to vote is not the gift of the Legislature but flows from the Constitution. In the first place, free and fair election has been declared to be a basic feature of the Constitution which means that no statute can completely negate the right to vote.[19]

Secondly, under Art. 326, the right to vote is a constitutional right. A person who has reached the age of 18 is "entitled" to vote. A person may be disqualified to vote by a statute but only on such grounds as "non-residence, unsoundness of mind, crime or corrupt or illegal practice." No statute can disqualify a voter on any other ground. Under Art. 325, no voter can be debarred from voting "on grounds only of religion, race, caste or sex". Further this means that, any statute passed by a legislature to regulate the right to vote has to fall within the parameters set out by Arts. 325 and 326. Any law infringing these parameters will be void. Therefore, the right to vote is not purely a gift of a statute. The right to vote has also a constitutional basis. Suppose, for the sake of argument, through a Constitutional amendment, Parliament is made a nominated, instead of an elected body. Will not such an amendment be held unconstitutional as it seeks to nullify two basic structures of the Constitution, *viz*., democracy and free and fair elections—the two crucial Constitutional values.

In the third place, it is difficult to appreciate as to why the electoral law should be immune from being challenged under Fundamental Rights. A law may make discriminatory provisions. Can such a law be held immune from a challenge under Art. 14? The law of elections cannot be left completely to the sweet will of the legislature. It is necessary to ensure that the legislature does not make irrational or unreasonable provisions to curtail the right to vote as "free and fair election" and 'democracy' are the basic features of the Constitution.[20]

In the fourth place, the right to stand for an election is conferred by Arts. 84(b) and 173(b).[21] The basic qualifications that a person who has reached the age of 25 years can contest for a seat in the Lok Sabha or the State Assembly cannot be taken away by any law. What a statute can do is to lay down qualifications and disqualifications for a candidate [Arts. 102(e) and 190(e)], and also make procedural provisions regarding filing of nomination paper, etc. But no statute can

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17. For discussion on Art. 14, see, Chapter XXI.
18. AIR 1997 SC 2814 at 2817 : (1997) 6 SCC 1.
19. See, Ch. XLI, *infra.*
20. For discussion on the Doctrine of 'Basic Features of the Constitution", see, *infra*, Ch. XLI.
21. See, *supra*, Chs. III and VI.

completely negate or tamper with the right conferred by Arts. 84 and 173 to contest an election for Lok Sabha or a State Legislative Assembly.

In the fifth place, the right to challenge an election through an election petition is conferred by Art. 329(b) and is, thus, a constitutional right. What remains for the legislature to do is to prescribe the forum and the procedure for deciding the election petitions. No legislature can refuse to set up any machinery for deciding election petitions.

Finally, while it may be correct to say that voting or contesting for an election is not a Fundamental Right, it does not necessarily follow therefrom that an election law is immune from being challenged *vis-à-vis* a Fundamental Right. There is no valid reason why such a law be treated outside the parameter of Art. 13(2).[22]

Right to vote being a constitutional right, what happens if a legislature imposes an unreasonable and irrational condition thereon? Suppose a legislature were to enact a law debarring handicapped persons from voting or contesting an election, or a law were to debar women from contesting elections, then can it be said that such a law is non-challengeable under Art. 14 as such a law cannot be challenged under Art. 325? It is thus clear that the right to vote and to contest an election are not purely statutory rights and do not depend solely on the sweet will of the Legislature. These Rights have a constitutional base as well and are subject to constitutional provisions as mentioned above.

D. ELECTION COMMISSION

In order to ensure free, fair and impartial elections, the Constitution establishes the Election Commission, a body autonomous in character and insulated from political pressures or executive influence. Care has been taken to ensure that the Commission functions as an independent agency free from external pressures from the party in power, or the executive of the day.

The Commission is set up as a permanent body under Art. 324(1). It is an all-India body having jurisdiction over elections to Parliament, State Legislatures, offices of the President and Vice-President.[23]

The reason for having an all-India body to supervise and conduct elections, rather than separate bodies to organise elections in each State, is that some States have a mixed population, as there are the native people as well as others who are racially, linguistically or culturally different from the native people. A State Government could discriminate against outsiders by so managing things as to exclude them from the electoral rolls and thus deprive them of their franchise which is the most basic right in democracy. In order to prevent injustice being done to any section of the people, it was thought best to have one central body which would be free from local influences and have control over the entire election machinery in the country.[24]

According to Art. 324(1), "the superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every State and of elections to the offices of Presi-

22. See, next Chapter.
23. *Supra*, Chs. II, III, VI.
24. See DR. AMBEDKAR'S speech, VIII CAD, 905-7.

dent and Vice-President held under this Constitution"—have been vested in the Election Commission.

The Election Commission consists of the Chief Election Commissioner [CEC] and such number of Election Commissioners [ECs], if any, as the President may fix from time to time [Art. 324(2)]. All these Commissioners are appointed by the President subject to the provisions of any law enacted by Parliament for the purpose [Art. 325(2)].

The Chief Election Commissioner acts as the Chairman of the Election Commission in case any other Election Commissioner besides him is appointed [Art. 324(3)].

It is clear from these constitutional provisions that the Election Commission consists of the ECE and the ECs as and when appointed by the President. The office of the CEC is envisaged to be a permanent fixure, but that cannot be said for the ECs, as their appointment is optional with the Central Executive. There cannot be an Election Commission without the CEC, but same is not the case with the ECs. Their number can vary from time to time. Art. 324(2) contemplates a statute to define the conditions of service of the CEC and the ECs.

The President may appoint, after consultation with the Election Commission, such Regional Commissioners as the President may consider necessary to assist the Election Commission in the discharge of its functions. The Regional Commissioners may be appointed before each general election to the Lok Sabha and the State Legislative Assemblies, and also before the biennial election to the State Legislative Councils [Art. 324(4)].

As the Regional Commissioners [RCs] are appointed by the President in consultation with the Commission to assist it to perform its functions, the ECs are placed on a higher pedestal than the RCs. While the ECs are members of the Election Commission, the RCs are not its members.

The President may make rules to determine the conditions of service and tenure of office of the Election Commissioners and the Regional Commissioners. This, however, is subject to any law made by Parliament [Art. 324(5)].

The tenure of the Chief Election Commissioner is independent of the executive discretion, for he cannot be removed from his office except in the like manner and on the like grounds as a Judge of the Supreme Court [Proviso to Art. 324(5)].[25] Further, the conditions of service of the Chief Election Commissioner cannot be varied to his disadvantage after his appointment [Proviso to Art. 324(5)]. No such safeguard is provided to the ECs.

These provisions of the Constitution thus concede a security of tenure to the Chief Election Commissioner similar to a Judge of the Supreme Court. He can, therefore, discharge his functions without fear, favour or pressure from the executive or the party in power. The tenure of other Election Commissioners and the Regional Commissioners is also free of the executive control in so far as none of them can be removed from office except on the recommendation of the Chief Election Commissioner [Proviso to Art. 324(5)].

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25. See, Ch. IV, *supra.*

An obligation has been placed on the Central as well as the State Governments to make available to the Election Commission, or to a Regional Commissioner, when requested by the Election Commission, such staff as may be necessary for the Election Commission to discharge its functions [Art. 324(6)].

As elections are held at intervals, therefore, the Election Commission does not employ a large staff on permanent basis. Accordingly, the Election Commission has been given the power to requisition staff as and when it needs from the Central and State Governments.

Art. 324(6) refers to such staff only as falls under the disciplinary control of these governments. Therefore, on a request of the Election Commission, the services of such government servants as are appointed to public services and posts under the Central and State Governments are to be made available for election purposes. This means that the services of the employees of the State Bank of India, which is a statutory body, cannot be requisitioned for election purposes.[26]

(a) COMMISSION—A MULTI-MEMBER BODY

In *S.S. Dhanoa v. Union of India*[27], the Supreme Court has laid down an important proposition regarding the composition of the Election Commission.

Until 1989, the Election Commission consisted of only the Chief Election Commissioner. In 1989, the Central Government changed tracks and sought to appoint Election Commissioners. The underlying purpose of this move seems to be to curb the powers of the CEC who was single handedly exercising the powers of the Election Commission. In 1989, by a notification issued under Art. 324(2), the number of Election Commissioners (besides the Chief Election Commissioner) was fixed at two. By another notification, the President appointed the petitioner and one other person as Election Commissioners as such. The rules made by the President under Art. 324(5) fixed the tenure of these Commissioners at 5 years, or until reaching the age of 65 years, whichever was earlier.

Hitherto, the Election Commission had consisted of only one member, *viz.*, the Chief Election Commissioner. With the addition of two more members, the smooth working of the Commission was adversely affected. Accordingly, on 1st January, 1990, the President issued two notifications under Art. 324(2) rescinding the 1989 notifications creating the two posts of Election Commissioners and appointing two persons to these posts. In this way, from 1990, the Election Commission again reverted to a one-man body. The question arose whether these notifications were constitutionally valid.

The Apex Court did however observe that when an institution like the Election Commission is entrusted with vital functions and is armed with exclusive and uncontrolled powers to execute them, it is both necessary and desirable that the powers are not exercised by one individual, however wise he may be. "It ill-conforms to the tenets of democratic rule." When vast powers are exercised by an institution which is accountable to none, it is politic to entrust its affairs to more hands than one. It helps to assure judiciousness and want of arbitrariness.

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26. *Election Commission of India v. State Bank of India, Staff Assn.,* AIR 1995 SC 1078 : 1995 Supp (2) SCC 13.
27. AIR 1991 SC 1745 : (1991) 3 SCC 567.

After an analysis of the provisions of Art. 324, and review of the debates held in the Constituent Assembly on the matter at issue, the Court laid down the proposition that under Art. 324(1), the status of Election Commissioners is not *pari passu* with that of the Chief Election Commissioner. The Chief Election Commissioner has been given protection in that his conditions of service cannot be varied to his disadvantage after his appointment, and he cannot be removed from his office except in like manner and on like grounds as a Judge of the Supreme Court. These protections are not available to the Election Commissioners. Their conditions of service can be varied even to their disadvantage after their appointment and they can be removed on the recommendation of the Chief Election Commissioner. These provisions indicate that the Chief Election Commissioner is not *primus inter partes, i.e.,* first among the equals, but is intended to be placed in a distinctly higher position than the Election Commissioners.

In this context, the Court held both the 1990 notifications as valid. Art. 324(2) leaves it to the President to fix and appoint such number of Election Commissioners as he may from time to time determine. The power to create the posts is unfettered. So also is the power to reduce or abolish them. If the President decided to abolish both the posts of the Election Commissioners either because there was no work for them, or that the Election Commission could not function, there could be nothing wrong with it. The Court stated:

> "The power to create the posts is unfettered. So also is the power to reduce or abolish them."

In the instant case, there was the case not of premature termination of service, but that of abolition of posts and termination of service was a consequence thereof.

From the tenor of the *Dhanoa* decision, it is clear that the Supreme Court has shown preference for a multi-member Election Commission rather than a single member body. The Court has also suggested that rules be made to lay down the procedure to transact the business of the Commission. The Election Commission is not merely an advisory body but an executive body as well.

Parliament has enacted the Chief Election Commissioner and other Election Commissioners (Conditions of Service) Act, 1991. The Act has been amended in 1993. The main feature of the Act is to lay down that the tenure of the CEC and the ECs is for six years subject to the retiring age of 65 years. This means that if they attain the age of 65 years before completing their tenure of six years, they would have to vacate the office. Each of them receives salary equal to that of a Judge of the Supreme Court.

The Act provides that all business of the Election Commission "shall, as far as possible, be transacted unanimously", but, in case of difference of opinion between the CEC and the other ECs, the matter "shall be decided according to the opinion of the majority". Further, it is provided that the Election Commission may, "by unanimous decision, regulate the procedure for transaction of the business as also allocation of the business amongst the CEC and other ECs".

The Act thus places the CEC and the ECs on par in matters of tenure, salaries, etc. However, the position of the CEC does differ from that of the ECs in two respects:

(1) According to the proviso to Art. 324(4), the CEC is not to be removed from his office except in like manner and on the like grounds as a Supreme Court Judge.

(2) The conditions of service of the CEC are not to be varied to his disadvantage after his appointment.

These two limitations on the power of Parliament are designed to protect the independence of the CEC from political and executive interference.

On the other hand, an EC [proviso to Art. 324(5)], is not to be removed from office except on the recommendation of the CEC. This provision also ensures the independence of the ECs. As the Supreme Court has observed in *T.N. Seshan v. Union of India*,[28] "the recommendation for removal must be based on intelligible, and cogent considerations which would have relation to efficient functioning of the Election Commission." This is so because the power is conferred on the CEC to ensure the independence of the ECs from political and executive bosses of the day. This is to ensure the independence of not only these functionaries but the Election Commission as a body.

Having insulated the CEC from external political and executive pressures, confidence was reposed in this independent functionary to safeguard the independence of his ECs by enjoining that they cannot be removed except on the CEC's recommendation. They have been placed under the protective umbrella of the independent CEC. If, therefore, the CEC were to exercise his power "as per his whim and caprice", he would become an instrument of oppression and this would destroy the independence of the Election Commission if the ECs "are required to function under the threat of the CEC recommending their removal". "It is, therefore, needless to emphasize that the CEC must exercise this power only when there exist valid reasons which are conducive to efficient functioning of the Election Commission.[29]

In 1993, the Central Government again decided to convert the Election Commission into a multi-member body. Accordingly, two notifications were issued on 1/10/93. According to one, the number of ECs was fixed at two. According to the other, two persons were appointed as the ECs. Thereupon, the incumbent CEC, T.N. Seshan, challenged the notifications as well as the changes made in the above-mentioned Act in 1993 as unconstitutional. The gist of his argument was that either there should not be a multi-member Election Commission, or that he as the CEC should have the sole decision-making power and that the other ECs should act merely as advisers. The CEC claimed that he was the sole repository of all power exercisable by the Commission falling within the scope of his activity.

In *T.N. Seshan v. Union of India*,[30] the Supreme Court rejected the arguments of the CEC and upheld the appointment of the ECs as well as of the provision in the Act requiring a unanimous decision, failing which a majority decision by the Commission on all matters coming before it.

The Court has maintained that the scheme of Art. 324 clearly envisages a multi-member body comprising the CEC and ECs. "The concept of plurality is

28. (1995) 4 SCC 611 at 625 : (1995) 5 JT 337.
29. *Ibid.*
30. *Supra*, footnote, 28.

writ large on the face of Art. 324(2)" which "clearly envisages a multi-member Election Commission comprising the CEC and one or more ECs". The Court has argued that if a multi-member body was not envisaged by the Constitution, then where was the need for providing in Art. 324(3) for the CEC to act as its chairman? Therefore, the notifications appointing the two ECs could not be faulted on this ground.

The Court also referred to what was said in *Dhanoa* emphasizing upon the desirability of having a multi-member body instead of leaving all power in the hands of a single person, *viz.*, the CEC who was accountable to none.

The Court has also rejected the argument of the CEC that a multi-member body would be unworkable. The Constitution-makers felt the need to provide for a multi-member body. To accept the argument that a multi-member body is unworkable would tantamount to destroying or nullifying Arts. 324(2) and (3). On this point, the Court has observed:[31]

> "We cannot overlook the fact that when the Constitution-makers provided for a multi-member Election Commission they were not oblivious of the fact that there may not be agreement on all points, but they must have expected such high-ranking functionaries to resolve their differences in a dignified manner. It is the constitutional duty of all those who are required to carry out certain constitutional functions to ensure the smooth functioning of the machinery without the clash of egos."

The Court has also rejected the argument that the CEC ought to have the sole decision-making power. The Court has pointed out that under Art. 324(3), the CEC acts as the Chairman of the multi-member body. As such, he presides over the meetings of the Commission. This does not mean that he has the sole decision-making power and the other ECs are merely advisers. It is the common practice of multi-member bodies to reach their decisions either unanimously or by majority vote. This is what is sought to be laid down in the Act mentioned above. To concede the final word to the CEC on all matters would render the ECs to the status of mere advisers and this does not emerge from the scheme of Art. 324.

The Election Commission is now a multi-member body having one CEC and 2 CEs. There are however several differences between the CEC, on the one hand, and the CEs, on the other. First, the CEC is the Chairman of the Commission. Two, he cannot be removed from office except in the same manner and on the same grounds as a Supreme Court Judge. Three, his conditions of service cannot be varied to his disadvantage. Four, the Election Commission cannot exist without the CEC while it is not compulsory to have ECs.

An EC, on the other hand, cannot be removed except on the recommendation of the CEC, and the terms and conditions of his service can be changed to his disadvantage during his term unlike the CEC. Thus, while the Constitution protects the independence of the CEC, it leaves it to him to protect the independence of the ECs and, thus, of the entire Commission. In all other matters, because of the Act, mentioned above, the ECs and the CEC stand *pari passu*, and some constitutional differentiation between the CEC and the ECs does not confer a superior status on the CEC to the ECs.

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31. (1995) 4 SCC 611 at 627 : (1995) 5 JT 337.

The reason for the constitutional differentiation between the positions of the CEC and the ECs is that while the constitution-makers wanted to institute a permanent Election Commission, they took the view that it was not necessary to have a large body all the time because elections would be held once in five years. The membership of the Commission could be increased by adding the CEs when the volume of work increased at the election time. Thus, the constitution-makers envisaged only the CEC, and not the CEs, as permanent incumbents. Things have changed now. Elections have now become a continuous feature of the Indian Polity, and, therefore, a multi-member body has become a necessity.

The Supreme Court has however clarified that only because the procedure and grounds for the removal of the CEC are the same as for a Supreme Court Judge, it does not equate the CEC to a Supreme Court Judge.[32]

It is suggested that since a multi-member Election Commission has now become the order of the day, it seems to be necessary to amend Art. 324 as regards the composition of the Commission. Provision should be made for the appointment of a three member body, all members ranking *pari passu,* the Chief Election Commissioner being designated as the Chairman of the body. In all other respects, all the members should enjoy the same status.

As stated above, the Supreme Court in *Dhanoa* has laid emphasis on the Election Commission being a multi-member, rather than a single member, body. The reasons is simple: it is safer to entrust power to a multi-member, rather than a single member, body.

(b) POWERS AND FUNCTIONS OF THE ELECTION COMMISSION

The Election Commission plays a pivotal role in the electoral mechanism of the country. The Election Commission primarily exercises administrative functions but it also has some adjudicative and legislative functions as well.

Art. 324(1) assigns the following functions to the Election Commission:

(1) The superintendence, direction and control of the preparation of the electoral rolls for all elections to Parliament, State Legislatures, offices of the President and Vice-President;

(2) Conduct of all these elections.

The powers of the Commission flow from Art. 324. The superintendence, direction and control of the entire electoral process in the country is vested in the Election Commission. The words "superintendence, direction and control" are of wide amplitude. These words are enough to include all powers necessary for the smooth and effective conduct of elections so that the will of the people may be expressed.[33]

The term 'election' in Art. 324 has been used in a wide sense so as to include the entire process of election which consists of several stages and it embraces many steps, some of which may have an important bearing on the result of the process. However, the general powers of superintendence, direction and control of the elections vested in the Election Commission under Art. 324(1) are subject

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32. See *Seshan,* (1995) 4 SCC 611 at 639 : (1995) 5 JT 337.

33. *Election Commission of India v. Ashok Kumar,* (2000) 8 SCC 216 : AIR 2000 SC 2979; *Lalji Shukla v. Election Commission,* AIR 2002 All 73.

to any law made either by Parliament under Art. 327, or by the State Legislatures under Art. 328 of the Constitution.[34]

Art. 324(1) is a plenary provision vesting the whole responsibility in the Election Commission for National and State elections. The Constitution contemplates free and fair elections and for this purpose vests responsibilities, directions and control of the conduct of elections in the Election Commission. This responsibility confers powers, duties and functions of many sorts, administrative or others, depending on the circumstances.

The Supreme Court has however cautioned that under Art. 324(1), the Commission does not exercise untrammelled powers otherwise it will become an *imperium in imperio* which no one is under the Indian Constitution. Ultimately, it is for the courts to decide what powers can be read into Art. 324(1).

If the law makes no provision to meet a situation, Art. 324 enables the Commission to act to push forward a free and fair election with expedition. Art. 324 makes comprehensive provision to take care of surprise situations. The Commission can order a re-poll for the whole constituency under compulsion of circumstances. Art. 324 confers on the Election Commission necessary powers to conduct the elections including the power to countermand the poll in a constituency and ordering a fresh poll therein because of hooliganism and breakdown of law and order at the time of polling or counting of votes. The Commission is subject to Rule of Law; it must act *bona fide* and be amenable to the norms of natural justice in so far as enforcement of such canons can reasonably and realistically be required of it as fair-play-in-action in the most important area of constitutional law, *viz.*, election.

The Supreme Court has ruled in *Mohinder Singh v. Chief Election Commissioner*[35] that the Commission should exercise its power of cancelling a poll according to the principles of natural justice.

The Election Commission has power to review its decision as to the expediency of holding the poll on a particular date.[36]

The Supreme Court has ruled in *Digvijay Mote v. Union of India,*[37] that the conduct of election is in the hands of the Election Commission which has the power of superintendence, direction and control of elections vested in it as per Art. 324 of the Constitution. Consequently, if the Election Commission is of the opinion that having regard to the disturbed conditions in a State, or a part thereof, free and fair elections cannot be held, it may postpone the same. However, this power is not uncontrolled. It is subject to judicial review as it is a statutory body exercising its functions affecting public law Rights. The judicial review will depend on the facts and circumstances of each case. The Court emphasized that the power conferred on the Election Commission by Art. 324 has to be exercised not mindlessly nor *mala fide* nor arbitrarily nor with partiality but in keeping with the

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34. See, *infra*, Sec. E.
35. AIR 1978 SC 851 : (1978) 1 SCC 405.
36. *Mohd. Yunus Saleem v. Shiv Kumar Shastri,* AIR 1974 SC 1218 : (1974) 4 SCC 854.
Also, *Election Commission v. State of Haryana,* AIR 1984 SC 1406 : 1984 Supp SCC 104.
37. (1993) 4 SCC 175.
Also, *Election Commission v. State Bank of India,* AIR 1995 SC 1078 : 1995 Supp (2) SCC 13.

guidelines of the Rule of Law and not stultifying the presidential notification nor existing legislation.

The Election Commission issued an order limiting the hours for using loud-speakers for electioneering purposes between 8 A.M. to 7 P.M. The order was made to avoid noise pollution and disturbance of peace and tranquility of the public in general. The order was challenged by a political party through a writ petition in the High Court. The High Court took the view that there was no nexus between the restrictions imposed and the power under Art. 324.

The Election Commission appealed to the Supreme Court. The Court without deciding the question whether the Commission has any such power to make such an order under Art. 324(1) in view of the pendency of the writ petition in the High Court, set aside the *interim* order passed by the High Court because "the *prima facie* position and the balance of inconvenience seem to be in favour of the aspect of public good in a matter which cannot be said to be unrelated to the area of the powers of the Election Commission under Art. 324". But, then, "granting *prima facie*, the existence of the power of the Election Commission", the Court held the impugned order too restrictive and, accordingly, banned the use of the loud-speakers during 10 P.M. and 6 A.M. and modified the order issued by the Election Commission accordingly.[38]

In May, 1982, during the elections for the Kerala State Legislative Assembly, electronic voting system was introduced at some polling booths in one constituency. This was done under the directions of the Election Commission issued under Art. 324. After the completion of the election, the validity of the electronic voting system was challenged through an election petition. In *Jose*[39], the Supreme Court setting aside the election of the successful candidate, ordered re-poll in such polling booths where the machines had been used.

The Court ruled that the order of the Commission directing the casting of ballots by machines was without jurisdiction. The Election Commission could not change the voting system as this matter fell within the domain of Parliament. The Court interpreted the word 'ballot' used in the Representation of the People Act as not including the casting of votes by any mechanical process. The Court construed Art. 324 as conferring only executive, but not legislative, powers on the Election Commission. Legislative powers in respect of elections to Parliament and the State Legislatures vest in Parliament and no other body and the Election Commission would come into picture only if no provision has been made by Parliament in regard to these elections.

The Court disagreed with the contention that the Constitution gives complete power to the Commission under Art. 324 for the conduct of elections. The Constitution could never have intended to make the Commission as an apex body in respect of matters relating to the elections and conferring on it legislative powers ignoring Parliament altogether. The Supreme Court laid down the following propositions as regards the power of the Commission under Art. 324:

(1) When there is no law or rule made under the law, the Commission may pass any order in respect of the conduct of elections.

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38. *Election Commission of India v. All India Anna Dravida Munetra Kazahagam*, 1994 Supp (2) SCC 689.

39. *A.C. Jose v. Sivan Pillai*, AIR 1984 SC 921 : (1984) 2 SCC 656.

(2) When there is an Act and rules made thereunder, it is not open to the Commission to override the same and pass orders in direct disobedience to the mandate contained in the rules or the Act.

This means that the powers of the Commission are meant to supplement, rather than supplant, the law and the rules in the matter of superintendence, direction and control provided by Art. 324.

(3) Where the law or the rules are silent, the Commission no doubt has plenary powers under Art. 324 to give any direction in respect of the conduct of elections.

(4) In the absence of any specific provision to meet a contingency, the Election Commission can invoke its plenary power under Art. 324.[40]

But when the Commission submits a particular direction to the Government for approval (as required by the rules), it is not open to the Commission to go ahead with the implementation of that direction at "its own sweet will", even though government approval is not given.

Rule 5(1) of the Rules made by the Central Government under the Representation of the People Act, 1951 (RPA), empowers the Election Commission to specify the symbols which candidates for election may specify. Other rules make provisions for allotment of symbols to the candidates. The Election Commission has issued the Symbols Order, 1968, under Art. 324 read with these Rules. The validity of this order has been challenged from time to time on the ground *inter alia* that the Order being legislative in character is *ultra vires* the Commission because the Commission has executive, but not legislative power under Art. 324. The Supreme Court has always upheld the validity of the Order.[41]

The Court has explained that in India, allotment of symbols to the candidates becomes necessary so that an illiterate voter may identify the candidate of his choice and cast his vote in his favour. The Symbols Order makes provisions for the reservation, choice and allotment of symbols and the recognition of political parties in connection therewith. The power to allot symbols has been conferred on the Election Commission by the Rules made under the RP Act. The power to issue the Symbols Order is comprehended within the power of "superintendence, direction and control' of elections vested in the Election Commission.

The Court has upheld the Order without characterising it as 'legislative' but treating it as "a compendium of directions in the shape of general provisions to meet the various kinds of situations appertaining to elections with particular reference to symbols", and the Election Commission has power to make such an order in its own right under Art. 324. The Supreme Court has observed in *APHLC*:[42] "The power to make these directions 'whether it is a legislative activity or not', flows from Art. 324, as well as from Rules 5 and 10".

The Court has reiterated in *Roop Lal Sathi v. Nachhattar Singh*,[43] that the Symbols Order is "in the nature of general directions issued by the Election

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40. *N. Krishnappa v. Chief Election Commissioner*, AIR 1995 AP 212.
41. *Sadiq Ali v. Election Comm.*, AIR 1972 SC 187 : (1972) 4 SCC 664; *APHLC Shillong v. M.A. Sangma*, AIR 1977 SC 2155 : (1977) 4 SCC 161; *Kanhaiya Lal Omar v. R.K. Trivedi*, AIR 1986 SC 111 : (1985) 4 SCC 628; *Jagannath Mohanta v. Election Commission of India*, AIR 2000 Ori 44; *Krishna Mohan Sharma v. Jai Bhadra Singh*, AIR 2001 All 175.
42. *APHLC*, *supra*, footnote 41, at 2164.
43. AIR 1982 SC 1559 : (1982) 3 SCC 487.

Commission to regulate the mode of allotment of symbols to the contesting candidates." But the Supreme Court giving a wider scope to Art. 324 has observed in *Kanhaiya Lal*:[44]

> " Even if for any reason, it is held that any of the provisions contained in the Symbols Order are not traceable to the Act or the Rules, the power of the Commission under Art. 324(1) of the Constitution which is plenary in character can compass all such provisions. Art. 324 of the Constitution operates in areas left unoccupied by legislation and the words 'superintendence', 'direction' and 'control' as well as 'conduct of all elections' are the broadest terms which would include the power to make all such provisions".

The Court has also stated further—

> "Any part of the Symbols Order which cannot be traced to Rules 5 and 10 of the Rules can easily be traced in this case to the reservoir of power under Art. 324(1) which empowers the Commission to issue all directions necessary for the purpose of conducting smooth, free and fair elections".

The Court has emphasized that "the source of power in this case is the Constitution, the highest law of the land, which is the repository and source of all legal powers and any power granted by the Constitution for a specific purpose should be construed liberally so that the object for which it is granted is effectively achieved".

The tenor of these cases is that the Election Commission has power under Art. 324(1) to issue directions with respect to such matters pertaining to elections as are not covered by any law. In Administrative Law, 'directions' are regarded as "administrative" and not "legislative" in nature.[45]

In *Mohinder Singh Gill v. Chief Election Commissioner*,[46] the Supreme Court has lucidly explained the scope of Art. 324. This is a plenary provision vesting the whole responsibility for national and state elections and, therefore, the necessary powers to discharge that function. Art. 324 has however to be read in the light of the constitutional scheme and the Representation of the People Acts, 1950 and 1951.

If competent legislation is enacted, as visualized by Art. 327, the Commission is bound by it. The Commission must act in conformity with, not in violation of the enacted law concerning elections. The Supreme Court has emphasized that no one is an *imperium in imperio* in our constitutional order. The Commission cannot claim to exercise any power under Art. 324 which may be in conflict with the enacted law. When, however, any situation arises for which the law does not provide for, the Commission can exercise power under Art. 324. In the words of the Court:

> "Art. 324, in our view, operates in areas left unoccupied by legislation and the words "superintendence, direction and control' as well as 'conduct of all elections', are the broadest terms".

Thus, when law is silent, "Art. 324 is a reservoir of power to act for the avowed purpose of, not divorced from, pushing forward a free and fair election with expedition.

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44. *Supra*, footnote 41, at 118.
45. JAIN, *A TREATISE ON ADM. LAW*, Vol. I, Ch. VIII.
46. (1978) 1 SCC 405. : AIR 1978 SC 851

In *Common Cause—A Registered Society v. Union of India*,[47] the question about the election expenses incurred by political parties, it was argued that elections in India are fought with money power and so the people should know the sources of the expenditure incurred by the political parties and the candidates in the process of election. The court ruled that purity of election is fundamental to democracy and the commission can ask the candidates about the expenditure incurred by the candidates and by a political party for this purpose. In a democracy where rule of law prevails "this type of naked display of black money, by violating the mandatory provisions of law, cannot be permitted." The court, therefore, ruled that under Art. 324, the commission can issue suitable directions to maintain the purity of election and to bring transparency in the process of election. The commission has power to issue directions requiring the political parties to submit to the election commission, for its scrutiny, the details of the expenditure incurred or authorised by the parties in connection with the election of their respective candidates. The court further observed that "the Constitution has made comprehensive provision under Art. 324 to take care of surprise situations and it operates in areas left unoccupied by legislation."

Finally, in *Union of India v. Ass. for Democratic Reforms*[48] the Supreme Court directed the election commission to issue certain directions to candidates to file an affidavit detailing information about themselves under certain specific heads. This was done to stop criminalisation of politics.[49] People have a right to know about the candidate for whom they are being urged to vote. The right to know flows from Art. 19(1)(a). When law is silent "Art. 324 is a reservoir of power to act for the avowed purpose of having free and fair elections. The court has further observed in the instant case:[50]

> "The constitution has taken care of leaving scope for exercise of residuary power by the commission in its own right as a creature of the constitution in the infinite variety of situations that may emerge from time to time in a large democracy, as every contingency could not be foreseen or anticipated by the enacted laws or the rules by issuing necessary directions, the commission can fill the vacuum till there is legislation on the subject".

Art. 324 is geared to the accomplishment of free and fair elections expeditiously. However, the Commission needs to exercise its powers with fairness and not arbitrarily. "Unchecked power is alien to our system". The Court has emphasized that the discretion vested in the Commission is to be exercised "properly, not perversely"; "not mindlessly nor *mala fide*, nor arbitrarily, nor with partiality but in keeping with the guidelines of the Rule of Law and not stultifying the Presidential notification nor existing legislation." The Court has observed further:

> "No body will deny that the Election Commissioner in our democratic scheme is a central figure and a high functionary. Direction vested in him will ordinarily be used wisely, not rashly…."

Howsoever wide the scope of Art. 324 may be, the Election Commission has to exercise its power in accordance with the existing law and not in derogation thereof.

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47. (1996) 2 SCC 752 : AIR 1996 SC 3081.
48. (2002) 5 SCC 294 : AIR 2002 SC 2112.
Also see, *supra*, Ch. II, Sec. D(e).
49. See, Ch. XXIV, Sec. C, *infra*.
50. (2002) 5 SCC 294 at 320 : AIR 2002 SC 2112.

And, ultimately, there are the courts to strike down any misuse of power by the Commission.[51]

Once the election results are declared, the Commission has no jurisdiction with respect to the election. Thereafter, the validity of the election of a candidate can be challenged through an election petition.[52] The Commission itself has no power to decide the legality and validity of an election which is alleged to have been held contrary to any legal provisions. The function of the Commission ends with the declaration of the election resulf.[53]

The Commission also has the function of advising the President or the Governor on the question of disqualification of any member of Parliament [Art. 103(2)],[54] or a member of the State Legislature [Art. 192(2)][55], as the case may be. While the Election Commission itself decides the question of supervening disqualification arising in case of a sitting member of Parliament or of a State Legislature, the power to decide on doubts and disputes arising out of elections as such is not vested in the Election Commission, and arrangements for the same have been made under legislation.[56]

While deciding the question of disqualification of a member of a House of Parliament, or of a State Legislature, the Election Commission functions in a *quasi*-judicial capacity and, therefore, it has to follow the principles of natural justice. One of these principles is the rule against bias.[57]

While deciding the question of disqualification against Ms. Jayalalitha, a member of the Legislative Assembly of Tamil Nadu, there was suspicion of bias against Shree Seshan who was the CEC and the Chairman of the Election Commission. The lawyer wife of the complainant (Dr. Swamy) was professionally engaged as the counsel in a case filed by Shri Seshan. Therefore, the Supreme Court directed in *Election Commission of India v. Subramanian Swamy*,[58] that the CEC should recuse himself from participating in the decision in the first instance and let the two Election Commissioners decide the matter. In case they differ, then the CEC should express his opinion on the ground of necessity.[59]

An important function conferred on the Election Commission by law is the removal of disqualification arising out of conviction for a specified offence, for purposes of voting or standing as a candidate at an election. The Election Commission is required to record the reasons in writing while deciding any such matter.[60]

In case of disqualification arising out of commission of a corrupt practice at an election, it is for the President to determine whether such person shall be disqualified

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51. *Kunwar Raghuraj Pratap Singh v. Chief Election Commissioner of India*, AIR 1999 All 98.
52. See, *infra*, Sec. F.
53. *Chandan Kumar Sarkar v. Chief Election Commr.*, AIR 1995 Gau 61.
54. *Supra*, Ch. II.
55. *Supra*, Ch. VI.
56. *Infra*, Sec. F.
57. On Natural Justice and Bias, see, Ch. VIII, Sec. E, *supra.*
58. AIR 1996 SC 1810 : (1996) 4 SCC 104.
59. For detailed discussion on the concept of bias, see, Jain, *A TREATISE ON ADM. LAW*, I. Ch. Jain, *CASES AND MATERIALS*, I, Ch.
60. See Ss. 11 and 11A of the R.P. Act, 1951. Also see, Chs. II and VI, *supra.*

and for what period. In this situation, the President has to act according to the opinion of the Election Commission.[61]

(c) ELECTION COMMISSION A TRIBUNAL FOR CERTAIN PURPOSES

Under Art. 324, read with the Election Symbols (Reservation and Allotment) Order, 1968, the Election Commission has power to allot symbols for purposes of elections to political parties and to adjudicate upon disputes with regard to recognition of political parties and rival claims to a particular symbol for purposes of elections.

What is the character of the Commission while adjudicating upon the dispute with regard to the recognition of a political party? Is the Election Commission a 'tribunal' under Art. 136 while adjudicating upon such a dispute and can the Supreme Court hear an appeal from the Commission's decision?

In several cases before 1974, the Supreme Court had heard appeals from the Election Commission without however deciding the question whether the Election Commission could be regarded as a 'tribunal' for purposes of Art. 136 in so far as it discharged adjudicatory functions. The Supreme Court had left this question open in these cases.[62] However in *A.P.H.L Conference, Shillong, v. W.A. Sangma,*[63] the Supreme Court held that the Commission is a tribunal for purposes of Art. 136 while deciding such a controversy. "The power to decide this particular dispute is a part of the State's judicial power and that power is conferred on the Election Commission by Art. 324 of the Constitution as also by R. 5 of the Rules."

Cancellation of an allotted symbol to a political party is a *quasi*-judicial matter and the affected party must be given a hearing before making any such order.[64]

Similarly, while deciding the question of supervening disqualification of a sitting member of a House of Parliament, or of a State Legislature, the Commission acts in a *quasi*-judicial capacity.[65]

The Election Commission has various administrative functions, but that does not mean that, while adjudicating a dispute, it does not exercise the judicial power conferred on it by the state. The Commission is created by the Constitution and is invested under the law with not only administrative powers, but also with certain judicial powers however fractional the same may be.

(d) GUJARAT ASSEMBLY ELECTION MATTER[66]

The Gujarat Legislative Assembly was dissolved prematurely, before the expiry of its normal tenure of five years, on 19-7-2002. The last sitting of the dissolved Assembly was held on 3-4-2002. According to Art. 174(1),[67] six months shall not intervene between the last sitting of one session and the date appointed

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61. S. 8A of the R.P. Act, 1951 as amended by the Election Laws (Amendment) Act, 1975. Also see, Chs. II an VI, *supra.*

62. *Sadiq Ali v. Election Commission,* AIR 1972 SC 187 : (1972) 4 SCC 664; *Ramashankar Kaushik v. Election Commission,* AIR 1974 SC 445 : (1974) 1 SCC 271.

63. AIR 1977 SC 2155 : (1977) 4 SCC 161.

64. *Uma Ballav Rath v. Maheshwar Mohanty,* AIR 1999 SC 1322 : (1999) 3 SCC 357.

65. See, *supra,* footnote 58.

66. (2002) 8 SCC 237 : (2002) 8 JT 389.

67. *Supra,* Ch. VI.

for the first meeting of the next meeting. It was argued that election to the Assembly must take place before 3-10-2002, i.e. within six months of the last sitting of the House. On the other hand, the Election Commission was of the view that since the law and order situation in the state was delicate, election could not be held before 3-10-2002 and it would take a few more months thereafter to hold the election. It was this dichotomy of views which became the subject-matter of the reference to the Supreme Court. The main question involved therein related to the interpretation of Art. 174(1) and Art. 324 and the inter-relation between the two provisions, if any, was the Election Commission bound by Art. 174(1) and was bound to hold election to the Gujarat Assembly before 3-10-2002.

The Presidential reference under Art. 143(1) of the Constitution,[68] was heard by a Bench of five learned Judges and three concurring judgments were delivered. The main propositions which emerged from the several judgments are as follows:

(1) Democracy is a part of the basic structure of the Constitution and free and fair elections at regular prescribed intervals are essential to the democratic system. Holding periodic, free and fair elections by the Election Commission are part of the basic structure of the Constitution.[69]

(2) Art. 174(1) relates to an existing, live and functional Assembly. It regulates the frequencies of sessions of existing Houses. Art. 174(1) is mandatory so far as the time period between two sessions of a living and functional House is concerned. But Art. 174(1) does not relate to a dissolved House. Accordingly, Art. 174(1) does not provide for any period for holding election for constituting fresh legislative Assembly.

Arts. 174 and 324 operate in different fields are not subject to one another.

3. Election Commission is a constitutional body which is an independent and impartial body free from any executive interference. But the powers of the commission are subject to a law made by Parliament or a State Legislature so long as the same does not encroach upon the plenary powers of the Election Commission. The legislative power is subject to the provisions of the constitution.

Conducting of elections is the sole responsibility of the Election Commission. "As a matter of law, the plenary powers of the Election Commission cannot be taken away by law framed by Parliament. If Parliament makes any such law, it would be repugnant to Art. 324."

Thus, Art. 324 "operates in the area left unoccupied by legislation and the words 'superintendence, control, direction' as well as 'conduct of all elections' are the broadest of the terms.'

4. From the various constitutional and statutory provisions, it can be inferred that on premature dissolution of a House, election ought to be held within six months from the date of dissolution of the Assembly.

5. On the premature dissolution of the Assembly, the Election Commission is required to initiate immediate steps for holding election for constituting legisla-

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68. *Supra*, Ch. IV.
69. *Indira Nehru Gandhi v. Raj Narain, supra; T.N. Seshan v. Union of India,* (1995) 5 JT 337 : (1995) 4 SCC 61.

ture assembly on the first occasion and in any case within six months from the date of premature dissolution of the assembly.

Effort should be to hold the election and not to defer holding the election. Only when there is an 'act of God' can the election be postponed beyond six months. But man-made obstructions in the way of elections should be sternly dealt with and should not allowed to defer the election.

6. As regards framing of the schedule for holding the election, the matter lies within the exclusive domain of the Election Commission. This is not subject to any law passed by Parliament.

According to BALAKRISHNAN, J., in a separate concurring opinion, any decision of the Election Commission which is intended to defeat the avowed object of forming an elected Government at the earliest, can be challenged before the Court. If the decision taken by the Commission is perverse, unreasonable or for extraneous reasons and if the decision of the Election Commission is vitiated by any of these grounds, the court can give appropriate direction for the conduct of the election.

The above propositions would apply *mutatis mutandis* to election to Lok Sabha and Art. 85. The Supreme Court's judgement gives some flexibility to frame the time-table to hold election to a prematurely dissolved house. But the over-all time frame for the purpose is six months from the date of dissolution. The Court has emphasized that free and fair elections are the *sine qua* non of democracy which is a basic feature of the Constitution.

E. LEGISLATIVE POWER REGARDING ELECTIONS

Several Articles in the Constitution specifically confer legislative power on Parliament with respect to election matters. Thus, Parliament is empowered to determine by law the manner in which, and the authority by which, each State is to be divided into territorial constituencies after each census for purposes of election to the Lok Sabha [Art. 82],[70] and the State Legislative Assembly [Art. 170(3)].[71]

Parliament may by law regulate any matter relating to the election of the President and the Vice-President subject to the Constitution [Art. 71(3)].[72]

In addition to the above, Parliament may make provisions by law, subject to the provisions of the Constitution, with respect to all matters relating to, or in connection with, elections to either House of Parliament or to the State Legislatures including the preparation of electoral rolls, the delimitation of constituencies, and all other matters necessary for securing the due Constitution of the several Houses [Art. 327]. This provision is reinforced by entry 72 in List I[73] with respect to all matters relating to the elections to either House of Parliament, or to the House or either House of the Legislature of a State subject to the provisions of the Constitution.

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70. *Supra*, Ch. II.
71. *Supra*, Ch. VI.
72. *Supra*, Ch. III.
73. *Supra*, Ch. X, Sec. D.

The supreme legislative power in relation to various elections is thus vested in Parliament but this power is subject to the provisions of the Constitution. Further, subject to the constitutional provisions, and in so far as provision has not been made by Parliament with respect to a matter under Art. 328, a State Legislature may make provision by law with respect to all matters in relation to, or in connection with, the elections to either of its Houses including the preparation of electoral rolls and all matters necessary for securing the due Constitution of such House or Houses. This provision is reinforced by entry 37 in List II.[74]

In pursuance of these constitutional provisions, Parliament has enacted several laws. The Delimitation Commission Act, 1952, provides for the appointment of the Delimitation Commission for making adjustment of seats in, and division of States into territorial constituencies for election to Lok Sabha and State Legislative Assemblies after each census.[75] The Commission is appointed by the Central Government and consists of three members—two sitting or retired Judges of the Supreme Court or High Courts, and the Chief Election Commissioner *ex-officio*. In performance of its duties, the Commission is to be assisted by two to seven associate members for each State drawn from amongst the members of the Lok Sabha representing the State, and the State Legislative Assembly. Every final order of the Commission, after publication in the Gazette of India, becomes final and cannot be called in question in any court.

The Representation of the People Act, 1950, provides for allocation of seats in, and the delimitation of constituencies for the purpose of elections to the Lok Sabha and the State Legislature, the qualifications of voters at such elections, the preparation of electoral rolls, etc.

The Representation of the People Act, 1951, provides for the actual conduct of elections to the Houses of Parliament and to the State Legislatures; the qualifications and disqualifications for membership of those Houses, the corrupt and illegal practices and other election offences and the decision of election disputes. The Act makes detailed provisions in regard to all matters and all stages connected with elections to the various legislatures in the country. The Act is a self-contained enactment so far as elections are concerned, and, therefore, to ascertain the true position in regard to any matter connected with elections, the Act and the rules made thereunder need to be looked into.[76] The Act empowers the Central Government to promulgate rules, after consultation with the Commission, for carrying out the purposes of the Act.

The Presidential and Vice-Presidential Elections Act, 1952, regulates certain matters relating to or connected with elections to the offices of the President and Vice-President of India.[77]

As stated above, the Election Commission has no legislative power, as such, in relation to elections. The Commission can issue directions. In *Lakshmi Charan Sen v. A.K.M. Hussain Ujjaman,*[78] the Supreme Court has observed that the directions issued by the Election Commission to the electoral officers are binding upon such officers but such directions have no force of law so as to create rights

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74. *Supra*, Ch. X, Sec. E.
75. *Supra*, Chs. II and VI.
76. *Ponnuswami N.P. v. Returning Officer,* AIR 1952 SC 64; *supra*, footnote 12.
77. *Supra*, Ch. III.
78. AIR 1985 SC 1233 : (1985) 4 SCC 689.

and liabilities between the contestants of election. The Court has explained the position as follows: There is no provision in any statute which would justify the proposition that the directions given by the Election Commission have the force of law. Election laws are self-contained codes. One must look to them for identifying the rights and obligations of the parties. In the absence of a statutory provision, the directions issued by the Election Commission cannot be equated with law.

The Election Commission is entitled to act *ex debito justitiae*, in the sense that, it can take steps or direct that steps be taken over and above those which it is obligated to take under the law. It can, therefore, issue directions to the Chief Electoral Officers. These directions are binding on those officers, but their violation cannot create rights and obligations unknown to the Election law. "We are of the opinion", said the Court, "that the directions issued by the Election Commission, though binding upon the Chief Electoral Officers, cannot be treated as if they are law, the violation of which could result in the invalidation of the election,[79] either generally, or specifically in the case of an individual."

In *Kanhaiya Prasad Sinha v. Union of India*,[80] the petitioner, a sub-divisional officer, was transferred by the State Government ignoring the direction of the Election Commission. The Patna High Court considering the legal effect of the direction ruled that directions issued by the Election Commission under Art. 324 may be directory or mandatory in nature, but even then they cannot be ignored. The State Government should respect them and implement them. In case the government fails to respect the directions, then the Court may examine the matter and pass appropriate orders.

The Commission has evolved the Model Code of Conduct laying down norms regulating the conduct of political parties, candidates and the various governments during the period of election. But, this code has no legal binding. The code has only moral value although the Commission does point out infractions of the code as and when they occur.

F. ELECTION DISPUTES

Art. 329(*a*) lays down that notwithstanding anything in the Constitution, the validity of any law relating to the delimitation of constituencies, or the allotment of seats to such constituencies, made or purporting to be made under Article 327 or 328 'shall not be called in question in any court.' This provision thus immunizes the law pertaining to the matters mentioned from being questioned in a court on any ground whatsoever.

The words 'notwithstanding anything in the Constitution', make it clear that this clause overrides everything else in the Constitution. Because of Art. 329(*a*), the orders made by the Delimitation Commission regarding delimitation of constituencies and published in the official gazette, could not be agitated in a court of law.[81]

Art. 329(*b*) provides that "notwithstanding anything in the Constitution", no election to either House of Parliament or to a House of a State Legislature "shall be called in question except by an election petition presented to such authority and in

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79. *Ibid.*, at 1242-1243.
80. AIR 1990 Pat 189.
81. *Meghraj Kothari v. Delimitation Commission*, AIR 1967 SC 669 : (1967) 1 SCR 400.

such manner as may be provided for by or under any law made by the appropriate legislature."

This means that a suit or a writ petition would not lie to set aside an election.[82] As the Supreme Court observed in *Durga Shankar*:[83] "The non-obstante clause with which Art. 329 of the Constitution begins…. debars us, as it debars any other court in the land, to entertain a suit or a proceeding calling in question any election to the Parliament or the State Legislature."

The policy underlying Art. 329(*b*) is that having regard to the important function discharged by the legislature in a democratic country, all disputes arising out of any election should be postponed till the election is over so as not to dislocate the time schedule for completion of the election and all election disputes should be raised only after the election is over. The term "election" used in Art. 329(b) has a broad connotation. The election process starts with the issue of a notification under the Representation of People Act, 1951, upto the declaration of the result. In between, Art. 329(b) bars any interference by the courts.[84]

The Representation of the People Act. 1951, as it stood before 1956, provided for a system of election tribunals to decide upon disputed elections. That Act did not provide for any judicial review of the decisions of the election tribunals. Parliament endeavoured to clothe the decisions of the election tribunals with the character of non-challengeability. Sec. 105 of the said Act enacted: "Every order of the Tribunal made under this Act shall be final and conclusive." The general approach at this time was to keep the courts out of the area of election disputes. This, it was hoped, would result in expeditious decision of election disputes. But things did not turn out as desired. In course of time, the courts succeeded in extending their supervision over the election tribunals.

The landmark case on the interpretation of Art. 329(*b*) is *Ponnuswami*[85] which bars 'judicial intervention' with the election process. The appellant filed his nomination paper from a constituency for election to the State Assembly. The returning officer rejected his nomination paper on certain grounds. The question was whether the candidate could challenge the decision of the returning officer through a writ petition under Art. 226.[86] The Supreme Court answered in the negative. Keeping in view the phraseology of Art. 329(*b*), the Supreme Court declared that the courts were barred from dealing with any matter arising while the elections were in progress, and till an election petition was disposed of by an election tribunal but not thereafter. The courts would not interfere with the process of election, *i.e.*, from the time the notification is issued till the election petition is disposed of. Any irregularity committed during the course of election could be challenged through an election petition after the election was over.[87]

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82. *Hari Vishnu Kamath v. Ahmad*, AIR 1955 SC 233 : (1955) 1 SCR 1104; *Jagan Nath v. Jaswant*, AIR 1954 SC 210 : 1954 SCR 892; *Krishna Ballabh Prasad Singh v. Sub-Div. Officer Hilsa*, AIR 1985 SC 1746 : (1985) 4 SCC 194.

83. *Durga Shankar Mehta v. Raghuraj Singh*, AIR 1954 SC 520 : (1955) 1 SCR 267.

84. *Election Commission of India v. Ashok Kumar*, (2000) 8 SCC 216 : AIR 2000 SC 2979.

85. *Supra*, footnote 76.

86. For Art. 226, see, Ch. VIII, *supra*.

87. Also, *Hari Vishnu Kamath v. Syed Ahmed Ishaque*, AIR 1955 SC 233 : (1955) 1 SCR 1104; S.K. *Dhara v. Election Comm. of India*, AIR 1973 Cal 184; *Mohinder Singh Gill v. The Chief Election Commissioner*, AIR 1978 SC 851 : (1978) 1 SCC 405; *T.D. Rajalakshmi v. District Election Officer*, AIR 1999 Ker 140.

Art. 329(*b*) is primarily intended to exclude the jurisdiction of all courts in regard to election matters and to lay down the only mode through which an election can be challenged. Any matter which has the effect of vitiating an election should be brought up only at the appropriate stage in an appropriate manner before the election tribunal and should not be brought up at an intermediate stage before any court.

Even if there is any ground relating to the non-compliance with the provisions of the Act and the Constitution on which the validity of any election process could be questioned, the person interested in questioning the election has to wait till the election is over and file an election petition thereafter questioning the election of the successful candidate. In *Ponnuswami*, the Court explained the reason for adopting this stance as follows:

> "It does not require much argument to show that in a country with a democratic Constitution in which the legislatures have to play a very important role, it will lead to serious consequences if the elections are unduly protracted or obstructed".

A legislature in a democratic country performs very important functions. It is, therefore, a matter of first importance that elections should 'be concluded as early as possible according to the time-schedule. It is therefore necessary to postpone all controversies and disputes arising out of the election till after the elections are over so that the election proceedings are not unduly retarded or protracted.[88]

The Supreme Court has laid stress on the *Ponnuswami* proposition, as stated above, from time to time. For example, the Court has observed in *Lakshmi Charan Sen v. A.K.M. Hassan Uzzaman*.[89]

> "… though the High Court did not lack the jurisdiction to entertain the writ petition and to issue appropriate directions therein, no High Court in the exercise of its power under Art. 226 of the Constitution should pass any orders, interim or otherwise which had the tendency or effect of postponing an election, which is reasonably imminent and in relation to which the writ jurisdiction is invoked. The High Courts must observe a self-imposed limitation on their power to act under Article 226, by refusing to pass orders or give directions which will inevitably result in an indefinite postponement of elections to legislative bodies, which are the very essence of the democratic foundation and functioning of our Constitution".

Non-interference with the process of election is a matter of judicial policy, a matter of self-imposed discipline, and not a matter of judicial powers.

But when once proceedings are instituted in accordance with Art. 329(*b*) by presentation of an election petition, and the election tribunal has decided the matter, the requirements of that Article are fully satisfied. Thereafter when the election petition has been disposed of by the election tribunal, its decision is open to attack in the same manner as the decision of any other tribunal.

The scope of Art. 329(*b*) is limited to initiation of proceedings for setting aside an election and not to any stage after the decision of the tribunal.[90] Beyond the decision of the election tribunal, the ban of Art. 329(*b*) does not bind. Once the

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88. *Ponnuswami*, AIR 1952 SC 64 at 70; *supra*, footnotes 12, 76 and 85.
89. AIR 1985 SC 1233 : (1985) 4 SCC 689.
90. Also see, *Hari Vishnu Kamath*, *supra*, footnote 87, at 238-239.

election tribunal has decided, the prohibition under Art. 329(*b*) is extinguished and the Supreme Court's overall power to interfere under Art. 136 springs into action.[91] Similarly, a High Court could issue a writ to an election tribunal under Art. 226,[92] as in the case of any other tribunal. This means that, the jurisdiction of the High Courts and that of the Supreme Court starts where the jurisdiction of the election tribunals end, that is, the jurisdiction of the courts starts after an election tribunal has given its decision on the election petition. So long as the poll process is on for election to Parliament or State Assembly, the courts cannot interfere. The only remedy open to the aggrieved party is through an election petition as envisaged by Art. 329(*b*) after the election is over.

The pattern which thus emerged in course of time after the commencement of the Constitution was that an election petition would first be decided by a tribunal; the matter would then invariably come before the High Court through a writ petition, and, lastly, it would come before the Supreme Court by way of appeal under Art. 136.

In effect, a three tier set-up came into being to deal with election matters. This position was recognised in 1956 when the Representation of the People Act, 1951, was amended so as to provide for a regular appeal from an election tribunal to the High Court. An appeal could go thereafter to the Supreme Court under Arts. 132, 133 and 136.[93]

This three tier system usually took a long time to finally decide election disputes. Therefore, the Election Commission recommended that election tribunals be abolished and trial of election petitions be handed over to the High Courts. This was expected to expedite disposal of election disputes as one step would be cut down. Accordingly, in 1966, the jurisdiction to hear and decide an election petition was transferred to the High Court by amending the Representation of the People Act, 1971. The High Court now sits as a statutory tribunal to decide election disputes with appeal to the Supreme Court.

The position now is that there exists a two tier system to decide election disputes. Election Tribunals are no longer appointed now. The election petitions are heard directly by the High Courts[94] from which an appeal may be taken to the Supreme Court under Arts. 132, 133 and 136.

A High Court cannot entertain a writ petition on behalf of a candidate whose nomination paper has been rejected by the returning officer as this is a part of the election process and is covered by Art. 329(*b*). The proper remedy for him is to file an election petition after the completion of the election.[95]

The question of the Election Commission cancelling the poll in a constituency and ordering re-poll therein falls within the process of election. Therefore, a writ petition challenging the decision of the Election Commission is barred by Art. 329(*b*).[96]

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91. *Supra*, Ch. IV.
92. *Supra*, Ch. VIII.
93. *Supra*, Ch. IV.
94. For a commentary on the jurisdiction of the High Courts in trying election petitions see, *H.M. Trivedi v. V.B. Raju*, AIR 1973 SC 2602 : (1974) 3 SCC 415.
Also see, *A.C. Sobhan kuar v. Union of India*, AIR 1984 AP 347.
95. *Ponnuswami, supra*. Also, *In the matter of*: *Sri Subrata Chatterji*, AIR 1983 Cal. 436.
96. *Mohinder Singh Gill v. Election Comm.*, AIR 1978 SC 851 : (1978) 1 SCC 405.

When a person who is incapable of being chosen as a member of the legislature under the Constitution (*e.g.*, he is below the age of 25 years) is elected, his election can be quashed through an election petition.[1] When a person is not qualified to be elected a member, there can be no doubt that the Election Tribunal has got to declare his election to be void. But, suppose, no election petition is filed to challenge his election, can the election be then challenged through a writ petition under Art. 226 ? Such a situation arose in *K. Venkatachalam v. A. Swamickan*.[2]

The appellant was not an elector in the electoral roll for an Assembly constituency for general election. He filed his nomination paper on affidavit impersonating himself as another person of the same name in the electoral roll. Undoubtedly, had an election petition been filed challenging his election, it would have been set aside. But this was not done. An election petition could be filed within the period of limitation set by the relevant statue which was over in the instant case. The Supreme Court was faced with the question whether in these circumstances no remedy was open to the respondent. To refuse a remedy would have meant that a disqualified person would continue to remain a member of the legislature. Art. 193 provides for penalty for sitting and voting when a person is not qualified to be a member of the Assembly.[3] The Supreme Court ruled that, in such a situation, the High Court could, under Art. 226, make a declaration that the appellant is not qualified to be a member of the Assembly. If he is allowed to continue to sit and vote in the Assembly, his action would be a fraud on the Constitution.

The Supreme Court has pointed out in *Venkatachalam* that Art. 226 "is couched in the widest possible term" and unless there is a clear bar to the High Court's jurisdiction under Art. 226, it can be exercised "when there is any act which is against any provision of law or violative of constitutional provisions and when recourse cannot be had to the provisions of the Act for the appropriate relief. "Art. 329(b) will not come into play when the case falls under Arts. 191 and 193 and the whole of the election process is over."[4]

Suppose a non-citizen is elected to a House. "Would the Court allow a foreign citizen to sit and vote in the legislative Assembly and not exercise jurisdiction under Art. 226 of the Constitution ?"[5]

Preparation of electoral rolls is anterior to, and not a part of, the election process, and the same may be challenged through a writ petition if provisions of the Constitution or the relevant Act are not complied with.[6]

The Supreme Court has held that, in a suitable case, a challenge to the electoral roll can be mounted on the ground of not complying with the requirements of law subject to the *Ponnuswami* ruling. Preparation and revision of electoral rolls, as such, is not regarded as a part of the process of election within the meaning of Art. 329(*b*). Preparation and revision of electoral rolls is a continuous

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1. *Durga Shankar v. Raghuraj*, AIR 1954 SC 520 : (1955) 1 SCR 267.
2. AIR 1999 SC 1723 : (1999) 4 SCC 526.
3. *Supra*, Ch. VI.
4. *Venkatachalam*, *supra*, footnote 2, at 1734.
5. *Ibid.*
6. *Roop Lal v. Dhan Singh*, AIR 1968 Punj. 1; *S.J. Jhala v. Chief Election Officer*, AIR 1969 Guj. 292; *A.K. Nair v. Elec. Commr.*, AIR 1972 Ker. 5.

process not connected with any particular election. This process goes on, whether there is an election or no election.

But this does not put the existing electoral roll in the cold storage. Election law abhors a vacuum. There is never a moment in the life of a political community when some electoral roll is not in force. When an election is to be held, the electoral roll which exists at the time when election is notified would form the foundation for holding such election. The election of a candidate is not open to challenge on the ground of the electoral roll being defective.[7] The fact that certain claims for inclusion of names in electoral rolls have not finally been disposed of cannot arrest the process of election. The reason is that the holding of elections to the legislature is a matter of paramount importance. On the one hand, it is the statutory right of an individual to vote, but, on the other hand, there is a constitutional obligation to hold election to the legislature.

Art. 329(*b*) bars any challenge to the elections through a writ petition on the ground that the electoral roll on the basis of which the impugned election was held was invalid. Once the final electoral rolls were published and elections held on the basis of such rolls, no one can challenge an election from any constituency on the ground that the electoral rolls were defective.[8]

The Election Commission issued a notification fixing the calendar of events for the purpose of holding the elections to the Legislative Council of Maharashtra. On a writ petition, the High Court issued an interim order staying the holding of the election. On appeal, the Supreme Court ruled in *Shivaji*[9] that, because of the non-obstante clause contained in Art. 329(*b*), the power of the High Court to entertain a petition questioning an election on whatever grounds under Art. 226 is taken away. The word "election" cannotes "the entire process culminating in a candidate being declared elected".

The Supreme Court emphasized that it was not the concern of the High Court under Art. 226 "to rectify any error even if there was an error committed in the process of election at any stage prior to the declaration of the result of the election notwithstanding the fact that the error in question related to a mandatory provision of the statute relating to the conduct of the election." If there was any such error committed in the course of the election process, the Election Commission has the authority to set it right by virtue of the power vested in it under Art. 324. The word 'election' in Art. 329(b) has been used in the wide sense as connoting the entire process culminating in a candidate being declared elected.

An order of the Election Commission cancelling poll, and ordering re-poll, in some polling booths is immune from being challenged through a writ petition because of Art. 329(*b*). It is a step in the election and such a petition amounts to calling in question a step in 'election' and is, therefore, barred by Art. 329(b). "..... Immunity is conferred only if the act impeached is done for the apparent object of furthering a free and fair election and the protective armour drops down

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7. *Lakshmi Charan Sen v. A.K.M. Hassan Uzzaman,* AIR 1985 SC 1233 : (1985) 4 SCC 689; *Indrajit-Barua v. Election Comm. of India,* AIR 1986 SC 103 : (1985) 4 SCC 722.

8. *Kabul Singh v. Kundan Singh,* AIR 1970 SC 340 : (1969) 2 SCC 452; *Indrajit Barua v. Election Comm. of India,* AIR 1986 SC 103 : (1985) 4 SCC 722.

9. *Election Comm. v. Shivaji,* AIR 1988 SC 61 : (1988) 1 SCC 277.
Also see, *T.D. Rajalakshmi v. District Election Officer,* AIR 1999 Ker 140; *Mullapally Ramachandran v. District Collector, Kannaur,* AIR 2000 Ker 15.

if the act challenged is either unrelated to or thwarts or taints the course of the election."[10]

In February, 1982, on a writ petition being filed under Art. 226, the Calcutta High Court issued an interim injunction on the Election Commission restraining it from declaring a date for holding State Assembly elections in West Bengal. The petition pointed out certain irregularities in the preparation of the electoral rolls and sought a stay of their publication. Certain questions about the *vires* of the laws of election were also raised. This created a sort of crisis for the term of the legislature was due to expire on June 24, 1982, and the Left Front Government in power wanted to complete the elections in March itself.

In an unprecedented move, the Supreme Court agreed to hear an appeal under Art. 136 and transfer the petition to itself for disposal on merits. Dismissing the petition, the Court agreed that in spite of Art. 329(*b*), the *vires* of the laws of election could be challenged through a writ petition. But the Court emphasized that no High Court in the exercise of its powers under Art. 226 should pass any order, interim or otherwise, which has the tendency or effect of postponing an election which is reasonably imminent and in relation to which its writ jurisdiction is invoked. The more imminent an election, the greater ought to be the reluctance of the High Court to take any step which will postpone the electoral process.[11]

The Election Commission in exercise of its powers under Art. 324 issued a direction relating to the employment of the electronic machines for the recording of votes in some polling booths in a constituency in Kerala. A candidate challenged this system of recording votes through a writ petition, but in *K.C.Mathew v. Election Commissioner,*[12] the Kerala High Court rejected the petition on the ground that it was barred by Art. 329(*b*).

This decision does not appear to be sound. It is stretching Art. 329(b) a little too much. It should also not be forgotten that judicial review has been declared to be a basic feature of the Constitution and that Art. 329(b) needs to be interpreted in the light of this declaration.[13] The question raised here concerned the legal validity of an order made by the Election Commission. Whether the order in question was within or without the authority of the Commission? Such a challenge ought not to be held barred by Art. 329. At present, no clause excluding jurisdiction of the courts is ever interpreted so as to bar a challenge to an order of an authority on the ground of *ultra vires* or jurisdictional error.[14]

But after the election, the matter was agitated again, and the Supreme Court quashed the order of the Election Commission as well as the election held through electronic machines[15]

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10. *Mohinder Singh, supra,* footnote 96, at 868.
11. *A.K.M. Hassan Uzzaman v. Union of India,* (1982) 2 SCC 218.
Also, *Election Commission v. State of Haryana,* AIR 1984 SC 1406 : 1984 Supp SCC 104.
12. AIR 1982 Ker 265.
Also, *supra,*
13. See, *infra,* Ch. XLI.
14. *Anisminic Ltd. Foreign Compensation Comm.,* (1967) 3 WLR 382.
For full discussion on this point, see, Jain, *A TREATISE ON ADM. LAW,* Vol. II.
15. *Jose v. Sivam, supra,* footnote 39.

The Supreme Court has restated its somewhat modified view on the maintenance of writ petitions. In *Election Commission of India v. Ashok Kumar*,[16] the Supreme Court has stated:

> "Any thing done towards completing or in furtherance of the election proceedings cannot be described as questioning the election…
>
> "Without interrupting, obstruction or delaying the progress of the election proceedings, judicial intervention is available if assistance of the court has been sought merely to correct or smoothen the progress of the election proceedings, to remove the obstacles therein, to preserve a vital piece of evidence if the same would be lost or destroyed or rendered irretrievable by the time the results are declared and stage is set for invoking the jurisdiction of the court…."

In the instant case, an order passed by the Election Commission regarding the manner of counting of votes was challenged as *mala fide*. The High Court passed an interim order staying the order of the Election Commission. On appeal, the Supreme Court stayed the High Court order and thus counting of votes took place as per the order of the Election commission. Clarifying the position, the Supreme Court stated that although the High Court order did not have the effect of "retarding, protracting, delaying or stalling the counting of votes or the progress of the election proceedings", yet the order ought not to have been made by the High Court because in the petition there was merely "a bald assertion of *mala fides*," "a mere *ipse dixit*" of the petitioner. "From such bald assertion an inference as to *mala fides* could not have been drawn even *prima facie*".

The lesson from the above case is that the Supreme Court has not faulted the High Court on the ground that it ought not to have made the order because of Art. 329(b). What the Supreme Court has said is that *on merits*, the order of the High Court was wrong.

Art. 329(*b*) by its terms does not bar writ petitions under Art. 226 to challenge elections to bodies other than Parliament and State Legislatures, as for example, municipal elections. But there is Art. 243-O which is similar to 329(b).[17] The remedy under Art. 226 cannot be taken away by any law. However, the remedy under Art. 226 is discretionary with the High Court and it may refuse to entertain a writ petition if an alternative, efficacious remedy is provided by law,[18] or if the effect thereof would be to delay elections.[19]

G. PARTY SYSTEM

Originally, the Constitution made no reference to the party system, as such. In course of time, however, the party system has come to be recognised formally as being essential for the running of the Parliamentary democratic system.

The Supreme Court has dilated upon the significance of the party system in several cases. For example, in *Rama Kant Pandey v. Union of India*,[20] the Court

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16. (2000) 8 SCC 216, at 232 : AIR 2000 SC 2979.

17. *Supra*, Ch. IX, Sec. H.
Also see, *State Election Commissioner v. State of Bihar*, AIR 2001 Pat 192.

18. *Mahaveer Singh v. Raghunath*, AIR 1983 NOC 220 (Raj); *Navuba Gokalji v. Returning Officer*, AIR 1982 Guj. 281; *Aminchand v. State of Punjab*, AIR 1983 P&H 90.

19. *Anugrah Narain Singh v. State of Uttar Pradesh*, (1996) 6 SCC 303 : (1996) 8 JT 733; *Boddula Krishnaish v. State Election Commissioner*, (1996) 3 SCC 416 at 418-422 : AIR 1996 SC 1595.

20. AIR 1993 SC 1766, 1768 : (1993) 2 SCC 438.

has pointed out that the Cabinet system adopted in India is based on the British pattern.[21] For a strong vibrant democratic government, it is necessary to have a parliamentary system which involves a majority as well as a minority so that there may be a full-fledged debate on controversial issues on the floor of the House. This is best achieved through the party system. "To abolish or ignore the party system would be to permit a chorus of discordant notes to replace an organised discussion." "It is, therefore, idle to suggest that for establishing a true democratic society, the party system should be ignored".[22]

In the instant case, the Court upheld a provision providing for countermanding of an election if any party candidate died but not when an independent candidate died. The Court ruled that the differential treatment accorded by law to party candidates does not fall foul of Art. 14.[23] The Court rejected the contention that the candidates set up by political parties should not receive any special treatment. The Court ruled that the candidates set up by political parties constitute a class by themselves.

Earlier in *Thampy*,[24] the Supreme Court had upheld a provision according to which a political party can spend, can incur expenses, without any limit, in support of a candidate as not being inconsistent with Art. 14. The Court stated in this connection:

> "It is the political parties which sponsor candidates, that are in a position to incur large election expenses…We do not consider that preferring political parties for exclusion from the sweep of monetary limits on election expenses, is so unreasonable, or arbitrary as to justify the preference being struck down upon that ground."

The Court explained the role of political parties thus: in any democratic system of government, political parties occupy a distinct and unique place. It is through them that the generality of people attempt to voice and ventilate their grievances. "Considering also, the power which they wield in the administration of government affairs, a special conferment of benefits on them in the matter of modalities governing the election process cannot be regarded as unreasonable or arbitrary".[25]

In *Agarwal*,[26] the Supreme Court has taken note of, and emphasized upon, the vital role played by the political parties in a parliamentary system in the following words:

> "In Parliamentary form of democracy political parties play vital role and occasionally they sponsor candidates of the election".

To strengthen the party system, the Court has even suggested the need for discouraging independent candidates from contesting elections because it causes unnecessary confusion to the voters.

The Election Symbols (Reservation & Allotment) Order, 1968, is also a step in the direction of recognising the party system.[27] While upholding the validity of the symbols order, the Court observed in *Kanhaiya Lal Omar v. R.K. Trivedi*,[28]

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21. *Supra*, Ch. III, Sec. B(c).
22. AIR 1993 SC at 1769.
23. See, *infra*, Ch. XXI.
24. *P. Nalla Thampy v. Union of India*, AIR 1985 SC 1133 : 1985 Supp SCC 189.
25. *Ibid.*, at 1140.
26. *Dhartipakar Madan Lal Agarwal v. Rajiv Gandhi*, AIR 1987 SC 1577 : 1987 Supp SCC 93.
27. *Supra.*

> "It is true that till recently, the Constitution did not expressly refer to the existence of political parties. But their existence is implicit in the nature of democratic form of government which our country has adopted…..The political parties have to be there if the present system of government is to succeed."

The Anti-Defection Law introduced in 1985 through the X Schedule to the Constitution is also an attempt to strengthen the party by discouraging defections from one party to another.[29]

The Constitution thus formally recognises the party system as an essential limb of the constitutional process in the country.

The *Representation of the People (Amendment) Ordinance, 2000.*

Reference has been made earlier to criminalisation of politics[30] and the ruling of the Supreme Court in *Union of India v. Association for Democratic Reforms.*[31] To dilute the impact of the court order, the Central Government has now promulgated the above ordinance making certain amendments to the Representation of the People Act, 1951.

A candidate for election to a House of Parliament/State legislature is now required to furnish information on the following two points:

(i) whether he is accused of any offence punishable with imprisonment for two years or more in a pending case in which a charge has been framed by the court of competent jurisdiction;

(ii) he has been convicted of an offence and sentenced to imprisonment for one year or more.

The candidate is not required to give any other information as was desired by the Supreme Court.

As regards declaration of assets and liabilities, same is to be made by an elected member to the presiding officer of the concerned House.

The ordinance then adds the following section as S. 33B to the RPA:

> "Notwithstanding anything contained in any judgment, decree or order of any court or any direction, order or any other instruction issued by the Election Commission, no candidate shall be liable to disclose or furnish any such information, in respect of his election, which is not required to be disclosed or furnished under this Act or the rules made thereunder".

While the ordinance takes a small step towards decriminalisation of politics, it is a flawed piece of legislation on more than one ground. It is an example as to how politicians of different shades and hues who shout hoarse day in, day out

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28. AIR 1986 SC 111, 116 : (1985) 4 SCC 628.

29. See, *supra*, Ch. II, Sec. F.

30. *Supra*, Ch. III, Sec. D(ii)(d).

31. In a commendable statement, the President of the Congress Party strongly condemned the Government's move "to wilfully pass an ordinance that defies (1) the will of a vast majority of the people, (2) the letter and spirit of the order of the Supreme Court and (3) the basic tenet of transparency and accountability in politics.

The Congress has expressed concurrence with the orders of the Supreme Court that candidates must disclose information regarding convictions and charges for offences, assets and bank balances and liabilities and overdues. Such information must be disclosed by all candidates at the time of filing nomination and prior to an election.

The Times of India, dated Aug. 28, 2002, p. 13.

condemning criminalisation of politics, come together forgetting all their ideological differences to protect their turf. The Supreme Court had not made any radical suggestion but even these suggestions are not acceptable to the politicians. This shows that there exists a wide gulf between preaching and practice in to-days political arena. The ordinance seeks to draw a veil of secrecy over the acts of the politicians and thus it lacks transparency.

It is also anti-democratic as it directly strikes at the people's right to know—a democratic right. The newly added S. 33B seeks to deny to the people the right to be informed about the credentials of the candidates for whom they are prompted to vote. Can it be said that it promotes free and fair elections in the country?

Above all the constitutional validity of S. 33B is extremely suspect. The Supreme Court has spelt out the right to know from the freedom of speech and expression couched in Art. 19(1)(a) which is a Fundamental Right. Therefore, right to information is itself a Fundamental Right. S. 33B directly seeks to nullify this right. It is like saying that no one has freedom of speech outside the statute. Therefore, it is hard to hold S. 33B as valid. No law, not falling within the parameters of Art. 19(2) can deny in any way the right guaranteed by Art. 19(1)(a). By no stretch of imagination S. 33B falls within the scope of Art. 19(2).

The ordinance has to be approved by Parliament, but it is doubtful if it will be approved in its present form because the Congress Party, which has a majority in the Rajya Sabha has expressed reservation about the Ordinance in its present form.[32]

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CHAPTER XX

FUNDAMENTAL RIGHTS (1)

SYNOPSIS

A. CONCEPT OF FUNDAMENTAL RIGHTS

Since the 17th century, if not earlier, human thinking has been veering round to the theory that man has certain essential, basic, natural and inalienable rights or freedoms and it is the function of the state, in order that human liberty may be preserved, human personality developed, and an effective social and democratic life promoted, to recognise these rights and freedoms and allow them a free play.

The concept of human rights can be traced to the natural law philosophers, such as, Locke and Rousseau. The natural law philosophers philosophized over such inherent human rights and sought to preserve these rights by propounding the theory of "social compact".[1]

According to LOCKE, man is born "with a title to perfect freedom and an uncontrolled enjoyment of all the rights and privileges of the Law of Nature" and he has by nature a power "to preserve his property—that is, his life, liberty, and estate, against the injuries and attempts of other men."[2]

The Declaration of the French Revolution, 1789, which may be regarded as a concrete political statement on Human Rights and which was inspired by the LOCKEIAN philosophy declared:

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1. See, LLOYD, INTRODUCTION TO JURISPRUDENCE, 117-123, 159 (1985).
2. Extracts from LOCKE, TWO TREATISES OF GOVERNMENT.

> "The aim of all political association is the conservation of the natural and inalienable rights of man".

The concept of human rights protects individuals against the excesses of the state. The concept of human rights represents an attempt to protect the individual from oppression and injustice. In modern times, it is widely accepted that the right to liberty is the very essence of a free society and it must be safeguarded at all times. The idea of guaranteeing certain rights is to ensure that a person may have a minimum guaranteed freedom.

The underlying idea in entrenching certain basic and Fundamental Rights is to take them out of the reach of transient political majorities. It has, therefore, come to be regarded as essential that these rights be entrenched in such a way that they may not be violated, tampered or interfered with by an oppressive government. With this end in view, some written constitutions guarantee a few rights to the people and forbid governmental organs from interfering with the same. In that case, a guaranteed right can be limited or taken away only by the elaborate and formal process of constitutional amendment rather than by ordinary legislation. These rights are characterised as Fundamental Rights.

The entrenched Fundamental Rights have a dual aspect. From one point of view, they confer justiciable rights on the people which can be enforced through the courts against the government. From another point of view, the Fundamental Rights constitute restrictions and limitations on government action, whether it is taken by the Centre, or a State or a local government. The government cannot take any action, administrative or legislative, by which a Fundamental Right is infringed.

Entrenchment means that the guaranteed rights cannot be taken away by an ordinary law. A law curtailing or infringing an entrenched right would be declared to be unconstitutional. If ever it is deemed necessary to curtail an entrenched right, that can only be done by the elaborate and more formal procedure by way of a constitutional amendment. As the Supreme Court has observed,[3] the purpose of enumerating Fundamental Rights in the Constitution "is to safeguard the basic human rights from the vicissitudes of political controversy and to place them beyond the reach of the political parties who, by virtue of their majority, may come to form the government at the centre or in the State".

The modern trend of guaranteeing Fundamental Rights to the people may be traced to the Constitution of the U.S.A. drafted in 1787. The U.S. Constitution was the first modern Constitution to give concrete shape to the concept of human Rights by putting them in to the Constitution and making them justiciable and enforceable through the instrumentality of the courts.

The original U.S. Constitution did not contain any Fundamental Rights. There was trenchant criticism of the Constitution on this score. Consequently, the Bill of Rights came to be incorporated in the Constitution in 1791 in the form of ten amendments which embody the LOCKEIAN ideas about the protection of life, liberty and property.[4]

The nature of the Fundamental Rights in the U.S.A. has been described thus: "The very purpose of a Bill of Rights was to withdraw certain subjects from the

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3. *Chairman, Rly. Board v. Chandrima Das,* AIR 2000 SC 988, 997 : (2000) 2 SCC 465.
4. B. BAILYN, IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION, (1967).

vicissitudes of political controversy, to place them beyond the reach of majorities and officials, to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly and other Fundamental Rights may not be submitted to vote; they depend on the outcome of no elections."[5]

In modern times, the concept of the people's basic rights has been given a more concrete and universal texture by the Charter of Human Rights enacted by the United Nations Organization (U.N.O.),[6] and the European Convention on Human Rights.[7] The Preamble to the Universal Declaration of Human Rights *inter alia* declares:

> "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world".

The concept of Fundamental Rights thus represents a trend in the modern democratic thinking.[8] The enforcement of human rights is a matter of major significance to modern constitutional jurisprudence. The incorporation of Fundamental Rights as enforceable rights in the modern constitutional documents as well as the internationally recognised Charter of Human Rights emanate from the doctrine of natural law and natural rights.

For sometime now a new trend is visible in India, *viz*., to relate the Fundamental Rights in India to the International Human Rights. While interpreting the Fundamental Rights provisions in the Indian Constitution, the Supreme Court has drawn from the International Declarations on Human Rights.[9] The Supreme

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5. JUSTICE JACKSON in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624.

6. IAN BROWNLIE, BASIC DOCUMENTS ON HUMAN RIGHTS (1971); (1998) 40 *JILI*, 1-327.

The General Assembly of the United Nations Organisation adopted the Universal Declaration of Human Rights on Dec. 10, 1948. This document has proved to be a mere declaration without any teeth. The Charter has so far remained merely a formal document without any measures having been taken to facilitate the realization of the basic freedoms and the human rights which the document contains.

7. For trends in the present-day Africa in the area of human rights, see, D.O. Ahic, Neo-Nigerian Human Rights in Zambia: A Comparative Study with some countries in Africa and West Indies, 12 *J.I.L.I.* 609 (1970).

8. In Europe, the Council of Europe adopted the European Convention for the Protection of Human Rights and Fundamental Freedoms on Nov. 4, 1950. The Convention has set up both a Commission and a Court of Human Rights to investigate and adjudicate upon claims made by individuals.

9. As will be apparent from the following discussion on specific Fundamental Rights, and the judicial interpretation thereof, the Supreme Court of India has frequently drawn from the Declaration of Human Rights to define the scope and content of the Fundamental Rights in India: see, for example: *Maneka Gandhi v. Union of India*, AIR 1978 SC 597; *M.H. Hoskot v. State of Maharashtra*, AIR 1978 SC 1548 : (1978) 3 SCC 544; *Randhir Singh v. Union of India*, AIR 1982 SC 879; *D.K. Basu v. Union of India*, AIR 1997 SC 610; *Vishaka v. State of Rajasthan*, (1997) AIR SCW 3043 : (1997) 6 SCC 241; *People's Union for Civil Liberties v. Union of India*, (1997) 1 SCC 301; *Apparel Export Promotion Council v. A.K. Chopra*, AIR 1999 SC 6251 : (1999) 1 SCC 759; *Chairman, Rly. Board v. Chandrima Das*, AIR 2000 SC 988 : (2000) 2 SCC 465. All these cases are discussed in the text which follows.

In *Madhu Kishwar v. State of Bihar*, AIR 1996 SC 1864 at 1869 : (1996) 5 SCC 125, the Supreme Court referred to the Declarations on "The Right to Development" adopted by the UN General Assembly on December 4, 1986, and also to Vienna Conventions on the Elimination of all forms of Discrimination against women (CEDAW) ratified by the UNO on Dec. 18, 1979.

Also see, *People's Union for Civil Liberties v. Union of India*, AIR 1997 SC 568, 575 : (1997) 1 SCC 301.

Court, for example, has made copious references to the Universal Declaration of Human Rights, 1948, and observed:

> "The applicability of the Universal Declaration of Human Rights and principles thereof may have to be read, if need be, into the domestic jurisprudence".[10]

There is no formal declaration of people's Fundamental Rights in Britain. The orthodox doctrine of the Sovereignty of Parliament prevailing there does not envisage a legal check on the power of Parliament which is, as a matter of legal theory, free to make any law even though it abridges, modifies or abolishes any basic civic right and liberty of the people.[11] The power of the executive is however limited in the sense that it cannot interfere with the rights of the people without the sanction of law.[12]

There prevails in Britain the concept of Rule of Law which represents, in short, the thesis that the executive is answerable to the courts for any action which is contrary to the law of the land. Rule of law constitutes no legal restraint on the legislative power of Parliament and, thus, cannot be equated to the concept of Fundamental Rights.

Until 1998, the protection of individual freedom in Britain, therefore, rested not on any constitutional guarantees but on public opinion, good sense of the people, strong common law traditions favouring individual liberty and the Parliamentary form of government. British lawyers often questioned the very basis of the theory of declaring basic civil rights in a constitutional document.

The British model could not be duplicated elsewhere. The fact remains that Britain is a small and homogeneous nation, having deep-rooted democratic traditions. But these conditions do not prevail in other countries which are composed of diverse elements, having no deep-rooted traditions of individual liberty, and which, therefore, face very different problems from those of Britain.

Even in Britain, there was an ever growing realisation that guaranteed civil rights do serve a useful purpose and that Britain should also have a written Bill of Rights.[13] Britain had accepted the European Charter on Human Rights.[14] But this was not good enough because the Charter did not bind Parliament but could be used only to interpret the local law. The feeling was that law made by Parliament was in essence law made by the House of Commons. This, in practice, meant that a government having support of a majority in the House (though it had the support only of a minority of electorate), could often force through whatever legisla-

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10. *Chairman, Railway Board v. Chandrima Das*, AIR 2000 SC 988 at 997 : (2000) 2 SCC 465.

11. *Supra*, Ch. II, Sec. M.
Also, *Lord Wright in Liversidge v. Anderson*, 1942 A.C. 206.

12. LORD ATKIN in *Eshugbayi v. Govt. of Nigeria*, 1931 A.C. 662.

13. HOOD PHILLIPS, CONST. AND ADM. LAW, 40, 438 (1978); also, REFORM OF THE CONSTITUTION (1970); DE SMITH, CONST. AND ADM. LAW, 439 (1977); SCARMAN, *ENGLISH LAW—THE NEW DIMENSION*; ANDERSON, ON LIBERTY, LAW AND JUSTICE (1978).
On July 7, 75, a resolution was moved in the House of Commons demanding that England should have a Bill of Rights. There is some opposition as well in academic circles to having a Bill of Rights; See, YARDLEY, Modern Constitutional Developments: Some Reflections. 1975 *Pub. Law* 197; LLOYD, Do We Need A Bill of Rights? *M.L.R.* 121 (1976); H.W.R. WADE, *CONSTITUTIONAL FUNDAMENTALS*, 24-40 (1980).
See also, REPORT OF SELECT COMMITTEE ON A BILL OF RIGHTS (HOUSE OF LORDS, 1978).

14. There have been some cases in Britain in this area: *Waddington v. Miah*, (1974) 1 W.LR. 613; *R. v. Secretary of State for Home Affairs ex p. Bhajan Singh*, (1975) 2 All ER 1081; *Bulmer Ltd. v. Bollinger, S.A.*, (1974) 2 All ER 1226.

tion it desired. What was, therefore, necessary was a Bill of Rights which could curb parliamentary legislative power. As SCARMAN observed:[15]

> "Without a Bill of Rights protected from repeal, amendment, or suspension by the ordinary processes of a bare Parliamentary majority controlled by the government of the day, human Rights will be at risk."[16]

Ultimately, the British Parliament enacted the Human Rights Act, 1998. The purpose of the Act is to give effect to the rights and freedoms guaranteed under the European Convention on Human Rights. The Act is a significant constitutional innovation.

The Act incorporates the Convention in Schedule I. These are the rights to which the Act gives effect. All legislation, so far as possible, is to be read and given effect to in a way which is compatible with convention rights [s. 3(1)(a)]. S. 2(1)(a) requires a Court determining a question regarding a convention right, to take into account any "judgment, decision, declaration or a advisory opinion of the European Court of Human Rights, so far as the same is relevant to the proceedings in question."

Under s. 4(1), the Court may make a declaration that a legal provision is incompatible with a convention right. In such a case, under s. 10(1)(b), the Minister may by order make such amendments to the legislation as he considers necessary to remove the incompatibility. Thus, the Minister is empowered to make "remedial orders" to remove incompatibilities between primary legislation (as passed by Parliament) and the Convention. But a draft of the order has to be approved by both Houses of Parliament.

The British Act falls short of a declaration of Fundamental Rights in the Constitution (such as is the case in India) in several respects; viz.:

(1) In India, if a law is incompatible with a Fundamental Right, the law is void.[17] Not so in Britain. The Human Rights Act does not provide the courts with the power to strike down legislation which is inconsistent with the Convention rights. A judicial declaration of incompatibility does not make the legislation void. In fact, such a declaration does not affect the validity of the law at all.

(2) The incompatibility may be removed by the Minister with the approval of Parliament. If the Minister does not seek to remove the incompatibility, the law in question continues to exist. This means that Parliament is free, if it so chooses, to enact and maintain in force legislation that is incompatible with the Convention rights. Not so in India where a void law is regarded as non-est.[18]

(3) The British Act is only an Act passed by Parliament. Parliament can repeal or amend the same by passing another Act. The Act is not entrenched against repeal but can be repealed in the ordinary way. On the other hand, a declaration of Fundamental Rights in the Constitution is of a more enduring and abiding nature than a mere statutory declaration of rights because to make any change in the Fundamental Rights, the Constitution needs to be amended which is a much more arduous and elaborate procedure than passing or amending an ordinary law.[19]

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15. *Supra*, footnote 13.
16. *Ibid*, 69.
17. See, *infra*, Sec. C.
18. *Ibid.*
19. See, Ch. XLI, *infra.*

The Australian Constitution, following the traditions of Britain, does not have a Bill of Rights but guarantees only a few rights, *e.g.*, freedom of religion.[20]

In a federal country, the problem becomes more complicated as there may be attacks on individual liberty and freedom not only at the Central level, but even at the state level.

In the modern era, it has become almost a matter of course to prescribe formally the rights and liberties of the people which are deemed worthy of protection from government interference. The wide acceptance of the notion that a formal Bill of Rights is a near necessity in the effective constitutional government arises, to some extent, from a feeling that mere custom or tradition alone cannot provide to the Fundamental Rights the same protection as their importance deserves. "The unique English situation is not simply exportable, and other nations have generally felt that their governments need the constant reminder which a bill of rights provides, while their people need the reassurance which it can supply."[21]

An outstanding example of this trend is Canada. To begin with, the Canadian Constitution had only a few guaranteed Rights.[22] Then, the Canadian Parliament enacted a law laying down basic Rights of the people.[23] Being only a law made by Parliament, it did not constitute any restriction on Parliament itself. The matter has now been taken further. The Canadian Constitution has been amended and a Charter of Rights has been formally incorporated therein in 1982.[24]

B. FUNDAMENTAL RIGHTS IN INDIA

Coming to India, a few good reasons made the enunciation of the Fundamental Rights in the Constitution rather inevitable. For one thing, the main political party, the Congress, had for long been demanding these Rights against the British rule. During the British rule in India, human rights were violated by the rulers on a very wide scale. Therefore, the framers of the Constitution, many of whom had suffered long incarceration during the British regime, had a very positive attitude towards these rights.

Secondly, the Indian society is fragmented into many religious, cultural and linguistic groups, and it was necessary to declare Fundamental Rights to give to the people a sense of security and confidence. Then, it was thought necessary that people should have some Rights which may be enforced against the government which may become arbitary at times. Though democracy was being introduced in India, yet democratic traditions were lacking, and there was a danger that the majority in the legislature may enact laws which may be oppressive to individuals or minority groups, and such a danger could be minimised by having a Bill of Rights in the Constitution.

The need to have the Fundamental Rights was so very well accepted on all hands that in the Constituent Assembly, the point was not even considered

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20. S. 116 of the *Australian Constitution*.
21. BOWIE, STUDIES IN FEDERALISM, 567, 601.
22. Ss. 93 and 133 of the British North America Act.
23. See the various articles on the subject in 37 *Can. B.R.* 1-217 (1959). Also AUBURN, Canadian Bill of Rights and Discriminatory Statutes, 86 *LQR* 306 (1970); WALTER S. TRANOPOLSKY, *The Canadian Bill of Rights* (1975).
24. See (1983) 61 *Can. B.R.* 1-442.

whether or not to incorporate such Rights in the Constitution. In fact, the fight all along was against the restrictions being imposed on them and the effort all along was to have the Fundamental Rights on as broad and pervasive a basis as possible.[25]

The Fundamental Rights are a necessary consequence of the declaration in the Preamble to the Constitution that the people of India have solemnly resolved to constitute India into a sovereign democratic republic and to secure to all its citizens justice, social, economic, and political; liberty of thought, expression, belief, faith and worship; equality of status and opportunity.[26]

Part III of the Constitution protects substantive as well as procedural rights.[27]

The Fundamental Rights in India, apart from guaranteeing certain basic civil Rights and freedoms to all, also fulfil the important function of giving a few safeguards to minorities, outlawing discrimination and protecting religious freedom and cultural rights. During emergency, however, some curtailment of the Fundamental Rights does take place.[28] But all these curtailments of Fundamental Rights are of a temporary nature.

Fundamental Rights must not be read in isolation but along with directive principles and fundamental duties.[29]

The Indian Constitution guarantees essential human rights in the form of Fundamental Rights under Part III and also directive principles of State policy in Part IV which are fundamental in the governance of the country. Freedoms granted under Part III have been liberally construed by various pronouncements of the Supreme Court in the last half a century, keeping in view the International Covenants to which India is a party. The object has been to place citizens at a centre stage and make the State accountable.[30]

Articles 12 to 35 of the Constitution pertain to Fundamental Rights of the people. These Rights are reminiscent of some of the provisions of the Bill of Rights in the U.S. Constitution but the former cover a much wider ground than the latter. Also, the U.S. Constitution declares the Fundamental Rights in broad and general terms. But as no right is absolute, the courts have, in course of time, spelled out some restrictions and limitations on these Rights. The Indian Constitution, however, adopts a different approach in so far as some Rights are worded generally; in respect of some Fundamental Rights, the exceptions and qualifications have been formulated and expressed in a compendious form in the Constitution itself, while in respect of some other Rights, the Constitution confers power on the Legislature to impose limitations. The result of this strategy has been that the constitutional provisions pertaining to Fundamental Rights have become rather detailed and complex.

The framers of the Indian Constitution, learning from the experiences of the U.S.A., visualized a great many difficulties in enunciating the Fundamental

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25. For an analysis of discussion on Fundamental Rights in the Constituent Assembly; see, GRANVILLE AUSTIN, THE INDIAN CONSTITUTION OF A NATION, 50-113 (1966).
26. See, Ch. I, *supra.*
27. *Pratap Singh v. State of Jharkhand,* (2005) 3 SCC 551 : AIR 2005 SC 273.
28. *Supra,* Ch. XIII, Sec. B(b).
Also, *infra,* Ch. XXXIII, Sec. F.
29. *Javed v. State of Haryana,* (2003) 8 SCC 369 : AIR 2003 SC 3057.
30. *People's Union for Civil Liberties v. Union of India,* (2005) 2 SCC 436 : (2005) 1 JT 283.

Rights in general terms and in leaving it to the courts to enforce them, *viz.*, the Legislature not being in a position to know what view the courts would take of a particular enactment, the process of legislation becomes difficult; there arises a vast mass of litigation about the validity of the laws and the judicial opinion is often changing so that law becomes uncertain; the judges are irremovable and are not elected; they are, therefore, not so sensitive to public needs in the social or economic sphere as the elected legislators and so a complete and unqualified veto over legislation could not be left in judicial hands.[31] Even then, certain rights especially economic Rights, have had to be amended from time to time to save some economic programmes.[32]

The Fundamental Rights in the Indian Constitution have been grouped under seven heads as follows:

(*i*) *Right to Equality* comprising Articles 14 to 18, of which Article 14 is the most important.[33]

(*ii*) *Right to Freedom* comprising Articles 19 to 22 which guarantee several freedoms, the most important of which is the freedom of speech.[34]

(*iii*) *Right against Exploitation* consists of Articles 23 and 24.[35]

(*iv*) *Right to Freedom of Religion* is guaranteed by Articles 25 to 28.[36]

(*v*) *Cultural and Educational Rights* are guaranteed by Articles 29 and 30.[37]

(*vi*) *Right to Property is* now very much diluted and is secured to some extent by Arts. 30-A, 31-A, 31-B and 31-C.[38]

(vii) Right to Constitutional Remedies is secured by Articles 32 to 35.

These Articles provide the remedies to enforce the Fundamental Rights, and of these the most important is Art. 32.[39]

As the Fundamental Rights constitute by and large a limitation on the government, the most important problem which the courts have been faced with while interpreting these rights has been to achieve a proper balance between the rights of the individual and those of the state or the society as a whole, between individual liberty and social control. This is a very difficult as well as a delicate task indeed in these days of development of the country into a social welfare state. On the whole, however, one could say that in the area of non-economic matters, like freedom of speech or the right to life, the line has been shifting in favour of the individual, while in the area of economic matters, the line has been constantly shifting in favour of social control. This has been achieved both by judicial interpretation as well as constitutional amendments as the discussion in the following pages will amply depict.

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31. B.N. RAU, INDIA'S CONSTITUTION IN THE MAKING, 245.
32. See, *infra*, Chs. XXIV, Sec. H; Chs. XXXI, XXXII; XLI and XLII.
33. See, Chs. XXI, XXII and XXIII, *infra.*
34. See, Chs. XXIV, XXV, XXVI and XXVII, *infra*.
35. See, Ch. XXVIII, *infra.*
36. See, Ch. XXIX, *infra*.
37. See, Ch. XXX, *infra.*
38. See, Chs. XXXI, XXXII, *infra.*
39. See, Ch. XXXIII, *infra.*

The Fundamental Rights guarantee certain economic rights. Too much emphasis on these rights might have led to the emergence of a *laissez faire* economy in India which is now an out of date concept. Accordingly, partly by judicial interpretation, and partly by constitutional amendment process, emphasis has come to be laid on social control in economic matters leading to the emergence of a regulated economy.

The right to property also has had a chequered history. Originally it was secured by Arts. 19(1)(*f*) and 31, and the courts were prone to give these provisions a broad perspective thus giving to property rights a better protection. But now the Fundamental Right to property has been very much diluted. This development has been discussed fully later.[40]

But, on the other hand, in the post 1977era, the most notable development has been that great emphasis has come to be laid on the right to life and personal liberty, *i.e.*, the freedom of the person guaranteed by Art. 21. Art. 21 has been given a new dimension by judicial interpretation.[41] In *Maneka Gandhi*,[42] the landmark case which initiated the process of expansion of the scope of Art. 21, the Court has observed:

> "The attempt of the Court should be to expand the reach and ambit of the Fundamental Rights rather than to attenuate their meaning and content by a process of judicial construction."

The great metamorphosis that has occurred in the judicial view as regards Art. 21 can be appreciated if the restrictive view adopted by the Supreme Court in *Gopalan*[43] is set against the expansive interpretation of Art. 21 in a series of cases beginning *Maneka Gandhi* in 1977.

In a nutshell, it may be said that, on the whole, the Supreme Court has displayed judicial creativity of a high order in interpreting the Fundamental Rights, especially during the last two decades. Reference may be made in this connection *inter alia* to such landmark Supreme Court cases as *Maneka Gandhi*, *Indra Sawhney*,[44] *Asiad* cases.[45] In *Ajay Hasia*,[46] BHAGWATI, J., has observed:

> "It must be remembered that the Fundamental Rights are constitutional guarantees given to the people of India and are not merely paper hopes or fleeting promises and so long as they find a place in the Constitution, they should not be allowed to be emasculated in their application by a narrow and constricted judicial interpretation".

The Supreme Court has even enunciated the doctrine of implied Fundamental Rights. The Court has asserted that in order to treat a right as Fundamental Right it is not necessary that it should be expressly stated in the Constitution as a Fundamental Right. Political, social and economic changes occurring in the country

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40. *Infra*, Chs. XXIV, Sec. G; Chs. XXXI and XXXII, *infra*.
41. *Infra*, Ch. XXVI.
42. AIR 1978 SC 597 : (1978) 1 SCC 248; *infra*, Ch. XXVI, Sec. D.
43. *Infra*, Ch. XXVI, Sec. B.
44. *Indra Sawhney v. Union of India*, AIR 1993 SC 477; *infra*, Ch. XXIII.
45. *People's Union for Democratic Rights v. Union of India*, AIR 1982 SC 1473 : (1982) 3 SCC 235; *infra*, Ch. XXVIII.
46. *Ajay Hasia v. Khalid Mujib*, AIR 1981 SC 487 at 493 : (1981) 1 SCC 722.

may entail the recognition of new rights and the law in its eternal youth grows to meet social demands.[47]

There is no rule that unless a right is expressly stated as a Fundamental Right it cannot be treated as one. Over time, the Supreme Court has been able to imply by its interpretative process, several Fundamental Rights, such as, freedom of press, right to privacy, out of the expressly stated Fundamental Rights.

By and large, barring some exceptions, the Supreme Court has, on the whole, interpreted the Fundamental Rights in a liberal manner. The Court has laid emphasis on this aspect from time to time. For instance, in *Pathumma*,[48] the Court has stated that in interpreting the Constitution, "the judicial approach should be dynamic rather than static, pragmatic and not pedantic and elastic rather than rigid." But the award of a sentence by the order of a Court cannot amount to violation of any of the Fundamental Rights.[49] On the whole, the Supreme Court has displayed a liberal and creative attitude in interpretation of Fundamental Rights and this has had a profound influence on the development and delineation of the Fundamental Rights in course of time. This will become clear from the following discussion.

The Fundamental Rights are not all distinct and mutually exclusive Rights. Each freedom has different dimensions and a law may have to meet the challenge under various Fundamental Rights. Thus, a law depriving a person of his personal liberty may have to stand the test of Arts. 14, 19 and 21 to be valid. Formerly, however, the courts had applied the doctrine of exclusivity of Fundamental Rights and treated each right as a distinct and separate entity,[50] but this view has now undergone a change,[51] thus, providing to the courts a better leverage to test the validity of laws affecting Fundamental Rights.

The Supreme Court plays a very significant role in relation to the Fundamental Rights. In the first place, the Court acts as the protector and the guardian of these rights. In the second place, the Court acts as the interpreter of the Fundamental Rights. The Supreme Court acts as the "sentinel on the qui vive" in relation to the Fundamental Rights. Commenting on its role entrusted to it under the Constitution to protect Fundamental Rights, the Supreme Court has observed in *Daryao*[52]:

> "The Fundamental Rights are intended not only to protect individual's rights but they are based on high public policy. Liberty of the individual and the protection of his Fundamental Rights are the very essence of the democratic way of life adopted by the Constitution, and it is the privilege and the duty of this Court to uphold those rights. This Court would naturally refuse to circumscribe them or to curtail them except as provided by the Constitution itself."

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47. *Unni Krishnan, J.P. v. State of Andhra Pradesh*, AIR 1993 SC 2178 : (1993) 1 SCC 645; *infra*, Ch. XXVI, for fuller discussion on this aspect.
48. *Pathumma v. State of Kerala*, AIR 1978 SC 771 : (1978) 2 SCC 1.
49. *Lalita Jalan v. Bombay Gas Co. Ltd.*, (2003) 6 SCC 107 : AIR 2003 SC 3157.
50. Chs. XXVI and XXVII, *infra.*
51. *Cooper* (*Bank Nationalisation* case), *infra*, Ch. XXVI, Sec. C; *Maneka Gandhi*, *infra*, Ch. XXVI, Sec. D.
52. *Daryao v. State of Uttar Pradesh*, AIR 1961 SC 1457, at 1461 : (1962) 1 SCR 574. See, *infra*, Ch. XXXIII, Sec. A.

The Fundamental Rights play a noteworthy role in the area of the Indian Administrative Law. A phenomenon generally discernible today in practically every democracy is the vast growth in the functions, powers and activities of the Administration under the impact of the modern philosophy of 'welfare state'. A large amount of discretion is left in the hands of administrative authorities. An important problem of modern Administrative Law is to seek to strengthen the techniques to control the administration in the exercise of its various powers. Some of the Fundamental Rights like Arts. 14, 19, 22 and 31 have been used for this purpose.

In a large number of cases, validity of laws conferring discretion on the Administration has been scrutinised with reference to the Fundamental Rights. For this purpose, both substantive as well as procedural parts of the law are taken into consideration.[53] On the substantive side, the courts have taken objection in many cases to bestowal of arbitrary and unregulated discretion on the Administration. On the procedural side, laws conferring discretion without necessary procedural safeguards have been invalidated. In some cases, objection has been taken to the exercise of administrative discretion on the ground of its being discriminatory, or having been exercised without due procedure. The discussion in the following pages amply illustrates the several points mentioned here.[54]

C. JUSTICIABILITY OF FUNDAMENTAL RIGHTS

ART. 13 : LAWS INCONSISTENT WITH FUNDAMENTAL RIGHTS

Art. 13 is the key provision as it gives teeth to the Fundamental Rights and makes them justiciable. The effect of Art. 13 is that the Fundamental Rights cannot be infringed by the government either by enacting a law or through administrative action.

Article 13(1) declares that all pre-Constitution laws shall be void to the extent of their inconsistency with the Fundamental Rights. Art. 13(1) deals with the pre-Constitution laws; if any such law is inconsistent with a Fundamental Right, it becomes void from 26-1-50, the date on which the Constitution of India came into force.

According to Art. 13(2), the State 'shall not make any law' which takes away or abridges the Fundamental Rights; and a law contravening a Fundamental Right is, to the extent of the contravention, void.

Article 13(2) is the crucial constitutional provision which deals with the post-Constitution laws. If any such law violates any Fundamental Right it becomes void *ab initio, i.e.,* from its inception. The effect of Art. 13(2) thus is that no Fundamental Right can be infringed by the state either by legislative or administrative action.

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53. *N.B. Khare v. Delhi*, AIR 1950 SC 211 : 1950 SCR 519.

54. For a detailed discussion on this aspect of Administrative Law, see : M.P. JAIN, Administrative Discretion and Fundamental Rights, 1 *JILI*, 223 (1959); M.P. JAIN, A TREATISE ON ADMINISTRATIVE LAW, I, Ch. XVIII, 765-835; JAIN, THE EVOLVING INDIAN ADMINISTRATIVE LAW, Ch. VI (1983); JAIN, CASES & MATERIALS ON INDIAN ADMN. LAW, II, Ch. XV, 1565-1911.

Article 13 makes the judiciary, and especially the Apex Court, as the guardian, protector and the interpreter of the Fundamental Rights.[55] It is the function of the courts to assess individual laws *vis-à-vis* the Fundamental Rights so as to ensure that no law infringes a Fundamental Right. The courts perform the arduous task of declaring a law unconstitutional if it infringes a Fundamental Right. It is the function of the courts to ensure that no statute violates a Fundamental Right. This is the exercise of its protective role by the judiciary, *i.e.*, protecting the Fundamental Rights from being violated by a statute. A statute is declared unconstitutional and void if it comes in conflict with a Fundamental Right.

Article 13 confers a power as well as imposes an obligation on the courts to declare a law void if it is inconsistent with a Fundamental Right. This is a power of great consequence for the courts. The Supreme Court has figuratively characterised this role of the courts as that of a "sentinel on the *qui vive*.[56] It may however be underlined that the courts do not lightly declare a statue unconstitutional because they are conscious of their responsibility in declaring a law made by a democratic legislature void. On the whole, not many statutes have been hit by Fundamental Rights. However, judicial review of administrative action is some what more pervasive than that of legislative action. The expansive purview of Art. 21 and other Articles, as stated above, affects administrative action very deeply as will be clear by the later discussion. The principles of Judicial Review of legislation and interpretation of the Constitution are fully discussed in a later Chapter.[57]

The Supreme Court has further bolstered its protective role under Art. 13(2) by laying down the proposition that judicial review is the 'basic' feature of the Constitution.[58] This means that the power of judicial review cannot be curtailed or evaded by any future Constitutional amendment. Protection of the institution of judicial review is crucially interconnected with the protection of Fundamental Rights, for depriving the Supreme Court and other Courts of their power of judicial review would mean that the Fundamental Rights become non-enforceable, "a mere adornment", as they will become rights without remedy.

This idea has been conveyed by CHANDRACHUD, C.J., as follows in *Minerva Mills*:[59]

> "It is the function of the Judges, nay their duty, to pronounce upon the validity of laws. If courts are totally deprived of that power, the fundamental rights conferred on the people will become a mere adornment because rights conferred on the people will become a mere adornment because rights without remedies are as writ in water. A controlled constitution will then become uncontrolled."

As KHANNA, J., has emphasized in *Kesavananda*:[60]

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55. See, Sec. B, *supra.*
56. *State of Madras v. V.G. Row,* AIR 1952 SC 196 : 1952 SCR 597.
57. On Judicial Review of Legislation, see, *infra,* Ch. XL.
58. For discussion on the Doctrine of 'Basic Features' of the Constitution, see, *infra,* Ch. XLI.
59. *Minerva Mills Ltd. v. Union of India,* AIR 1980 SC. 1789 : (1980) 2 SCC 591.
Also see, *Waman Rao v. Union of India,* AIR 1981 SC 271 : (1981) 2 SCC 362.
60. *Kesavananda v. State of Kerala,* AIR 1973 SC 1461 : (1973) 4 SCC 225.
For a detailed discussion on this case, see, *infra,* Ch. XLI.

> "As long as some Fundamental Rights exist and are a part of the Constitution, the power of judicial review has also to be exercised with a view to see that the guarantees afforded by those rights are not contravened…Judicial review has thus become an integral part of our constitutional system".

AHMADI, C.J., speaking on behalf of a bench of seven Judges in *L. Chandra Kumar v. India*,[61] has observed:

> "The Judges of the Superior Court have been entrusted with the task of upholding the Constitution and to this end, have been conferred the power to interpret it. It is they who have to ensure that the balance of power envisaged by the Constitution is maintained and that the legislature and the executive do not, in the discharge of their functions, transgress constitutional limitations…..We, therefore, hold that the power of judicial review over legislative action vested in the High Courts under Art. 226[62] and in this Court under Art. 32[63] of the Constitution is an integral and essential feature of the Constitution, constituting part of its basic structure. Ordinarily, therefore, the power of the High Courts and the Supreme Court to test the constitutional validity of legislation can never be ousted or excluded."

Accordingly, in the instant case, the Supreme Court has declared unconstitutional clause 2(d) of Art. 323A and clause 3(d) of Art. 323B, to the extent they sought to exclude jurisdiction of the High Courts and the Supreme Court conferred under Arts. 226, 227 and 32. The Court has observed in this connection:

> "The jurisdiction conferred on the High Courts under Arts. 226/227 and upon the Supreme Court under Art. 32 of the Constitution is part of the inviolable basic structure of our Constitution. While this jurisdiction cannot be ousted, other Courts and Tribunals may perform a supplemental role in discharging the powers conferred by Articles 226/227 and 32 of the Constitution."[64]

It may be appreciated that declaration of Fundamental Rights in the Constitution cannot be of much avail if no machinery is provided for their enforcement. The Constitution confers this protective role on the Supreme Court and the High Courts. These Courts can issue various writs, orders and directions for the enforcement of these Fundamental Rights by virtue of Arts. 32 and 226.[65]

It may be interesting to know that the U.S. Constitution does not specifically provide for judicial review. But, as early as 1803, in the famous case of *Marbury v. Madison*,[66] the Supreme Court asserted that it would review the constitutionality of the Congressional Acts. MARSHALL, C.J., expounded the theory of judicial review of the constitutionality of Acts of Congress as follows:

> "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the Courts must decide on the operation of each. So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that

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61. AIR 1997 SC 1125, at 1130 : (1997) 3 SCC 261.
For discussion on this case, see, Ch. VIII, Sec. I.
62. For discussion on Art. 226, see, *supra*, Ch. VIII, Secs. C and D.
63. For discussion on Art. 32, see, *infra*, Ch. XXIII, Sec. A.
64. See, *Chandra Kumar*, *supra*, footnote 61, at 1156.
65. For discussion on Art. 32, see, *infra*, Ch. XXXIII; for Art. 226, see, *supra*, Ch. VIII.
66. 1 Cranch 137.
Also see, *infra*, Ch. XL.

the Court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law, the Court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty."

Article 13 deals with statute law and not with the law declared by the courts, or with the directions or orders made by the Supreme Court under Art. 142.[67]

D. STATE

Most of the Fundamental Rights are claimed against the state and its instrumentalities and not against private bodies.[68] Art. 13(2), as stated above, bars the 'state' from making any 'law' infringing a Fundamental Right.

The two important concepts used in this provision, are : 'state' and 'law'. These concepts need some elucidation.

Fundamental Rights are claimed mostly against the 'state'.

Article 12 gives an extended significance to the term 'state'. Art. 12 clarifies that the term 'state' occurring in Art. 13(2), or any other provision concerning Fundamental Rights, has an expansive meaning.

According to Art. 12, the term 'state' includes—

(*i*) the Government and Parliament of India:

(*ii*) the Government and the Legislature of a State;

(*iii*) all local authorities; and

(*iv*) *other authorities* within the territory of India, or under the control of the Central Government.

The actions of any of the bodies comprised within the term 'state' as defined in Art. 12 can be challenged before the courts under Art. 13(2) on the ground of violating Fundamental Rights.

The most significant expression used in Art. 12 is "other authorities". [See (iv) above]. This expression is not defined in the Constitution. It is, therefore, for the Supreme Court, as the Apex Court, to define this term. It is obvious that wider the meaning attributed to the term "other authorities" in Art. 12, wider will be the coverage of the Fundamental Rights, *i.e.*, more and more bodies can be brought within the discipline of the Fundamental Rights.

(a) OTHER AUTHORITIES

The interpretation of the term 'other authorities' in Art. 12 has caused a good deal of difficulty, and judicial opinion has undergone changes over time. Today's government performs a large number of functions because of the prevailing phi-

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67. *Ashok Kumar Gupta v. State of Uttar Pradesh,* (1997) 5 SCC 201, at 248 : 1997 SCC (L&S) 1299.
For discussion on Art. 142, see, *supra*, Ch. IV, Sec. G.

68. *Shamdasani v. Central Bank of India,* AIR 1952 SC 59; *Vidya Verma v. Shivnarain,* AIR 1956 SC 108 : (1955) 2 SCR 983.
But see, Arts. 17 and 23, *infra*, Chs. XXIII, Sec. H and XXVIII, Sec. A.

losophy of a social welfare state.[69] The government acts through natural persons as well as juridical persons. Some functions are discharged through the traditional governmental departments and officials while some functions are discharged through autonomous bodies existing outside the departmental structure, such as, companies, corporations *etc.*

While the government acting departmentally, or through officials, undoubtedly, falls within the definition of 'state' under Art. 12,[70] doubts have been cast as regards the character of autonomous bodies. Whether they could be regarded as 'authorities' under Art. 12 and, thus, be subject to Fundamental Rights?

An autonomous body may be a statutory body, *i.e.*, a body set up directly by a statute, or it may be a non-statutory body, *i.e.*, a body registered under a general law, such as, the Companies Act, the Societies Registration Act, or a State Co-operative Societies Act, *etc.* Questions have been raised whether such bodies may be included within the coverage of Art. 12.

For this purpose, the Supreme Court has developed the concept of an "instrumentality" of the state. Any body which can be regarded as an "instrumentality" of the state falls under Art. 12. The reason for adopting such a broad view of Art. 12 is that the Constitution should, whenever possible, "be so construed as to apply to arbitrary application of power against individuals by centres of power. The emerging principle appears to be that a public corporation being a creation of the state is subject to the Constitutional limitation as the state itself".[71] Further that "the governing power wherever located must be subject to the fundamental constitutional limitations".[72]

In *Rajasthan State Electricity Board v. Mohanlal*,[73] the Supreme Court ruled that a State electricity board, set up by a statute, having some commercial functions to discharge, would be an 'authority' under Art. 12. The Court emphasized that it is not material that some of the powers conferred on the concerned authority are of commercial nature. This is because under Art. 298,[74] the government is empowered to carry on any trade or commerce. Thus, the Court observed: "The circumstance that the Board under the Electricity Supply Act is required to carry on some activities of the nature of trade or commerce does not, therefore give any indication that the 'Board' must be excluded from the scope of the word 'state' is used in Art. 12."

In *Sukhdev v. Bhagatram*,[75] three statutory bodies, *viz.*, Life Insurance Corporation, Oil and Natural Gas Commission and the Finance Corporation, were held to be "authorities" and, thus, fall within the term 'state' in Art. 12. These corporations do have independent personalities in the eyes of the law, but that does not

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69. For further discussion on this concept see Ch. XXXIV, *infra*, under Directive Principles.
70. *K.A. Karim & Sons v. I.T.O.*, 1983 Tax. L.R. 1168; *Hujee Mohd. Ibrahim v. Gift Tax Officer*, 1983 Tax. L.R. 1160; *Imperial Chemical Industries Ltd. v. Registrar of Trade Marks*, AIR 1981 Del. 190.
71. MATHEW, J., in *Sukhdev v. Bhagatram*, AIR 1975 SC 1331 : (1975) 1 SCC 421.
72. AIR 1975 SC, at 1352.
73. AIR 1967 SC 1857 : (1967) 3 SCR 377.
74. See, *supra*, Ch. XII, Sec. C; *infra*, Chs. XXIV, XXX and XXXIX.
75. AIR 1975 SC 1331 : (1975) 1 SCC 421.
For a detailed comment on this case see, M.P. JAIN, The Legal Status of Public Corporations and their Employees, 18 *JILI* 1 (1976).

mean that "they are not subject to the control of the government or that they are not instrumentalities of the government".[76]

The question was considered more thoroughly in *Ramanna D. Shetty v. International Airport Authority*,[77] The International Airport Authority, a statutory body, was held to be an 'authority'. The Supreme Court also developed the general proposition that an 'instrumentality' or 'agency' of the government would be regarded as an 'authority' or 'State' within Art. 12 and laid down some tests to determine whether a body could be regarded as an instrumentality or not. Where a corporation is an instrumentality or agency of the government, it would be subject to the same constitutional or public law limitation as the government itself. In this case, the Court was enforcing the mandate of Art. 14 against the Corporation.[78]

By now though the question of statutory bodies had been settled, as stated above, yet that of the non-statutory bodies, still continued to cause confusion and difficulty.

In several cases hitherto, a government company incorporated under the Indian Companies Act had been held to be not an 'authority' under Art. 12.[79] In *Sabhaji Tewary v. India*,[80] a case decided after *Sukhdev*, the Supreme Court ruled that the Indian Council of Scientific Research, a body registered under the Societies Registration Act (thus a non-statutory body), but under a good deal of governmental control and funding, was not a 'state'.

There were judicial observations in *Sukhdev* to the effect that even a non-statutory body could be treated as an 'authority' if it could be regarded as an instrumentality or agency of the government. But these observations did not affect the judicial thinking in *Sabhajit*.[81] Again, the Supreme Court made observations in *Raman* suggesting that a non-statutory body could be regarded as an 'authority' if it could be regarded as an instrumentality of the government, but the actual body involved there was statutory in nature.

Burmah Shell was nationalised and vested in the Government itself under the Burmah Shell (Acquisition of Undertakings in India) Act, 1976. The Act provided that the undertaking would be vested in a government company. Accordingly, the undertaking was taken over by the Bharat Petroleum Corporation, a government company registered under the Indian Companies Act. The question was whether Bharat Petroleum—which was neither a government department nor

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76. *Ibid.*, at 1356.

77. AIR 1979 SC 1628 : (1979) 3 SCC 489.
For detailed comments on this case, see M.P. JAIN, JUSTICE BHAGWATI and *Indian Adminsitrative Law*, (1980) Ban. L.J. 1, 38-45.

78. For further discussion on *Ramanna,* see, Ch. XXXIX, *infra;* for Art. 14, see, Ch. XXI, *infra.*

79. See, *R.D. Singe v. Secretary,* B.S.S.I. Corp., AIR 1974 Pat. 212; *M.L. Nohria v. Gen. Ins. Corp. of India*, AIR 1979 P&H 183; *Abdul Ahmad v. Govt. Woollen Mill*, AIR 1979 J&K 57.

80. AIR 1975 SC 1329 : (1975) 1 SCC 485.
This case has now been overruled : see, *infra*, 1197.

81. See JAIN, *supra*, footnote 80.

a statutory body but merely a company—could be regarded as an "authority" and so "state" under Art. 12.

In *Som Prakash v. Union of India*,[82] the company was held to fall under Art. 12. The Court emphasized that the true test for the purpose whether a body was an 'authority' or not was not whether it was formed by a statute, or under a statute, but it was "functional". In the instant case, the key factor was "the brooding presence of the state behind the operations of the body, statutory or other". In this case, the body was semi-statutory and semi-non-statutory. It was non-statutory in origin (as it was registered); it also was recognised by the Act in question and, thus, had some "statutory flavour" in its operations and functions. In this case, there was a formal transfer of the undertaking from the Government to a government company. The company was thus regarded as the "alter ego" of the Central Government. The control by the Government over the corporation was writ large in the Act and in the *factum* of being a government company. Agency of a State would mean a body which exercises public functions.[83]

The question regarding the status of a non-statutory body was finally clinched in *Ajay Hasia*,[84] where a society registered under the Societies Registration Act running the regional engineering college, sponsored, supervised and financially supported by the Government, was held to be an 'authority'. Money to run the college was provided by the State and Central Governments. The State Government could review the functioning of the college and issue suitable instructions if considered necessary. Nominees of the State and Central Governments were members of the society including its Chairman. The Supreme Court ruled that where a corporation is an instrumentality or agency of the government, it must be held to be an authority under Art. 12. "The concept of instrumentality or agency of the government is not limited to a corporation created by a statute but is equally applicable to a company or society…." Thus, a registered society was held to be an 'authority' for the purposes of Art. 12. *Ajay Hasia* has initiated a new judicial trend, *viz.,* that of expanding the significance of the term "authority".

In *Ajay Hasia,* The Supreme Court laid down the following tests to adjudge whether a body is an instrumentality of the government or not:

(1) If the entire share capital of the body is held by the government, it goes a long way towards indicating that the body is an instrumentality of the government.

(2) Where the financial assistance given by the government is so large as to meet almost entire expenditure of the body, it may indicate that the body is impregnated with governmental character.

(3) It is a relevant factor if the body enjoys monopoly status which is conferred or protected by the state.

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82. AIR 1981 SC 212 : (1981) 1 SCC 449.

83. *Deewan Singh v. Rajendra Prosad Ardevi,* (2007) 10 SCC 528, 542 : AIR 2007 SC 767, it is difficult to extract precisely the principle on which the judgment proceeded.

84. *Ajay Hasia v. Khalid Mujib,* AIR 1981 SC 487 : (1981) 1 SCC 722.

(4) Existence of deep and pervasive state control may afford an indication that the body is a state instrumentality.

(5) If the functions performed by the body are of public importance and closely related to governmental functions, it is a relevant factor to treat the body as an instrumentality of the government.

The important question is not how the juristic person is born, but why has it been brought into existence? It does not matter what is the structure of the body in question: it may be statutory or non-statutory; it may be set up by, or under, an Act of the Legislature or even administratively. It does not matter whether the body in question has been set up initially by the government or by private enterprise. It does not matter what functions does the body discharge; it may be governmental, semi-governmental, educational, commercial, banking, social service. The Supreme Court has pointed out that even if it may be assumed that one or the other test as provided in the case of *Ajay Hasia* may be attracted, that by itself would not be sufficient to hold that it is an agency of the State or a company carrying on the functions of public nature.[85] In view of the several views and tests suggested by Supreme Court it is not possible to make a close ended category of bodies which would be considered to be a state within the meaning of Art.12. The question in each case will have to be considered on the basis of facts available as to whether in the light of the cumulative facts as established, the body is financially, functionally, administratively dominated, by, or under the control of the Government. Such control must be particular to the body in question and must be pervasive.

Mere regulatory control whether under statute or otherwise would not serve to make a body a part of the State. Hence when the facts revealed :

(1) The Board of Control of Cricket in India was not created by a statute;

(2) No part of the share capital of the Board was held by the Government;

(3) Practically no financial assistance was given by the Government to meet the whole or entire expenditure of the Board;

(4) The Board did enjoy a monopoly status in the field of cricket but such status is not State conferred or State protected.

(5) There was no existence of a deep and pervasive State control and the control, if any, is only regulatory in nature as applicable to other similar bodies.

(6) The Board was not created by transfer of a government owned corporation and was an autonomous body.

The Court noted that the Union of India has been exercising certain control over the activities of the Board in regard to organizing cricket matches and travel

85. *Federal Bank Ltd. v. Sagar Thomas,* (2003) 10 SCC 733 : AIR 2003 SC 4325.

of the Indian team abroad as also granting of permission to allow the foreign teams to come to India. The Court also assumed that even if there was some element of public duty involved in the discharge of the Board's functions the Board would not be an authority for the purpose of Article 12.

In the absence of any authorization, if a private body chooses to discharge any functions or duties which amount to public duties or State functions which is not prohibited by law then it may be considered to be an instrumentality of the State.[86]

In *S. C. Chandra*[87] the Supreme Court came dangerously close to creating a confusion in relation to the concepts of instrumentality of the State. The judgment in this case was a common one and involved, amongst others Bharat Coking Coal Limited. Without any discussion whatsoever the Court appears to have approved the view taken by Division Bench of the Jharkhand High Court that BCCL was "not an instrumentality of the State as per Section 617 of the Companies Act as its dominant function was to raise coal and sale and imparting education was not its dominant function.".

The question which arose for decision was whether the teachers of a school not owned by BCCL and was run by a Managing Committee and whose teachers were never appointed by BCCL, although BCCL used to release non-recurring grants subject to certain conditions would result in such teachers to be considered as the employees of BCCL and entitled to all benefits available to the regular employees of BCCL.

In this factual background it is not understandable as to how the question of BCCL being an instrumentality of the State could be of any relevance either before the Division Bench of the High Court or the Supreme Court. Since the school was not owned or managed by BCCL and not even entirely dependent upon financial aid from BCCL it could not have been considered to be an instrumentality of the State. "Dominant function" test was applied in a situation where there was no function which the BCCL was obliged to discharge. This case cannot be an authority for the proposition that BCCL is not an instrumentality of the state.

The Courts have been led to take such an expansive view of Art. 12 because of the feeling that if instrumentalities of the government are not subjected to the same legal discipline as the government itself because of the plea that they were distinct and autonomous legal entities, then the government would be tempted to adopt the stratagem of setting up such administrative structures on a big scale in order to evade the discipline and constraints of the Fundamental Rights thus eroding and negating their efficacy to a very large extent. In this process, judicial control over these bodies would be very much weakened.[88]

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86. *Zee Telefilms Ltd. v. Union of India*, (2005) 4 SCC 649 : AIR 2005 SC 2677.
87. *S.C.Chandra v. State of Jharkhand*, (2007) 8 SCC 279 : AIR 2007 SC 3021.
88. *Steel Authority of India Ltd. v. National Union Water Front Workers*, AIR 2001 SC 3527, 3540-3542 : (2001) 7 SCC 1.

The law appears to be now settled in view of the judgment of a seven Constitution Bench of the Supreme Court in *Pradeep Kumar Biswas*[89] where, after considering the authorities it concluded that the tests formulated in Ajay Hasia[90] were not a rigid set of principles so that if a body falls within any of those tests, ex hypothesi, it must be considered to be a State within the meaning of Article 12. The Court suggested a general guideline observing:

> "The question in each case would be whether in the light of the cumulative facts as established, the body is financially, functionally and administratively dominated by or under the control of the Government. Such control must be particular to the body in question and must be pervasive. If this is found then the body is a State within Article 12. On the other hand, when the control is merely regulatory whether under statute or otherwise, it would not serve to make the body a State."

The main tests which the courts apply to determine whether a body is an instrumentality of the government or not are: funding and control. Is the entire share capital or a major part of it held by the government? Is the body in question effectively controlled by the government not only in the making of its policy but also in carrying out its functions? Does the government foot a substantial part of the bill for running the operations of the concerned body? Is the administration of the body in the hands of the government-appointed directors and are they subject to government control in the discharge of their functions? Does the state exercise deep and pervasive control over the body in question? Whether the operation of the corporation is an important public function closely related to governmental functions? Does the body enjoy monopoly status conferred or protected by the state? The above tests are not exhaustive but only indicative or illustrative. It is for the courts to decide in each case whether the body in question falls within the purview of Art. 12.

A company enjoying the monopoly of carrying on a business under an Act of Legislature has the "trappings" of "state" and is an "authority" under Art. 12.[91]

Once a body is characterised as an 'authority' under Art. 12, several significant incidents invariably follow, *viz.*:

(1) The body becomes subject to the discipline of the Fundamental Rights which means that its actions and decisions can be challenged with reference to the Fundamental Rights.

(2) The body also becomes subject to the discipline of Administrative Law.

(3) The body becomes subject to the writ jurisdiction of the Supreme Court under Art. 32 and that of the High Courts under Art. 226.

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89. *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology*, (2002) 5 SCC 111 : (2002) 4 JT 146. See also *Steel Authority of India Limited v. Madhusudan Das*, (2008) 15 SCC 560. See also *State of U.P. v. Radhey Shyam Rai*, (2009) 5 SCC 577 : (2009) 3 JT 393.

90. *Ajay Hasia v. Khalid Mujib Sehravardi*, (1981) 1 SCC 722 : AIR 1981 SC 487.

91. *Biman Kishore Bose v. United India Insurance Co. Ltd.*, (2001) 6 SCC 477 : (2001) 6 JT 125.

In course of time, the Supreme Court has been expanding the horizon of the term "other authority" in Art. 12. A large number of bodies, statutory[1] and non-statutory,[2] have been held to be 'authorities' for purposes of Art. 12. For example, the Supreme Court has held the Statistical Institute as an authority. It is a registered society but is governed by the Indian Statistical Institute Act, 1959. The composition of the body is dominated by the representatives appointed by the Central Government. The money required for running the Institute is provided entirely by the Central Government. It has to comply with all the directions issued by the Central Government. "The control of the Central Government is deep and pervasive and, therefore, to all intents and purposes, it is an instrumentality of the Central Government and as such is an 'authority' within the meaning of Art. 12 of the Constitution".[3]

The Indian Council of Agricultural Research came into existence as a department of the government, continued to be an attached office of the government even though it was registered as a society, it was wholly financed by the government. The ICAR was accordingly held to be an 'authority' under Art. 12 as it was a society set up by the state.[4] A cooperative society is not a State within Art. 12 unless the tests indicated in *Ajay Hasia*,[5] are satisfied.[6] Cooperative societies cannot be, without examination of relevant factual aspects, equated with public sector undertakings.[7]

In *Central Inland Water Transport Corporation v. Brojo Nath*,[8] the corporation, a government company incorporated under the Companies Act, has been held to be an authority, and so the 'state' within the meaning of Art. 12. The Supreme Court has laid down the following significant principle in this regard:

> "If there is an instrumentality or agency of the state which has assumed the garb of a government company as defined in S. 617 of the Companies Act, it does not follow that it thereby ceases to be an instrumentality or agency of the

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1. *Statutory bodies* held to fall under Art. 12—Food Corporation: *Punjab v. Raja Ram*, AIR 1981 SC 1694 : (1981) 2 SCR 712; State Bank of India: *State Bank of India v. Kalpaka Transport Co.*, AIR 1979 Bom. 250; Utter Pradesh Warehousing Corporation: *U.P. Warehousing Corporation v. Vijay Narain*, AIR 1980 SC 840. Gujarat State Financial Corporation: *Guj. State Fin. Corp. v. Lotus Hotels (P) Ltd.*, AIR 1983 SC 848; University: *Gadadhar v. Calcutta University*, AIR 1981 Cal. 216; Electricity Board: *Omega Advertising Agency v. State Electricity Board*, AIR 1982 Gau. 37 : *DCM Ltd. v. Assistant Engineer, Rajasthan State Electricity Board, Kota*, AIR 1988 Raj 64; *Oil and Natural Gas Commission: Oil and Natural Gas Commission v. Association of N.G.C. Industries of Gujarat*, AIR 1990 SC 1851; Nationalised Banks: *Hyderabad Commercials v. Indian Bank*, AIR 1991 SC 247; Life Corporation of India: *LIC of India v. Consumer Education & Research Centre*, AIR 1995 SC 1811; *Harshad J. Shah v. LIC*, AIR 1997 SC 2459 : (1997) 5 SCC 64; see also *Bank of India v. O.P. Swarnakar*, (2003) 2 SCC 721 : AIR 2003 SC 838, Nationalised Banks held covered.

2. Non-statutory bodies—*Andhra Pradesh* State Irrigation Development Corporation (a body registered under the Indian Companies Act): *B. Satyanarayana v. State of Andhra Pradesh*, AIR 1981 AP 125; *Delhi Transport Corporation v. D.T.C. Mazdoor Congress*, AIR 1991 SC 101 : 1991 Supp (1) SCC 600. Also see, *infra*, footnotes 21, 22.

3. *B.S. Minhas v. Indian Statistical Institute*, AIR 1984 SC 363, 369 : (1983) 4 SCC 582.

4. *P.K. Ramachandra Iyer v. Union of India*, AIR 1984 SC 541 : (1984) 2 SCC 141.

5. (1981) 1 SCC 722.

6. *Zoroastrian Coop. Housing Society Ltd. v. District Registrar, Co-op. Societies (Urban)*, (2005) 5 SCC 632 : AIR 2005 SC 2306, held to be not 'state'.

7. *UPSEB v. Sant Kabir Sahakari Katai Mills Ltd.*, (2005) 7 SCC 576 : (2005) 8 JT 399. See also *State of Assam v. Barak Upatyaka D.U. Karmachari Sanstha*, (2009) 5 SCC 694 : AIR 2009 SC 2249, mere provision of financial assistance for several years is not conclusive.

8. AIR 1986 SC 1571 : (1986) 3 SCC 156.

state. For the purposes of Art. 12, one must necessarily see through the corporate veil to ascertain whether behind that veil is the face of an instrumentality or agency of the state".

Mysore Paper Mills, a government company, has been held to be an instrumentality of the State Government and, hence, an authority under Art. 12.[9] More than 97% of the share capital of the company has been contributed by the State Government and the financial institutions of the Central Government, Out of 12 directors, 5 are government nominees and the rest are approved by the Government; the company has been entrusted with important public duties and the Government exercises various other forms of supervision over the company. The company is an instrumentality of the Government and its physical form of a company "is merely a cloak or cover for the Government." Any doubt as to whether a writ petition under Art. 226 would lie against state corporation has been set at rest by the declaration of the Supreme Court.[10]

Not only a body sponsored or created by the government may be treated as an 'authority', but even a private body (one sponsored and formed by private persons) may be so treated if—(*i*) it is supported by extraordinary assistance given by the state, or (*ii*) if the state funding is not very large, state financial support coupled with an unusual degree of control over its management and policies may lead to the same result. The various tests laid down in *Ajay Hasia* case would have to be applied and considered cumulatively.[11] Applying *Ajay Hasia* tests (i) to (iv) it has been held that the appellant Mill was neither an instrumentality nor an agency of the Government and was not an "other authority".

The Cochin Refineries Ltd. incorporated under the Companies Act has been held to be not an 'authority' because only 53 per cent of its share capital has been subscribed by the Central Government; 26 per cent share is held by a private foreign company which also nominates two directors on the board of directors; government control over the company is not large; government's financial assistance is not unusual.[12] And a general regulation under a statute does not render activities of the body so regulated as subject to such control of the State as to bring it within the meaning of State under Art. 12.[13]

Some non-statutory bodies which have been held to be 'authorities' within the meaning of Art. 12 are:

1. The Council for the Indian School Certificate Examinations—a society registered under the Societies Registration Act, and imparting education and holding examinations.[14]

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9. *Mysore Paper Mills Ltd. v. The Mysore Paper Mills Officers' Association,* (2002) 2 SCC 167 : AIR 2002 SC 609.

10. *Virendra Kumar Srivastava v. U.P. Rajya Karmachari Kalyan Nigam,* (2005) 1 SCC 149 : AIR 2005 SC 411.

11. *GM, Kisan Sahkari Chini Mills Ltd. v. Satrughan Nishad,* (2003) 8 SCC 639 : AIR 2003 SC 4531.

12. *R.M. Thomas v. Cochin Refineries Ltd.,* AIR 1982 Ker. 248.
Also see, *Pritam Singh v. State of P&H,* AIR 1982 P&H 228.
The Bengal Chamber of Commerce registered under the Companies Act is not an authority: In re: *M.L. Shaw,* AIR 1984 Cal 22.

13. *S.S.Rana v. Registrar Coop. Societies,* (2006) 11 SCC 634 : (2006) 5 JT 186.

14. *Vibhu Kapoor v. Council of I.S.C. Examination,* AIR 1985 Del 142.

2. An aided school receiving 95% of its expenses by way of government grant and subject to regulations made by the department of education though managed by a registered body.[15]
3. The Indian Council of Agricultural Research, a society registered under the Societies Registration Act.[16]
4. Even if the entire share capital of a company is subscribed by the government, it cannot yet be treated as a government department. The company has its own corporate personality distinct from the government. Such a government company can still be treated as an authority under Art. 12.[17] Government companies, such as, Bharat Earth Movers Ltd., Indian Telephone Industries Ltd., in which the Government holds 51% share capital, and which are subject to pervasive government control, have been held to be "other authorities" under Art. 12.[18]
5. The regional rural banks set up in pursuance of the power given by a statute. A regional bank is wholly funded by a nationalised bank, Central Government and the State Government. It is sponsored by a nationalised bank; it is under the pervasive control of the Central Government and it discharges functions analogous to those discharged by a welfare state.[19]
6. The Sainik School Society registered under the Societies Registration Act. The society establishes and manages Sainik schools. A Sainik school is fully funded by the Central and State Governments and the Central Government exercises over-all control over the society.[20]
7. The State Financial Corporation constituted under the State Financial Corporation Act, 1951 has been held to be state within the meaning of Article 12 of the Constitution and was required to act fairly, reasonably in accordance with the statutory and constitutional scheme including Article 14.[21]
8. The Children's Aid Society, a registered body under the Societies Registration Act, having the Chief Minister of Maharashtra as the *ex-officio* President and the Minister of Social Welfare as its Vice-President.[22]
9. National Agricultural Cooperative Federation of India (NAFED).[23]

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15. *Manmohan Singh v. Commr., U.T., Chandigarh,* AIR 1985 SC 364 : 1984 Supp SCC 540.
16. *P.K. Ramachandra Iyer v. Union of India,* AIR 1984 SC 541 : (1984) 2 SCC 141.
17. *Dr. S.L. Agarwal v. The Gen. Manager, Hindustan Steel Ltd.,* AIR 1970 SC 1150; *Western Coalfields Ltd.v. Special Area Dev. Authority,* AIR 1982 SC 697 : (1982) 1 SCC 125; *Steel Authority of India Ltd. v. Shri Ambica Mills Ltd.,* AIR 1998 SC 418 : (1998) 1 SCC 465; *Hindustan Steel Works Construction Ltd. v. State of Kerala,* AIR 1997 SC 2275; *Balbir Kaur v. Steel Authority of India,* AIR 2000 SC 1596 : (2000) 6 SCC 493. See also *State of Uttaranchal v. Alok Sharma, Subsidiaries of Kumaon Mandal Vikas Nigam Ltd. (though wound up) were 'State',* (2009) 7 SCC 647 : (2009) 6 JT 463.
18. *M. Kumar v. Earth Movers Ltd.,* AIR 1999 Kant 343.
19. *Chairman, Prathama Bank Moradabad v. Vijay Kumar,* AIR 1989 SC 1977 : (1989) 4 SCC 441.
20. *All India Sainik Schools Employees Ass. v. Defence Minister-cum-Chairman, Board of Governors, Sainik School Society,* AIR 1989 SC 88 : 1989 Supp (1) SCC 205.
21. *Everest Wools Pvt. Ltd. v. U.P. Financial Corporation,* (2008) 1 SCC 643 : (2008) 1 JT 140.
22. *Sheela Barse v. Secretary, Children Aid Society,* AIR 1987 SC 656 : (1987) 3 SCC 50.
23. *Ajoomal v. Lilaram,* AIR 1983 SC 278 : (1983) 1 SCC 119.

10. Delhi Stock Exchange is covered by definition of State under Art. 12 and amenable to writ jurisdiction of High Court.[24]
11. Projects and Equipment Corp. of India, a subsidiary owned by the State Trading Corporation which is also a non-statutory body.[25]
12. U.P. State Co-operative Land Development Bank Ltd. is a cooperative society but it is under pervasive control of the State Government and is an extended arm of the Government. It is thus an instrumentality of the State.[26]

In *Sabhajit Tewary,*[27] the Council of Scientific and Industrial Research (CSIR) was held to be not an "authority" under Art. 12. Now, the Supreme Court has overruled *Tewary* holding it to be erroneous. CSIR has now been held to be an "authority" under Art. 12.[28]

Punjab Water Supply & Sewerage Board is an autonomous body and the statute which incorporates it provides that any direction issued by the State shall be binding on it and brings it within the concept of State in Art. 12 and are bound to comply with the Constitutional scheme of equality enshrined in Articles 14 and 16 of the Constitution of India.[29]

In this expansive trend, there have been some discordant notes as well. One such example is furnished by *Tekraj v. Union of India*,[30] where the Supreme Court has held the Institute of Constitutional and Parliamentary Studies as not being an 'authority' under Art. 12. The Institute is a registered society receiving grants from the Central Government and having the President of India, Vice-President and the Prime Minister among its honorary members. The Central Government exercises a good deal of control over the Institute. In spite of Government funding and control, the Court has refused to hold it as an authority with the remark:

> "…… ICPS is a case of its type—typical in many ways and the normal tests may perhaps not properly apply to test its character."

On the same basis, National Council of Educational Research and Training has been held to be outside the scope of Art. 12. NCERT is a society registered under the Societies Registration Act. It is largely an autonomous body; its activities are not wholly related to governmental functions; government control is confined mostly to ensuring that its funds are property utilised; its funding is not entirely from government sources.[31]

A private educational institution, even if it is recognised by, or affiliated to, a university, cannot be regarded as an instrumentality of the government for pur-

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24. *K. C. Sharma v. Delhi Stock Exchange*, (2005) 4 SCC 4 : AIR 2005 SC 2884.
25. *A.L. Kalra v. P & E Corp. of India*, AIR 1984 SC 1361.
26. *U.P. State Coop. Land Development Bank Ltd. v. Chandra Bhan Dubey*, AIR 1999 SC 753 : (1999) 1 SCC 741.
27. *Supra*, note 73.
28. *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology*, 2002 5 SCC 111 : (2002) 4 JT 146.
29. *Punjab Water Supply and Sewerage Board v. Ranjodh Singh*, (2007) 2 SCC 491 : AIR 2007 SC 1082.
30. AIR 1988 SC 469 : (1988) 1 SCC 236.
31. *Chander Mohan Khanna v. National Council of Educational Research and Training*, (1991) 4 SCC 578 : AIR 1992 SC 76.

poses of Art. 12. Recognition is only for the purposes of conforming to the standards laid down by the State. Affiliation is with regard to the syllabi and the courses of study.[32]

The expanding connotation being given to the term 'authority' in Art. 12 is an instance of judicial creativity. The courts have adopted this stance to bring as many bodies as possible within the discipline of Fundamental Rights. Wider the concept of 'other authority' wider the coverage of Fundamental Rights.

The courts have been able to bring within the sweep of Fundamental Rights every instrumentality or agency through which the government acts. Almost all government activities have been subjected to the obligation of Fundamental Rights. BHAGWATI, J., in his opinion in *Ajay Hasia*[33] provided the rationale for expansively interpreting the term "authority" in Art. 12. A modern government functions, under the impulse of the philosophy of a welfare state, on a very broad scale: it undertakes a multitude of socio-economic functions.[34] For the sake of convenience, the government not always departmentally but also through various types of bodies, such as, a company, co-operative society, corporation *etc*., "but this contrivance of carrying on such activities through a corporation cannot exonerate the government from implicit obedience to the Fundamental Rights." BHAGWATI, J., went on to observe:

> "To use the corporate methodology is not to liberate the government from its basic obligation to respect the Fundamental Rights and not to override them. The mantle of a corporation may be adopted in order to free the Government from the inevitable constraints of red-tapism and slow motion but by doing so, the Government cannot be allowed to play truant with the basic human rights. Otherwise it would be the easiest thing for the Government to assign to a plurality of corporations almost every state business, such as, Post and Telegraph, T.V. and Radio, Rail Road and Telephones—in short every economic activity and thereby cheat the people of India out of the Fundamental Rights guaranteed to them."[35]

BHAGWATI, J., maintained:

> "The courts should be anxious to enlarge the scope and width of the Fundamental Rights by bringing within their sweep every authority which is an instrumentality or agency of the government or through the corporate personality of which the government is acting…"

Thus, in giving an expansive interpretation to the term "other authority" in Art. 12, the Supreme Court is discharging its protective role, *i.e.*, to protect the Fundamental Rights from being annihilated by the Government resorting to the expedient of setting up various bodies, outside government departments, to discharge its manifold functions.

A Fundamental Right can be enforced against an authority when it is within the Indian territory, or it is under the control of the Government of India though outside the Indian territory. In the latter case, a writ would be issued to the Gov-

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32. *Unni Krishnan, J.P. v. State of Andhra Pradesh,* AIR 1993 SC 2178, at 2206 : (1993) 1 SCC 645.
33. AIR 1981 SC 487 : (1981) 1 SCC 722; *supra,* footnote 90.
34. For discussion on this aspect, see, under "Directive Principles", Ch. XXXIV, *infra.*
35. AIR 1981 SC 487, at 493 : (1981) 1 SCC 722.

ernment of India which can have it executed by the concerned authority by exercising its power of control over it.

A *quasi*-judicial authority is not subject to the control of the government in the functional sense, and, therefore, no order can be passed against the government for enforcement of a Fundamental Right by a *quasi*-judicial body functioning outside India.[36] As the Supreme Court has stated, the mere fact that the authority is appointed and is subject to the disciplinary action by the government, is not determinative of the question of control.

What is necessary is a control of functions of the authority; the government should be in a position to give directions to the authority "to function in a particular manner with respect to such function". The government can exercise such control over an administrative or executive body but not on a *quasi*-judicial body. The government could not direct a *quasi*-judicial body to act in a particular matter before it in a particular manner. It therefore resolves to this that no Fundamental Right can be claimed against a *quasi*-judicial body functioning outside the Indian territory.

Another example of the expansive interpretation of the expression "other authorities" in Art. 12 is furnished by the recent decision of the Supreme Court in *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology*.[37] In this case, the Supreme Court has overruled *Sabhajit Tewary*[38] and has held that the Council of Scientific and Industrial Research (CSIR) is an authority under Art. 12 and was bound by Art. 14.[39] The Court has ruled that "the control of the Government in CSIR is ubiquitous". The Court has now laid down the following proposition for identification of "authorities" within Art. 12:

> "The question in each case would be—whether in the light of the cumulative facts as established, the body is financially, functionally and administratively dominated by or under the control of the government. Such control must be particular to the body in question and must be pervasive. If this is found then the body is a state within Art. 12. On the other hand, when the control is merely regulatory whether under statute or otherwise, it would not serve to make the body a state".[40]

Even though a body, entity or corporation is held to be "State" within the definition of Article 12 of the Constitution, what relief is to be granted to the aggrieved person or employee of such a body or entity is a subject matter in each case for the Court to determine on the basis of the structure of that society and also its financial capability and viability.[41]

Bombay Port Trust is an instrumentality of the State and hence an "authority" within the meaning of Article 12 and amenable to writ jurisdiction of the Court.[42]

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36. *K.S. Rama Murthy v. Chief Commissioner, Pondicherry*, AIR 1963 SC 1464 : (1964) 1 SCR 656. For a comment on the case, see, 5 *JILI*, 522.
37. (2002) 5 SCC 111 : (2002) 4 JT 146.
38. *Supra*, note.
39. *Infra*, Ch. XXI.
40. (2002) 5 SCC at 134.
41. *Virendra Kumar Srivastava v. U.P. Rajya Karmachari Kalyan Nigam*, (2005) 1 SCC 149 : AIR 2005 SC 411.
42. *Jamshed Hormusji Wadia v. Board of Trustees, Port of Mumbai*, (2004) 3 SCC 214 : AIR 2004 SC 1815.

The multiple test as laid down by the majority view in Pradip Biswas is to be applied for ascertaining whether a body is a State within the meaning of Art. 12.[43]

(b) LOCAL AUTHORITY

The expression 'local authority' in Art. 12 refers to a unit of local self-government like a municipal committee or a village panchayat.[44]

The Delhi Development Authority, a statutory body, has been held to be a 'local authority' because it is constituted for the specific purpose of development of Delhi according to plan which is ordinarily a municipal function.[45] The activities of the D.D.A. are limited to Delhi. It has some element of popular representation in its composition and enjoys a considerable degree of autonomy.

In the instant case, reference was made to the definition of "local authority" given in S. 3(31) of the General Clauses Act which runs as follows:

> "'Local authority' shall mean a municipal committee, district board, body of port commissioners or other authority legally entitled to, or entrusted by the Government with, the control or management of a municipal or local fund."

The Supreme Court has ruled that to be characterised as a 'local authority', the authority concerned must have separate legal existence as a corporate body, it must not be a mere government agency but must be legally an independent entity; it must function in a defined area and must ordinarily, wholly or partly, directly or indirectly, be elected by the inhabitants of the area. It must also enjoy a certain degree of autonomy either complete or partial, must be entrusted by statute with such governmental functions and duties as are usually entrusted to municipal bodies such as those connected with providing amenities to the inhabitants of the locality like health and education, water and sewerage, town planning and development roads, markets, transportation, social welfare services, *etc*. Finally, such a body must have the power to raise funds for furtherance of its activities and fulfillment of its objectives by levying taxes, rates, charges or fees.

In *Calcutta State Transport Corporation v. Commr. of Income-tax, West Bengal*,[46] the Supreme Court refused to characterise the Corporation as a 'local authority'. The corporation is meant only for the purpose of providing road transport services and has no element of popular representation in its constitution. Its powers and functions bear no relation to the powers and functions of a municipal committee. It is more in the nature of a trading corporation.

A Fundamental Right is not infringed by a judicial order and no action, therefore, lies against a Court or judge on the ground of breach of a Fundamental

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43. *Virendra Kumar Srivastava v. U.P. Rajya Karmachari Kalyan Nigam*, (2005) 1 SCC 149 : AIR 2005 SC 411.

44. *Ajit Singh v. State of Punjab*, AIR 1967 SC 856 : (1967) 2 SCR 143; *State of Gujarat v. Shantilal Mangaldas*, AIR 1969 SC 634 : (1969) 1 SCC 509; *J. Hiralal v. Bangalore Municipality*, AIR 1982 Knt. 137.
See, *Supra*, Ch. IX, Secs. H and I.

45. *Union of India v. R.C. Jain*, AIR 1981 SC 951 : (1981) 2 SCC 308.
Also, *Premji Bhai Parmar v. Delhi Development Authority*, AIR 1980 SC 738 : (1980) 2 SCC 129.

46. AIR 1996 SC 1316 : (1996) 8 SCC 758.

Right,[47] the reason being that what a judicial decision purports to do is to decide the controversy between the parties brought before the court.

Even a *quasi*-judicial body acting within its jurisdiction under a valid law does not infringe a Fundamental Right merely by misinterpreting a law.[48] But if a *quasi*-judicial body acts under an *ultra vires* law, or outside its jurisdiction, or ignores mandatory rules of procedure prescribed in the relevant law, or infringes principles of natural justice, and thereby affects a Fundamental right then its action can be quashed by the courts.[49]

IBA and Banks which were created under respective Parliamentary Acts or nationalized in terms of the Banking Companies (Acquisition and Transfer of Undertakings) Acts, 1970 and 1980 were "State" within meaning of Art. 12.[50]

Without expressing any opinion on the question as to whether a cooperative society is a "State" within the meaning of Article 12 of the Constitution, the Supreme Court has held that a writ petition will be maintainable when the action of the cooperative society is violative of mandatory statutory provisions by which it is governed.[51]

E. LAW

Another term used in Art. 13(2) is 'law'.[52]

The basic norm contained in Art. 13(2) is that any 'law' inconsistent with a Fundamental Right is void.

The term 'law' in Art. 13 has been given a wide connotation so as to include any ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law [Art. 13(3)(*a*)]. This means that, not only a piece of legislation, but any of the things mentioned here can be challenged as infringing a Fundamental Right. Accordingly, *inter alia* the following have been held to be 'law' under Art. 13, the validity of which can be tested on the touchstone of Fundamental Rights:

(i) a resolution passed by a State Government under Fundamental Rule 44 of the State;[53]

(ii) a government notification under the Commissions of Inquiry Act setting up a commission of inquiry;[54]

(iii) a notification[55] or an order[56] under a statute;

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47. *Naresh v. State of Maharashtra*, AIR 1967 SC 1 : (1966) 3 SCR 744.
48. *Ujjam Bai v. State of Uttar Pradesh*, AIR 1962 SC 1621 : (1963) 1 SCR 778; *Pioneer Traders v. C.C., Imports and Exports*, AIR 1963 SC 734 : 1963 Supp (1) SCR 349.
For a comment on the *Ujjam Bai* case, see, 4 *JILI*, 452.
49. *Kamala Mills v. Bombay*, AIR 1965 SC 1942 : 1966 (1) SCR 64.
See, under '*Certiorari*', Ch. VIII, Sec. E(iv), *supra*.
50. *Indian Banks' Association, Bombay v. Devkala Consultancy Service*, (2004) 11 SCC 1 : AIR 2004 SC 2615.
51. *A. Umarani v. Registrar, Coop. Societies* (2004) 7 SCC 112 : AIR 2004 SC 4504 Quere – why it should not be applicable limited companies or registered bodies etc.
52. *Supra*.
53. *State of Madhya Pradesh v. Mandawar*, AIR 1954 SC 493 : (1955) 1 SCR 599.
54. *Dalmia v. Justice Tendolkar*, AIR 1958 SC 538 : 1959 SCR 279.
55. *Madhubhai Amathalal Gandhi v. Union of India*, AIR 1961 SC 21 : (1961) 1 SCR 191.
56. *Pannalal Binjraj v. Union of India*, AIR 1957 SC 397 : 1957 SCR 233.

(iv) an administrative order;[57] but administrative instruction is not law within the meaning of Article 13.[58]

(v) a custom or usage;[59]

(vi) bye-laws of a municipal or a statutory body;[60]

(vii) regulations made by a statutory corporation like the Life Insurance Corporation.[61]

The validity of the above can be questioned under the Fundamental Rights.

The bye-laws of a co-operative society framed under the Co-operative Societies Act do not fall within the purview of Art. 13.[62]

Parliament, while making an Act cannot be deemed to have taken into consideration an earlier law found to be in contravention of Art. 13.[63]

Though a law as such may not be invalid, yet an order made under it can still be challenged as being inconsistent with a Fundamental Right because no law can be presumed to authorise anything unconstitutional.[64]

A question of great importance which has been debated in India from time to time is whether the term 'law' in Art. 13(1) would include an Act passed by Parliament to amend the Constitution. The question has been discussed fully at a later stage in this book.[65]

One point needs to be emphasized. A restriction on a Fundamental Right can be imposed only through a statute, statutory rule or statutory regulation. A Fundamental Right cannot be put under restraint merely by an administrative direction not having the force of law.[66]

(a) PERSONAL LAWS

There prevail in India several personal laws, such as, Hindu Law, Muslim Law, Parsi Law, Christan Law of marriage and divorce. These are by and large non-statutory, traditional systems of law having some affinity with the concerned religion. Being ancient systems of law, there are several aspects of these systems of laws which are out of time with the modern thinking and may even be incompatible with some Fundamental Rights.

From time to time, several features of these laws have been challenged before the courts on the ground of their incompatibility with the Fundamental Rights. By and large, in such cases, the courts have adopted an equivocal attitude. The

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57. *Balaji v. State of Mysore*, AIR 1963 SC 649 : 1963 Supp (1) SCR 439.
58. *Punit Rai v. Dinesh Chaudhary*, (2003) 8 SCC 204 : AIR 2003 SC 4355.
59. *Sant Ram v. Labh Singh*, AIR 1965 SC 314 : (1964) 7 SCR 756.
60. *Tahir v. District Board*, AIR 1954 SC 630.
61. *Bhagatram, supra*; *Hirendra Nath Bakshi v. Life Insurance Corp.*, AIR 1976 Cal. 88.
62. *Co-op. Credit Bank v. Industrial Tribunal*, AIR 1970 SC 245.
63. *Rakesh Vij v. Raminder Pal Singh Sethi*, (2005) 8 SCC 504 : AIR 2005 SC 3593.
64. *Narendra Kumar v. Union of India*, AIR 1960 SC 430 : (1960) 2 SCR 375; *State of Madhya Pradesh v. Bharat Singh*, AIR 1967 SC 1170 : (1967) 2 SCR 454.
65. *Infra*, Ch. XLI.
66. *Bishan Dass v. State of Punjab*, AIR 1961 SC 1570 : (1962) 2 SCR 69; *Kharak Singh v. State of Uttar Pradesh*, AIR 1963 SC 1295 : (1964) 1 SCR 332; *Satwant Singh v. A.P.O.*, AIR 1967 SC 1836 : (1967) 3 SCR 525.

courts have adopted the policy of non-interference keeping in view the susceptibilities of the groups to which these laws apply.

For this purpose, the courts have adopted two strategies. One, in some cases the courts have ruled that the challenged features of personal laws are not incompatible with the Fundamental Rights. Reference to this aspect is made in the course of the following discussion on specific Fundamental Rights, especially, under Arts. 14, 15, 25 and 26. Two, the courts have denied that the personal laws fall within the coverage of Art. 13 and, thus, these laws cannot be challenged under the Fundamental Rights. For instance, GAJENDRAGADKAR, J., observed in *State of Bombay v. Narasu Appa Mali*:[67]

> "……. the framers of the Constitution wanted to leave the personal laws outside the ambit of Part III of the Constitution (*viz.*, Fundamental Rights). They must have been aware that these personal laws needed to the reformed in many material particulars and in fact they wanted to abolish these different personal laws and to evolve one common code. Yet they did not wish that the provisions of the personal laws should be challenged by reason of the Fundamental Rights …. and so they did not intend to include these personal laws within the definition of the expression "laws in force".

The view expressed by the Bombay High Court in *Narasu* has been reiterated in several cases by the High Courts[68] and the Supreme Court.[69] For example, in *Ahmedabad Women Action Group v. Union of India*,[70] a public interest litigation was filed through a writ petition to declare the Muslim Personal Law which allows polygamy as void as offending Arts. 14 and 15.[71] The Supreme Court refused to take congnisance of the matter. The Court observed that the issues raised involve questions of state policy with which the Court does not ordinarily have any concern. The remedy lies somewhere else (meaning the Legislature) rather than the courts.

In *P.E. Mathew v. Union of India*,[72] s. 17 of the Indian Divorce Act, a Central pre-Constitutional Law, was challenged as arbitrary, discriminatory and violative of Art. 14. But the Kerala High Court adopted the ratio of the Supreme Court cases, cited above, that the personal Christian Law, lay outside the scope of Fundamental Rights. Though the Court did agree that s. 17 was unjustified and discriminatory yet it did not say so. The Court left the matter to the Legislature to amend the law adopting the plea that personal laws do not fall under the purview of the Fundamental Rights. The Court ruled that personal laws are outside the scope of Art. 13(1) as they are not laws as defined in Art. 13(3)(*b*).

A word of comment on the line of decisions mentioned above may be in order at this stage.

After the commencement of the Constitution, several Acts have been passed by Parliament and the State Legislatures modifying several aspects of these personal laws. *Prima facie*, it is difficult to argue that these statutes do not fall within the scope of Art. 13(3)(*a*). But because of the sensitivities of the people

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67. AIR 1952 Bom 84.
68. *Srinivasa Aiyar v. Saraswati Ammal*, AIR 1952 Mad 193; *Ram Prasad v. State of Uttar Pradesh*, AIR 1957 All 411.
69. *Krishna Singh v. Mathura Ahir*, AIR 1980 SC 707 : (1981) 3 SCC 689.
70. AIR 1997 SC 3614 : (1997) 3 SCC 573.
71. For discussion on Arts. 14 and 15(1), see, Chapters XXI and XXII, *infra.*
72. AIR 1999 Ker 345.

and the delicate nature of the issues involved, the Courts have thought it prudent not to interfere with these laws on the touchstone of Fundamental Rights and leave it to the Legislature to reform these laws so as to bring them in conformity with the Fundamental Rights.

Article 13(1) says that all "laws in force" in India when the Constitution comes in force shall be void if inconsistent with a Fundamental Right. According to Art. 13(3)(*b*), the expression "laws in force" *includes* laws passed or made by a Legislature or other competent authority." This is an inclusive definition. It is clear, that Art. 13(3)(*b*) does not exclude other forms of law besides the pre-Constitution legislative enactments. But the Court has rejected the argument that Art. 13(1)(b) is only inclusive and not exhaustive. Even if we accept the literal, technical and narrow interpretation of Art. 13(3)(*b*) that it refers only to pre-Constitution legislation and does not include uncodified judge-made amorphous personal laws, there is no reasons or logic in excluding from the scope of Fundamental Rights legislative Acts enacted in the area of personal laws before and after the commencement of the Constitution, such as, the Indian Divorce Act. The only explanation for this judicial stance can be that as a matter of judicial policy the courts do not wish to get involved in the delicate task of adjudging these Acts *vis-à-vis* Fundamental Rights.[73]

(b) CUSTOM

What is the position of customs extant in India before the commencement of the Constitution and continued thereafter. In *Gazula Dasaratha Rama Rao v. State of Andhra Pradesh*,[74] the Constitution Bench of the Supreme Court expressed the view that Art. 13(1) which says that laws in force in India before the commencement of the Constitution shall be void if inconsistent with Fundamental Rights "includes custom or usage having the force of law". The Court observed:

> "Therefore, even if there was a custom which has been recognized by law… that custom must yield to a Fundamental Right".

In *Sant Ram v. Labh Singh*,[75] the Constitution Bench of the Supreme Court ruled that a customary right of pre-emption by vicinage was void under Art. 19(1)(*f*).[76] The Court referred to Art. 13(1)(*a*) which says that 'law' includes 'custom'. The Court also ruled that the definition of 'laws in force' contained in Art. 13(1)(*b*) "does not in any way restrict the ambit of the word 'law' in Art. 13(1)(*a*).[77]

In *Madhu Kishwar v. State of Bihar*,[78] RAMASWAMI, J., expressed the view that customs of tribals, though elevated to the status of law by Art. 13(1)(*a*), "yet it is essential that the customs inconsistent with or repugnant to constitutional Scheme must always yield place to Fundamental Rights."

RAMASWAMI, J., adopting an activist attitude ruled that tribal women would succeed to the estate of their male relations. The majority generally agreed with

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73. This topic has further been discussed later. See, Chs. XXI, XXII, XXIX and XXXIV, *infra.*
74. AIR 1961 SC 564, 570 : (1961) 2 SCR 931.
75. AIR 1965 SC 314 : (1964) 7 SCR 756.
76. For discussion on Art. 19(1)(f), see Ch. XXXI, Sec. D.
77. *Ibid.*, at 316.
78. AIR 1996 SC 1864, 1871 : (1996) 5 SCC 125.

this approach though it adopted a conservative approach in the specific situation and desisted from declaring a tribal custom as inconsistent with Art. 14 saying that to do so "would bring about a chaos in the existing state of law."[79] The majority made male succession subject to the right of livelihood of the female dependent.

This discussion reveals a dichotomy in the judicial attitudes as expressed in *Madhu Kishwar*[80] and *Narasu Appa Mali*[81] If the Supreme Court holds customs pre-existing the constitution to be subject to Fundamental Rights, then there seems to be no reason as to why personal laws ought not to be held subject to Fundamental Rights.

In the view of the author, the Supreme Court has adopted the correct approach in the cases concerning customs. In cases concerning personal laws, the courts have adopted a policy approach, rather than a legalistic approach.

F. UNCONSTITUTIONALITY OF A STATUTE

Article 13(1) refers to pre-Constitution laws while Art. 13(2) refers to post-Constitution laws. A law is void if inconsistent with a Fundamental Right.

A void statute is unenforceable, *non-est*, and devoid of any legal force: courts take no notice of such a statute, and it is taken to be notionally obliterated for all purposes.

In *Behram v. State of Bombay*,[82] the Supreme Court has observed on this point:

> "Where a statute is adjudged to be unconstitutional, it is as if it had never been. Rights cannot be built up under it, contracts which depend upon it for their consideration are void, it constitutes a protection to no one who has acted under it and no one can be punished for having refused obedience to it before the decision was made. And what is true of an Act void in toto is true also as to any part of an Act which is found to be unconstitutional and which consequently has to be regarded as having never at any time been possessed of any legal force…."

Any law made in contravention of Part III is dead from the very beginning and cannot at all be taken notice of or read for any purpose whatsoever.[83]

The above proposition is not however universally or absolutely true in all situations. It is subject to a few exceptions as follows:

(1) Some Fundamental Rights apply to all persons, citizens as well as non-citizens, *e.g.*, Arts. 14, 21, while some of these Rights, such as Art. 19, apply only to citizens.[84]

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79. *Ibid.*, at 1885.
80. *Supra*, footnote 78.
81. *Supra*, footnote 67; also, *supra*, footnote 70.
82. *Behram v. State of Bombay*, AIR 1955 SC 123 : (1955) 1 SCR 613.
Also see, VENKATARAMAN, The Status of an Unconstitutional Statute, 2 *JILI*, 401 (1960).
For further discussion on this topic see, Ch. XL, Sec. F, *infra.*
83. *Rakesh Vij v. Raminder Pal Singh Sethi*, (2005) 8 SCC 504 : AIR 2005 SC 3593.
84. *Chairman Rly. Board v. Chandrima Das*, AIR 2000 SC 988 : (2000) 2 SCC 465.
Also see, *infra*, under Arts. 14, 19 & 21.

A law inconsistent with a Fundamental Right of the former type is ineffective *qua* all persons. On the other hand, a law inconsistent with a Fundamental Right available to citizens only, is *non-est* only *qua* citizens but not *qua* non-citizens who cannot claim the benefit of the Fundamental Right in question.[85]

(2) Art. 13(1) is prospective and not retrospective.[86] Therefore, a pre-Constitution law inconsistent with a Fundamental Right becomes void only after the commencement of the Constitution. Any substantive rights and liabilities accruing under it prior to the enforcement of the Constitution are not nullified. It is ineffective only with respect to the enforcement of rights and liabilities in the post-Constitution period.

A person was being prosecuted under a law before the Constitution came into force. After the Constitution came into force, the law became void under Art. 19(1)(*a*).[87] It was held that Art. 13(1) could not apply to him as the offence had been committed before the enforcement of the Constitution and, therefore, the proceedings against him were not affected.[88]

But the procedure through which rights and liabilities were being enforced in the pre-Constitution era is a different matter. A discriminatory procedure becomes void after the commencement of the Constitution and so it cannot operate even to enforce the pre-Constitution rights and liabilities.[89] A law inconsistent with a Fundamental Right is not void as a whole. It is void only to the extent of inconsistency. This means that the doctrine of severability has to be applied and the offending portion of the law has to be severed from the valid portion thereof.[90]

G. DOCTRINE OF ECLIPSE

The prospective nature of Art. 13(1) has given rise to the doctrine of eclipse.

A legal provision enacted in 1948, authorising the State Government to exclude all private motor transport business, became inconsistent with Art. 19(1)(*g*) when the Constitution came into force in 1950.[91] In 1951, Art. 19(1)(*g*) was amended so as to permit the State Government to monopolise any business.[92] What was the effect of the constitutional amendment of 1951 on the law of 1948? Whether the law having become void was dead once for all and so could not be revitalised by a subsequent constitutional amendment without being re-enacted, or whether it was revived automatically? It was to solve this problem that the Supreme Court enunciated the doctrine of eclipse in *Bhikaji v. State of Madhya Pradesh*.[93]

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85. *State of Gujarat v. Shri Ambica Mills*, AIR 1974 SC 1300 : (1974) 4 SCC 656.

86. Art. 13(1) runs as follows:
"All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void."

87. For Art. 19(1)(*a*), see, *infra*, Ch. XXIV, Sec. C.

88. *Keshavan Madhava Menon v. State of Maharashtra*, AIR 1951 SC 128 : 1951 SCR 228.
Also, *Rabindra Nath v. Union of India*, AIR 1970 SC 470 : (1970) 1 SCC 84.

89. *Lachmandas v. State of Maharashtra*, AIR 1952 SC 235 : 1952 SCR 710.

90. See *Sub-Inspector Rooplal v. Lt. Governor*, (2000) I SCC 644 : AIR 2000 SC 594.
For the Doctrine of Severability, see, *infra*, Sec. H; also, Ch. XL, *infra*.

91. For discussion on Art. 19(1)(*g*), see, *infra*, Ch. XXIV, Sec. H.

92. *Ibid.*

93. AIR 1955 SC 781 : (1955) 2 SCR 589.

The doctrine of eclipse envisages that a pre-Constitution law inconsistent with a Fundamental Right was not wiped out altogether from the statute book after the commencement of the Constitution as it continued to exist in respect of rights and liabilities which had accrued before the date of the Constitution.[1] Therefore, the law in question will be regarded as having been 'eclipsed' for the time being by the relevant Fundamental Right. It was in a dormant or moribund condition for the time being. Such a law was not dead for all purposes. If the relevant Fundamental Right is amended then the effect would be "to remove the shadow and to make the impugned Act free from all blemish or infirmity". The law would then cease to be unconstitutional and become revivified and enforceable.[2]

The doctrine of eclipse has been held to apply only to the pre-Constitution and not to the post-Constitution laws. The reason is that while a pre-Constitution law was valid when enacted and, therefore, was not void *ab initio*, but its voidity supervened when the Constitution came into force, a post-Constitution law infringing a Fundamental Right is unconstitutional and a nullity from its very inception. Therefore, it cannot be vitalised by a subsequent amendment of the Constitution removing the infirmity in the way of passing the law.[3] The Supreme Court has distinguished between Arts. 13(1) and 13(2), as the phraseology of the two is different from each other.

Article 13(2) which applies to the post-Constitution laws prohibits the making of a law abridging Fundamental Rights, while Art. 13(1) which applies to the pre-Constitution laws contains no such prohibition. Under Art. 13(1), the operation of the pre-Constitution law remains unaffected until 26-1-1950, even if it becomes inoperative after the commencement of the Constitution. Under Art. 13(2), the words "the State shall not make any law" indicate that after the commencement of the Constitution, no law can be made so as to contravene a Fundamental Right. Such a law is void *ab initio*. Therefore, the doctrine of eclipse cannot apply to such a law and it cannot revive even if the relevant Fundamental Right is amended later to remove the hurdle in the way of such a law.[4]

In case the law contravenes a Fundamental Right limited to the citizens only, it will operate with respect to the non-citizens,[5] but it will not be revived *qua*-citizens merely by the amendment of the Fundamental Right involved.[6] Because Art. 13(2) affects the competence of the legislature to enact it with respect to the citizens, the law will have to be re-enacted after the constitutional amendment if it is desired to make it operative *qua* the citizens as well.

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1. *The Keshavan Madhava Menon* case, *supra*, footnote 88.
2. Also, *Purshottam v. Desai*, AIR 1956 SC 20 : (1955) 2 SCR 887.
3. The Privy Council has also held that an invalid statute is non-existent and a later constitutional amendment will not automatically revive it: *Akar v. A.G. of Sierra Leone*, (1969) 3 All ER 384, 392.
Also see, *Dularey Lodh v. IIIrd. Addl. Dist. Judge, Kanpur*, AIR 1984 SC 1260 : (1984) 3 SCC 99.
4. *Saghir v. State of Uttar Pradesh*, AIR 1954 SC 728 : (1955) 1 SCR 707; *Deep Chand v. State of Uttar Pradesh*, AIR 1959 SC 648; *Muhammadbhai v. State of Gujarat*, AIR 1962 SC 1517; *Abu Khan v. Union of India*, AIR 1983 SC 1301 : (1984) 1 SCC 88.
5. *State of Gujarat v. Shri Ambika Mills Ltd.*, AIR 1974 SC 1300 : (1974) 4 SCC 656.
6. *Mahendralal Jain v. State of Uttar Pradesh*, AIR 1963 SC 1019 : 1963 Supp (1) SCR 912. Also *supra*, Ch. XVIII, Sec. C.

An Act declared unconstitutional under Arts. 14, 19 and 31(2), is revived when it is put in the Ninth Schedule.[7] The express words of Art. 31B cure the defect in such an Act with retrospective operation from the date it was put on the statute book. Such an Act even though inoperative when enacted because of its inconsistency with a Fundamental right, assumes full force and vigour retrospectively as soon as it is included in the IX Schedule. It is not necessary to re-enact such an Act.[8]

From this arises another question. When a post-Constitution law is held inconsistent with a Fundamental Right, can it be revived by amending the Act in question so as to remove the blemish, or will it have to be re-enacted as a whole? The Delhi High Court has held by a majority that the Act will have to be re-enacted and it cannot be revived by its mere amendment.[9] This view appears to emanate logically from the position adopted by the Supreme Court in treating such a law void *ab-initio* and not applying the doctrine of eclipse to the post-Constitution laws as discussed above.

There is no direct Supreme Court case on the specific point. The nearest authority on the point is the *Shama Rao* case.[10] An Act was challenged on the ground of excessive delegation.[11] Pending the decision, the Legislature passed an amending Act seeking to remove the defect. The Supreme Court ruled by a majority that when an Act is bad on the ground of excessive delegation, it is still-born and void *ab initio*, and it cannot be revived by an amending Act seeking to remove the vice. The whole Act should be re-enacted in the modified form.

This ruling supports the proposition that an Act held invalid under Art. 13(2) could not be revived merely by amending it but will have to be re-enacted. The same proposition will apply when an Act infringes a Fundamental Right applicable to the citizens only. Such a law will be regarded as 'still-born' *vis-à-vis* the citizens even though it may be operative *qua* the non-citizens, and so it will have to be re-enacted if it is desired to make it valid *qua* the citizens.[12]

A reference may be made here to *Hari Singh v. Military Estate Officer, Delhi*.[13] The Punjab Public Premises Act was declared void by the Supreme Court as being inconsistent with Art. 14.[14] There was a corresponding law made by Parliament enacted in 1958. Consequent upon the Supreme Court decision on the Punjab Act, Parliament re-enacted its own law in 1971, seeking to remove the blemish pointed out by the Supreme Court, and made it operative retrospectively

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7. See, *infra*, Chs. XXXI and XXXII.
8. *L. Jagannath v. Authorised Officer*, AIR 1972 SC 425 : (1971) 2 SCC 893. *Infra*, Ch. XXVII for Art. 31B.
9. *P.L. Mehra v. D.R. Khanna*, AIR 1971 Del. 1.
10. AIR 1967 SC 1480 : (1967) 2 SCR 650.
11. *Supra*, Ch. II, Sec. N.
12. *State of Gujarat v. Shri Ambica Mills*, *supra*, note 51.
JUSTICE DESHPANDE has argued cogently against this rule. He favours application of the doctrine of eclipse to the post-Constitution laws as well. He pleads that mere amendment of the law should be sufficient to revivify it in case it conflicted with the Fundamental Right. See his dissenting judgement in the *Mehra* case, *supra*, note 55. Also, DESHPANDE, *Judicial Review of Legislation*, 9, 177, 185, 198, 220.
For a review of the book by the author see, 16 *JILI*, 727, 736.
Also see, VENKATARAMA AIYAR J. in *Sundararamier's* case, AIR 1958 SC 468.
13. AIR 1972 SC 2205 : (1972) 2 SCC 239.
14. *Infra*, Ch. XXI.

with effect from the date of commencement of the original Act. A new clause was also added saying that all orders made under the old law would be deemed to be valid and effective as if they were made under the new law. This clause was challenged, the argument being that the 1958 Act being unconstitutional, there could not be validation of anything done under an unconstitutional Act. Holding the clause to be valid, the Supreme Court called it a fallacious argument for it overlooked the crucial point that the 1971 Act was made effective retrospectively from the date of the 1958 Act and the action done under the 1958 Act was deemed to have been done under the 1971 Act, and the new Act was valid under Art. 14.[15]

H. DOCTRINE OF SEVERABILITY

According to Art. 13, a law is void only "to the extent of the inconsistency or contravention" with the relevant Fundamental Right. The above provision means that an Act may not be void as a whole; only a part of it may be void and if that part is severable from the rest which is valid, then the rest may continue to stand and remain operative. The Act will then be read as if the invalid portion was not there. If, however, it is not possible to separate the valid from the invalid portion, then the whole of the statute will have to go.[16]

The Supreme Court has explained the doctrine as follows in *RMDC*:[17]

> "When a legislature whose authority is subject to limitations aforesaid enacts a law which is wholly in excess of its powers, it is entirely void and must be completely ignored. But when the legislation falls in part within the area allotted to it and in part outside it, it is undoubtedly void as to the latter; but does it on that become necessarily void in its entirety? The answer to this question must depend on whether what is valid could be separated from what is invalid, and that is a question which has to be decided by the Court on a consideration of the provisions of the Act"

The Supreme Court has laid down the following propositions as regards the doctrine of severability:[18]

(1) The intention of the Legislature is the determining factor in determining whether the valid parts of a statute are separable from the invalid parts. The test is whether the Legislature would have enacted the valid parts had it known that the rest of the statute was invalid.[19] "The test of severability requires the Court to ascertain whether the legislature would at all have enacted the law if severed part was not the part of the law".[20]

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15. Similar clauses have been held valid in *West Ramnad Electric Distribution Co v. State of Madras*, AIR 1962 SC 1753 : (1963) 2 SCR 747; *State of Mysore v. D. Achiah Chetty*, AIR 1969 SC 477 : (1969) 1 SCC 248.

16. *Kameshwar Pd. v. State of Bihar*, AIR 1962 SC 1166 : 1962 Supp (3) SCR 369; *State of Madhya Pradesh v. Ranojirao Shinde*, AIR 1968 SC 1053 : (1968) 3 SCR 489.

17. *R.M.D.C. v. Union of India*, AIR 1957 SC 628, at 633; *Kihota Hollohon v. Zachilhu*, AIR 1993 SC 412 at 440 : 1992 Supp (2) SCC 651.

18. See, *RMDC, Ibid*; *Motor General Traders v. State of Andhra Pradesh*, AIR 1984 SC 121 : (1984) 1 SCC 222.

19. *Harakchand v. Union of India*, AIR 1970 SC 1453 : (1969) 2 SCC 166.
Also, *Att. Gen. for Alberta v. Att. Gen. for Canada*, (1947) AC 503, 518.

20. *Kihota Hollohon, supra*, Ch. II, Sec. F(a).

In determining the legislative intent on the question of severability, it will be legitimate to take into account the history of the legislation, its object, the title and the preamble to it.

(2) If the valid and invalid provisions are so inextricably mixed up that they cannot be separated from one another, then the invalidity of a portion must result in the invalidity of the Act in its entirety.

(3) On the other hand, if they are so distinct and separate that after striking out what is invalid, what survives can stand independently and is workable—the portion which remains is in itself a complete code independent of the rest, then it will be upheld notwithstanding that the rest had become unenforceable.

If the nature or the object or the structure of the legislation is not changed by the omission of the void portion, the latter is severable from the rest.[21]

(4) Even when the valid provisions are distinct and separate from the invalid provisions, but if they all form part of a single scheme which is intended to operate as a whole, then the invalidity of a part will result in the failure of the whole.

(5) Likewise, though the valid and invalid parts of a statute are independent and may not form part of a scheme, but what is left after omitting the invalid portion is so thin and truncated as to be in substance different from what it was when it emerged out of the legislature, then also it will be rejected in its entirety.

(6) If after the invalid portion is expunged from the statute, what remains cannot be enforced without making alterations and modifications therein, then the whole of it must be struck down as void. The reason is that a Court cannot make alterations or modifications in the law in order to enforce what remains of it after expunging its invalid portion; otherwise it would amount to judicial legislation.[22]

(7) The severability of the valid and invalid provisions of a statute does not depend on whether the provisions are enacted in the same section or different sections; it is not the form, but the substance of the matter that is material, and that has to be ascertained on an examination of the Act as a whole and of the setting of the relevant provision therein.

In the *R.M.D.C.* case was involved the Prize Competitions Act which was broad enough to include competitions of a gambling nature as well as those involving skill. Under Art. 19(1)(*g*),[23] Parliament could restrict prize competitions only of a gambling nature but not those involving skill. Holding that the application of the Act could be restricted to the former, the Court stated that Parliament would have still enacted the law to regulate competitions of gambling nature; nor did restricting the Act to this kind of competitions affect its texture or colour. The provisions of the Act were thus held severable in their application to competi-

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21. *Gopalan v. State of Madras*, AIR 1950 SC 27, 46 : 1950 SCR 88; *Kihota Hollohon, supra*, Ch. II Sec. F(a).

In *Hinds v. R.*, (1976) 1 All ER 355, invalid portion of the statute was severed from the rest because what was left was a sensible legislative scheme or a grammatical piece of legislation requiring no addition or amendment.

Also see, *Laxmi Khandsari v. State of Uttar Pradesh*, AIR 1981 SC 873, 891 : (1981) 2 SCC 600.

22. *Sewpujanrai v. Customs Collector*, AIR 1958 SC 845 : 1959 SCR 821.

23. For Art. 19(1)(g), see, *infra*, Ch. XXIV, Sec. H.

tions in which success did not depend to any substantial extent on skill. This illustrates proposition (1) mentioned above.

To some extent, there exists an inconsistency between the *Thappar*[24] and the *R.M.D.C.* case. When an offending provision is couched in a language wide enough to cover restrictions within and without the constitutionally permissible limits, according to the *Thappar* case it cannot be split up if there is a possibility of its being applied for purposes not sanctioned by the Constitution,[25] but according to the *R.M.D.C.* case, such a provision is valid if it is severable in its application to an object which is clearly demarcated from other objects falling outside the constitutionally permissible legislation. The Supreme Court has itself pointed out this aspect of the matter in *Supdt. Central Prison v. Dr. Lohia*,[26] but left open the question. The Court, however, stated that in the *R.M.D.C.* case, the difference between the two classes of competitions, namely, those that are gambling in nature and those in which success depends on skill, was clear cut and had long been recognised in legislative practice. But when the difference between what is permissible and what is not permissible is not very precise, the whole provision is to be held void, whether the view taken in the *Romesh Thappar* or the *R.M.D.C* case is followed.

It appears that it is difficult to evolve a clear cut principle as much depends on the facts of each case, the determining factor being whether, on the provision being sustained to the extent it falls within the permissible limits, is there any danger of its being misused for the purpose not permitted? If the Court has the ultimate control to decide whether a particular application of the law goes beyond the permissible limits, then there may not be any danger of misuse of the provision. If, however, the matter has been left to the subjective satisfaction of the Executive, and the Court cannot scrutinise the basis of such satisfaction to see whether the law has been applied to a purpose not permitted, then it will be safer to declare the whole provision bad.

I. WAIVER OF FUNDAMENTAL RIGHTS

Can a person waive any of his Fundamental Rights?

To begin with, VANKATARAMA AIYAR, J., in *Behram v. State of Maharashtra*,[27] divided the Fundamental Rights into two broad categories:

(i) Rights conferring benefits on the individuals, and

(ii) those rights conferring benefits on the general public.

The learned Judge opined that a law would not be a nullity but merely unenforceable if it was repugnant with a Fundamental Right in the former category, and that the affected individual could waive such an unconstitutionality, in which case the law would apply to him. For example, the right guaranteed under Art. 19(1)(*f*) was for the benefit of properly-owners and when a law was found to in-

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24. *Romesh Thappar v. State of Madras*, AIR 1950 SC 124 : 1950 SCR 594.
Also see, *infra*, under Art. 19(1)(a), Ch. XXIV, Sec. C.

25. Also see, *Chintamanrao v. State of Madhya Pradesh*, AIR 1951 SC 118 : 1950 SCR 759.

26. AIR 1960 SC 633 : (1960) 2 SCR 821.
Also see, under Art. 19(1)(*a*) *infra*, Ch. XXIV, Sec. C.

27. AIR 1955 SC 123 : (1955) 1 SCR 123.

fringe Art. 19(1)(*f*), it was open to any person whose right had been infringed to waive his Fundamental Right.[28] In case of such a waiver, the law in question could be enforced against the individual concerned.

The majority on the bench, however, was not convinced with this argument and repudiated the doctrine of waiver saying that the Fundamental Rights were not put in the Constitution merely for individual benefit. These Rights were there as a matter of public policy and, therefore, the doctrine of waiver could have no application in case of Fundamental Rights. A citizen cannot invite discrimination by telling the state 'You can discriminate', or get convicted by waiving the protection given to him under Arts. 20 and 21.[29]

The question of waiver of a Fundamental Right has been discussed more fully by the Supreme Court in *Basheshar Nath v. I.T. Commissioner*.[30] The petitioner's case was referred to the Income-tax Investigation Commission under S. 5(1) of the relevant Act. After the Commission had decided upon the amount of concealed income, the petitioner on May 19, 1954, agreed as a settlement to pay in monthly instalments over Rs. 3 lacs by way of tax and penalty. In 1955, the Supreme Court declared S. 5(1) *ultra vires* Art. 14.[31] The petitioner thereupon challenged the settlement between him and the Commission, but the plea of waiver was raised against him. The Supreme Court however upheld his contention.

In their judgments, the learned Judges expounded several views regarding waiver of Fundamental Rights, *viz.*:

(1) Art. 14 cannot be waived for it is an admonition to the state as a matter of public policy with a view to implement its object of ensuring equality. No person can, therefore, by any act or conduct, relieve the state of the solemn obligation imposed on it by the Constitution.

(2) A view, somewhat broader than the first, was that none of the Fundamental Rights can be waived by a person. The Fundamental Rights are mandatory on the state and no citizen can by his act or conduct relieve the state of the solemn obligation imposed on it.

The constitution makes no distinction between Fundamental Rights enacted for the benefit of an individual and those enacted in public interest or on grounds of public policy.

A large majority of the people in India are economically poor, educationally backward and politically not yet conscious of their rights. Individually or even collectively, they cannot be pitted against the state, and, therefore, it is the duty of the judiciary to protect their Rights against themselves.

(3) The minority judges took the view that an individual could waive a Fundamental right which was for his benefit, but he could not waive a Right which was for the benefit of the general public. This was reiteration of the view expressed by VENKATARAMAN, J., in *Behram*, as stated above.

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28. For discussion on Art. 19(1)(*f*), see, *infra*, Ch. XXIV, Sec. G; Ch. XXXI, Sec. B.
29. For comments on Arts. 20 and 21, see, *infra*, Chs. XXV and XXVI.
30. AIR 1959 SC 149 : 1959 Supp (1) SCR 528.
31. For a discussion on Art. 14, see, *infra*, next Chapter.

In view of the majority decision in *Basheshar*, it is now an established proposition that an individual cannot waive any of his Fundamental Rights.[32] This proposition has been applied in a number of cases.

According to the Bombay High Court:[33] "The state cannot arrogate to itself a right to commit breach of the Fundamental Rights of any person by resorting to principles of waiver or estoppel or other similar principles." Similarly, the Gauhati High Court has explained that the Fundamental Rights have been embodied in the Constitution not merely for the benefit of a particular individual but also as a matter of constitutional policy and for public good, and, therefore, the doctrine of waiver or acquiescence cannot be applied thereto. "A citizen cannot voluntarily get discrimination or waive his Fundamental Right against discrimination" as the right of not being discriminated against is enshrined in Art. 14 and is a Fundamental Right.[34]

In *Olga Tellis*,[35] the Court asserted that "the high purpose which 'the constitution seeks to achieve by conferment of fundamental rights is not only to benefit the individual but to secure the larger interests of the community.' Therefore, even if a person says, either under mistake of law or otherwise, that he would not enforce any particular Fundamental Right, it cannot create an estoppel against him. "Such a concession, if enforced, would defeat the purpose of the Constitution. Were the argument of estoppel valid, an all-powerful state could easily tempt an individual to forgo his precious personal freedoms on promise of transitory, immediate benefits."

In *Olga Tellis*, in a writ proceeding in the High Court, the pavement dwellers gave an undertaking that they would not claim any Fundamental Right to put up huts on pavements or public roads and that they would not obstruct the demolition of the huts after a certain date. Later, when the huts were sought to be demolished after the specified date, the pavement dwellers put up the plea that they were protected by Art. 21. It was argued in the Supreme Court that they could not raise any such plea in view of their previous undertaking. The Court overruled the objection saying that Fundamental Rights could not be waived. There can be no estoppel against the Constitution which is the paramount law of the land. The constitution has conferred Fundamental Rights not only to benefit individuals but to secure the larger interests of the community. The Court observed : "No individual can barter away the freedoms conferred on him by the Constitution".

Therefore, in spite of their earlier undertaking in the High Court, the pavement dwellers are entitled to raise the plea of Art. 21 of the Constitution in their favour.[36]

Recently, in *Nar Singh Pal v. Union of India*,[37] the Supreme Court has asserted:

> "Fundamental Rights under the Constitution cannot be bartered away. They cannot be compromised nor can there be any estoppel against the exercise of Fundamental Rights available under the Constitution".

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32. N.L. NATHANSON, Waiver of Constitutional Rights in Indian and American Constitutional Law, 4 *JILI*, 157 (1962).
33. *Yousuf Ali Abdulla Fazalbhoy v. M.S. Kasbekar*, AIR 1982 Bom. 135 at 143.
34. *Omega Advertising Agency v. State Electricity Board*, AIR 1982 Gau. 37.
35. *Olga Tellis v. Bombay Municipal Corporation*, AIR 1986 SC 180, at 192-193 : (1985) 3 SCC 545.
36. For discussion on Art. 21, see, *infra*, Ch. XXVI.
37. (2000) 3 SCC 589, 594 : AIR 2000 SC 1401.

In the instant case, a casual labourer with the Telecom Department had worked continuously for 10 years and had thus acquired the "temporary" status. He was prosecuted for a criminal offence but was ultimately acquitted. In the meantime, his service was terminated. He questioned the order of termination but also accepted retrenchment benefit. The Supreme Court ruled that his service could not have been terminated without a departmental inquiry and without giving him a hearing. Acceptance of retrenchment benefit by him did not mean that he had surrendered all his constitutional rights. Accordingly, the order of termination was quashed by the Supreme Court and he was reinstated in service.

The doctrine of non-waiver developed by the Supreme Court of India denotes manifestation of its role of protector of the Fundamental Rights.

It may be of interest to know that in the U.S.A., a Fundamental Right can be waived.[38]

38. *Pierce Oil Corporation v. Phoenix Refining Co.*, 259 US 125 (1922); *Boykin v. Alabama*, 395 US 238 (1969); NATHANSON, *supra*, footnote 32, 4 *JILI*, 157 (1962).

CHAPTER XXI

FUNDAMENTAL RIGHTS (2)
RIGHT TO EQUALITY (i)

SYNOPSIS

A. INTRODUCTORY

The Constitution of India guarantees the Right to Equality through Articles 14 to 18. "Equality is one of the magnificent corner-stones of Indian democracy."[1]

The doctrine of equality before law is a necessary corollary of Rule of Law which pervades the Indian Constitution.[2]

Article 14 outlaws discrimination in a general way and guarantees equality before law to all persons. In view of a certain amount of indefiniteness attached to the general principle of equality enunciated in Article 14, separate provisions to cover specific discriminatory situations have been made by subsequent Articles. Thus, Art. 15 prohibits discrimination against citizens on such specific grounds as religion, race, caste, sex or place of birth. Art. 16 guarantees to the citizens of India equality of opportunity in matters of public employment. Art. 17 abolishes untouchability, and Art. 18 abolishes titles, other than a military or academic distinction. Thus, the Supreme Court has said that the Constitution lays down provisions both for protective discrimination as also affirmative action.[3]

In this series of constitutional provisions, Art. 14 is the most significant. It has been given a highly activist magnitude in recent years by the courts and, thus, it generates a large number of court cases. In recent days, Art. 16 has also assumed great significance because of the problems of reservation in public services. Art. 14 is the genus while Arts. 15 and 16 are the species. Arts. 14, 15 and 16 are constituents of a single code of constitutional guarantees supplementing each other.

Article 14 of the Constitution embodies the principle of "non-discrimination". However, it is not a free standing provision. It has to be read in conjunction with rights conferred by other articles like Art. 21 of the Constitution. Article 21 refers to "right to life" and embodies several aspects of life. It includes "opportunity", Articles 21 and 14 are the heart of the chapter on Fundamental Rights. They cover myriad features of life.[4]

In situations not covered by Arts. 15 to 18, the general principle of equality embodied in Art. 14 is attracted whenever discrimination is alleged. The goal set out in the Preamble to the Constitution regarding status and opportunity is embodied and concretised in Arts. 14 to 18.[5]

It may be worthwhile to note that Art. 7 of the Universal Declaration of Human Rights, 1948, declares that all are equal before the law and are entitled with-

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1. THOMMEN, J., in *Indra Sawhney v. Union of India*, AIR 1993 SC 477 : 1992 Supp (3) SCC 212.
For full discussion on this case, see, *infra.*
2. *Ashutosh Gupta v. State of Rajasthan*, (2002) 4 SCC 34 : AIR 2002 SC 1533.
3. *Andhra Pradesh Public Service Commission v. Baloji Badhavath*, (2009) 5 SCC 1 : (2009) 5 JT 563.
4. *Reliance Energy Ltd. v. Maharashtra State Road Development Corpn. Ltd.*, (2007) 8 SCC 1 : (2007) 11 JT 1.
5. For Preamble to the Constitution see, Ch. I, *supra*, and Ch. XXXIV, *infra.*

out any discrimination to the equal protection of laws. By and large the same concept of equality inheres in Art. 14 of the Indian Constitution.

It may be noted that the right to equality has been declared by the Supreme Court as a basic feature of the Constitution. The Constitution is wedded to the concept of equality. The Preamble to the Constitution emphasizes upon the principle of equality as basic to the Constitution. This means that even a constitutional amendment offending the right to equality will be declared invalid.[6] Neither Parliament nor any State Legislature can transgress the principle of equality.[7] This principle has been recently reiterated by the Supreme Court in *Badappanavar*[8] in the following words:

> "Equality is a basic feature of the Constitution of India and any treatment of equals unequally or unequals as equals will be violation of basic structure of the Constitution of India."

B. EQUALITY BEFORE LAW : ART. 14

A constitution bench of the Supreme Court has declared in no uncertain terms that equality is a basic feature of the constitution and although the emphasis in the earlier decisions evolved around discrimination and classification, the content of Article 14 got expanded conceptually and has recognized the principles to comprehend the doctrine of promissory estoppel non arbitrariness, compliance with rules of natural justice eschewing irrationality etc.[9]

If there is no affectation of a vested right, the question of applicability of Art. 14 would not arise.[10] Such an absolute proposition is inconsistent with the recognition by the Supreme Court in or in many of its earlier judgments in relation to promissory estoppel and legitimate expectation which are not only much short of indefeasible right but were evolved to protect a person from unfair or arbitrary exercise of power.[11] Moreover Article 14 itself confers a 'vested' Fundamental Right and it is difficult to appreciate the logic behind the enunciation.

Article 14 bars discrimination and prohibits discriminatory laws. Art. 14 is now proving as a bulwark against any arbitrary or discriminatory state action. The horizons of equality as embodied in Art. 14 have been expanding as a result of the judicial pronouncements and Art. 14 has now come to have a "highly activist magnitude".

Articles 14 and 15 read in the light of the preamble to the Constitution reflect the thinking of our Constitution makers and prevent any discrimination based on religion or origin in the matter of equal treatment or employment and to apply the same even in respect of a cooperative society.[12]

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6. For discussion on the "Basic Features of the Constitution", see, Ch. XLI, *infra.*
7. *Kesavananda Bharati v. State of Kerala,* AIR 1973 SC 1461 : (1973) 4 SCC 225; *Indra Sawhney v. Union of India (II),* AIR 2000 SC 498 : (2000) 1 SCC 168; see, *infra.*
8. *M.G. Badappanavar v. State of Karnataka,* AIR 2001 SC 260, at 264 : (2001) 2 SCC 666.
9. *M. Nagaraj v. Union of India,* (2006) 8 SCC 212 : AIR 2007 SC 71.
10. *State of Kerala v. Peoples Union for Civil Liberties, Kerala State Unit,* (2009) 8 SCC 46 at page 90 : (2009) 9 JT 579.
11. *Food Corporation of India v. Kamdhenu Cattle Feed Industries,* AIR 1993 SC 1601 : (1993) 1 SCC 71.
12. *Zoroastrian Coop. Housing Society Ltd. v. District Registrar, Coop. Societies (Urban),* (2005) 5 SCC 632 : AIR 2005 SC 2306.

All persons in similar circumstances shall be treated alike both in privileges and liabilities imposed.[13]

But equality cannot be applied when it arises out of illegality e.g. when Art. 14 is sought to be involved in aid of compassionate appointment wrongly made earlier.[14]

It has been held that non application of mind is a facet of arbitrary exercise of power.[15]

It is now firmly established that Art. 14 strikes at arbitrary state action, both administrative and legislative. There has been a significant shift towards equating arbitrary or unreasonableness as the yardstick by which administrative as well as legislative actions are to be judged. A basic and obvious test to be applied in cases where administrative action is attacked as arbitrary is to see whether there is any discernible principle emerging from the impugned action and if so, does it really satisfy the test of reasonableness.[16] It is now considered that non-compliance with the rules of natural justice amounts to arbitrariness violating Art. 14.[17]

The Supreme Court has quoted with approval the following observations of Bharucha J sitting in the Bombay High Court.[18]

> "….the government company or corporation must act reasonably not only when terminating the authority of an occupant of public premises …… to occupy the same but also when, thereafter, it seeks his eviction therefrom". This approval, therefore means that the landlord State's act in initiating proceedings must be not only substantively but also procedurally reasonable.[19]

For propagating this reasonable and fairness principle the court relied upon its earlier judgments in relation to Rent Acts.[20]

There is no discrimination merely because a state policy had not been introduced simultaneously at different levels.[21] The Court explained that when policies are made which have far reaching implications and are dynamic in nature, their implementation in a phased manner is welcome because it receives gradual willing acceptance and invites lesser resistance.[22]

Art. 14 runs as follows : "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India." This provision corresponds to the equal protection clause of the 14th Amendment of the U.S. Constitution which declares: "No State shall deny to any person within its jurisdiction the equal protection of the laws."

Two concepts are involved in Art. 14, *viz.*, 'equality before law' and 'equal protection of laws'.

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13. *John Vallamattom v. Union of India,* (2003) 6 SCC 611 : AIR 2003 SC 2902.
14. *General Manager, Uttaranchal Jal Sansthan v. Laxmi Devi,* (2009) 7 SCC 205 : AIR 2005 SC 3121.
15. *Onkar Lal Bajaj v. Union of India,* (2003) 2 SCC 673 : AIR 2003 SC 2562.
16. *Union of India v. International Trading Co.,* (2003) 5 SCC 437 : AIR 2003 SC 3983.
17. *Rajasthan State Road Transport Corpn. v. Bal Mukund Bairwa (2),* (2009) 4 SCC 299, 317 : (2009) 2 JT 423.
18. *Minoo Framroze Balsara v. Union of India,* AIR 1992 Bom 375.
19. *New India Assurance Co. Ltd. v. Nusli Neville Wadia,* (2008) 3 SCC 279.
20. *Dwarkadas Marfatia and Sons v. Board of Trustees of the Port of Bombay,* (1989) 3 SCC 293; *Ashoka Marketing Ltd. v. Punjab National Bank,* (1990) 4 SCC 406.
21. *Javed v. State of Haryana,* (2003) 8 SCC 369 : AIR 2003 SC 3057.
22. *Ibid.*

The first is a negative concept which ensures that there is no special privilege in favour of any one, that all are equally subject to the ordinary law of the land and that no person, whatever be his rank or condition, is above the law. This is equivalent to the second corollary of the DICEAN concept of the Rule of Law in Britain.[23] This, however, is not an absolute rule and there are a number of exceptions to it, *e.g.*, foreign diplomats enjoy immunity from the country's judicial process; Art. 361 extends immunity to the President of India and the State Governors;[24] public officers and judges also enjoy some protection, and some special groups and interests, like the trade unions, have been accorded special privileges by law.

The second concept, 'equal protection of laws', is positive in content. It does not mean that identically the same law should apply to all persons, or that every law must have a universal application within the country irrespective of differences of circumstances. Equal Protection of the laws does not postulate equal treatment of all persons without distinction. What it postulates is the application of the same laws alike and without discrimination to all persons *similarly* situated. It denotes equality of treatment in equal circumstances. It implies that among equals the law should be equal and equally administered, that the like should be treated alike without distinction of race, religion, wealth, social status or political influence.[25]

Where a particular mode is prescribed for doing an act and there is no impediment in adopting the procedure, the deviation to act in different manner which does not disclose any discernible principle which is reasonable in itself shall be labelled as arbitrary. Every State action must be informed by reason and it follows that an act uninformed by reason is per se arbitrary.[26]

The Supreme Court has explained in *Sri Srinivasa Theatre v. Govt. of Tamil Nadu*,[27] that the two expressions 'equality before law' and 'equal protection of law' do not mean the same thing even if there may be much in common between them. "Equality before law" is a dynamic concept having many facets. One facet is that there shall be no privileged person or class and that none shall be above law. Another facet is "the obligation upon the State to bring about, through the machinery of law, a more equal society…..For, equality before law can be predicated meaningfully only in an equal society…."

Article 14 provides positive and not negative equality. Hence any action or order contrary to law does not confer any right upon any person for similar treatment. Thus unauthorized additional construction and change of user of land cannot be claimed on the basis that the same had been granted in other cases in contravention of law.[28]

Article 14 prescribes equality before law. But the fact remains that all persons are not equal by nature, attainment or circumstances, and, therefore, a mechanical equality before the law may result in injustice. Thus, the guarantee against the denial of equal protection of the law does not mean that identically the same rules of law should be made applicable to all persons in spite of difference in circum-

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23. WADE & PHILLIPS, *CONST. & ADM. LAW*, 87 (1977).
24. *Supra*, Chs. III and VII.
25. *Jagannath Prasad v. State of Uttar Pradesh*, AIR 1961 SC 1245 : (1962) 1 SCR 151; *Mohd. Shaheb Mahboob v. Dy. Custodian*, AIR 1961 SC 1657 : (1962) 2 SCR 371.
26. *Bannari Amman Sugars Ltd. v. CTO*, (2005) 1 SCC 625 : 2004 JT 500.
27. AIR 1992 SC, at 1004.
28. *Vishal Properties (P) Ltd. v. State of Uttar Pradesh*, (2007) 11 SCC 172 : AIR 2007 SC 2924. See also *State of Uttaranchal v. Alok Sharma*, (2009) 7 SCC 647 : (2009) 6 JT 463.

stances or conditions.[29] The varying needs of different classes or sections of people require differential and separate treatment. The Legislature is required to deal with diverse problems arising out of an infinite variety of human relations. It must, therefore, necessarily have the power of making laws to attain particular objects and, for that purpose, of distinguishing, selecting and classifying persons and things upon which its laws are to operate.

The principle of equality of law thus means not that the same law should apply to everyone but that a law should deal alike with all in one class; that there should be an equality of treatment under equal circumstances. It means "that equals should not be treated unlike and unlikes should not be treated alike. Likes should be treated alike".[30]

But when charge of discrimination was made for treating diploma holders and degree holders in the same category, the Supreme Court suddenly said that Art.14 cannot be stretched too far as it will paralyse the administration and repelled the challenge.[31]

Art. 14 thus means that 'equals should be treated alike'; it does not mean that 'unequals ought to be treated equally'. Persons who are in the like circumstances should be treated equally. On the other hand, where persons or groups of persons are not situated equally, to treat them as equals would itself be violative of Art. 14 as this would itself result in inequality. As all persons are not equal by nature or circumstances, the varying needs of different classes or sections of people require differential treatment. This leads to classification among different groups of persons and differentiation between such classes. Accordingly, to apply the principle of equality in a practical manner, the courts have evolved the principle that if the law in question is based on rational classification it is not regarded as discriminatory.[32] The clubbing of those dealers against whom there was no allegation with the handful of those against whom there were allegations of political connection and patronage, results in treating unequals as equals.[33]

Equality of opportunity embraces two different and distinct concepts. There is a conceptual distinction between a non discrimination principle and affirmative action under which the State is obliged to provide a level playing field to the oppressed classes. Affirmative action in the above sense seeks to move beyond the concept of non discrimination towards equalising results with respect to various groups. Both the conceptions constitute 'equality of opportunity'.[34]

A Legislature is entitled to make reasonable classification for purposes of legislation and treat all in one class on an equal footing. The Supreme Court has underlined this principle thus: "Art. 14 of the Constitution ensures equality among equals: its aim is to protect persons similarly placed against discriminatory treatment. It does not however operate against rational classification. A person setting up a grievance of denial of equal treatment by law must establish that between persons similarly circumstanced, some were treated to their prejudice and the differential treatment had no reasonable relation to the object sought to

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29. *Chiranjeet Lal v. Union of India*, AIR 1951 SC 41 : 1950 SCR 869.
30. *Gauri Shankar v. Union of India*, AIR 1995 SC 55, at 58 : (1994) 6 SCC 349.
31. *Dilip Kumar Garg v. State of Uttar Pradesh*, (2009) 4 SCC 753 : (2009) 3 JT 202.
32. *Ashutosh Gupta v. State of Rajasthan*, (2002) 4 SCC 34.
33. *Onkar Lal Bajaj v. Union of India*, (2003) 2 SCC 673 : AIR 2003 SC 2562.
34. *M. Nagaraj v. Union of India*, (2006) 8 SCC 212 : AIR 2007 SC 71.

be achieved by the law."[35] In the context of Karnataka Industrial Areas Development Act, 1966 and the Regulations framed thereunder it has been held that fixation of price at a higher rate for small and fully developed plots and at a lower rate for a large plot not entirely developed and provided with peripheral infrastructural facilities only, was not arbitrary.[36]

Appointment on compassionate ground is never considered a right of a person. In fact, such appointment is violative of rule of equality enshrined and guaranteed under Article 14 of the Constitution. When any appointment is to be made in Government or semi government or in public office, cases of all eligible candidates must be considered alike. This is the mandate of Article 14. Normally, therefore, the State or its instrumentality making any appointment to public office, cannot ignore such mandate. At the same time, however, in certain circumstances, appointment on compassionate ground of dependants of the deceased employee is considered inevitable so that the family of the deceased employee may not starve. The primary object of such scheme is to save the bereaved family from sudden financial crisis occurring due to death of the sole bread earner. It is thus an exception to the general rule of equality and not another independent and parallel source of employment.[37] The court has distinguished employment based on descent and compassionate appointment as the latter is based on an additional factor, namely, death or medical invalidation of a serving employee leaving the family in distress and such a factor may constitute a valid basis of classification.[38]

Article 14 forbids class legislation; it does not forbid reasonable classification of persons, objects and transactions by the Legislature for the purpose of achieving specific ends. Classification to be reasonable should fulfil the following two tests:

(1) It should not be arbitrary, artificial or evasive. It should be based on an intelligible differentia, some real and substantial distinction, which distinguishes persons or things grouped together in the class from others left out of it.

(2) The differentia adopted as the basis of classification must have a rational or reasonable *nexus* with the object sought to be achieved by the statute in question.[39]

Hostile discrimination is obvious where some allottees despite having complied with all conditions, including payment of full amount due, were not given possession, whereas others were granted possession even before payment or after depositing a small proportion of the total dues.[40]

What is however necessary is that there must be a substantial basis for making the classification and that there should be a *nexus* between the basis of classification and the object of the statute under consideration. In other words, there must be some rational *nexus* between the basis of classification and the object intended

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35. *Western U.P. Electric Power and Supply Co. Ltd. v. State of Uttar Pradesh*, AIR 1970 SC 21, 24 : (1969) 1 SCC 817. Also see, *R.K. Garg v. Union of India*, AIR 1981 SC 2138 : (1981) 4 SCC 676; Re: *Special Courts Bill*, AIR 1979 SC 478 : (1979) 1 SCC 380; *State of Uttar Pradesh v. Kamla Palace*, AIR 2000 SC 617 : (2000) 1 SCC 557.

36. *Chairman & MD, BPL Ltd. v. S.P. Gurarajа*, (2003) 8 SCC 567 : AIR 2003 SC 4536.

37. *General Manager, State Bank of India v. Anju Jain* (2008) 8 SCC 475.

38. *V. Sivamurthy v. State of A.P.*, (2008) 13 SCC 730 : (2008) 11 SCALE 294.

39. *Laxmi Khandsari v. State of Uttar Pradesh*, AIR 1981 SC 873, 891 : (1981) 2 SCC 600. Test for valid classification restated. *State of Haryana v. Jai Singh*, (2003) 9 SCC 114 : AIR 2003 SC 1696; *Welfare Asson. ARP v. Ranjit P. Gohil*, (2003) 9 SCC 358; See also (2004) 1 SCC 369 : AIR 2003 SC 3057; See also *Javed v. State of Haryana*, (2003) 8 SCC 369 : AIR 2003 SC 3057.

40. *Government of A.P. v. Maharshi Publishers Pvt. Ltd.*, (2003) 1 SCC 95 : AIR 2003 SC 296.

to be achieved. Therefore, mere differentiation or inequality of treatment does not *per se* amount to discrimination within the inhibition of the equal protection clause. To attract Art. 14, it is necessary to show that the selection or differentiation is unreasonable or arbitrary; that it does not rest on any rational basis having regard to the object which the Legislature has in view in making the law in question.[41] As the Supreme Court has explained: "The differentia which is the basis of the classification and the Act are distinct things and what is necessary is that there must be a *nexus* between them."[42] As the Supreme Court has observed recently in *Thimmappa*:[43]

> "When a law is challenged to be discriminatory essentially on the ground that it denies equal treatment or protection, the question for determination by the Court is not whether it has resulted in inequality but whether there is some difference which bears a just and reasonable relation to the object of legislation. Mere differentiation does not *per se* amount to discrimination within the inhibition of the equal protection clause. To attract the operation of the clause it is necessary to show that the selection or differentiation is unreasonable or arbitrary, that it does not rest on any rational basis having regard to the object which the legislature has in view".

Again, the Supreme Court has observed:[44]

> "It is settled law that differentiation is not always discriminatory. If there is a rational nexus on the basis of which differentiation has been made with the object sought to be achieved by particular provision, then such differentiation is not discriminatory and does not violate the principles of Article 14 of the Constitution".

The Supreme Court has however warned against over-emphasis on classification. The Court has explained that 'the doctrine of classification is only a subsidiary rule evolved by the courts to give practical content to the doctrine of equality, over-emphasis on the doctrine of classification or anxious or sustained attempt to discover some basis for classification may gradually and imperceptibly erode the profound potency of the glorious content of equity enshrined in Art. 14 of the Constitution. The over-emphasis on classification would inevitably result in substitution of the doctrine of classification for the doctrine of equality… Lest, the classification would deny equality to the larger segments of the society'.[45]

Marginal over inclusiveness or under inclusiveness, will not vitiative the classification.[46]

Whether a classification adopted by a law is reasonable or not is a matter for the courts to decide. *Caterpillar*[47] is another example of under classification and

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41. *Jaila Singh v. State of Rajasthan*, AIR 1975 SC 1436 : (1976) 1 SCC 682. But when charge of discrimination was made for treating diploma holders and degree holders in the same category, the Supreme Court held that Art. 14 cannot be stretched too far as it will paralyze the administration and repelled in challenge. *Dilip Kumar Garg v. State of Uttar Pradesh*, (2009) 4 SCC 753 : (2009) 3 JT 202.

42. *In re Special Courts Bill, 1978*, AIR 1979 SC 478 : (1979) 1 SCC 380.

43. *K. Thimmappa v. Chairman, Central Board of Directors*, AIR 2001 SC 467 : (2001) 2 SCC 259.

44. *Union of India v. M.V. Valliappan*, (1999) 6 SCC 259, 269 : AIR 1999 SC 2526.

45. *L.I.C. of India v. Consumer Education and Research Centre*, AIR 1995 SC 1811, 1822 : (1995) 5 SCC 482, Also see, *infra*. Instance of over classification *E. V. Chinnaiah v. State of A.P.*, (2005) 1 SCC 394 : AIR 2005 SC 162, true character of the statute to be examined and not merely the preamble.

46. *Basheer alias N. P. Basheer v. State of Kerala*, (2004) 3 SCC 609 : AIR 2004 SC 2757.

47. *Caterpillar India (P) Ltd. v. Western Coalfields Ltd.*, (2007) 11 SCC 32 : AIR 2007 SC 2971.

Article 14. Here a preference policy was adopted by which the Government granted price preference to Public Sector Enterprises (PSEs) to the effect that the price quoted by them which was less than 10% of the lowest price would be reckoned while taking a decision on finalizing the tender. The Supreme Court found that the policy suffered from under classification and since an uniform policy of protection without considering whether such protection was necessary or not was arbitrary. The question of reasonableness of classification has arisen in innumerable cases. The twin tests applied for the purpose are, however, quite flexible. The courts, however, show a good deal of deference to legislative judgment and do not lightly hold a classification unreasonable. A study of the cases will show that many different classifications have been upheld as constitutional.[48] There is no closed category of classification; the extent, range and kind of classification depend on the subject-matter of the legislation, the conditions of the country, the economic, social and political factors at work at a particular time. The differential treatment must have a rational relation to the object sought to be achieved. Constitutional interpretation being a difficult task, its concept varies from statute to statute, fact to fact, situation to situation and subject matter to subject matter.[49] There is no discrimination when a financial benefit is made available for those who had been invalidated out of service because of their tenure of service was reduced due to invalidment on account of disability or war injury and those who retired in the normal course.[50] And merely because in the past two categories of employees had been treated differently does not mean that they cannot be equated subsequently.[51]

It is not necessary that for a classification to be valid, its basis must always appear on the face of the law. To find out the reasons and the justification for the classification, the court may refer to relevant material, *e.g.* objects and reasons appended to a Bill, parliamentary debates, affidavits of the parties, matters of common knowledge, the background circumstances leading to the passage of the Act, etc.[52]

The concept of equality allows differential treatment but it prevents distinctions that are not properly justified. Justification needs each case to be decided on a case to case basis.[53] For example, there is no discrimination by reason of non-alteration of allotment price for a plot of land in 1993 paid by a person for a larger plot exchanged in 1996 whereas another person whose allotment was made in 1996 at 1996 price since the price paid by the former for the exchanged land had been held constant only for the acreage allotted in 1993 and for the excess acreage allotted in 1996, the former had also been charged at the 1996 price.[54]

When a person seeks to impeach the validity of a law on the ground that it offends Art. 14, the onus is on him to plead and prove the infirmity. If a person complains of unequal treatment, the burden lies on him to place before the court sufficient material from which it can be inferred that there is unequal treatment.

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48. *Swaroop Vegetables Products Industries v. State of Uttar Pradesh*, AIR 1984 SC 20 : (1983) 4 SCC 24.
49. *Chhattisgarh Rural Agriculture Extension Officers Assn. v. State of M.P.*, (2004) 4 SCC 646 : AIR 2004 SC 2020.
50. *P. K. Kapur v. Union of India*, (2007) 9 SCC 425, 430 : (2007) 3 JT 98.
51. *Dilip Kumar Garg v. State of Uttar Pradesh*, (2009) 4 SCC 753 : (2009) 3 JT 202.
52. *Jagdish Pandey v. Chancellor, Bihar University*, AIR 1968 SC 353 : (1968) 1 SCR 231; *State of Jammu & Kashmir v. T.N. Khosa*, AIR 1974 SC 1 : (1974) 1 SCC 19.
53. *M. Nagaraj v. Union of India* , (2006) 8 SCC 212 : AIR 2007 SC 71.
54. *NOIDA v. Arvind Sonekar*, (2008) 11 SCC 31 : AIR 2008 SC 1983.

A mere plea that he has been treated differentially is not enough. He must produce necessary facts and figures to establish, that he has not only been treated differently from others, but that he has been so treated from persons similarly situated and circumstanced without any reasonable basis and that such differential treatment has been made unjustifiably. The initial presumption is in favour of the validity of the law, and if the person fails to adduce sufficient evidence in support of his challenge to the law in question, his plea of the provision in question being violative of Art. 14 cannot be entertained. The state can lean on the initial presumption of validity of the law.[55] The Supreme Court has recently explained the principle of initial presumption of validity as follows in *Ashutosh Gupta v. State of Rajasthan :*[56]

> "There is always a presumption in favour of the constitutionality of enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles. The presumption of constitutionality stems from the wide power of classification which the legislature must, of necessity possess in making laws operating differently as regards different groups of persons in order to give effect to policies. It must be presumed that the legislature understands and correctly appreciates the need of its own people."

The Supreme Court has explained the rationale underlying this rule as follows: many a time, the challenge is based on the allegation that the impugned provision is discriminatory as it singles out the petitioner for hostile treatment, from amongst persons who, being situated similarly, belong to the same class as the petitioner. Whether there are other persons who are situated similarly as the petitioner is a question of fact. And whether the petitioner is subjected to hostile discrimination is also a question of fact. That is why the burden to establish the existence of these facts rests on the petitioner. "To cast the burden of proof in such cases on the state is really to ask it to prove the negative that no other persons are situated similarly as the petitioner and that the treatment meted out to the petitioner is not hostile."[57] Hostile discrimination can only arise as between persons who are similarly situated. Hence, it was not possible for the candidate for Deputy Manager's post to claim that he had been discriminated against because a Joint Manager had been appointed since there was nothing common between the two posts. It was perfectly valid for the employer to fill up one category of posts and decline to do so for other categories of posts for business reasons.[58]

Thus, in *Nachane*,[59] when the employees of the Life Insurance Corporation were exempted from the provisions of the Industrial Disputes Act (IDA) by a law of Parliament, and these employees challenged the law as discriminatory, the Supreme Court stated that the burden of establishing hostile discrimination was on the petitioners (L.I.C. employees); it was for them to show that they and the employees of other establishments to whom the provisions of the IDA applied were similarly circumstanced to justify the contention that by excluding the LIC employees from the purview of the IDA they had been discriminated against. No materials had been produced before the Court for the purpose. There cannot be

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55. *G.K. Krishnan v. State of Tamil Nadu,* AIR 1975 SC 583 : (1975) 1 SCC 375.
Also see *Ashutosh Gupta v. State of Rajasthan,* (2002) 4 SCC 34 at 41 : AIR 2002 SC 1533.
56. (2002) 4 SCC 34 at 41 : AIR 2002 SC 1533.
57. *Deena v. Union of India,* AIR 1983 SC 1154, 1167 : (1984) 1 SCC 29.
58. *Food Corporation of India v. Bhanu Lodh,* (2005) 3 SCC 618 : AIR 2005 SC 2775.
59. *A.V. Nachane v. Union of India,* AIR 1982 SC 1126, 1132 : (1982) 1 SCC 205.

perfect equality in any matter on an absolute scientific basis and certain inequities here and there would not offend Art. 14.[60] Again exclusion of prisoners convicted of crimes against women from scheme of remission to prevent crimes against women cannot be said to violate any reasonable principle or concept of law.[61] It has been held that IMNS is a distinct and separate class by itself, even though it is a part of the Indian Army.[62] In other words permissible classification would include a class even though it is a part of a larger class.

A statute carries with it a presumption of Constitutionality. Such a presumption extends also in relation to a law which has been enacted for imposing reasonable restrictions on the Fundamental Rights. A further presumption may also be drawn that the statutory authority would not exercise the power arbitrarily.[63]

On the other hand, if discrimination is writ large on the face of the legislation, the onus may shift to the state to sustain the validity of the legislation in question.[64]

In *Deepak Sibal v. Punjab University*,[65] the Supreme Court has pointed out that a classification need not be made with "mathematical precision". But, if there is little or no difference between the persons or things which have been grouped together and those left out of the group, then classification cannot be regarded as reasonable. The Court has also pointed out that to consider reasonableness of classification it is necessary to take into account the objective for such classification. "If the objective be illogical, unfair and unjust, necessarily the classification will have to be held as unreasonable." Also, surrounding circumstances may be taken into consideration in support of the constitutionality of a law which may otherwise be hostile or discriminatory in nature. "But the circumstances must be such as to justify the discriminatory treatment or the classification subserving the object sought to be achieved."

At times, even administrative necessity or convenience has been upheld as a basis of classification.[66] This is especially so in matters of taxation and economic regulation, because of the complexities involved in these areas, *e.g.*, a bewildering conflict of expert opinion exists on economic matters.[67]

Considering the totality of circumstances and the financial climate world over, if it was thought as a matter of policy to have speedier legal method to recover dues over and above statutes already in existence providing for speedy recovery, such a policy decision cannot be faulted nor is it a matter to be gone into by the Courts, to test the legitimacy of such a measure relating to financial policy.[68]

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60. *H. P. Gupta v. Union of India*, (2002) 10 SCC 658 : (2001) 9 JT 78.
61. *Sanaboina Satyamarayana v. Govt. of AP.*, (2003) 10 SCC 78 : AIR 2003 SC 3074.
62. *Jasbir Kaur v. Union of India*, (2003) 8 SCC 720 : AIR 2004 SC 293.
63. *People's Union for Civil Liberties v. Union of India*, (2004) 2 SCC 476 : AIR 2004 SC 1442.
64. *Dalmia v. Tendolkar*, AIR 1958 SC 538 : 1959 SCR 279; *Jagdish Pandey v. Chancellor, Bihar University, supra*, footnote 52; *State of Jammu & Kashmir v. T.N. Khosa, supra*, footnote 52; also, *infra*.
65. AIR 1989 SC 903 : (1989) 2 SCC 145; Need not be scientifically perfect or logically complete *Dharam Dutt v. Union of India*, (2004) 1 SCC 712 : AIR 2004 SC 1295.
66. *Supdt. & Remembrancer of Legal Affairs v. State of West Bengal*, AIR 1975 SC 1030 : (1975) 4 SCC 754.
67. *State of Gujarat v. Ambica Mills*, AIR 1974 SC 1300 : (1974) 4 SCC 656; *San Antonio School District v. Rodrigues*, (1973) 411 U.S. 1; *infra*.
68. *Mardia Chemicals Ltd. v. Union of India*, (2004) 4 SCC 311 : (2004) 4 JT 308.

The effect of these various principles is to enable the courts to uphold legislation in most of the cases and give the benefit of doubt as to the purpose of classification to the legislature. On the whole, the courts show reluctance to void legislation on the ground of its incompatibility with Art. 14. This judicial self-limitation has been taken to such length that, at times, voices of protest have been raised from the bench itself against too much judicial anxiety "to discover some basis for classification". A warning has been sounded that such an approach would substitute the doctrine of classification for the doctrine of equality and deprive it of much of its content. The Supreme Court has stated: "Over emphasis on the doctrine of classification or an anxious and sustained attempt to discover some basis for classification may gradually and imperceptibly deprive the guarantee of equality of its spacious content."[69] But the fact remains that many a time the Supreme Court itself has ignored this warning and upheld legislation, as stated above, by finding some policy within the law.

Article 14 will apply even if the laws emanate from the Parliament and a State legislature. As such since the compensation payable under the Land Acquisition Act, 1894 to the landowner would be more than what is payable under the Land Acquisition and Requisition, U.P. Avas Evam Vikas Parishad Adhiniyam, 1965 (1 of 1966), Sections 29 and 32 of the Adhiniyam were violative of Article 14 and the provisions of the Land Acquisition Act are to be read into the provisions of the Adhiniyam.[70]

Article 14 does not mandate that a person should be granted illegal and unjustified relief similar to those granted to others earlier.[71]

The Supreme Court has reiterated that the Courts cannot act as an Appellate Authority and examine the correctness, suitability and appropriateness of a policy nor are courts advisors to the executive on matters of policy which the executive is entitled to formulate. Judicial review in this area is confined to the examination as to whether any Fundamental Rights have been violated or it is opposed to the provisions of the Constitution or any statutory provision or is manifestly arbitrary. It is through this "manifestly arbitrary door" that challenges are likely to be made to formulation of policies and in such a case the Court must necessarily examine the provisions of the policy to come to the conclusion as to whether it is manifestly arbitrary or not. In effect the Court to a certain extent will act as an appellate authority although the court says that the courts cannot act as such an appellate authority.[72] The Court rejected the challenge to the granting of national film awards by saying that the object was to select the best of Indian films made for public exhibition in various categories and give them national awards. The precise question which arose was as to whether the Government could impose a condition that the entry of films for the awards will be restricted to only those

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69. *Mohd. Shujat Ali v. Union of India*, AIR 1974 SC 1631, 1653 : (1975) 3 SCC 76.
Also, SUBBA RAO, J., in *Lachhman Dass v. State of Punjab*, AIR 1963 SC 222 : (1963) 2 SCR 190; see also *Commissioner of Police v. Acharya Jagadishwarananda Avadhuta*, (2004) 12 SCC 770 : AIR 2004 SC 2984 – different basis of classification.

70. *Savitri Cairae v. U. P. Avas Evam Vikas Parishad*, (2003) 6 SCC 255 : AIR 2003 SC 2725, the contrary view expressed in the earlier editions of the book has to this extent must be considered to be not tenable. However the question of laws emanating from two state legislature being tested by comparison may not apply because of limits of territorial operation.

71. *Anand Buttons Ltd. v. State of Haryana*, (2005) 9 SCC 164 : AIR 2005 SC 565.

72. *Directorate of Film Festivals v. Gaurav Ashwin Jain*, (2007) 4 SCC 737 : AIR 2007 SC 1640.

which posses a certificate issued by the Censor Board under Section 5A of the Act. These matters were considered by the Court to be matters of policy and judicial review is concerned with the legality of the policy and not the wisdom or soundness of the policy. It emphasizes that there was nothing illogical or unreasonable or arbitrary about a policy to select only the best from among films certified for public exhibition.

Arbitrariness on the possibility that a power may be abused, despite the guidelines, in the provisions providing for such power cannot be held to be arbitrary and unreasonable.[73]

When a statute is impugned under Art. 14, it is the function of the court to decide whether the statute is so arbitrary or unreasonable that it has to be struck down. At best, a statute upon a similar subject deriving its authority from another source can be referred to, if its provisions have been held to be unreasonable, or have stood the test of time, only for the purpose of indicating what may be said to be reasonable in the context,[74] and the extent to which it is not unconstitutional.[75]

Perpetuation of hostile discrimination is not contemplated within Art. 14.[76]

But the court has held that even if a law cannot be declared *ultra vires* on the ground of hardship, it can be so declared on the ground of total unreasonableness applying the Wednesbury "unreasonableness".[77]

The benefit of "equality before law" and "equal protection of law" accrues to every person in India whether a citizen or not. As the Supreme Court has observed on this point:

> "We are a country governed by the Rule of Law. Our Constitution confers certain rights on every human-being and certain other rights on citizens. Every person is entitled to equality before the law and the equal protection of the laws."[78]

C. ILLUSTRATIONS

The question of reasonableness of classification *vis-a-vis* Art. 14 in the light of the principles stated above has arisen before the courts in a large number of cases. Some of these cases are noted below.

(a) MISCELLANEOUS SITUATIONS

Heirs of landowners sought restoration of their acquired lands in terms of Standing Order 28 framed by State Government read with para 493 of Land Ad-

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73. *Commissioner of Central Excise Jamshedpur v. Dabur (India) Ltd.*, (2005) 3 SCC 646 : (2005) 5 JT 582.

74. *State of Madhya Pradesh v. Mandavar*, AIR 1955 SC 493 : (1955) 2 SCR 186; *Bar Council, Uttar Pradesh v. State of Uttar Pradesh*, AIR 1973 SC 231 : (1973) 1 SCC 261; *Sant Lal Bharti v. State of Punjab*, AIR 1988 SC 485 : (1988) 1 SCC 366; *State of Tamil Nadu v. Ananthi Ammal*, AIR 1995 SC 2114 : (1955) 1 SCC 519.

75. *Javed v. State of Haryana*, (2003) 8 SCC 369 : AIR 2003 SC 3057.

76. See also *State of Kerala v. K. Prasad*, (2007) 7 SCC 140 : AIR 2007 SC 2701.

77. *Grand Kakatiya Sheraton Hotel and Towers Employees & Workers Union v. Srinivasa Resorts Ltd.*, (2009) 5 SCC 342 : AIR 2009 SC 2337.

78. *Faridabad CT. Scan Centre v. D.G. Health Services*, AIR 1997 SC 3801 : (1997) 7 SCC 752.
Also, *Chairman, Railway Board v. Chandrima Das*, AIR 2000 SC 988, 997 : (2000) 2 SCC 465.

ministration Manual providing for return of the agricultural lands to landowners or their heirs when the lands were no longer required for the purposes for which those were acquired. While acting on the said policy decision, the government released lands in favour of some other persons, but respondents' claim for restoration of their lands was denied without showing why the policy could not be applied in favour of respondents also. Though Standing Order 28 and para 493 did not create any right in favour of any person to get back possession of the land, but while acting under such standing order or manual the government cannot discriminate between persons similarly situated.[79]

It is valid to exempt military and naval messes and canteens from restrictions on use or consumption of liquor, for military has its own traditions and mode of life and, therefore, there is an understandable basis for classification. The differentiation made by the prohibition law between Indians and foreigners staying in India for a short time is also valid.[80] For admission to a medical college of a State non-residents were required to pay capitation fee but residents in the State were exempt from the same. This classification, based on residence within the State, is valid.[81]

In relation to S.18 of the Atomic Energy Act, 1962 which confers power on the Central Government to make orders restricting the disclosure of certain specified information, has been held to be valid. The Supreme Court noted the sensitivity of the subject matter of the Act and pointed out that it could not be said the section employed words which provided for no criteria nor could it be said that no standard had been laid down by Parliament the exercise of the power. It is furthermore not a case where principles on which the power of the Central Government is to be exercised have not been disclosed or essential legislative functions have been delegated.[82]

A State law passed with a view to preserve and improve livestock permitted the killing of buffaloes, sheep and goats, but totally banned the killing of cows, bulls and calves. Cows and their calves, bulls and bullocks are important for the agricultural economy of the country; female buffaloes are milch cattle; bullocks are more useful as draught animals than male buffaloes; sheep and goat have not much utility as draught or milch animals. The different categories of animals being thus susceptible of classification into separate groups on the basis of their usefulness to society, the butchers killing each category may also be placed in distinct classes according to the effect their occupations produce on society, and, accordingly, the Act was held valid.[83]

Difference between Indian and European prisoners in the matter of treatment and diet violates Art. 14.[84]

Where some allottees despite having complied with all conditions, including payment of full amount due, were not given possession, whereas others were even before making payment or after depositing a small proportion of the total

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79. *State of Haryana v. Gurcharan Singh* (2004) 12 SCC 540.
80. *State of Bombay v. Balsara,* AIR 1951 SC 318 : 1951 SCR 682.
81. *Joshi v. Madhya Bharat,* AIR 1955 SC 334 : (1955) 1 SCR 1215.
82. *People's Union for Civil Liberties v. Union of India,* (2004) 2 SCC 476 : AIR 2004 SC 1442.
83. *Quareshi v. State of Bihar,* AIR 1958 SC 731 : 1959 SCR 333.
84. *Madhu Limaye v. Supdt., Tihar Jail, Delhi,* AIR 1975 SC 1505 : (1975) 1 SCC 525.
Also see, *Pannalal Binjraj, infra.*

due, it was indicative of hostile discrimination against the allottees who have paid up and that undue favour had been shown to the others.[85]

In *Ram Sarup v. Munshi*[86], the Supreme Court has held that the right of pre-emption based on consanguinity did not infringe Art. 19(1)(f). But, later, in *Ram Prakash v. State of Haryana,*[87] the Court ruled that such a right is inconsistent with Art. 14 characterising it as "a relic of the feudal past" and "inconsistent with modern ideas". Right of pre-emption in favour of co-sharers or tenants has however been held to be valid.

Failure to implement a scheme within a reasonable time may amount to unreasonableness infringing Art.14.[88]

The Bihar Hindu Religious Trusts Act excludes the Sikhs from its purview and provides for separate trust boards for Hindus and Jains. This is valid because there are some differences between Hindus, Sikhs and Jains in essential details of their faiths, religious practices and organisation of their trusts; it cannot be said that Sikhs, Hindus and Jains are situated alike in the matter of religious trusts in Bihar.[89]

Under the Land Acquisition Act, the government can acquire land for a government company or a public company but not for a private company or an individual. This is a valid classification. The intention of the legislature clearly is that private companies should not have the advantage of acquiring land inasmuch as the profit of their venture goes to a few hands.[90]

In-service employees and retirees form different classes and, as such, there was no violation of Article 14 if they are treated differently, namely, where full and free medical facilities is provided to in-service defence personnel but not to retired defence employees.[91]

A legal provision providing for compulsory transfer of land by a landowner to the municipal committee for a public purpose without payment of compensation has been held to be violative of Art. 14.[92]

The imposition of the condition of prohibition on transfer of land granted to a backward class for a particular period does not constitute any unreasonable restriction.[93]

Special provisions can be made by a Legislature to protect and preserve the economic interests of persons belonging to the Scheduled Castes and Scheduled Tribes and to prevent their exploitation.[94]

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85. *Govt. of A. P. v. Maharshi Publishers (P) Ltd.* (2003) 1 SCC 95 : AIR 2003 SC 296.
86. See, *infra*, Ch. XXXI, Sec. B, under Art. 19(1)(*f*).
Also see, *Bhau Ram v. Baijnath Singh, infra; Sant Ram v. Labh Singh*, AIR 1965 SC 314 : (1964) 7 SCR 756.
87. AIR 1986 SC 859 : (1986) 2 SCC 249.
88. *Pramila Suman Singh v. State of Maharashtra,* (2009) 2 SCC 729 : (2009) 1 JT 665.
89. *Moti Das v. Sahi*, AIR 1959 SC 942 : 1959 Supp (2) SCR 563.
90. *R.L. Arora v. State of Uttar Pradesh*, AIR 1964 SC 1230 : (1964) 6 SCR 784.
91. *Confederation of Ex-servicemen Association v. Union of India,* (2006) 8 SCC 399 : AIR 2006 SC 2945.
92. *Yogendra Pal v. Municipality, Bhatinda,* AIR 1994 SC 2550 : (1994) 5 SCC 709.
93. *Bhadrappa v. Tolacha Naik,* (2008) 2 SCC 104 : AIR 2008 SC 1080.
94. *Manchegowda v. State of Karnataka,* AIR 1984 SC 1151 : (1984) 3 SCC 301. Also see, Ch. XXII, *infra.*

When a statute provides for consultation but procedure for holding such consultation, the competent authority can evolve its own procedure and such a provision cannot be held to be arbitrary.[95]

The Kerala Agrarian Relations Act, 1961, fixing the maximum land-ceiling in the State was declared to be discriminatory under Art. 14 on three grounds: (i) it fixed a ceiling on tea, coffee and rubber plantations but not on those of areca and pepper and there appeared to be no reason for making such a distinction; (ii) by giving an artificial definition to the term 'family' which did not conform to any type of families in the State, discrimination arose in the matter of land-holding; (iii) for land in excess of the ceiling, different cuts were made if the amount of compensation was over Rs. 15,000 and this was discriminatory as there was no reason why two persons should be paid at different rates when they were deprived of property of the same kind but only different in extent.[96]

The provisions of the Public Premises Eviction Acts and the Rules are required to be construed in the light of the tests as envisaged under Article 14 of the Constitution and with a view to give effect thereto, the doctrine of purposive construction may have to be taken recourse to.[97]

Whenever an Act is amended, there is bound to be some difference in treatment between transactions completed before the amendment and those which are to take place in future, but this is not discriminatory under Art. 14.[98]

Mere absence of provision for representation/appeal, would not render a discretionary power arbitrary or discriminatory when such power was exercised by the highest authority and for specified reason.[99]

A rule of the Rajasthan High Court required that for appointment to the Rajasthan Higher Judicial Service, an advocate must have practised for 7 years in the High Court of Rajasthan, or the courts subordinate thereto. In *Moolchandani*,[99a] the Supreme Court declared the rule as being inconsistent with Art. 14 as the classification made by the rule was not founded on any intelligible differentia having a reasonable *nexus* with the object sought to be achieved.

(b) UNGUIDED DISCRETION

Discretion exercisable according to a policy or for a purpose clearly stated in the statute, is not unrestricted discretion.[99b] and, as such, the statute cannot be considered as conferring arbitrary power.

(c) CUT-OFF DATES

The Government issued an office memorandum announcing a liberalised pension scheme for retired government servants but made it applicable to those who

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95. *Chairman & MD BPL Ltd. v. S. P. Gururaja,* (2003) 8 SCC 567 : AIR 2003 SC 4536.
96. *K. Kunhikonam v. State of Kerala,* AIR 1962 SC 723 : 1962 Supp (1) SCR 829.
Also, *Krishnaswami v. State of Madras,* AIR 1964 SC 1515 : (1964) 7 SCR 82.
97. *New India Assurance Co. Ltd. v. Nusli Neville Wadia,* (2008) 3 SCC 279 : AIR 2008 SC 876.
98. *Udai Ram v. Union of India,* AIR 1968 SC 1138; *Jain Bros. v. Union of India,* AIR 1970 SC 778 : (1969) 3 SCC 311.
99. *Indian Airlines Ltd. v. Prabha D. Kanan,* (2006) 11 SCC 67 : AIR 2007 SC 548.
99a. *Ganga Ram Moolchandani v. State of Rajasthan,* AIR 2001 SC 2616 : (2001) 6 SCC 89.
99b. *Federation of Rly. Officers Assn. v. Union of India,* (2003) 4 SCC 289 : AIR 2003 SC 1344.

had retired after March 31, 1979. The Supreme Court in *Nakara*[1] held the fixing of the cut-off date to be discriminatory as violating Art. 14. The Court argued that all pensioners retiring either before the cut-off date or thereafter formed one class. The division of pensioners into two classes on the basis of the date of retirement was not based on any rational principle because a difference of two days in the matter of retirement could have a traumatic effect on the pensioner. Such a classification was held to be arbitrary and unprincipled as there was no acceptable or persuasive reason in its favour. The said classification had no rational nexus with the object sought to be achieved. But the Court has recognised that whenever a cut off date is fixed, a question may arise as to why a person would suffer only because he comes within the wrong side of the cut-off date. But the fact that some persons or a section of society would face hardship, by itself, cannot be a ground for holding that the cut-off date so fixed is *ultra vires* Article 14.[2]

The *Nakara* ruling was considered by the Supreme Court in *Krishna Kumar v. Union of India*.[3] The Supreme Court ruled in this case that the option given to the employees covered by the Provident Fund Scheme to switch over to the pension scheme with effect from the specified cut-off date would not be violative of Art. 14. The Court argued that *Nakara* never required that all retirees formed a class and that no further classification could be possible. Pension-retirees and provident-fund-retirees do not form one homogeneous class and different rules apply to the two groups. It would not therefore be reasonable to argue that whatever applies to the pension-retirees must also be equally applicable to the provident-fund-retirees. The rights of each provident fund retirees crystallise on his retirement and no continuing obligation remains thereafter. But in case of a pension retiree, the obligation continues till his death.

Financial constraint is a valid ground for fixation of cut-off date for grant of benefit of increased quantum of death-cum-retirement gratuity. The action of Government in limiting the said benefit to government employees who died or retired on or after 1-4-1995 *i.e.* the cut-off date was not arbitrary, irrational or violative of Art. 14.[4]

When the army personnel claimed on the basis of *Nakara* the same pension rights irrespective of their date of retirement, the Supreme Court negatived the contention in *Indian Ex-Service League v. Union of India*"[5]

According to an office memorandum issued in 1979, a portion of the dearness allowance was to be treated as pay for the purpose of retirement benefits in respect of government servants who retired on or after the 30th September, 1977. The government servants who had retired before 30th September, 1977, claimed citing *Nakara* that the benefit ought to have been extended to all retired govern-

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1. *D.S. Nakara v. Union of India,* AIR 1983 SC 130 : (1983) 1 SCC 305.
Also see, *M.C. Dhingra v. Union of India,* (1996) 7 SCC 564 : AIR 1996 SC 2963.

2. *Ramrao v. All India Backward Class Bank Employees Welfare Assn.,* (2004) 2 SCC 76 : AIR 2004 SC 1459.

3. AIR 1990 SC 1782 : (1990) 4 SCC 207.
Also see, *All India Reserve Bank Retired Officers Ass. v. Union of India,* (1992) Suppl. (1) SCC 664 : AIR 1952 SC 767. Further see *R. P. Bhardwaj v. Union of India,* (2005) 10 SCC 244, relating to cut off dates; See also *Achhaibar Maurya v. State of Uttar Pradesh,* (2008) 2 SCC 639 : (2007) 14 Scale 425.

4. *State of Punjab v. Amar Nath Goyal,* (2005) 6 SCC 754 : AIR 2006 SC 171.

5. (1991) 2 SCC 104 : AIR 1991 SC 1182.

ment servants irrespective of their date of retirement. The Supreme Court rejected this contention and upheld the validity of the memorandum in *Union of India v. B.P.N. Menon*,[6] thus, adopting a stance at variance with *Nakara*.

The Court now took the position that any revised scheme in respect of post-retirement benefits can be implemented from a cut-off date which can be regarded as reasonable and rational in the light of Art. 14. The Court now maintained that whenever a revision takes place, a cut-off date becomes imperative because the benefit has to be allowed within the financial resources available with the government. Due to many constraints, it is not always possible to confer the same benefits to one and all irrespective of the dates of their retirements. The memorandum in the instant case was the result of an agreement between the government and the staff union. It was based on the recommendation of the Third Pay Commission. The date fixed as the cut-off date was held to be as not arbitrary as the price index level on this date had reached 272. The Court observed: "Not only in matters of revising the pensionary benefits but even in respect of revision of scales of pay, a cut-off date on some rational or reasonable basis has to be fixed for extending the benefits."

The respondent, a commissioned officer retired on May 18, 1982. According to the rules prevailing at the time, he was held not entitled to any pension. On January 1, 1986, the rules were amended and persons in his position now became entitled to pensionary benefits. He now laid a claim for grant of pension pleading the *Nakara* ruling in his support. But the Court rejected his claim holding that the ratio of *Nakara* had no application to the factual situation in the instant case.[7] *Nakara* prohibited discrimination between pensioners forming a single class and bound by the same rules. The cut-off date chosen in that case was held to be arbitrary. In the instant case the respondent was not eligible for pension under the rules prevalent then. The new rules were not given any retrospective effect and, therefore, the respondent cannot claim any pension because of the new rule "This is not a case where a discrimination is being made among pensioners who were similarly situated".

The Supreme Court has observed in the case noted below:[8]

> "It is open to the State or to the Centre, as the case may be, to change the conditions of service unilaterally. Terminal benefits as well as pensionary benefits constitute conditions of service. The employer has the undoubted power to revise the salaries and/or the pay scales as also terminal benefits/pensionary benefits. The power to specify a date from which the revisions of pay scales or terminal benefits/pensionary benefits, as the case may be, shall take effect is a concomitant of the said power. So long as such date is specified in a reasonable manner, i.e., without bringing about a discrimination between similarly situated persons, no interference is called for by the court in that behalf… The only question is whether the prescription of the date is unreasonable or discriminatory…"[9]

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6. AIR 1994 SC 2221 (1994) 4 SCC 68.
7. *Commander Head Quarter, Calcutta v. Biplabendra Chanda*, AIR 1997 SC 2607 : (1997) 1 SCC 208.
8. *State of West Bengal v. Rattan Behari Dey*, (1993) 4 SCC 62 : 1993 (2) LLJ 741.
9. Also see, *Union of India v. Lieut. (Mrs.) E. Iacats*, (1997) 7 SCC 334 : 1997 (2) LLJ 830.

In *Hari Ram Gupta v. State of Uttar Pradesh*,[10] the State Government refused to give the benefit of pension to those who had retired prior to the coming into force of the new rules. Refusing to apply the *Nakara* ruling to the instant factual situation, the Court pointed out that in *Nakara* all pensioners formed a class as a whole and the Court refused to micro-classify them by an arbitrary, unprincipled and unreasonable eligibility criteria.

In the case noted below,[11] the employees were governed by the contributory Provident Fund Scheme. With effect from 1-7-1986, a scheme was introduced. The question which arose was whether the pension scheme ought to be applied to those who had already retired before the introduction of the pension scheme, i.e. 1-7-1986. The Supreme Court rejected the claim. As per the rules prevalent at the time, the retirees had received all their retiral benefits. If the pension scheme were made applicable to all past retirees, the resulting financial burden would amount to Rs. 200 crores which would be beyond the capacity of the employer. The reasons given for introducing the scheme from 1-7-1986 *inter alia* was financial constraint—a valid ground. The Court ruled that the "retired" employees and those who were in employment on 1-7-1986, "cannot be treated alike as they do not belong to one class. The workmen, who had retired after receiving all the benefits available under the Contributory Provident Fund Scheme, cease to be employees of the appellant Board w.e.f. the date of their retirement. They form a separate class." Thus, there was no illegality in introducing the pension scheme prospectively from 1-7-1986, and not making it applicable retrospectively to those who had retired before that date.

A regulation providing for termination of service of an air hostess in Air India International on her first pregnancy has been held to be arbitrary and abhorrent to the notions of a civilized society.[12] Exclusion from the Minimum Wages Act of the workmen employed by government on famine relief work, and payment to them of wages lower than the minimum wages, violates Art. 14, "The rights of all the workers will be the same whether they are drawn from an area affected by drought and scarcity conditions or come from elsewhere."[13]

Stipends payable by the State Government to the post-graduate students of Agricultural university as well as of medical colleges, were enhanced but from different dates. The Court declared it to be discriminatory as the State Government failed to show that there was any reasonable basis or intelligible differential for fixing different dates for paying increased stipends to the two streams of students, especially when the Government had been maintaining parity all along among these students.[14]

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10. AIR 1998 SC 2483 : (1998) 6 SCC 328.
Also see, *All India Reserve Bank Retired Officers Assn. v. Union of India*, AIR 1992 SC 767 : (1992) 2 SCC 55; *All India PNB Retired Officers Assn. v. Union of India*, dated 17-11-1998.

11. *Tamil Nadu Electricity Board v. R. Veerasamy*, AIR 1999 SC 1768 : (1999) 3 SCC 414; see also cut-off date/ point, *State Bank of India v. L. Kannaiah*, (2003) 10 SCC 499 : AIR 2003 SC 3860.

12. *Air India v. Nergesh Meerza*, AIR 1981 SC 1829, 1853 : (1981) 4 SCC 335.

13. *Sanjit Roy. v. State of Rajasthan*, AIR 1983 SC 328 : (1983) 1 SCC 525.

14. *State of Andhra Pradesh v. G. Ramakishan*, AIR 2001 SC 324 : (2001) 1 SCC 323. See also *State of Himachal Pradesh v. Anjana Devi*, (2009) 5 SCC 108 : AIR 2009 SC 2229. See also *State of Bihar v. Upendra Narayan Singh*, (2009) 5 SCC 65 : (2009) 4 JT 577. See also *State of Himachal Pradesh v. Anjana Devi*, (2009) 5 SCC 108 : AIR 2009 SC 2229.

(d) LANDLORD-TENANT RELATIONSHIP

The position of law is settled that the State and its authorities including instrumentalities of States have to be just, fair and reasonable in all their activities including those in the field of contracts. Thus even while playing the role of a landlord or a tenant, the State and its authorities remain so and cannot be heard or seen causing displeasure or discomfort to Article 14. The State and its instrumentalities, as landlords have the liberty of revising the rates of rent so as to compensate themselves against loss caused by inflationary tendencies. They can and rather must also save themselves from negative balances caused by the cost of maintenance, payment of taxes and costs of administration. The State, as the landlord, need not necessarily be a benevolent and good charitable Samaritan. However, the State cannot be seen to be indulging in rack renting, profiteering and indulging in whimsical or unreasonable evictions or bargains. Having been exempted from the operation of rent control legislation, the courts cannot hold them tied to the same shackles from which the State and its instrumentalities have been freed by the legislature in its wisdom and thereby requiring them to be ruled indirectly or by analogy by the same law from which they are exempt.

At the same time the liberty given to the State and its instrumentalities by the statute enacted under the Constitution does not exempt them from honouring the Constitution itself. They continue to be ruled by Article 14. The validity of their actions in the field of landlord tenant relationship is available to be tested not only under the rent control legislation but under the Constitution.[15]

The Supreme Court has struck down as discriminatory and unconstitutional a provision in the Andhra Pradesh Buildings (Lease, Rent and Eviction) Control Act, 1960, exempting all buildings constructed on or after August 26, 1957, from the operation of the Act. The Court said that the impugned provision was violative of Art. 14 of the Constitution (equality before law) as the "continuance of this provision in the statute book will imply the creation of a privileged class of landlords without any rational basis." The Court said that "the incentive to build which provided a reasonable classification for such class of landlords (when the Act was made in 1960) no longer exists by lapse of time in the case of the majority of such landlords." "There is no reason why after all these years they (landlords who built their houses on or after August 26, 1957) should not be brought at par with other landlords who are subject to the restrictions imposed by the Act in the matter of eviction of tenants and control of rents."

Exemption can however be granted to "newly constructed buildings" for a limited period of time. In this connection, the Court has said:…. "what was once a non-discriminatory piece of legislation may in course of time become discriminatory."

The incentive to build provides a rational basis for classification of landlords under Art. 14 of the Constitution and "it is necessary in the national interest that there should be freedom from restrictions for a limited period of time." Hence the State legislature may provide incentive to persons who want to build new houses as it serves a definite social purpose and to mitigate rigours to landlords who may have recently built houses for a limited period.[16] In *Mohinder Kumar v. State of*

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15. *Jamshed Hormusji Wadia v. Board of Trustees, Port of Mumbai,* (2004) 3 SCC 214 : AIR 2004 SC 1815.

16. *Motor General Traders v. State of Andhra Pradesh,* AIR 1984 SC 121 : (1984) 1 SCC 222. Also, *Punjab Tin Supply Co., Chandigarh v. Central Government,* AIR 1984 SC 87 : (1984) 1 SCC 206.

Haryana,[17] the Supreme Court has held valid exemption of new buildings from rent control for ten years.

The Tamil Nadu Rent Control Act was made inapplicable to tenants of residential buildings paying more than Rs. 400 per months as rent. Holding the provision bad under Art. 14, the Supreme Court has held that while tenants in non-residential buildings paying rent of more than Rs. 400 were protected, similar tenants in residential buildings were not. The Court saw no justification for such a classification.[18]

But, on the other hand, in several cases, the Supreme Court has justified greater protection being given to the tenants of commercial premises than those of residential premises.[19] The reason is that commercial tenancy is much more valuable than a residential tenancy. A commercial tenancy has got distinct features and characteristics of its own different from that of a residential tenancy. Accordingly, all the grounds of eviction of a tenant of a residential premises may not be available for eviction of a tenant of commercial premises.[20] For example, while *bona fide* necessity of the landlord may be a good ground to evict a tenant of a residential premises, the same ground may not be available under the relevant law for the eviction of a tenant from commercial premises. Similarly, the heirs of the statutory tenants of commercial premises may be better protected than those of residential premises.

On the other hand, in *Harbilas Rai Bansal v. State of Punjab,*[21] the Supreme Court has expressed a different view. The Punjab Rent Act provided, to begin with, that a landlord could evict a tenant from commercial/residential property on the ground of his own *bona fide* personal need. But, then, the law was amended so that while a landlord could evict a tenant in residential property on the ground of his own *bona fide* need but not if the property was non-residential. The Supreme Court ruled that this differentiation between tenants of residential and non-residential properties was violative of Art.14. A tenant in a non-residential property could continue in possession for life and after his death his heirs could continue the tenancy. The Court ruled that any classification between tenants of residential and non-residential properties had no nexus with the object sought to be achieved by the Act in question. "Tenants of both kinds of buildings need equal and same protection of the beneficial provisions of the Act. Neither from the objects and reasons of the Act nor from the provisions of the Act it is possible to discern any basis for the classification created by the Amendment."

(e) FOREIGNERS

The power of the Government of India to expel foreigners is absolute and unlimited and there is no provision in the Constitution fettering its discretion and the executive government has unrestricted right to expel a foreigner. So far as right to be heard is concerned, there cannot be any hard and fast rule about the manner in which a person concerned has to be given an opportunity to place his

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17. AIR 1986 SC 244 : (1985) 4 SCC 221.
18. *Rattan Arya v. State of Tamil Nadu,* AIR 1986 SC 1444 : (1986) 3 SCC 385.
19. *Gauri Shankar v. Union of India,* AIR 1995 SC 55 : (1994) 6 SCC 349.
20. *Gian Devi Anand v. Jeevan Kumar,* AIR 1985 SC 796 : (1985) 2 SCC 683.
21. AIR 1996 SC 857 : (1996) 1 SCC 1.

case. The deportation proceedings are not proceedings for prosecution where a man may be convicted or sentenced. The procedure under the foreigners Act and the Foreigners (Tribunals) Order 1964 is just, fair and reasonable and does not offend any Constitutional provision.[22]

It is open to the state to make a classification for conferring benefit on a specified class of employees e.g. pension Rules not being made applicable to casual employees.[23]

(f) CIVIL SERVICES

In *Mohan Kumar Singhania v. Union of India*,[24] the Supreme Court has ruled that each of the various civil services, namely, I.A.S., I.F.S., I.P.S., Group A Services and Group B Services, is a 'separate and determinate' service forming a distinct cadre and that each of the Services is founded on intelligible differentia which on rational grounds distinguishes persons grouped together from those left out and that the differences are "real and substantial" having a "rational and reasonable nexus" to the "objects sought to be achieved".

(g) LIFE INSURANCE

The Life Insurance Corporation, a statutory body, introduced a scheme of life insurance, which was open only to persons in government or semi-government service or of reputed commercial firms. This scheme was declared unconstitutional as being violative of Art. 14. LIC argued that this salaried group of lives formed a class with a view to identify health conditions. But the Supreme Court rejected the argument observing, "The classification based on employment in government, semi-government and reputed commercial firms has the insidious and inevitable effect of excluding lives in vast rural and urban areas engaged in unorganised or self-employed sectors to have life insurance offending Art. 14 of the Constitution and socio-economic justice."[25]

(h) MISTAKE NOT TO BE REPEATED

The Supreme Court has stated in *Gursharan Singh*[26] that the guarantee of 'equality before law' is a positive concept. It cannot be enforced by a person in a negative manner. Therefore, if an illegality or irregularity is committed by the state in favour of a person or a group of persons, others cannot claim that the same irregularity or illegality be also committed in their favour on the principle of equality before law.

Benefits extended to some persons in an irregular or illegal manner cannot be claimed by a citizen on the plea of equality as enshrined in Art. 14. If such claims are enforced, it will amount to continuance and perpetuation of an illegal proce-

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22. *Sarbananda Sonowal v. Union of India*, (2005) 5 SCC 665 : AIR 2005 SC 2920.
23. *General Manager, North West Railway v. Chanda Devi*, (2008) 2 SCC 108.
24. AIR 1992 SC 1 : 1992 Supp (1) SCC 594.
25. *LIC of India v. Consumer Education & Research Centre*, AIR 1995 SC 1811, 1822 : (1995) 5 SCC 482.
26. *Gursharan Singh v. New Delhi Municipal Commissioner*, AIR 1996 SC 1174, 1179 : (1996) 2 SCC 459.
Also see, *Secretary, Jaipur Development Authority, Jaipur v. Daulat Nal Jain*, (1997) 1 SCC 35; *State of Haryana v. Ram Kumar Mann*, (1997) 3 SCC 321; *Jalandhar Improvement Trust v. Sampuran Singh*, AIR 1999 SC 1347 : (1999) 3 SCC 494; *C.S.I.R. v. Ajay Kumar Jain (Dr.)*, AIR 2000 SC 2710 : (2000) 4 SCC 186.

dure or order for extending similar benefits to others. To base a claim on the concept of equality, the petitioner has to establish that his claim being just and legal, has been denied to him, while it has been extended to others and in this process there has been a discrimination.

In the following case,[27] the Supreme Court has observed:

> "We fail to see how Art. 14 can be attracted in cases where wrong orders are issued in favour of others. Wrong orders cannot be perpetuated with the help of Art. 14 on the basis that such wrong orders were earlier passed in favour of some other persons and, therefore, there will be discrimination against others if correct orders are passed against them."

The principle of equality enshrined in Art. 14 does not apply when the order relied upon is unsustainable in law and is illegal.[28]

In *Chandigarh Administration v. Jagjit Singh*,[29] the Supreme Court has stated:

> "Generally speaking, the mere fact that the respondent authority has passed a particular order in the case of another person similarly situated can never be the ground for issuing a writ in favour of the petitioner on the plea of discrimination. The order in favour of the other person might be legal and valid or it might not be. That has to be investigated first before it can be directed to be followed in the case of the petitioner. If the order in favour of the other person is found to be contrary to law or not warranted in the facts and circumstances of his case, it is obvious that such illegal or unwarranted order cannot be made the basis of issuing a writ compelling the respondent authority to respect the illegality or to pass another unwarranted order."

Merely because the concerned authority has passed one illegal/unwarranted order in favour of one person, it does not entitle the High Court to issue a writ compelling the authority to repeat that illegality over and over again. By refusing to direct the authority to repeat the illegality, the court is not condoning the earlier illegal act/order nor can such illegal order constitute the basis for a legitimate complaint of discrimination.[30] Art. 14 does not countenance repetition of a wrong action to bring both wrongs at a par.[31]

A wrong judgment passed by a High Court under Art. 226 in favour of one person does not entitle another person to claim a similar benefit by invoking the doctrine of equality in his favour. Two wrongs do not make a right.[32]

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27. *Faridabad CT Scan Centre v. D.G. Health Services*, AIR 1997 SC 3801 : (1997) 5 SCC 752; See also *Vice Chancellor, M. D. University Rohtak v. Jahan Singh*, (2007) 5 SCC 77 : (2007) 4 SCALE 226.

28. *Union of India (Railway Board) v. J.V. Subhaiah*, (1996) 2 SCC 258.

29. (1995) 1 SCC 745 : AIR 1995 SC 705.

30. Also see, *Style (Dress Land) v. Union Territory, Chandigarh*, (1999) 7 SCC 89, 103 : AIR 1999 SC 3678; *Union of India v. Rakesh Kumar*, AIR 2001 SC 1877 : (2001) 4 SCC 309.

31. *Union of India v. International Trading Co.*, (2003) 5 SCC 437 : AIR 2003 SC 3983. See also *State of Bihar v. Upendra Narayan Singh*, (2009) 5 SCC 65 : (2009) 4 JT 577. See also *State of Uttaranchal v. Alok Sharma*, (2009) 7 SCC 647 : (2009) 6 JT 463.

32. *State of Bihar v. Kameshwar Prasad Singh*, AIR 2000 SC 2306 : (2000) 9 SCC 94.

(i) HARDSHIP

Mere hardship is no ground to strike down a valid legislation.[33] But the court has held that even if a law cannot be declared *ultra vires* on the ground of hardship, it can be so declared on the ground of total unreasonableness applying the Wednesbury "unreasonableness".[34]

(j) RECOVERY OF LOANS

A special machinery can be established for expeditious recovery of the loans advanced by the State or the State Financial Corporation. These loans are advanced to assist people financially to set up industries in the State so as to advance the well being of the people. If these loans are recovered expeditiously, fresh loans may be advanced to other persons for a similar purpose. These loans thus differ from the ordinary loans which are advanced for earning interest.[35]

(k) PERPETUATION OF ILLEGALITY

It would be constitutionally immoral to perpetuate inequality among majority people of the country in the guise of protecting the Constitutional Rights of minorities and the backward and downtrodden.[36]

(l) PUBLIC SECTOR UNDERTAKING

Favourable treatment shown to a public sector undertaking is not discriminatory. These undertakings stand in a different class altogether and the classification made between these enterprises and others is a valid one.[37] As the Supreme Court has observed: "….. preference shown to …….. public sector undertakings being in public interest, will not be construed as arbitrary so as to give rise to a contention of violation of Article 14 of the Constitution."[38]

Similarly it has been held that preference shown by the State to cooperative societies does not violate Art. 14 as these societies play a positive and progressive role in the economy of our country.[39]

(m) DISCRIMINATION BY THE STATE IN ITS OWN FAVOUR

Art. 14 does not outlaw discrimination between the state and a private individual because the two are not placed on the same footing. Thus, creation of a monopoly by the state in its favour will not be bad under Art. 14.[40]

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33. *Prafulla Kumar Das v. State of Orissa*, (2003) 11 SCC 614 : AIR 2003 SC 4506.

34. *Grand Kakatiya Sheraton Hotel and Towers Employees & Workers Union v. Srinivasa Resorts Ltd.*, (2009) 5 SCC 342 : AIR 2009 SC 2337.

35. *State of Kerala v. V.R. Kalyanikutty*, AIR 1999 SC 1305 : (1999) 3 SCC 657.

36. *Islamic Academy of Education v. State of Karnataka*, (2003) 6 SCC 697 : AIR 2003 SC 3724.

37. *Hindusthan Paper Corporation Ltd. v. Govt. of Kerala*, AIR 1986 SC 1541 : (1986) 3 SCC 398.

38. *Indian Drugs & Pharmaceutical Ltd. v. Punjab Drugs Manufacturers Association*, AIR 1999 SC 1626 : (1999) 6 SCC 247.

Also, *Oil & Natural Gas Commission v. Association of Natural Gas Consuming Industries of Gujarat*, AIR 1990 SC 1851.

39. *Sarkari Sasta Anaj Vikreta Sangh, Tahsil Bemetra v. Madhya Pradesh*, AIR 1981 SC 2030 : (1981) 4 SCC 471; *Krishna Kakkanath v. Govt. of Kerala*, (1997) 9 SCC 495.

40. *Saghir Ahmad v. State of Uttar Pradesh*, AIR 1954 SC 728 : (1955) 1 SCR 707; *Kondal Rao v. A.P.S.R.T. Corpn*, AIR 1961 SC 82; *Orissa Minor Oil (P) Ltd. v. State of Orissa*, AIR 1983 Ori. 265.

Exemption granted to lands and buildings of the government, or a local authority, or a government sponsored housing board, from the Rent Control Act has been held valid as none of these has a profit motive and would not evict its tenants merely to unduly raise rents as private landlords usually do and thus their tenants are not similarly situated as those of the private individuals.[41]

Under the Limitation Act, government claims are barred after 60 years, whereas private claims are barred in a much shorter period. This distinction has been held valid because in the former case the loss falls on the community at large and also because government machinery works much slower than a private individual.[42] Money due to the state in respect of its trading activities can be made recoverable as a public demand. It is not against Art. 14 to distinguish between the government as a banker and other bankers for purposes of recovery of money, for government dues are the dues of the entire community and, therefore, a law providing special facility to recover the same cannot be said to offend Art. 14.[43]

Government debts can be given priority over individual debts;[44] special procedures can be laid down for eviction of unauthorised occupants of government premises as government property forms a class by itself;[45] special provisions can be made for recovering debts due to the government or to a bank established with public funds as disinguished from private banks.[46] Exemption granted to the State from payment of court-fees has been held valid because, in any case, the State has to bear the expense of the administration of civil justice.[47]

(n) TAXING STATUTES

Art. 14 covers tax legislation as well. Tax laws do not fall outside the scope of Art. 14, and such laws must also pass the test of Art. 14. However, taxing statutes enjoy more judicial indulgence because picking and choosing within limits is inevitable in taxation. The principle of classification is applied somewhat liberally in case of a taxing statute. The legislature enjoys a great deal of latitude in the matter of classification of objects and purposes of taxation. The courts adopt a more tolerant attitude towards a tax law.

The courts assert that in view of the intrinsic complexity of fiscal adjustments of diverse elements, a legislature ought to be permitted a larger discretion and latitude in the matter of classification for taxing purposes.[48] The rate of tax and objects to be taxed are to be determined by the Legislature and unless it is found

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41. *Baburao Shantaram v. Bombay Housing Board*, AIR 1954 SC 153 : 1954 SCR 572.
42. *Nav Rattan Mal v. State*, AIR 1961 SC 1704 : (1962) 2 SCR 324.
43. *Manna Lal v. Collector of Jhalawar*, AIR 1961 SC 828 : (1961) 2 SCR 962.
44. *Builders Supply Corpn. v. Union of India*, AIR 1965 SC 1061 : (1965) 2 SCR 289.
45. *M. Chhagan Lal v. Greater Bombay Municipality*, AIR 1974 SC 2009; *State of Gujarat v. Patel Bava Karsan*, AIR 1980 SC 1144 : 1980 Supp SCC 7.
46. *Lachman Das v. State of Punjab*, AIR 1963 SC 222. Also, *Director of Industries, State of U.P. v. Deep Chand*, AIR 1980 SC 801; *G.S . Agarwal v. State of Uttar Pradesh*, AIR 1983 SC 1224 : 1984 Supp SCC 607.
47. *P.C. Sukhani v. State of Sikkim*, AIR 1982 Sikkim 1.
48. *State of Maharashtra v. M.B. Badiya*, AIR 1988 SC 2062 : (1988) 4 SCC 290; *State of Karnataka v. D.P. Sharma*, AIR 1975 SC 594; *Anant Mills v. State of Gujarat*, AIR 1975 SC 1234; I.T.O., *Shillong v. N.T.R. Rymbai*, AIR 1976 SC 670; *Ganga Sugar Corp. v. State of Uttar Pradesh*, AIR 1980 SC 286; *State of Karnataka v. Hansa Corp.*, AIR 1981 SC 463 : (1980) 4 SCC 697; *Laxmi Narain v. State of Orissa*, AIR 1983 Ori. 229; *State of Bihar v. S.K. Sinha*, AIR 1995 SC 885: (1995) 3 SCC 86.

to be so unreasonable, the court does not interfere with the latitude enjoyed by the Legislature in this behalf.[49] On this point, the Supreme Court has observed in *Khandige*:[50]

> "…. The courts, in view of the inherent complexity of fiscal adjustment of diverse elements, permit a larger discretion to the Legislature in the matter of classification, so long it adheres to the fundamental principles underlying the said doctrine. The power of the Legislature to classify is of "wide range and flexibility" so that it can adjust its system of taxation in all proper and reasonable ways."

Again the Court has observed in *Hoechst*:[51]

> "When the power to tax exists, the extent of the burden is a matter for discretion of the law-makers. It is not the function of the court to consider the propriety or justness of the tax, or enter upon the realm of legislative policy. If the evident intent and general operation of the tax legislation is to adjust the burden with a fair and reasonable degree of equality, the constitutional requirements is satisfied."

The reason for greater judicial tolerance shown towards a tax law is that taxation is not merely a source of raising money to defray government expenses but it is also a tool to reduce inequalities in society. Accordingly, while applying the doctrine of classification, the legislature is allowed much more freedom of choice in the matter of taxation *vis-à-vis* other types of laws. As no scheme of taxation is free of all discriminatory impact, a tax measure is struck down on the ground of discrimination under Art. 14 only on the ground of palpable arbitrariness applied in the context of the felt needs of the times and societal exigencies informed by experience. The tests of the vice of discrimination in a tax law are thus less rigorous.[52]

Parliament imposed expenditure tax on hotels where room charges were Rs. 400 or over per day for a unit of residential accommodation. Holding the Act valid against a challenge under Art. 14, the Supreme Court emphasized that having regard to the wide variety of diverse economic criteria that go into the formulation of a fiscal policy, the legislature enjoys a wide latitude in the matter of selection of persons, subject-matter, events, etc. for purposes of taxation.[53]

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49. *Meenakshi v. State of Karnataka,* AIR 1983 SC 1283, 1289.

50. *Khandige Sham Bhai v. Agri. Income-tax Officer,* AIR 1963 SC 591 at 594-95 : (1963) 3 SCR 809. Also see, *Khyerbari Tea Co. v. State of Assam,* AIR 1964 SC 925, 941 : (1964) 5 SCR 975.

51. *Hoechst Pharmaceuticals Ltd. v. State of Bihar,* AIR 1983 SC 1019 : (1983) 4 SCC 45.
Also see, *State of Kerala v. Aravind Ramakant Modawadakar,* (1999) 7 SCC 400, at 406 : AIR 1999 SC 2970.

52. *Kerala Hotel and Restaurant Association v. State of Kerala,* AIR 1990 SC 913 : (1990) 2 SCC 502, *Khadi & Village Soap Industries Association v. State of Haryana,* AIR 1994 SC 2479 : 1994 Supp (3) SCC 218; *Spences Hotels Pvt. Ltd. v. State of West Bengal,* (1991) 2 SCC 154; *Gannon Dunkerley & Co. v. State of Rajasthan,* (1993) 1 SCC 364 at 397; *I.T.O. v. N. Takim Roy Rymbai,* AIR 1976 SC 670; *G.K. Krishna v. State of Tamil Nadu,* AIR 1975 SC 583; *State of Gujarat v. Sri Ambica Mills,* AIR 1974 SC 1300; *Hiralal v. State of Uttar Pradesh,* AIR 1973 SC 1034; *Jaipur Hosiery Mills v. State of Rajasthan,* AIR 1971 SC 1330 : (1970) 2 SCC 26.

53. *Elel Hotels and Investments Ltd. v. Union of India,* AIR 1990 SC 1664 : (1989) 3 SCC 698; see also *R. C. Tobacco (P) Ltd. v. Union of India,* (2005) 7 SCC 725 : AIR 2005 SC 4203. Wide discretion conferred on legislature in tax and economic matters; See also *Gujarat Ambuja Cements Ltd. v. Union of India,* (2005) 4 SCC 214 : AIR 2005 SC 3020.

In the field of taxation, the Supreme Court has permitted the legislature to exercise an extremely wide discretion in classifying items for tax purposes, so long as it refrains from clear and hostile discrimination against particular persons or classes. A tax on purchasers of hides and skins only, and not on purchasers of other commodities, was held valid as there was 'no material on the record' to suggest that the purchasers of other commodities were similarly situated as those of hides and skins.[54]

A sales tax imposed on sales of virginia tobacco but not of country tobacco is not bad under Art. 14, for the former has certain features which distinguish it from the latter.[55] A higher show tax on cinema houses with large seating accommodation and situated in fashionable, busy or rich localities than on small cinema houses containing less accommodation and situated in poor localities, is valid.[56] Classification for purposes of income-tax with reference to the sources of income is valid.[57] Differential rates of tax can be imposed on stage carriages and goods vehicles as the two belong to distinct categories.[58] Levy of a higher grazing rate for animals belonging to the outsiders than on those belonging to the residents of the State is discriminatory as there is no rational basis for making such a distinction.[59]

Parliament enacted a law imposing expenditure tax at 10% ad valorem on 'chargeable expenses' incurred in hotels wherein room charges were Rs. 400 or over per day for a unit of residential accommodation. The Act was challenged under Art. 14. The argument was that there was no basis or intelligible differentia for discriminating between the levy of the tax on expenditure over food or drink provided by a hotel and the food and drink provided by a restaurant or eating house not situated in a hotel even though the cost of food or beverage could be higher than that on similar items in a taxed hotel. The Court held the tax valid arguing that "the bases of classification cannot be said to be arbitrary or unintelligible nor as without a rational nexus with the object of the law." People with economic superiority would enjoy the services of a hotel having accommodation priced at Rs. 400/- or more per day. This basis of classification could not be condemned as irrational. The Court emphasized the point that having regard to the wide variety of diverse economic criteria that go into the formulation of a fiscal policy legislature enjoys a wide latitude in the matter of selection of persons, subject-matter, events, etc. for purposes of taxation. The tests of the vice of discrimination in a taxing law are, accordingly, less rigorous.[60]

An entertainment tax was levied by the Tamil Nadu Government on admission to cinema theatres. Different rates were prescribed depending on the locality where the cinema was situated and also on the amenities provided therein. The

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54. *V.M. Syed v. State of Andhra Pradesh*, AIR 1954 SC 314 : 1954 SCr 1117.
55. *East India Tobacco Co. v. State of Andhra Pradesh*, AIR 1962 SC 1733 : (1963) 1 SCR 404.
56. *Western India Theatres v. Cantonment Board*, AIR 1959 SC 582 : 1959 Supp (2) SCR 63.
57. *I.T.O., Shillong v. N.T.R. Rymbai*, AIR 1976 SC 670 : (1976) 1 SCC 916.
58. *Ambala Bus Syndicate (Pvt.) Ltd. v. State of Punjab*, AIR 1983 P&H. 213.
59. *Lakshman v. State of Madhya Pradesh*, AIR 1983 SC 656 : (1983) 3 SCC 275.
60. *Federation of Hotel and Restaurant v. Union of India*, AIR 1990 SC 1637 : (1989) 3 SCC 634.

tax was levied at a particular percentage of the rate of admission. This percentage varied from locality to locality. The tax was challenged under Art. 14, but the Supreme Court ruled that the classification made between the theatres was not an unreasonable one. The Court emphasized that the concept of "Equality before law" contained in Art. 14 envisages an "obligation upon the State to bring about, through the machinery of law, a more equal society envisaged by the Preamble and Part IV of our Constitution.[61] For, equality before law can be predicated meaningfully only in an equal society."[62]

In Andhra Pradesh, for levying a similar tax, the Legislature prescribed different rates of tax by classifying theatres into different classes, namely, air conditioned, air-cooled, ordinary, permanent, semi permanent, touring and temporary. The theatres were further categorised on the basis of the type of the local area in which they were situated. The levy was held valid as the legislature had sought to classify the cinema theatres taking into consideration the differentiating circumstances for the purpose of imposing the tax. The Court rejected the argument of the theatre owners that the classification was not perfect and that there should have been further classification amongst the theatres falling in the same class on the basis of the location of the theatre in each local area.[63]

To find out discrimination, what is decisive is not the phraseology of a statute but the impact and effect of the law. A law *ex facie* non-discriminatory may in effect operate unevenly on persons or property not similarly situated and thus offend the equality clause. Conversely, a law appearing to be discriminatory may not be so in actual operation.[64] Just as a difference in the treatment of persons similarly situate leads to discrimination so also discrimination can arise if persons who are unequals, *i.e.,* differently placed, are treated similarly. A law providing for equal treatment of unequal objects, transactions or persons would be condemned as discriminatory if there is absence of rational relation to the object intended to be achieved by the law.

This proposition is illustrated by *K.T. Moopil Nair v. State of Kerala*,[65] A land tax at a flat rate of Rs. 2 per acre was declared discriminatory as it made no reference to income, either actual or potential, from the land taxed. A flat rate of tax was imposed whether or not there was any income from the property. The Act in question did not have any regard to the quality of the land or its productive capacity and so levy of the tax at a flat rate was invalid. Lack of classification by the Act therefore created inequality. This was evident from the facts of the instant case, where the petitioner was required to pay a tax of Rs. 54,000 per year while the income from the land taxed came to Rs. 3,100 only. The tax was therefore characterised as discriminatory and confiscatory and hence bad under Art. 14.

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61. Part IV of the Constitution pertains to "Directive Principles of State Policy"; see, *infra*, Ch. XXXIV.
62. *Sri Srinivasa Theatre v. Govt. of Tamil Nadu*, AIR 1992 SC 999, 1004 : (1992) 2 SCC 643.
63. *Venkateshwara Theatre v. State of Andhra Pradesh*, AIR 1993 SC 1947 : (1993) 3 SCC 677.
64. *Khandige Sham Bhat v. Agricultural, I.T.O.*, AIR 1963 SC 591 : (1963) 3 SCR 809.
65. AIR 1961 SC 552 : (1961) 3 SCR 77.

Following the *Moopil Nair* case, the Supreme Court in *State of Andhra Pradesh v. Raja Reddy*,[66] declared void land revenue imposed at a flat rate on land without taking into account the quality or productivity of the soil. Moreover, the Act laid down no procedure to assess land revenue, and however, grievous the mistake made in the assessment, there was no way for the aggrieved party to get it corrected. No notice was prescribed and no opportunity was given to the assessee to question the assessment on his land. The Court emphasized that Art. 14 can be offenderd both when a statutory provision finds differences where there are none, or makes no difference where there is one. Even a tax law cannot introduce unreasonable discrimination between persons or property either by classification or lack of it.

A tax on buildings on the 'floorage' basis (the rate of tax being determined by the floor area) on a sliding scale, whether the building be situated in a large industrial town or in an insignificant village, was held discriminatory under Art. 14 as the rate of tax did not depend upon the purpose for which the building was used, the nature of the structure, the town and locality in which the building was situated, the economic rent obtainable from the building, its cost and other related circumstances which might appropriately be taken into consideration in any rational system of taxation of buildings. No attempt was made at any rational classification in imposing the tax in question. Imposing a uniform tax on objects, persons or transactions essentially dissimilar may result in discrimination.[67]

A tax on urban land was held invalid because of lack of classification which resulted in inequality and hostile discrimination.[68]

Kerala levied a tax at the rate of Rs. 50 per hectare on seven types of plantations. The tax was challenged on the ground of lack of classification. By a majority of 3 : 2, the Supreme Court upheld the tax. The majority found that the law sought to equalise the different plantations for purposes of taxability. HIDAYATULLAH, C.J., speaking for the majority observed: "….. the burden of proving discrimination is always heavy and heavier still when a taxing statute is under attack….The burden is on a person complaining of discrimination. The burden is proving *not* possible 'inequality' but hostile 'unequal' treatment. This is more so when uniform taxes are levied."

On the other hand, the minority held that tax was discriminatory as it was not related to productivity of land. For example, the average yields of the lands varied from 350 kgs to 1850 kgs of tea and so a uniform tax must result in inequality among tea-growers who formed one class.[69] The minority view appears to be more rational in this case.

Whenever power is delegated by the legislature for the purpose of levying taxes on a particular commodity or exempting some other commodity from taxation, a sort of classification is to be made. Such classification cannot be a product

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66. AIR 1967 SC 1458 : (1967) 3 SCR 28.
Also see, *Samarendra Nath v. State of West Bengal*, AIR 1981 Cal. 58.
67. *State of Kerala v. Haji Kutty*, AIR 1969 SC 378 : (1969) 1 SCR 645.
68. *Parshava Properties Ltd. v. State of West Bengal*, AIR 1982 Cal 202.
69. *Twyford Tea Co. v. State of Kerala*, AIR 1970 SC 1133 : (1970) 1 SCC 189.

of blind approach by the administrative authorities on which the responsibility of delegated legislations is vested by the Constitution. A notification issued by a Taxing Department of a State which lacks a sense of reasonability because it is not able to strike a rational balance of classification between the items of the same category would be *ultra vires* Art. 14.[70]

The reasonableness of classification must be examined on the basis, that when the object of the taxing provision is not to tax the sale of certain chemical fertilizers included in the list which clearly points out that all the fertilizers with similar compositions must be included without excluding any other chemical fertilizer which has the same elements and, as such, there is no basis for differential treatment amongst the same class. The Court referred to Ayurveda Pharmacy case[71] which had held that two vital items of the same category could not be discriminated against and where such a distinction is made between the items falling in the same category it should be done on a reasonable basis, in order to save such a classification being in contravention of Art. 14 of the Constitution.[72]

A classification on the basis of capacity to pay for purposes of taxation is valid. It is therefore permissible to levy a higher tax on those who are economically stronger than those who are weaker. "The object of a tax is not only to raise revenue but also to regulate the economic life of the society."[73]

A flat rate tax may not be bad always. It is only in marginal cases when the impact of such a tax is glaringly discriminatory or expropriatory that it may be hit by Art. 14. Therefore, a tax of Re. 1 per bottle of foreign liquor (produced in India) is valid as it is levied at a conveniently flat rate with minimal effect on overall price and it is easy to collect.[74]

A classification made to prevent evasion of tax and fraud on taxation may be held valid under Art. 14.[75] The Central Government classified match manufacturing units into mechanised and non-mechanised units and levied a lower excise duty on the latter than on the former. It was argued that the non-mechanised category did not distinguish between stronger and weaker units and thus treated unequals as equals. Rejecting the contention, the courts held that a pertinent principle of differentiation linked to productive processes had already been adopted and further sub-classi-fication between strong and weak units in the same class could not be insisted upon with reference to Art. 14.[76]

Several State Legislatures enacted statutory provisions levying cesses/taxes on minerals. These provisions were invalidated by the Supreme Court on the ground that the power to impose these levies vested with Parliament and not the States.

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70. *State of Uttar Pradesh v. Deepak Fertilizers & Petrochemical Corpn. Ltd.,* (2007) 10 SCC 342 : (2007) 8 JT 148.
71. (1989) 2 SCC 285 : AIR 1989 SC 1230.
72. *State of Uttar Pradesh v. Deepak Fertilizers & Petrochemical Corpn. Ltd.,* (2007) 10 SCC 342 : (2007) 8 JT 148.
73. *Kodar v. State of Kerala,* AIR 1974 SC 2272 : (1974) 4 SCC 422.
Also, *Hoechst Pharmaceuticals, supra,* footnote 51 on 1240.
74. *Balaji v. I.T.O.*, AIR 1962 SC 123 : (1962) 2 SCR 983.
75. *Avinder Singh v. State of Punjab,* AIR 1979 SC 321 : (1979) 1 SCC 137.
76. *M. Match Works v. Asstt. Collector,* AIR 1974 SC 497 : (1974) 4 SCC 428.

The State levies were at different rates. To protect the States from refunding the revenue collected from these levies, Parliament enacted an Act validating the State levies with retrospective effect.

This Act was challenged *inter alia* under Art. 14 on the ground that it imposed levies in different States at different rates. The Court held that there was no violation of Art. 14 by Parliament as there was historic justification for the law in question. Different States were imposing levies at different rates and to validate the State levies, Parliament had to adopt the very rates prevailing in the various States. "It is really not a case where the Parliamentary enactment is creating the distinction or different treatment. Distinction and different treatment was already there over several decades; each State was prescribing its own rate on the same material… The Parliament has intervened and by enacting the impugned law in exercise of its undoubted power, validated the levy and all that flows from it. In such circumstances, there was no other way except to do what has actually been done". When Parliament was re-enacting the very provisions prevalent in the States, it could not but adopt those very rates.[77]

Differentiation in taxation levied on intra-state and inter-State contract carriages was upheld by the Supreme Court in the following case,[78] on the ground that "in many factual ways the vehicles covered by two different permits do form a separate and distinct class". The courts would not interfere with classification, "which is the prerogative of the legislature", so long as it was not arbitrary or unreasonable. The *nexus* of the classification with the object of taxation in the instant case lay in *pubic interest*—"which is again within the realm of legislative wisdom unless tainted by perversity or absurdity". The Supreme Court reiterated the proposition as regards the power of the State to tax that "the State has a wide discretion in selecting the persons or objects it will tax and thus a statute is not open to attack on the ground that it taxes some persons or objects and not others." A very wide latitude is available to the legislature in the matter of classification of objects, persons and things for the purpose of taxation.

(o) ECONOMIC AFFAIRS

There is no such law that a particular commodity cannot have a dual fixation of price. Dual fixation of price based on reasonable classification of different types of customers has met with approval from the courts, e.g. Respondent coal company charging lower prices for supply of coal from core/linked sector industries while charging higher prices from appellants who did not belong to the core sector. The Court held that primary consideration for placing industries concerned in the core sector being their intrinsic importance to the economy of country and role which they play in nation building activities. Requirement of coal in the core sector is on the higher side either for captive power generation or for other uses for manufacturing operations. Any substantial increase in price of coal would have a substantial effect on cost of finished products of vital importance, and cost of services to the public. These factors legitimately call for a special treatment as far as these industries are concerned. For charging lesser prices or evolving a dual price policy it cannot be said that in such a case that equals are being treated unequally or that the classification

77. *P. Kannadasan v. State of Tamil Nadu,* AIR 1996 SC 2560 : (1996) 5 SCC 670.
78. *State of Kerala v. Aravind Ramakant Modawdakar,* (1999) 7 SCC 400 : AIR 1999 SC 2970.

does not rest on a rational basis. Moreover, respondent coal company is facing a heavy financial deficit having an accumulated loss of more than Rs.1000 crores. Decontrol of price was done with predominant object of enabling respondent and other coal companies which were in the red, to become solvent and profitable. An industrial company completely held by the Govt. (like respondent) cannot be denied right to keep in view the consideration of commercial expediency while formulating its policies in discharge of its functions. Though absolute and unfettered freedom cannot be granted to State owned companies, but a wide latitude and flexible approach should be conceded especially when price fixation has been taken out of the realm of statutory control.[79] In judicial review, the court is neither concerned with the (economic) policy nor with the rates. But in appropriate proceedings it may enquire into the question, whether relevant considerations have gone in and extraneous/irrelevant considerations been kept out while determining the price. In case the legislature has laid down the pricing policy and prescribed the factors which should guide the determination of the price, then the Court will, if necessary, enquire into the question whether the policy and factors were present to the mind of the authorities specifying the price. The Court does not substitute its judgment for that of the legislature or its agent as to the matters within the province of either. The judicial enquiry is confined to the question whether the findings of facts are reasonably based on evidence and whether such findings are consistent with the laws of the land.[80]

Sugar dealers in Calcutta were permitted to keep a maximum stock of 3500 quintals of sugar whereas those in towns with population up to one lakh, only 250 quintals and in towns with less than one lakh population, only 100 quintals. Such a classification of dealers was held to be not arbitrary but based on reasonable classification and so not bad under Art. 14.[81]

The agricultural debtors form a separate category because of their poverty, economic backwardness and miserable conditions. Therefore, a law enacted to give relief to agricultural indebtedness is not invalid.[82] A law imposing a minimum sentence of six months' rigorous imprisonment on offenders guilty of selling adulterated food is not hit by Art. 14.[83] When unequally placed persons are treated equally, Art. 14 is violated.[84]

By a Central law, the undertakings of 14 banks were acquired by the Central Government and these banks were prohibited from doing any banking business. This was held to be discriminatory as other banks could carry on banking business and new banks could be floated and there was thus no rational explanation for the prohibition on the 14 banks in question.[85]

The Special Bearer Bonds (Immunities and Exemptions) Act, 1981, providing for investment in bearer bonds was held valid *vis-a-vis* Art. 14 in *R.K. Garg v.*

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79. *Pallavi Refractories v. Singareni collieries Co. Ltd.*, (2005) 2 SCC 227 : AIR 2005 SC 744.
80. *Pallavi Refractories v. Singareni collieries Co. Ltd.*, (2005) 2 SCC 227 : AIR 2005 SC 744.
81. *P.P. Enterprises v. Union of India*, AIR 1982 SC 1016 : (1982) 2 SCC 33.
82. *Pathumma v. State of Kerala*, AIR 1978 SC 771 : (1978) 2 SCC 1.
83. *Inderjeet v. State of Uttar Pradesh*, AIR 1979 SC 1867 : (1979) 4 SCC 246.
84. *Hyderabad Karnataka Education Society v. State of Karnataka*, AIR 1983 Knt. 251, 268.
85. *R.C. Cooper v. Union of India*, AIR 1970 SC 564 : (1970) 1 SCC 248.

Union of India.[86] The object of the Act being to unearth black money lying secreted, and to canalise the same into productive purposes, the classification made between those possessing black money and others could not be regarded as arbitrary or irrational. It was based on intelligible differentia having rational relation with the object of the Act. Only limited immunities had been granted to the holders of the bearer bonds. These are necessary to induce the holders of black money to invest in bearer bonds.

In the instant case, the Supreme Court emphasized that the laws relating to economic activities should be viewed with greater indulgence than ordinary laws and economic laws may not be struck down merely on account of crudities and inequities inasmuch as such legislations are designed to take care of complex situations and complex problems which do not admit of solutions through any doctrinaire approach or straight-jacket formulae.

In the words of the Court:

> "Another rule of equal importance is that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion etc… The court should feel more inclined to give judicial deference to legislative judgment in the field of economic regulation than in other areas where fundamental human rights are involved."

There is no Fundamental Right in a citizen to carry on trade or business in liquor.[87] The State under its regulatory power has the power to prohibit absolutely every form of activity in relation to intoxicants such as its manufacture, storage, export, import, sale and possession. However, when the State decides to grant such right or privilege to others, the State cannot escape the rigour of Art. 14. In this connection, the Supreme Court has observed in *Nandlal*:[88]

> "But while considering the applicability of Art. 14 in such a case we must bear in mind that having regard to the nature of the trade or business the Court would be slow to interfere with the policy laid down by the State Government for grant of licences for manufacture and sale of liquor. The court would, in view of the inherently pernicious nature of the commodity allow a large measure of latitude to the State Government in determining its policy of regulating manufacture and trade in liquor. Moreover, the grant of licences for manufacture and sale of liquor would essentially be a matter of economic policy where the court would hesitate to intervene and strike down what the State Government has done unless it appears to be plainly arbitrary, irrational or *mala fide*".[89]

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86. AIR 1981 SC 2138 : (1981) 4 SCC 675.
To justify the classification, the Court emphasized upon the evils of blackmoney, *viz.*, it adversely affects revenue; there are other adverse economic effects; it corrodes the economy. There was thus need to tackle this problem. It was thus necessary to give certain immunities to the holders of these bonds, *e.g.*, they were not required to disclose the nature and source of acquisition of such bonds, these bonds were not to be taken into account for proceedings under any tax law, etc.

87. See, *infra*, under Art. 19(1)(g), Ch. XXIV, Sec. H.

88. *State of Madhya Pradesh v. Nandlal Jaiswal*, AIR 1987 SC 251, at 279 : (1986) 4 SCC 566.

89. Also see, *Khoday Distillers Ltd. v. State of Karnataka*, AIR 1996 SC 912, at 915.

(p) GEOGRAPHICAL DIFFERENTIATION

Geographical considerations may form a valid basis of classification for purposes of legislation in appropriate cases. In this connection, the Supreme Court has recently observed in *Clarence Pais v. Union of India*[90]:

> "Historical reasons may justify differential treatment of separate geographical regions provided it bears a reason and just relation to the matter in respect of which differential treatment is accorded. Uniformity in law has to be achieved, but that is a long drawn process."

The State of Rajasthan passed an Act prescribing a procedure for fixing fair and equitable rent payable by the tenants in the Marwar region. It was challenged on the ground that it did not apply to the whole State. Rejecting the objection, the Supreme Court stated that Art. 14 prohibits unequal treatment of persons similarly situated. The Act would be bad if it were established that conditions prevailing in other areas of the State were similar to those in Marwar where the Act applied. This was not proved. An Act could not be held discriminatory merely because it did not apply to the whole State.[91]

One uniform law need not operate throughout the State regarding any particular matter. If circumstances so warrant, a State can be divided into several zones and different laws regarding the same matter applied to these zones. Thus, Orissa can have two Acts to nationalise road transport, one applying to that part of the State which was previously British, and the other to that part which was previously princely, as the conditions in the two parts differ materially.[92]

With the States' Re-organisation in 1956, territories from one State became part of another State. To avoid any dislocation in the legal system, the States Reorganisation Act stipulated that the existing laws would continue in force in these areas. The result was that in some cases, different laws prevailed in different areas of a State on the same subject. This was held valid on the ground that "differentiation arises from historical reasons; and a geographical classification based on historical reasons can be upheld as not being contrary to the equal protection clause in Art. 14."[93]

The Indian Income-tax Act provides for recovery of arrears of income-tax according to the land revenue recovery law prevalent in each State. These laws differ from State to State and prescribe different procedures, some harsher than others. It was argued that income-tax being a Union subject, the procedure for recovery of income-tax must be uniform throughout India, for to the Union all defaulters were alike and similarly situated, and thus prescribing different machinery from State to State created discrimination.

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90. AIR 2001 SC 1151, 1155 : (2001) 4 SCC 325.
91. *Kishan Singh v. State of Rajasthan,* AIR 1955 SC 795 : (1955) 2 SCR 531.
92. *Ram Chandra v. State of Orissa,* AIR 1956 SC 298.
93. *Bhaiya Lal v. State of Madhya Pradesh,* AIR 1962 SC 981 : 1962 Supp (2) SCR 257.
Also, *State of Madhya Pradesh v. Bhopal Sugar Industries,* AIR 1964 SC 1179 : (1964) 6 SCR 846; *Shri Amar Mutt v. Commr., H.R. & C.E. Dept.,* AIR 1980 SC 1 : (1979) 4 SCC 642.

The provision was held valid on the ground that to group the defaulters state-wise was to classify them on a geographical basis and this was an intelligible differentia. To subject the defaulters to the same coercive process as has been devised by their State, on a consideration of local needs, could not be regarded as bereft of a reasonable nexus between the basis of classification and the object sought to be achieved by the Indian Income-tax Act.[1] A law need not be applied to the whole State all at once. No discrimination arises if the law, to begin with, is applied to selected areas in the State.[2]

Under the Arms Act, an offence could be tried only after obtaining the sanction of the Central Government, but in the area North of the Ganga and Jamuna rivers, an offence could be tried without any such sanction. The distinction was held bad as it was based on an irrational factor. The differentiation between the area North of Ganga-Jamuna and the rest of the country had been made as a result of the political situation existing in 1857, *viz.*, the largest opposition to the British Government had come from the talukedars in this area. But in the changed political situation of today, it was impossible to sustain any such distinction.[3]

Although geographical difference can be a basis of classification provided it had nexus with the object to be achieved, mere geographical classification cannot be sustained where the Act instead of achieving the object of legislation defeats the very purpose for which it has been made.[4]

(q) PROCEDURAL DIFFERENTIATION

Art. 14 guarantees equal protection not only as regards substantive laws but procedural laws as well. Art. 14 condemns discrimination not only by a substantive law but also by a law of procedure.[5]

As the Supreme Court has observed:[6] Art. 14 "not only guarantees equal protection as regards substantive laws but procedural laws also come within its ambit. The implication of the Article is that all litigants similarly situated are entitled to avail themselves of the same procedural rights for relief, and for defence with like protection and without discrimination." It means that all litigants, similarly situated, are entitled to the same procedural rights for relief and for defence. This means that if special procedure is laid down for a class of people as distinguished from others, then the 'class' must be based on a rational differentia having a reasonable relation with the object sought to be achieved. Further, all in the same 'class' should be subjected to the same law; there cannot be selectivity within a class. If within the same class some are subjected to a more drastic procedure than others, then it is discriminatory and bad under Art. 14. If two laws apply to a class, then the one which is more burdensome is discriminatory and so void under Art. 14.

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1. *Collector of Malabar v. E. Ebrahim*, AIR 1957 SC 688 : 1957 SCR 970.
2. *Shanmugha Oil Mill v. Market Committee*, AIR 1960 Mad. 160.
3. *Jai Lal v. Delhi Adm.*, AIR 1962 SC 1781 : (1963) 2 SCR 864.
4. *Sarbananda Sonowal v. Union of India*, (2005) 5 SCC 665 : AIR 2005 SC 2920, Illegal migrants (Determination by Tribunals) Act 1983, held to be unconstitutional.
5. *Charan Lal Sahu v. Union of India*, AIR 1990 SC 1480 : (1990) 1 SCC 613.
6. *Shri Meenakshi Mills Ltd., Madurai v. A.V. Visvanatha Sastri*, AIR 1955 SC 13 : (1955) 1 SCR 787.

The above-mentioned principles can be illustrated by a few examples. A law in Jammu and Kashmir laying down a procedure, materially different from the ordinary criminal procedure, to try 'enemy agents' was held valid because the term 'enemy agents', as defined in the ordinance, constituted a clearly defined class. Creating a new offence, and providing a stringent procedure for its trial, do not give rise to discrimination as permissible classification under Art. 14 need not be of persons only; even offences of a serious nature may be treated as a class and tried in a way different from ordinary offences and dealt with by a drastic procedure without violating the equal protection clause.[7]

According to S. 27 of the Evidence Act, a statement made to a police officer by an accused in custody when it leads to the discovery of a fact is admissible in evidence. It was argued against the provision that it drew a distinction between statements made by persons in custody and those not in custody. The provision was however upheld because the classification between persons in custody and those not in custody in the context of admissibility of statements made by them concerning the off-ence charged was not arbitrary or artificial.[8]

Under S. 178A of the Sea Customs Act, if goods like gold, diamonds, etc., are seized in the reasonable belief that they are smuggled goods, then the burden of proving that they are not smuggled goods is on the person from whose possession they have been seized. The provision was challenged as discriminatory, for under the ordinary law it is for the prosecution to establish its case, and not for the accused to prove his innocence. Nevertheless, the provision was held valid because it was designed to minimize smuggling; it applied to goods which could easily be smuggled, and the classification of goods was based on an intelligible differentia which had a rational relation to the object sought to be achieved by the Act, *viz.*, to prevent smuggling.[9]

Under the Supreme Court Rules, while no security is required to be given for filing a writ petition under Art. 32 to enforce a fundamental right, a security has to be given for moving an application for reviewing an order already made on a writ petition. There is no discrimination involved here, for in a review petition, the Court is asked to re-open a matter which had already been closed after hearing the parties.[10]

The Punjab Municipalities Act, 1911, provides for removal of a member of a municipality after giving him a hearing under specified circumstances. It also provides for removal of a member of a municipality without a hearing. This is discriminatory, for while in one case hearing is to be given to the member concerned, it may not be given in the other cases.[11]

Differential treatment by way of a provision saving proceedings in execution and those pending execution has been held to be violating Art. 14.[12]

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7. *Rehman Shagoo v. State of Jammu & Kashmir*, AIR 1960 SC 1 : (1960) 1 SCR 680.
8. *State of Uttar Pradesh v. Deoman Upadhyaya*, AIR 1960 SC 1125 : (1961) 1 SCR 14.
9. *Babu Lal v. Collector of Customs*, AIR 1957 SC 877.
10. *Lala Ram v. Supreme Court of India*, AIR 1967 SC 847 : (1967) 2 SCR 14.
11. *Ram Dial v. State of Punjab*, AIR 1965 SC 1518 : (1965) 2 SCR 858.
Also see, *Mohta & Co. v. Vishwanath*, AIR 1954 SC 545 : (1955) 1 SCR 448; *Muthiah v. C.I.T.*, AIR 1956 SC 269 : (1955) 2 SCR 1247.
12. *Mahendra Saree Emporium (II) v. G. V. Srinivasa Murthy*, (2005) 1 SCC 481 : AIR 2004 SC 4289.

(r) LEGISLATION APPLICABLE TO A SINGLE PERSON

A statute based on a reasonable classification does not become invalid merely because the class to which it applies consists of only one person. A single body or institution may form a class. A legislation specifically directed to a named person or body would be valid if, on account of some special circumstances, or reasons applicable to that person, and not applicable to others, the single person could be treated as a class by himself. The Act may however be bad if there are no special circumstances differentiating the person concerned from the rest, or if others having the same attributes are not covered by the Act. A restriction imposed by reason of a statute, can be upheld in the event it is found that the person to whom the same applies, forms a separate and distinct class and such classification is a reasonable one based on intelligible differentia having nexus with the object sought to be achieved.[13]

The contention that the institution Indian Council of World Affairs (ICWA) was singled out and though there were several other institutions run by societies or other organizations which were in the grip of more serious mismanagement and maladministration were not even touched and Parliament chose to legislate as to one institution only, did not find favour with the Court. Moreover, no other institution is named or particularized so as to be comparable with ICWA. In the ICWA case successive Parliamentary Committees found substance in the complaints received that an institution of national importance was suffering from mismanagement and maladministration. The satisfaction of the President that emergent action was called for would not be vitiated merely because earlier the normal legislative process could not culminate in legislative enactments.[14]

A large cotton textiles mill employing a large labour force, closed down due to mismanagement. Parliament enacted an Act empowering the Central Government to appoint its own directors to take over the control and management of the company and its properties. A shareholder challenged the Act on the ground that since it singled out the company, it was discriminatory and bad under Art. 14. The Supreme Court by a majority declared the Act to be valid. Noting the background conditions leading to the passage of the Act in question, *viz.*, mismanagement of the company's affairs which prejudicially affected production of an essential commodity (*i.e.*, cloth) and had created serious unemployment among a section of the community, the Court pointed out that the facts with regard to the company were of an 'extraordinary' character and "fully justified the company being treated as a class by itself". Also, the petitioner failed to show that there were other companies in the same position as the company in question.

The minority's view in the instant case however was different. Accepting the proposition that a legislation having a reasonable classification could not be held to be unconstitutional even if its application was found to affect only one person, it, nevertheless, held the Act in question bad as it made no classification; it selected a particular company and imposed liabilities on it. The minority agreed that though presumption should be made in support of the constitutional validity of a law, yet it held that in the instant case such a presumption was excluded as discrimination was writ large over the face of the Act.[15]

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13. *John Vallamattom v. Union of India*, (2003) 6 SCC 611 : AIR 2003 SC 2902.
14. *Dharam Dutt v. Union of India*, (2004) 1 SCC 712 : AIR 2004 SC 1295.
15. *Charanjit Lal v. Union of India*, AIR 1951 SC 41 : 1950 SCR 869.

To put an end to protracted litigation which arose after the death of a rich jagirdar, the Hyderabad Legislature passed an Act allowing the claims of a few, and dismissing those of the other claimants. The Act was held invalid on the ground that it denied to a few persons a right to enforce their claims in a court and thus discriminated them from the rest of the community in respect of a valuable right which 'the law secures to them all'. The only purpose of the legislation was to end certain private disputes but that did not furnish any rational basis for the discrimination made. Continuance of a dispute even for a long period of time between rival claimants to the property of a private person is not such an unusual circumstance as to invest a case with special or exceptional features and make it a class by itself justifying its differentiation from all other cases of succession disputes.[16]

The principle of the above case was again applied in *Ram Prasad Sahi v. State of Bihar*.[17] The court of wards granted a lease of land to the appellant. Thinking it to be against law, the Bihar Legislature enacted legislation to cancel this particular lease. Holding the Act void, the Supreme Court stated that the dispute was a legal dispute pure and simple between two private parties. What the Legislature had done was to single out a certain individual and deny him the rights which every Indian had to have his case adjudicated upon by a judicial tribunal according to law. The presumption of constitutionality of a legislative enactment, would not assist the State when on the face of a Statute there is no classification at all, and no attempt has been made to select any individual or group with reference to any differentiating attribute peculiar to that individual or group and not possessed by others.

A special law passed for Shri Jagannath Temple was held valid for the temple held a unique position amongst the Hindu temples and so it could be given a special treatment.[18] Special provisions can be made for each university as each university is a class by itself. Art. 14 does not require that provisions of every University Act must always be the same.[19]

The Prime Minister is allowed the use of an Indian Air Force aircraft for non-official purposes (including election) but not so the leaders of other political parties. This is not discriminatory because in view of the P.M.'s status and duties, he is a class by himself. It is necessary to ensure his personal safety and enable him to discharge official business promptly so that national interests may not suffer.[20]

A law providing for taking over of Auroville by government does not infringe Art. 14 as the Auroville institution has a uniqueness of its own.[21] In the same category would fall a law made applicable to a few specified objects and persons. A law nationalising twelve specified sugar mills in the State of Uttar Pradesh was held valid as these mills were in intolerable economic condition.[22]

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16. *Ameerunnissa v. Mahboob Begum*, AIR 1953 SC 91 : 1953 SCR 404.
17. AIR 1953 SC 215 : 1953 SCR 1129.
18. *Bira Kishore Deb v. State of Orissa,* AIR 1964 SC 1501 : (1964) 7 SCR 32.
Also, *Tilkayat Shri Govindlalji v. State of Rajasthan,* AIR 1963 SC 1638 : (1964) 1 SCR 561.
19. *Azeez Basha v. Union of India,* AIR 1968 SC 692 : (1968) 1 SCR 833.
20. *P.V. Sastri v. Union of India,* AIR 1974 Del. 1.
21. *S.P. Mittal v. Union of India,* AIR 1983 SC 1 : (1983) 1 SCC 51.
22. *Ishwari Khetan Sugar Mills v. State of Uttar Pradesh,* AIR 1980 SC 1955 : (1980) 4 SCC 136.

A single institution is capable of being treated as a class by itself if there are special circumstances or reasons which are applicable to that institution. Moreover, it is clear from the language of Entries 62 and 63 that there can be legislation in respect of a single institution.[23]

A retired member of the State Electricity Board was appointed as its Chairman in 1982 for five years. Thereafter, his appointment was further extended for five years. Thus, he was to remain in office up to 1992. With the elections to the State Legislative Assembly of Himachal Pradesh, a new Chief Minister came in power in 1990. Before the respondent's appointment could come to an end, the State Government promulgated an ordinance fixing the age of retirement for members and the Chairman of the Board at 65. The ordinance was to apply not only to future appointees but also to the present incumbents in the Board.

The respondent-Chairman of the Board challenged the constitutional validity of the ordinance (which later became an Act of the State Legislature) under Art. 14, as he had to retire from the chairmanship of the Board on reaching the age of 65 years but before his tenure came to an end. The High Court quashed the notification retiring the chairman issued under the Ordinance on the ground that the provision fixing the age of retirement could apply only prospectively and not to the present incumbents in office. On appeal by the State Government, the Supreme Court reversed the High Court and, after an exhaustive review of the case-law, upheld the validity of the Ordinance in question.[24]

The Court ruled that no one could quarrel with the desirability of the policy that a terminal point of time be provided beyond which a chairman and members of the State Electricity Board must cease to hold office by operation of law. The law is in general terms. The fact that it applies to one person at the moment does not make it invalid. Art. 14 does not come in the way of a legislature enacting a law applicable to one single person if there is reasonable classification. In the words of the Court:[25]

> "The possibility of this legislation applying to one or more persons exists *in principle*. The fact that only one individual came to be affected cannot render the legislation arbitrary as violative of Art. 14. This is because S. 3 is in general terms and the incidents of its applying to one individual does not render the legislation invalid."

The Court also pointed out that the courts have always refrained from attributing *mala fides* to the Legislature.[26]

The Bihar Legislature enacted an Act to nationalise institutions fulfilling certain criteria. The programme for nationalisation was to be carried out in phases. Under the Act immediately only one institution was taken over. Accordingly, the Schedule to the Act in question mentioned only one institution for take-over, but there was a provision in the Act to amend the Schedule by adding more institutions. The Supreme Court held the Act valid in *Lalit Narayan Mishra Institute of Economic Development & Social Change, Patna v. State of Bihar*,[27] on the

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23. *Dharam Dutt v. Union of India*, (2004) 1 SCC 712 : AIR 2004 SC 1295.
24. *State of Himachal Pradesh v. Kailash Chand Mahajan*, AIR 1992 SC 1277 : 1992 Supp (2) SCC 351.
25. *Ibid.*, at 1305.
26. See, *K. Nagaraj v. State of Andhra Pradesh*, AIR 1985 SC 551 : (1985) 1 SCC 523.
27. AIR 1988 SC 1136.

ground that no question of singling one institution arose. The Court refused to accept the argument that a law in general terms but affecting only one person at the time becomes a single person's legislation and thus violates Art. 14. The Court observed:

> "When nationalisation has to be done in a phased manner, all the institutions cannot be taken over at a time. The nationalisation in a phased manner contemplates that by and by the object of nationalisation will be taken over."

Consequent upon the Bhopal Gas Disaster, Parliament enacted the Bhopal Gas Disaster (Processing of Claims) Act, 1985. Under this Act, the Central Government took over the exclusive right of representing and acting on behalf of every victim for claiming compensation from the concerned multinational corporation. In place of the victims, the Central Government became entitled to file suits against the company for compensation. The validity of the Act was challenged on two main grounds, *viz.*, (*i*) Could Parliament enact such a law? (*ii*) Was the law not discriminatory under Art. 14? The Supreme Court upheld the law on both these grounds in *Charan Lal Sahu v. Union of India*.[28] The Court ruled that the Act in question was passed in recognition of the right of the sovereign to act as *parens patriae*. In the words of SABYASACHI MUKHARJI, C.J.:[29]

> "But there is no prohibition or inhibition, in our opinion, conceptually or jurisprudentially, for Indian State taking over the claims of the victims or for the State acting for the victims as the Act has sought to provide…."

The Court also ruled that the Act was not discriminatory as the victims formed a distinct class having several distinguishing marks deserving special treatment, *e.g.*, many of the victims of the tragedy could not have pursued the legal remedies on their own pitted as they were against a multinational and a big Indian corporation; the victims became exposed to a contingent of foreign contingency lawyers who descended on the scene. Again, in the words of SABYASACHI MUKHARJI, C.J.:[30]

> "….the claimants and victims can legitimately be described as a class by themselves different and distinct, sufficiently separate and identifiable to be entitled to special treatment for effective, speedy, equitable and best advantageous settlement of their claims. There indubitably is differentiation. But this differentiation is based on a principle which has rational nexus with the aim intended to be achieved by its differentiation. The disaster being unique in its character in the recorded history of industrial disasters and situated as the victims were against a mighty multinational with the presence of foreign contingency lawyers looming on the scene, in our opinion, there were sufficient grounds for such differentiation and different treatment. In treating the victims of the gas leak disaster differently and providing them a procedure which was just, fair, reasonable and which was not unwarranted or unauthorized by the Constitution, Art. 14 is not breached."

(s) TWO LAWS

If there are two laws covering a situation, one more drastic than the other, there is the danger of discrimination if the Administration has a discretion to apply any of these laws in a given case. Of the two persons placed in similar situa-

28. AIR 1990 SC 1480 : (1990) 1 SCC 613.
29. *Ibid.*, 1506.
30. *Ibid.*, at 1533.

tion, one may be dealt with under the drastic law and the other under the softer law. To minimise any chance of such discrimination, the courts insist that the drastic law should lay down some rational and reasonable principle or policy to regulate administrative discretion as to its application. If the drastic law fails to do so, then it will be void under Art. 14.

This proposition was applied by the Supreme Court before 1974. To evict a person from unauthorised occupation of public premises, a Punjab Act provided for a summary procedure. The collector had not two choices; he could either himself order eviction under the special law, or could file an ordinary suit in a court for eviction under the general law. The Punjab law was declared void under Art. 14 because being a drastic law it laid down no policy to guide the collector's choice as to which law to follow in what cases; the matter was left to his unguided discretion and so there could be discrimination within the same class *inter se*, *viz.*, unauthorised occupants of public premises.[31]

A logical consequence of this ruling was the amendment of the general law to provide that no court would have jurisdiction to entertain any suit in respect of eviction of unauthorised occupants of public premises. With this amendment the law became valid for now only one procedure was available to evict unauthorised occupants. The procedure by way of suit was no longer available, and therefore, the vice of discrimination disappeared.[32]

The Supreme Court reconsidered the matter in *Maganlal Chhagganlal v. Greater Municipality*.[33] Here was involved the question of the validity of a Bombay Act which was *pari passu* with the earlier Punjab Act declared invalid in the *Northern India* case. The Supreme Court felt worried by the fact that the argument based on the availability of two procedures, one more onerous than the other and, therefore, discriminatory, should have led to the apparently harsher procedure becoming the rule and resort to ordinary civil courts being barred. The Court wondered as to "who benefits by resort to the ordinary civil courts being barred." The Court found it difficult to reconcile itself to the position that the mere possibility of resort of the civil court should make invalid a procedure which would otherwise be valid. Therefore, *Northern India* was now overruled, and the Bombay Act was upheld. The proposition regarding discriminatory procedures was rephrased as follows: where a statute providing for a more drastic procedure different from the ordinary procedure covers the whole field covered by the ordinary procedure, without any guidelines as to the class of cases in which either procedure is to be resorted to, the statute will be hit by Art. 14. Even there, a provision for appeal may cure the defect.

Further, if in such cases from the preamble and surrounding circumstances, as well as the provisions of the statutes themselves explained and amplified by affidavits, necessary guidelines could be inferred, the statute will not be hit by Art. 14. Then again, where the statute itself covers only a class of cases, the statute will not be bad. The fact that in such cases the executive will choose which cases are to be tried under the special procedure will not affect the validity of the stat-

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31. *Northern India Caterers v. State of Punjab*, AIR 1967 SC 1581 : (1967) 3 SCR 399.
Also see, *Rayala Corpn. v. Director of Enforcement*, AIR 1970 SC 494 : (1969) 2 SCC 412.

32. *Hari Singh v. Military Estate Officer, New Delhi*, AIR 1972 SC 2205 : (1972) 2 SCC 239.

33. AIR 1974 SC 2009. Also, *Ahmedabad Municipality v. Ramanlal*, AIR 1975 SC 1187 : (1975) 1 SCC 778; *Chairman, Auqaf Comm. v. Suraj Ram*, AIR 1976 J&K 14.

ute. Therefore, the Court held that the argument that the mere availability of two procedures will vitiate one of them, that is the special procedure, is not supportable.

Applying the proposition in the instant case, the Court held that the statute in question lays down the purpose behind it, *i.e.* speedy eviction of unauthorised occupants of government premises. This provides sufficient guidance to the authorities in whom the power is vested. It would be extremely unreal to hold that an officer would resort to the dilatory court proceedings in any case when he has at his disposal a quick procedure. The provisions of the Act "cannot be struck down on the fanciful theory that power would be exercised in such an unrealistic fashion". The fact that the Legislature considered that the ordinary procedure is inefficient or ineffective in evicting unauthorised occupants of government property, and therefore provided a special procedure for it, is a clear guidance for the authorities charged with the duty of evicting unauthorised occupants. In addition, the Court also held that the difference between the ordinary court procedure and the special procedure was not so unconscionable as to attract the vice of discrimination. Under the special procedure, there was a provision for the concerned person to be heard and represented by a lawyer.[34] "After all Art. 14 does not demand a fanatical approach."

The Court explained *Maganlal* later in *Iqbal Singh*[35] by saying that mere availability of two procedures would not justify the quashing of a provision as being violative of Art. 14. What is necessary to attract the inhibition of Art. 14 is that there must be "substantial and qualitative differences" between the two procedures so that one is really and substantially more drastic than the other. Thus, as a result of *Maganlal*, judicial attitude towards differential procedures has become very tolerant.[36]

Under S. 5(1)(*a*) of the Minimum Wages Act, the government was required to appoint a committee representing all interests to hold a detailed enquiry regarding the concerned employment before advising the government in the matter of fixing minimum wages. Under S. 5(1)(*b*), the government could itself publish proposals for minimum wages and give two months time to the affected persons to make representations.

S. 5 was challenged as discriminatory on the ground that the procedure under (*a*) was more advantageous to the employers than under (*b*) as their representatives on the committee could have a better say, and there was no guidance given to the government as to when it should follow which procedure. The Court rejected the challenge saying that the purpose of both procedures was to collect necessary data concerning an employment; the advice of the committee in (*a*) was not binding on the government, the government could adopt either of the procedures depending upon whether it has sufficient data or not concerning an employment to enable it to fix minimum wages and so there was no discrimination.[37]

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34. Also see, *Pandia Nadar v. State of Tamil Nadu*, AIR 1974 SC 2044 : (1974) 2 SCC 539.
35. *Iqbal Singh v. State (Delhi Adm.)*, AIR 1977 SC 2437.
36. The *Maganlal Chhaganlal* doctrine has been applied in *State of Gujarat v. Dharam Das*, AIR 1982 SC 781; *State of Uttar Pradesh v. Arshad Ali Khan*, AIR 1982 SC 780 : (1981) 4 SCC 144; *S.T. Commr. v. Radhakrishan*, AIR 1979 SC 1588; *Director of Industries, U.P. v. Deep Chand*, AIR 1980 SC 801 : (1980) 2 SCC 332.
37. *C.B. Boarding & Lodging v. State of Mysore*, AIR 1970 SC 2042 : (1969) 3 SCC 84.

Under the Bombay Town Planning Act, 1954, land could be acquired by following a procedure less favourable, and paying less compensation, than the Land Acquisition Act. It was argued that the existence of two laws for acquiring land, one less favourable than the other, was discriminatory under Art. 14. But the Supreme Court rejected the contention in *Prakash Amichand Shah v. State of Gujarat.*[38] The Court ruled that while the State could acquire property under the Land Acquisition Act, the local authority working under the Planning Act could do so only under that Act. There was no option to the local authority to resort to one or the other of the alternative methods which result in acquisition. Also, since the acquisition under the Town Planning Act was for a particular purpose, the Act could provide for payment of compensation for such acquisition and it was not necessary to pay compensation under the Land Acquisition Act. The Court thus found that there was no denial of equal protection of laws or the equality before the law in the instant case.

But when two laws covering the same matter differ on substantive points, the harsher law may still be held invalid under Art. 14. When there existed two legal provisions for acquisition of land for a public purpose, lower compensation being payable under the one law than under the other, the drastic law was held bad because there was no classification to whom it would apply and the State could give one owner different treatment from the other equally situated.[39]

(t) SPECIAL COURTS

In *State of West Bengal v. Anwar Ali Sarkar*,[40] was involved a Bengal law permitting setting up of special courts for the 'speedier trial' of such 'offences', or 'classes of offences' or 'cases', or 'classes of cases', as the State Government might direct by a general or special order. These courts were to follow a procedure less advantageous to the accused in defending himself than the procedure followed by the ordinary criminal courts.

The Act was held invalid as it made no reasonable classification, laid down "no yardstick or measure for the grouping either of persons or of cases or of offences" so as to distinguish them from others outside the purview of the Act. The government had the power to pick out a case of a person and hand it over to the special tribunal while leaving the case of another person similarly situated to be tried by the ordinary criminal courts. It gave 'uncontrolled authority' to the executive 'to discriminate'. The necessity of 'speedier trial' was held to be too vague, uncertain and indefinite criterion to form the basis of a valid and reasonable classification.

On the other hand, in *Kathi Raning Rawat v. Saurashtra*,[41] a provision practically similar to the one involved in the *Anwar Ali* case was held valid because

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38. AIR 1986 SC 468 : (1986) 1 SCC 581.

39. *Deputy Commissioner, Kamrup v. Durganath*, AIR 1968 SC 394 : (1968) 1 SCR 561; *Nagpur Improvement Trust v. Vithal Rao*, AIR 1973 SC 689 : (1973) 1 SCC 500; *Om Prakash v. State of Uttar Pradesh*, AIR 1974 SC 1202 : (1974) 1 SCC 628; *D.S. Rege v. Municipal Corp. of Greater Bombay*, AIR 1979 Bom. 311.

In *State of Kerala v. Cochin Town Planning Trust*, AIR 1980 SC 1438 : (1980) 3 SCC 554, the Court has observed that the basis of equity jurisprudence is that classification is not permissible for compensation purposes so long as differentia relied on has no rational relation to the object in view: *ibid.*, 1446. See also, *P.C. Goswami v. Collector of Darrang*, AIR 1982 SC 1214 : (1982) 1 SCC 439.

40. AIR 1952 SC 75 : 1952 SCR 284.

41. AIR 1952 SC 123 : 1952 SCR 435.

the Court found that a policy was stated in the preamble to the Act, and that the government was expected to select such offences, classes of offences and classes of cases for trial in special courts as were calculated to affect public safety, maintenance of public order, etc.

Comparing the above two cases, it would appear that the main difference in the terms of the statutes, which resulted in different judicial verdicts as to their validity, was that the preamble to the Saurashtra Act was more elaborately worded than that to the Bengal Act. While the term 'speedier trial' used in the Bengal Act to set up special courts was held to be indefinite, the words 'public safety, etc.' in the preamble to the Saurashtra Act were held to be more definite and as giving a guiding principle to control administrative discretion. In essence, therefore, the difference would appear to be more of a drafting nature rather than of substance.[42]

Though the principle that law should lay down the policy if discretion to classify is vested by it in the executive, and that the executive cannot be given an uncontrolled authority to differentiate, was applied in both cases, yet difference arose in its application to specific circumstances. However, in the Saurashtra law the provision authorising the government to pick out any individual 'case' for trial by a special court was held invalid as being discriminatory. The government could specify a 'class' of cases, offences or persons for trial by special courts, but it could not claim a power to send a single, specific 'case' out of a class to a special court for trial.

The principle laid down in the above cases has been reiterated and applied in several other cases pertaining to special courts, though the result reached by the courts may not always appear to be quite satisfactory. In *Kedar Nath v. State of West Bengal*,[43] the law setting up special courts mentioned the offences triable by them but gave a discretion to the government to allot cases for trial to these courts. Two questions were raised for the consideration of the Supreme Court: (i) Did the law disclose any reasonable classification as to the offences mentioned ? (ii) Was the discretion left with the government to select cases for trial by special courts valid?

The Court answered both the questions in the affirmative. As regards the first, it held that the types of offences mentioned in the Act were those which were widely prevalent during wartime and the policy was clear in the Act. It should however be noted that the Act in question contained no specific words to define the policy. The Court discovered the underlying policy by its own process of rationalization. On the second question, the argument that the government could make a discriminatory choice among persons charged with the same offence, submitting one case for trial to a special court and leaving the other for trial by an ordinary court, and thus discriminate within the same class, was rejected on the ground that the standards, policy and purpose of the Act were laid down in clear terms, and the administrative authority "is expected to select the cases to be brought before the courts in fulfilment of that policy".

So far as the power to refer specific cases was sustained, the *Kedar Nath* case goes beyond the *Saurashtra* case mentioned above, but a subtle difference be-

42. See, *K. Haldar v. State of West Bengal*, AIR 1960 SC 457 : (1960) 2 SCR 646.
43. AIR 1953 SC 404 : 1954 SCR 30.

tween the situations in the two cases may be noted: whereas the *Saurashtra* law made no classification of offences itself and left the whole matter to the executive subject to the policy statement in its preamble, the law in the *Kedar Nath* case itself made the classification of offences for trial by special courts, and subject to this classification, power to refer specific cases was conferred on the executive. Nevertheless, by its holding in the *Kedar Nath* case, the Court did dilute to some extent the principle it evolved in the *Saurashtra* case,[44] for the government could pick and choose individual cases for trial by special courts.

In August, 1978, the President made a reference to the Supreme Court under Art. 143(1) of the Constitution,[45] seeking the Court's opinion on the constitutional validity of the Special Courts Bill proposing the setting up of special courts for speedy trial of offences committed by the holders of high public and political offices during the emergency of 1975-77. The proposed court was to be presided over by a sitting or retired High Court Judge to be appointed by the Central Government in consultation with the Chief Justice of India, and the accused could appeal to the Supreme Court against the verdict of such a court. The Supreme Court ruled that Parliament could make the law in question under entries 11A of List III and entry 77 of List I,[46] and that it did not infringe Art. 14 as the classification provided for by the Bill was valid. "The promulgation of emergency is not and cannot be a matter of normal occurrence in a nation's life, and "offences alleged to have been committed during the period of emergency constitute a class by themselves and so do the persons who are alleged to have utillised the high public or political offices by them as a cover or opportunity for the purpose of committing those offences."[47] The Court also invoked Art. 21 to assess the fairness of the procedure provided for in the Bill—this aspect is discussed later.[48]

The above-mentioned bill was enacted as the Courts Act, 1979 with one major change. Originally it was confined only to the trial of offences committed during the emergency, but, in Parliament, its scope was expanded so as to provide for setting up of special courts for trial of offences committed by those who held high "public or political offices" for all time to come. The Act was thus envisaged to be a permanent measure instead of being confined only to the emergency.

The Act was upheld by the Supreme Court in *State (Delhi Administration) v. V.C. Shukla*,[49] against challenge under Art. 14. The Court said that the main object of the Act was to provide for the speedy trial of certain class of offences, *viz.*, offences committed by person holding high public or political offices as a trust. Such persons have been placed in a separate class. For maintaining democracy, administrative efficiency and purity, it is necessary that when such persons commit serious abuse of power and are guilty of a breach of trust reposed in them, they form a special class of offenders. Quick disposal of such cases is necessary, for if such cases are allowed to have their normal, leisurely, span before normal courts, then the whole purpose in launching them may be frustrated. The term 'high public or po-

44. For comprehensive discussion of these cases see the *Maganlal Chhagganlal* case, *supra*, footnote 36.
45. *Supra*, Ch. IV, Sec. F(g).
46. *Supra*, Ch. X, Secs. F and D.
47. AIR 1979 SC 478 : (1979) 1 SCC 380.
48. *Infra*, Ch. XXVI.
49. AIR 1980 SC 1382 : (1980) Supp SCC 249.

litical office' is not vague; it bears a clear connotation as it means persons holding top positions wielding large powers.

(u) UNREASONABLE LAWS

As has been explained by BHAGWATI, J., in *Bachan Singh v. State of Punjab,*[50] Rule of law which permeates the entire fabric of the Indian Constitution excludes arbitrariness. "Wherever we find arbitrariness or unreasonableness there is denial of rule of law." Art. 14 enacts primarily a guarantee against arbitrariness and inhibits state action, whether legislative or executive, which suffers from the vice of arbitrariness. "Every state action must be non-arbitrary and reasonable. Otherwise, the court would strike it down as invalid."

This new dimension of Art. 14 transcends the classificatory principle. Art. 14 is no longer to be equated with the principle of classification. It is primarily a guarantee against arbitrariness in state action and the doctrine of classification has been evolved only as a subsidiary rule for testing whether a particular state action is arbitrary or not. If a law is arbitrary or irrational it would fall foul of Art. 14. As an example, it has been held that any penalty disproportionate to the gravity of the misconduct would be violative of Art. 14.[51]

But controlled discretion exercisable according to a policy for a purpose clearly enunciated by a statute does not suffer from the vice of conferment of unrestricted discretion.[52]

A statutory provision providing for payment of compensation for the land acquired by the State from a person, in several annual instalments instead of one lump sum, is unreasonable. The Supreme Court has argued that the owner of the land would require compensation in lieu of land forthwith to re-establish himself by purchasing another piece of land and, therefore, compensation ought to be paid in one lump sum.[53] But section 2(6) of the West Bengal Sales Tax Act, 1994 which requires the transporter to disclose the name of the consignor or consignee was not oppressive, irrelevant or arbitrary. Moreover for the purpose of such disclosure no special proforma is mandatory nor any machinery required to effectuate the provision.[54] A mere hardship cannot be a ground for striking down a valid legislation unless it is held to be suffering from the vice of discrimination or unreasonableness.[55]

The Court has, however, pronounced a self imposed restraint that ordinarily it will not determine the merits of the legislation and arrive at a conclusion that it is arbitrary violating Art. 14. The Court has pointed out that "inquisitorial inquiry"

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50. AIR 1982 SC 1336; *infra,* Ch. XXVI.
Also, *E.P. Royappa v. State of Tamil Nadu,* AIR 1974 SC 555 : (1974) 4 SCC 3; *Maneka Gandhi v. Union of India,* AIR 1978 SC 597 : (1978) 1 SCC 248; *Ramana D. Shetty v. International Airport Authority,* AIR 1979 SC 1628 : (1979(3 SCC 489; *Ajay Hasia v. Khalid Mujib,* AIR 1981 SC 487 : (1981) 1 SCC 722; see, *infra,* note 48 on 1042.

51. *Bhagat Ram v. State of Himachal Pradesh,* AIR 1983 SC 454, 460 : (1983) 2 SCC 442; For unreasonable and arbitrary provisions see *Salem Advocate Bar Association v. Union of India,* (2005) 6 SCC 344 : AIR 2005 SC 3353.

52. *Federation of Railway Officers Association v. Union of India,* (2003) 4 SCC 289 : AIR 2003 SC 1344.

53. *State of Tamil Nadu v. Ananthi Ammal,* AIR 1995 SC 2114 at 2120 : (1995) 1 SCC 519.

54. *State of West Bengal v. E.I.T.A India Ltd.,* (2003) 5 SCC 239 : AIR 2003 SC 4126.

55. *Prafulla Kumar Das v. State of Orissa,* (2003) 11 SCC 614 : AIR 2003 SC 4506.

is beyond the province of judicial review.[56] Qualifying the word "ordinarily" implies that in certain situations the Court might consider the merits. The Court has pointed out in Kerala Scheduled Tribes case that there is a presumption that the ground realities are known to the State, and, therefore, "if anybody raises a contrary contention it would be for him to bring on record sufficient material to lead the Court to arrive at a conclusion that "State's action was arbitrary".[57]

A law which was justified at the time of its enactment may, with the passage of time, become arbitrary and unreasonable with the change in circumstances.

In Motor General Traders v. State of Andhra Pradesh,[58] the Supreme Court has observed:

> "What was once a perfectly valid legislation may, in course of time, become discriminatory and liable to challenge on the ground of its being violative of Art. 14." In *Synthetics and Chemicals Ltd. v. State of Uttar Pradesh*,[59] the Supreme Court has observed that "restriction valid under one circumstance may become invalid in changed circumstances".

A provision not unconstitutional at the commencement of the Constitution can be rendered unconstitutional by later developments and thinking such as gender equality.[60]

Under the Bombay Rent Restriction Act, rents of premises were frozen at the level of 1st September, 1940. The Supreme Court declared the provision to be unreasonable and arbitrary and violative of Art. 14 in the year 1998 in view of so much inflation in the country since 1940.[61]

The Bar Council made a rule debarring persons aged above 45 years from enrolment as an advocate. The Supreme Court declared the rule to be discriminatory, unreasonable and arbitrary and thus violative of the principle of equality enshrined in Art. 14.[62]

Reservation by institutional preference is not violative of Art. 14 so long as it is reasonable and reasonableness has to be judged from a pragmatic point of view having regard to changed circumstances and practical realities.[63]

Merely because an appeal is not provided in a statute, would not by itself render a statute constitutionally invalid. However, if no appeal is provided for under a statute, an aggrieved party will still have the remedy of approaching the High Courts and Supreme Court in exercise of its power of Judicial review. Hence S. 3 Maharashtra Act. 17 of 1986 read with S. 9 Maharashtra Act 15 of

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56. *State of Kerala v. Peoples Union for Civil Liberties, Kerala State Unit*, (2009) 8 SCC 46 : (2009) 9 JT 579.
57. *State of Kerala v. Peoples Union for Civil Liberties, Kerala State Unit*, (2009) 8 SCC 46, 91. See also *V. Subramanyam v. Rajesh Raghuvendra Rao*, (2009) 5 SCC 608: AIR 2009 SC 1858.
58. AIR 1984 SC 121 : (1984) 1 SCC 222. Also, *Rattan Arya v. State of Tamil Nadu*, AIR 1986 SC 1444 : (1986) 3 SCC 385.
59. AIR 1990 SC 1927 : (1990) 1 SCC 109.
60. *John Vallamattom v. Union of India*, (2003) 6 SCC 611 : AIR 2003 SC 2902.
61. *Malpe Vishwanath Acharya v. State of Maharashtra*, AIR 1998 SC 602 : (1998) 2 SCC 1.
62. *Indian Council of Legal Aid and Advice v. Bar Council of India*, AIR 1995 SC 691 : (1995) 1 SCC 732.
63. *Saurabh Choudri v. Union of India*, (2003) 11 SCC 146 : AIR 2004 SC 361.

1987 abolishing appeals from original or appellate jurisdiction, was constitutionally invalid.[64]

D. ADMINISTRATIVE DISCRETION & ART. 14

A common tendency in modern democracies is to confer discretionary power on the government or administrative officers. The power is usually couched in very broad phraseology and gives a large area of choice to the administrator concerned to apply the law to actual factual situations.

In order to ensure that discretion is properly exercised, it is necessary that the statute in question lays down some norms or principles according to which the administrator has to exercise the discretion. Many a time the statutes do not do this and leave the administrator free to exercise his power according to his judgment. This creates the danger of official arbitrariness which is subversive of the doctrine of equality. To mitigate this danger, the courts have invoked Art. 14. In course of time, Art. 14 has evolved into a very meaningful guarantee against any action of the Administration which may be arbitrary, discriminatory or unequal.[65]

This principle manifests itself in the form of the following propositions:

(1) A law conferring unguided and unrestricted power on an authority is bad for arbitrary power is discriminatory.

(2) Art. 14 illegalises discrimination in the actual exercise of any discretionary power.

(3) Art. 14 strikes at arbitrariness in administrative action and ensures fairless and equality of treatment.

(i) CONFERRING ABSOLUTE DISCRETION

Proposition (1), stated above, envisages that a law conferring absolute or uncontrolled discretion on an authority negates equal protection of law because such power can be exercised arbitrarily so as to discriminate between persons and things similarly situated without reason.[66] As Bhagwati, J., has observed: "The law always frowns on uncanalised and unfettered discretion conferred on any instrumentality of the State."[67] Where power granted is open to use disproportionate to purpose to be achieved is invalid in the absence of guidelines or principles or norms which are 'essential' for exercise of such power.[68]

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64. *Jamshed N. Guzdar v. State of Maharashtra*, (2005) 2 SCC 591 : AIR 2005 SC 862. *Quare*: Whether appellate and supervisory jurisdiction could be alternative.

65. *Shrinivasa Rao v. J. Veeraiah*, AIR 1993 SC 929; *R.L. Bansal v. Union of India*, AIR 1993 SC 978 : 1992 Supp (2) SCC 318.

66. For discussion on proposition (2) See, *infra*, (ii) on 1272, under the heading "Administrative Discrimination".

67. *Sheo Nandan Paswan v. State of Bihar*, AIR 1987 SC 877, 895 : (1987) 1 SCC 288; see also *Ajit Kumar Nag v. GM (PJ) Indian Oil Corpn. Ltd.*, (2005) 7 SCC 764 : AIR 2005 SC 4217.

68. *District Registrar and Collector v. Canara Bank*, (2005) 1 SCC 496 : AIR 2005 SC 186.

The Court can veto any conferment of discretionary power on an authority if it is too broad, sweeping or uncanalised. The Supreme Court has laid down the applicable principle in the following words in *Naraindas*:[69]

> "Article 14 ensures equality before law and strikes at arbitrary and discriminatory state action….
>
> If power conferred by statute on any authority of the State is vagrant and unconfined and no standards or principles are laid down by the statute to guide and control the exercise of such power, the statute would be violative of the equality clause, because it would permit arbitrary and capricious exercise of power, which is the antithesis of equality before law".

In *Sudhir Chandra*,[70] the Supreme Court has observed:

> "… Our Constitution envisages a society governed by rule of law. Absolute discretion uncontrolled by guidelines which may permit denial of equality before law is the antithesis of rule of law. Absolute discretion not judicially reviewable inheres the pernicious tendency to be arbitrary and is therefore violative of Art. 14. Equality before law and absolute discretion to grant or deny benefit of the law are diametrically opposed to each other and cannot coexist."

It means that the legislature cannot validly enact a provision conferring naked or arbitrary power on the Administration to be exercised by it in its absolute discretion. No law ought to confer excessive discretionary power on any authority. The court can veto conferment of discretionary power on an authority if it finds it to be naked or arbitrary. S.73 of the Stamp Act, 1899 (as applicable in the Andhra Pradesh) has been held to suffer from the vice of excessive delegation, since (i) there were no guidelines as to the persons who may be authorized by the Collector, and (ii) there was no requirement of reasons being recorded by the Collector or the person authorized for his belief necessitating search, and (iii) the power of impounding documents could be exercised without giving notice or a chance to make good the deficit stamp duty, except in case of documents in custody of a bank (no reasons having being given for making the distinction), and the power to adjudicate upon need for impounding documents in all cases being vested in the person authorized. A discretionary power may not necessarily be a discriminatory power but where a statute confers a power on an authority to decide matters of moment without laying down any guidelines or principles or norms, the power has to be struck down as being violative of Article 14. The A.P. Amendment permits inspection being carried out by the Collector by having access to the documents which are in private custody i.e. custody other than that of a public officer. According to the Court it is clear that this provision empowers invasion of the home of the person in whose possession the documents "tending" to or leading to the various facts stated in Section 73 are in existence. Section 73

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69. *Naraindas v. State of Madhya Pradesh*, AIR 1974 SC 1232 : (1974) 4 SCC 788; Guidelines or principles or norms for exercise of discretionary power is essential. see also *District Registrar and Collector v. Canara Bank*, (2005) 1 SCC 496 : AIR 2005 SC 186. See also *Punjab Dairy Development Board v. Cepham Milk Specialities Ltd.*, (2004) 8 SCC 621 : AIR 2004 SC 4466, impost of cess on the licenced capacity of the producer of milk and dairy products following *Kishan Lal Lakhmi Chand v. State of Orissa*, 1993 Supp (4) SCC 461; See also *Raichurmatham Prabhakar v. Rawatmal Dugar*, (2004) 4 SCC 766 : AIR 2004 SC 3625; Rent Act conferring arbitrary and unreasonable power.

70. *Sudhir Chandra v. Tata Iron & Steel Co. Ltd.*, AIR 1984 SC 1064, 1071 : (1984) 3 SCC 369.

being one without any safeguards as to the probable or reasonable cause or reasonable basis or materials violates the right to privacy both of the house and of the person. Under the garb of the power conferred by Section 73 the person authorized may go on rampage searching house after house i.e. residences of the persons or the places used for the custody of documents. The possibility of any wild exercise of such power may be remote, but then on the framing of Section 73 the possibility cannot be ruled out. Any number of documents may be inspected, may be seized and may be removed and at the end the whole exercise may turn out to be an exercise in futility. The exercise may prove to be absolutely disproportionate to the purpose sought to be achieved. A reasonable nexus between stringency of the provision and the purpose sought to be achieved must exist[71]

The rationale underlying this proposition is that unbridled discretionary power may degenerate into arbitrariness, or may result in discrimination and, thus, contravenes Art. 14 which bars discrimination.[72]

To be valid, discretionary power ought to be hedged by policy, standards, guidelines or procedural safeguards to regulate its exercise otherwise the court may declare a provision conferring sweeping powers on the Administration as void. Bhagwati, J., has enunciated the principle in *Maneka Gandhi*[73] as follows:

> "… when a statute vests unguided and unrestricted power in an authority to affect the rights of a person without laying down any policy or principle which is to guide the authority in exercise of this power, it would be affected by the vice of discrimination since it would leave it open to the Authority to discriminate between persons and things similarly situated."

The above-mentioned principle is often invoked by the courts to assess the validity of laws conferring discretionary power. There is voluminous case-law in this area, but only a few illustrations may be given here to denote how the courts apply the principle in practice. A fuller discussion on this topic falls appropriately in the realm of Administrative Law.[74] In the context of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971, the Supreme Court has held that the initiation of proceedings under the Act must be as a last resort and the doctrine of proportionality should be applied to find out whether the power has been reasonably exercised.[75]

A statutory provision authorising the State Government, if it considers it necessary or expedient, to requisition by a written order any movable property and pay such compensation to the owner thereof as it may determine, is bad as it confers uncontrolled power on the government. There are no guidelines in the law regarding the object or purpose for which the government could requisition any

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71. *District Registrar and Collector v. Canara Bank*, (2005) 1 SCC 496 : AIR 2005 SC 186.
72. *District Registrar and Collector –vs- Canara Bank* (2005) 1 SCC 496 : AIR 2005 SC 186.
73. *Maneka Gandhi v. Union of India*, (1978) 2 SCJ at 350.
Also see, *E.P. Royappa v. State of Tamil Nadu*, AIR 1974 SC 555 : (1974) 4 SCC 3
74. For a detailed discussion on this topic, see, JAIN, *A TREATISE ON ADM. LAW*, I, Ch. XVIII; JAIN, *CASES & MATERIALS ON ADM. LAW*, III, Ch. XV; see also *Indra Parkash Gupta v. State of J & K*, (2004) 6 SCC 786 : AIR 2004 SC 2523.
75. *Teri Oat Estates (P) Ltd. v. U. T. Chandigarh*, (2004) 2 SCC 130 : (2003) 10 SCALE 1016.

movable property; there is no requirement that the property can be requisitioned only for a public purpose.[76]

A regulation made by Air India International, a statutory corporation, fixed the normal age of retirement of air hostesses at 35 years but authorised the managing director to extend the same to 45 years at his option subject to other conditions being satisfied. The regulation was held bad as it armed the managing director with uncanalized and unguided discretion to extend the age of retirement of any air hostess. No guidelines, principles or norms were laid down subject to which the power was to be exercised.[77] Nor was there any procedural safeguard available to an air hostess who was denied extension.

S. 6(4) of the U.P. Industrial Disputes Act, 1947, authorised the State Government to remit an order of a labour tribunal for reconsideration of the adjudicating authority and that authority was to submit the award to the government after reconsideration. The Supreme Court noted that S. 6(4) did not require the Government to hear the parties before remitting the award to the concerned adjudicating authority, the Government was not required to give reasons for remitting the award; the Government was not required to inform the authority the specific points on which it was to reconsider the award. In *B.B. Rajwanshi v. State of Uttar Pradesh*,[78] the Supreme Court declared S. 6(4) unconstitutional under Art. 14. The Court observed:

> "The provision cannot be upheld in the absence of necessary statutory guidelines for the exercise of the power conferred by it having regard to the fact that the proceeding before the labour court or the industrial tribunal is in the nature of quasi-judicial proceeding where parties have adequate opportunity to state their respective cases, to lead evidence and make all their submissions."

S. 6(4) was so widely worded that it was likely to result in grave injustice to a party in whose favour an award was made as S. 6(4) could be used to re-open the whole case. S. 6(4) conferred "unguided and uncontrolled powers" on the State Government. The power could be used arbitrarily to favour one party over the other; the power was capable of serious mischief.[79] The Court refused to accept the argument that the Government could seek necessary guidance from the object and content of the Act.

In practice, however, courts show a good deal of tolerance and deference towards conferment of discretion, and it is only in an extreme situation that a statutory provision is declared invalid on the ground of conferring excessive administrative discretion. There are a number of cases in which conferment of broad discretion has been upheld on such grounds as: the statutory provision conferring power has sufficient guidelines, principles or policies to regulate the exercise of power; the power has been conferred on a high official who is not expected to misuse the same but is expected to exercise the power reasonably and rationally;[80] there are procedural safeguards subject to which the power is to be

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76. *State of Punjab v. Khan Chand*, AIR 1974 SC 543 : (1974) 1 SCC 549.
77. *Air India v. Nergesh Meerza*, AIR 1981 SC 1829 : (1981) 4 SCC 335.
78. AIR 1988 SC 1089 : (1988) 2 SCC 415.
79. *Ibid.*, 1096.
80. *Chinta Lingam v. Union of India*, AIR 1971 SC 474 : (1970) 3 SCC 768; *State (Delhi Adm.) v. V.C. Shukla*, AIR 1980 SC 1382 : 1980 (3) SCR 500; *infra*.

exercised, such as, natural justice, recording of reasons for the decision, provision of appeal to a higher authority, etc.[81]

In *Laxmi Divi*[82] the court has reiterated the principle that mere likelihood of abuse of discretionary power conferred under statute would not render the statutory provision unconstitutional. There is always a difference between a statute and the action taken under a statute *i.e.* the statute may be valid and Constitutional but the action taken under it is invalid. Thus while considering the validity of Section 47A of the Stamp Act the Court held that an arbitrary market value whether or not based on extraneous considerations can always be challenged in judicial review proceedings.

As regards laying down of principles or guiding norms, it has been held, for instance, that it is not essential that the very section in the statute which confers the power should also lay down the rules of guidance, or the policy for the administrator to follow. If the same can be gathered from the preamble, or the long title of the statute and other provisions therein, the discretion would not be regarded as uncontrolled or unguided and the statute in question will not be invalid. At times, even vague policy statements to guide administrative discretion have been held by the courts as complying with Art. 14.[83]

An Orissa Act authorised the State Government to take over any estate free from all encumbrances. According to its preamble, the Act was passed in pursuance of the Directive Principles of State policy to secure economic justice to all.[84] The Supreme Court ruled that there was a clear enunciation of the policy in the Act, and the discretion vested in the government was not absolute as it had to be exercised in the light of this policy. All estates in the State could not be taken over at once due to financial difficulties and, therefore, in the very nature of things it was necessary to give "a certain amount of discretionary latitude to the State Government."[85]

The Kerala Education Bill gave a broad power of control to the government over private schools. As for example, government could recognise or not a newly established school, or could take over any school. The Supreme Court held that the general policy of the Bill was deducible from its preamble and the title, and the same was further reinforced by more definite statements of policy in different clauses. The government was to exercise its discretion to implement that policy. The power to take over schools could be exercised only after the Assembly

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81. *Sukhwinder Pal Bipan Kumar v. State of Punjab*, AIR 1982 SC 65 : (1982) 1 SCC 31; *Gram Saba, Shahzadpur v. State of Punjab*, AIR 1982 P&H 33; *Shiv Dutt Rai Fateh Chand v. Union of India*, AIR 1984 SC 1194, 1212 : (1983) 3 SCC 529.

82. *Govt. of Andhra Pradesh v. P. Laxmi Devi*, (2008) 4 SCC 720 : AIR 2008 SC 1640.

83. *Chandrakant Saha v. Union of India*, AIR 1979 SC 314 : (1979) 1 SCC 285; *Organo Chemical Industries v. Union of India*, AIR 1979 SC 1803 : (1979) 4 SCC 573; *New India Industrial Corp. Ltd. v. Union of India*, AIR 1980 Del 277; *R.R. Verma v. Union of India*, AIR 1980 SC 1461 : (1980) 3 SCC 288; *State (Delhi Administration) v. V.C. Shukla*, AIR 1980 SC 1399; *A.K. Roy v. Union of India*, AIR 1982 SC 710 : (1982) 1 SCC 271; for discussion on Roy, see, *infra*, under *Preventive Detention*, Ch. XXVII, Sec. B; *Shri Ram Bearings Ltd. v. Union of India*, AIR 1982 Pat. 93; *State of Mysore v. M.L. Nagade & Gadap*, AIR 1983 SC 762 : (1983) 3 SCC 253; *Ashok K. Yadav v. State of Haryana*, AIR 1987 SC 454 : (1985) 4 SCC 417.
Also see, M.P. JAIN, *THE EVOLVING INDIAN ADM. LAW*, 93-102 (1983).

84. See, *infra*, Ch. XXXIV.

85. *Biswambhar v. State of Orissa*, AIR 1954 SC 139 : 1954 SCR 842.
Also, *Bhairebendra v. State of Assam*, AIR 1956 SC 503 : 1956 SCR 303.

passed a resolution authorising the government to do so. Thus the Bill was held valid under Art. 14.[86]

S. 10(1) of the Industrial Disputes Act empowers the government to refer an industrial dispute to a board for settlement, or a court of enquiry, or a tribunal for adjudication. It was challenged on the ground that it gave arbitrary power to the government to discriminate between parties similarly situated. Rejecting the contention, the Court observed that "no two cases are alike in nature", and the industrial disputes which arise in particular establishments require to be treated having regard to the situation prevailing in the same. The discretion is not uncontrolled as the criteria to exercise it are to be found within the Act itself.[87]

A Bihar Act enacted that every appointment, dismissal, removal of any teacher of a college made during November, 1961, and March, 1962, would be subject to such order as the Chancellor "may, on the recommendation of the University Service Commission", pass. The provision literally appears to give uncanalised powers to the Chancellor to do what he liked with respect to the said appointments. The Court however 'read down' the provision and held it valid. The Chancellor's authority was only to satisfy himself that the said appointments etc., were in accordance with the relevant University Act both as to the substantive and procedural aspects thereof. Then, before passing the order, he would receive recommendation from the University Commission which was bound to give a hearing to the person concerned. This was not uncanalised power.[88]

The power conferred by S. 10(3)(*c*) of the Passport Act on the Passport Authority to impound a passport "in the interests of general public" has been held to be not unguided or uncontrolled. The ground is not vague and indefinite. These words have a well-defined meaning as they have been taken from Art. 19(5).[89] There are several procedural safeguards as well, *e.g.*, recording of reasons for impounding the passport, supplying a copy thereof to the affected person, and an appeal from him to a higher authority and hearing of the affected person.[90]

Under S. 105 of the Customs Act, if the Assistant Collector has reason to believe that some goods or documents are secreted, he can authorize any officer of customs to search for the same. The Assistant Collector is not obligated to give reasons for his belief, or to give the particulars of the goods or the documents. Nevertheless, the Supreme Court rejected the argument that arbitrary power was conferred on the Assistant Collector to make a search.

The Court ruled that not only a policy has been laid down but effective checks on his exercise of the power to search have been imposed. The policy is that the search could be in regard to the goods liable to be confiscated, or for the documents relevant to a proceedings under the Act. Though the Assistant Collector need not give reasons for ordering a search, yet if the existence of his belief is questioned in any collateral proceeding, he has to produce relevant evidence to sustain his belief. Under S. 165(5) of the Cr.P.C., he has to send forthwith to the

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86. *In Re Kerala Education Bill,* AIR 1958 SC 956 : 1958 SCR 995; *supra*.
87. *Niemla Mills Ltd. v. The 2nd Punjab Tribunal,* AIR 1957 SC 329 : 1957 SCR 335.
88. *Jagdish Pandey v. Chancellor, Bihar Univ.,* AIR 1968 SC 353 : 1968 (1) SCR 231; *supra*.
89. *Infra*, Ch. XXIV, Sec. F.
90. *Maneka Gandhi v. Union of India,* AIR 1978 SC 597, 631 : (1978) 1 SCC 248. *Infra,* Ch. XXIV.

Collector of Customs a copy of any record made by him and the Collector can certainly give necessary directions if the Assistant Collector goes wrong. Further, under S. 136(2) of the Customs Act, the Assistant Collector can be prosecuted and punished if he requires any person or place being searched without having reason to believe that he has such goods on his person, or that goods are secreted in that place.[91]

A land tax law was challenged on the ground that it left the power to determine land value to the subjective satisfaction of the tax commissioner. The argument was rejected for the proceedings before him were *quasi*-judicial and an appeal lay against his decision to a tribunal. The commissioner had to reach the decision about land value objectively on materials produced before him.[92]

Under the Income-tax Act, a person may be assessed either at the place of business or residence. But the Commissioner of Income-tax may transfer a case from one I.T.O. to another, while the Board of Revenue could transfer it from one place to another. The validity of the provision was sustained in *Pannalal Binjraj v. Union of India*,[93] in the face of an attack that it vested the executive with arbitrary power to transfer the case of an assessee from one place to another while others similarly situated could continue to be assessed at the place of their business or residence. The Court held that the provision had been made for 'administrative convenience' and 'convenient and efficient assessment' of income-tax and, therefore, the power to transfer assessment was not naked but was guided and controlled by the purpose which is to be achieved by the Act itself. The case may be characterised as the high water-mark of judicial deference to administrative convenience, for 'administrative convenience' by itself could hardly be regarded as a definite policy to control administrative discretion.[94]

A law authorised the competent authority to declare an area as a slum area, to declare house unfit for human habitation, and declare a slum area as a clearance area. These provisions were challenged under Art. 14 on the ground that they did not provide for a reasonable opportunity to the affected parties to be heard. The considerations which the authority had to keep in view in deciding whether an area was a slum area, or whether a house was unfit for habitation were laid down.

Considering the constitutionality of the impugned provisions, the Supreme Court stated in *State of Mysore v. Bhat*,[95] that there were two possible approaches to this question. One, to hold the provisions unconstitutional because they did not provide a reasonable opportunity for the affected parties to be heard. Two, if in the absence of anything to the contrary, the authority concerned was bound to follow the principles of natural justice, the law was not unconstitutional but the orders issued by the authority would be bad if issued without following natural justice.

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91. *Gopikisan v. Assistant Collector, Customs,* AIR 1967 SC 1298 : (1967) 2 SCR 340.
But see, *Abdul Wahab & Co., v. Asst. Commr., C.T.*, AIR 1968 Mys 100, where power of search and seizure conferred by the Mysore Sales Tax Act, 1957, was held invalid under Art. 14.

92. *Asst. Commr., U.L.T. v. B. & C. Co.,* AIR 1970 SC 169 : (1969) 2 SCC 55.

93. AIR 1957 SC 397 : 1957 SCR 233.

94. M.P. JAIN, Administrative Discretion and Fundamental Rights, 1 *JILI*, 247-8; M.P. JAIN, JUSTICE BHAGWATI and Indian Constitutional Law, 2 *JILI*, 36.

95. AIR 1975 SC 596 : (1975) 1 SCC 110.

The Court adopted the second alternative in the instant case. There was nothing in the Act militating against the opportunity to be heard. Further, the nature of the statutory duty was such that it implied an obligation on the authority to hear before deciding. The statutory provisions were therefore held valid, but the orders made under them were declared invalid as these had been issued without giving hearing to the affected persons. The Court could come to this conclusion because of the fact that the right of hearing is now given a wide operation in administrative proceedings.[1]

Broad discretion conferred on a high official may be held valid on the ground that he is expected to act with responsibility and not to misuse his power. As the Supreme Court observed in *Organo Chemicals*:[2]

> "When power is conferred on high and responsible officers they are expected to act with caution and impartiality while discharging their duties … The vesting of discretionary power in the State or public authorities or an officer of high standing is treated as a guarantee that the power will be used fairly and with a sense of responsibility."

To illustrate this principle, broad discretion conferred on the Comptroller and Auditor-General in respect of fixation of seniority among the staff was upheld on the ground that he was a high ranking constitutional authority who would act according to the needs of his department and without arbitrariness.[3] In many cases, large discretionary power conferred on the government without any built-in safeguards or guidelines, have been held valid on the ground that the government can be expected to exercise its powers with extreme caution and care.[4]

In *Union of India v. Annam Ramalingam*,[5] the Supreme Court upheld the validity of S. 28 of the Gold Control Act, 1968, against attack on the ground, that it provided no criteria or guidelines for the exercise of his power by the Administrator. S. 28 barred a licensed dealer, unless authorised by the Administrator, to carry on business as a money lender or banker on the security of ornaments or any other article. Although, there was no express rule prescribing the conditions or circumstances for grant of power had been made, that was held not to be decisive of the matter.

S. 28 being a part and parcel of the entire scheme of gold control as envisaged by the Act "the object of the enactment and the scheme affords sufficient guidance to the Administrator in the matter of exercising his discretion under that section". S. 28 was designed to prevent circumvention of other provisions of the Act. Against the Administrator's order a revision lay to the Central Government

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1. JAIN, *A TREATISE ON ADM. LAW*, I, Ch. IX.

2. AIR 1979 SC 1803 : (1979) 4 SCC 573.
For detailed comments on this case see, M.P. JAIN, Survey of Adm. Law *in I.L.I., XV ANNUAL SURVEY OF INDIAN LAW*, 324-6 (1979).

3. *Accountant-General v. S. Doraiswamy*, AIR 1981 SC 783 : (1981) 4 SCC 93.

4. *Laxmi Khandsari v. State of Uttar Pradesh*, AIR 1981 SC 873, 888 : (1981) 2 SCC 600.
In *A.K. Sabhapathy v. State of Kerala*, AIR 1983 Ker 24, the Kerala High Court said: "The fact that the power vests in the government is itself a sufficient safeguard".
But see, *contra*, *Jaswant Singh v. Sub-Divisional Officer*, AIR 1982 P&H 69, where the High Court has said that arbitrary discretionary power with no guidelines is not valid even though the power is conferred on a high authority like the State Government. This is only one of the many criteria to judge the constitutionality of a statute. This is a correct judicial attitude. Also see, *supra*.

5. AIR 1985 SC 1013 : (1985) 2 SCC 443.

"which implies that he will have to make judicious use of his power or discretion and any improper exercise is liable to be corrected by a higher authority".

On the whole, while the basic principle stands, *viz.*, uncontrolled discretion ought not to be conferred on the administration, the general judicial tendency is to apply this principle in a very flexible manner. The courts tend to uphold the law rather than declare it invalid on this ground which is done only in rare cases.[6] The proposition that high officials can be entrusted with large powers is untenable. Every person, high or low, is susceptible to misusing power in the absence of proper controls. The status of an officer is no guarantee that he will not misuse his powers.[7] In fact, the Supreme Court has itself warned that "wide discretion is fraught with tyrannical potential even in high personages, absent legal norms and institutional checks."[8]

A powerful reiteration of the principle that uncontrolled and unguided discretionary power is incompatible with Art. 14 comes from the Supreme Court in *Suman Gupta v. State of Jammu & Kashmir*.[9] The Medical Council of India in a report on undergraduate medical education, recommended that with a view to encouraging national integration, 10 per cent of the seats in every medical college, other than those where admissions were planned on an All India basis, should be reserved on a reciprocal basis for students from other States. This recommendation was later accepted at a joint conference of the Central Council of Health and the Central Family Welfare Council with the modification that such reservation should be 5%. Thereafter, the States of Andhra Pradesh, Jammu & Kashmir, Karnataka, Kerala and Tamil Nadu agreed among themselves to nominate candidates reserved in the medical colleges of the other participating States.

The instant case raised the question of the validity of the nominations made by the Governments of Andhra Pradesh and Jammu & Kashmir reciprocally in the medical colleges of each other on the ground that the nominations were made by the State Governments in their absolute and arbitrary discretion. The Supreme Court declared this procedure of nominating candidates by the governments "in their absolute and unfettered choice" to seats for the MBBS course in medical colleges outside their respective States on a reciprocal basis as unconstitutional under Art. 14.

While commending the goal of national integration as highly commendable and laudable, the Court has not accepted the thesis that the selection of candidates for that purpose must remain in the unlimited discretion and the uncontrolled choice of the State Government. "The exercise of all administrative power vested in public authority must be structured within a system of controls informed by both relevance and reason, relevance in relation to the object which it seeks to serve, and reason in regard to the manner in which it attempts to do so." Art. 14 is violated by powers and procedures which in themselves result in unfairness and arbitrariness. The Court has emphasized:

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6. Also see, *Jyoti Pd. v. Union Territory of Delhi*, AIR 1961 SC 1602 : (1962) 2 SCR 125; *Naraindas v. State of Madhya Pradesh*, AIR 1974 SC 1232.

7. *Kishan Chand v. Commr. of Police*, AIR 1961 SC 705, 715 : (1961) 3 SCR 135 (SUBBA RAO, J.)

8. *Mohinder Singh Gill v. Chief Election Commr.*, AIR 1978 SC 851 : (1978) 1 SCC 405.

9. AIR 1983 SC 1235 : (1983) 4 SCC 309.

> "…there is a well-recognised distinction between an administrative power to be exercised within defined limits in the reasonable discretion of designated authority and the vesting of an absolute and uncontrolled power in such authority. One is power controlled by law countenanced by the Constitution, the other falls outside the Constitution altogether."

Thus, if the State Government desires to advance the objective of national integration it must adopt procedures "which are reasonable and are related to the objective". It is incumbent on the government to adopt a criterion or restrict its power by reference to norms which, while designed to achieve its object, nevertheless, confine the flow of that power within constitutional limits.

The Court rejected an argument of the State Governments that as the governments finance medical education within their respective States, they are entitled to exercise absolute discretion in the nomination of the candidates to seats in medical colleges outside the States concerned, "specially when the nomination is part of a reciprocal arrangement between the different States."

The Court directed the Medical Council of India "to formulate a proper constitutional basis for determining the selection of candidates for nomination to seats in medical colleges outside the State in the light of the observations contained in this judgment." Until such a policy is formulated and concrete criteria are embodied in the selection procedure, the nominations are to be made by selecting candidates strictly on merit, the candidates nominated being those in order of merit, immediately below the candidates selected for admission to the medical college of the home State.

S. 3 of the Prevention of Corruption Act, 1988, empowers the State Government to appoint as many special Judges as may be necessary "for such case or group of cases" as may be specified in the notification. The validity of this provision was challenged under Art. 14 on the ground that it confers unfettered, unguided and absolute discretion on the Government and is thus capable of leading to abuse of power by the Government.

The Supreme Court has however upheld the validity of this provision in *J. Jayalalitha v. Union of India*.[10] The Court has agreed with the proposition that conferment of discretionary power on the executive which in the absence of any policy or guidelines permits it to pick and choose is unconstitutional.[11] But, in the instant case, the Court has ruled that S. 3(1) does not confer unfettered or unguided power because the object of the Act and S. 3 indicate when, and under what circumstances, the power conferred by S. 3 has to be exercised. The policy can be gathered from the preamble, the provisions of the enactment and other surrounding circumstances.[12]

One of the objects of the Act is to provide speedy trial far cases of corruption. This is the policy of the Act and, therefore, while exercising the power under S. 3, the Government shall have to be guided by the said policy. The Legislature could not have anticipated as to how many special Judges would be needed in an area. There-

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10. (1999) 5 SCC 138 : AIR 1999 SC 1912.

11. *Re Special Courts Bill,* 1978 (1979) 1 SCC 380 : AIR 1979 SC 478; *A.R. Antulay v. R.S. Nayak,* (1988) 2 SCC 602 : AIR 1988 SC 1531; *State of West Bengal v. Anwar Ali Sarkar, supra.*

12. See, *Jyoti Pershad v. Administrator for the Union Territory of Delhi,* AIR 1961 SC 1602 : (1962) 2 SCR 125; *Kathi Raning Rawat v. Saurashtra,* AIR 1952 SC 123 : 1952 SCR 435.

fore, the Legislature could not have laid down any fixed rule or guideline. It had to leave this matter to the discretion of the State Government as it would be in a better position to know the requirement. This is why discretion has been conferred on the State Government to appoint as many special Judges as may be necessary.

Absolute discretion to give or not to give gratuity has been rejected as unenforceable.[13]

(ii) ADMINISTRATIVE DISCRIMINATION

Here we see the application of the second proposition mentioned above.[14]

The first proposition discussed above envisages that where a statute is discriminatory either because it does not make a reasonable classification, or confers unregulated discretion on the executive, the statute itself is void under Art. 14. The second proposition being discussed now, however, envisages the situation where the statute itself does not suffer from any such vice, but the administrative authority may implement it in a discriminatory manner, or may not follow the policy or principle laid down in the Act to regulate its discretion.

In such a case, the charge of violation of equal protection may be laid against the Administration and its action quashed under Art. 14. The classic case on the point is *Yick Wo v. Hopkins*,[15] an American case. By an ordinance, the City of San Francisco made it unlawful to carry on a laundry, without the consent of the board of supervisors, except in a brick or stone building. In administering, the ordinance, 200 Chinese launderers were denied permission, even though they complied with every requisite, while 80 non-Chinese under similar circumstances had been permitted. The U.S. Supreme Court held that the ordinance has been administered with "a mind so unequal and oppressive as to amount to a practical denial by the State" of equal protection of laws. Though the law itself may be fair on its face, yet, if it is administered by public authority "with an evil eye and an unequal hand", so as practically to make unjust and illegal discriminations between persons in similar circumstances, the denial of equal justice is still within the prohibition of Art. 14. This Article secures all persons in India "not only against arbitrary laws but also against arbitrary application of laws." It ensures non-discrimination in state action both in the legislative and the administrative spheres.

The Cotton Control Order, 1950, banned all contracts and options in cotton except those permitted by the Textile Commissioner. The Commissioner permitted hedging contracts by members of the East-India Cotton Association. On being challenged by the M.B. Cotton Association which had been denied permission to enter into hedging contracts, the Supreme Court denied that there was discrimination because while East-India was an old and well-organised body dealing in hedging contracts, the *M.B. Association* was a new body and so the two Associations were not on an equal footing.[16]

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13. *Sudhir Chandra v. Tata Iron and Steel Co. Ltd.*, AIR 1984 SC 1064, 1071 : (1984) 3 SCC 369.
14. *Supra*, 1262.
15. 118, U.S. 356.
16. *M.B. Cotton Association v. Union of India*, AIR 1954 SC 634.

In *Lumsden Club v. State of Punjab*,[17] the Excise Commissioner banned the sale of liquor at the Lumsden Club but not at other clubs which were in similar position. The order was quashed as there was unjust discrimination. There could be a situation where discretion though conferred subject to a standard or policy, may be exercised in disregard of the policy. If so, it can be challenged under Art. 14.

A Tamil Trust made an application to the Government of Andhra Pradesh seeking permission to establish an engineering college for the benefit of the Tamil minority in the State of Andhra Pradesh. The Government refused permission to the Trust but at the same time it granted permission to two other societies to establish private engineering colleges. In *Vellore Educational Trust v. State of Andhra Pradesh*,[18] the Court quashed the Government's refusal of permission to the Tamil Trust as "not at all tenable" and quashed it. The Court also directed the Government to reconsider the matter and dispose it of according to law. This is an instance of discriminatory governmental action.

Although the principle is well-established that discriminatory administrative action can be challenged under Art. 14, yet, in practice, challenges to administrative action succeed only rarely, for the judicial attitude generally is to sustain administrative action against attacks of discrimination. The courts start with a presumption that the administration has not acted in a discriminatory manner; they would not easily assume abuse of power when discretion is vested in high officials. Further, the onus to prove that there has been an abuse of power is on the complainant. If, however, in a particular case, the complainant points out the circumstances which *prima facie* make out the exercise of power discriminatory *qua* him, then the authority concerned would be obligated to explain the circumstances under which the order was made. The court would then scrutinise the circumstances "with regard to the object sought to be achieved by the enactment and come to its own conclusion with respect to the *bona fides* of the order". The administration would have a good defence if it can prove *bona fides*.[19]

Selective application of law on an objective basis is not objectionable. The leading case in the area is *Ram Krishna Dalmia v. Justice Tendolkar*.[20] A commission of inquiry was appointed into Dalmia concerns by a notification under S. 3 of the Commission of Inquiry Act, 1952. S. 3 as well as the notification were challenged as discriminatory. S. 3 was held valid as the discretion conferred thereunder was not unguided because it was to be exercised subject to the policy and conditions laid down in the Act, *viz.*, a commission could be appointed to inquire into a definite matter of public importance. The notification was also sustained against the charge that it arbitrarily singled out the petitioner and his companies for hostile and discriminatory treatment and subjected them to a harassing and oppressive inquiry.

The Court held that Parliament having left the selective application of the Inquiry Act to the discretion of the government, the latter must act on the information available to it and the opinion it formed thereon. It is to be presumed, until

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17. AIR 1957 Punj. 20
18. AIR 1988 SC 130 : 1987 Supp SCC 543.
19. *Pannalal Binjraj v. Union of India*, AIR 1957 SC 397, 408 : 1957 SCR 233.
Also, MUKHERJEA J, in *Anwar Ali, supra*.
20. AIR 1958 SC 538 : 1959 SCR 279.

the contrary is proved, that the government would act honestly, properly and in conformity with the policy and the principles laid down by Parliament. The Court further held that the quality and characteristics said to exist in the petitioner's companies were so unique as to constitute a good or valid basis on which the petitioner and his companies could be regarded as a class by themselves. The facts as disclosed afforded sufficient support to the presumption of constitutionality of the notification. The petitioners failed to discharge the onus on them to prove that other persons or companies similarly situated have been left out and that they had been singled out for discriminatory and hostile treatment.

In *State of Jammu & Kashmir v. Bakshi Ghulam Mohammad,*[21] appointment of a Commission of Inquiry to enquire into acquisition of wealth by the former Prime Minister of the State by misuse of his official position was challenged as discriminatory as it was directed only against the Prime Minister and not the rest of his cabinet colleagues. The Court rejected the argument saying that it would be strange if the inquiry were also directed against all the other Ministers, for it could not be asserted that all Ministers had acquired wealth by misuse of their official position. The Prime Minister was a class by himself, and it could not be argued that by picking the former Prime Minister out of the entire cabinet for the enquiry, he had been discriminated.

At times, a statute may grant power to government to *exempt* any person or object from the operation of the Act. Such a power would be valid if not uncontrolled, and the statute in question contains a policy for its exercise.[22] But if the power of exemption granted by the statute to the government is uncanalised, unlimited or arbitrary, and the Act does not lay down any principle or policy for the guidance of exercise of discretion, or if the exemption granted is not according to the policy of the statute, the same can be quashed. Even when the grant of power of exemption is held valid, a question may still be raised that the actual exercise of power is arbitrary or illegal.

Under the Madras Buildings (Lease and Rent Control) Act, 1949, the government could exempt any building or class of buildings from the provisions of the Act. A government order exempting a specific building was held to be discriminatory as the reasons which led the government to pass the order were not such as could be countenanced by the policy or purpose of the Act.[23]

Under s. 113 of the T.N. Town and Country Planning Act, 1971, government could grant exemption to "any land or building or class of lands or buildings" from "all or any of the provisions of this Act" "subject to such conditions as they deem fit." This provision was held valid as the Supreme Court found that the preamble to the Act and many of the provisions of the Act "clearly indicate its policy". "Each of them contributes for subserving the policy of the Act, and clearly declares the purpose of the Act." Therefore, s. 113 could not be held to be 'unbridled'.

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21. AIR 1967 SC 122 : 1966 Supp SCR 401.

22. *Inder Singh v. State of Rajasthan*, AIR 1957 SC 510 : 1957 SCR 605; *Orient Weaving Mills v. Union of India*, AIR 1963 SC 98 : 1962 Supp (3) SCR 481; *Consumer Action Group v. State of Tamil Nadu*, (2000) 7 SCC 425; *Registrar of Cooperative Societies v. K. Kunyahmu*, (1980) 1 SCC 340; *A.N. Parasuraman v. State of Tamil Nadu*, (1989) 4 SCC 683.

23. *P.J. Irani v. State of Madras*, AIR 1961 SC 1781 : (1962) 2 SCR 169.

But a number of exemption orders issued under this provision were invalidated by the Supreme Court on the ground that these orders revealed non-application of mind and had been passed mechanically and arbitrarily and not in furtherance of the policy of the Act.

The State of Andhra Pradesh levied a purchase tax on purchase of sugarcane by sugar mills. The government had power to exempt from payment of tax any new factory. The government adopted the policy to grant exemption only to co-operative sugar factories and no other new factory. While 3 Judges of the Supreme Court held the exercise of discretion proper, two Judges held it invalid. According to the minority Judges, the policy of the Act was to provide incentive to the establishment of new sugar factories. Therefore, the policy regarding exemption must have some rational relation to the object. From this point of view, all new factories stand on the same footing, and there can be no justification for giving a favoured treatment to co-operative societies. Preferring co-operative societies to other new sugar factories "is wholly unrelated to the object of the exempting provision".

The view of the minority in the above case appears to be more rational for the government policy in effect meant promotion of co-operative societies and not sugar industry generally, and this was not what the Act envisaged. Each case of exemption should have been considered on merits. Whether a factory was co-operative or not was an irrelevant consideration for this purpose.[24]

At times, a statute may empower the government to extend any or all of its provisions to other persons, places or activities. Here again the same question arises: Is the power unguided? Has some policy been laid down for the purpose? If extended to a person or activity, whether this has been done according to the policy?[25]

The Government of India raised the age of compulsory retirement from 55 to 58 years subject to some conditions. The respondent was not given the benefit of this decision. The Court quashed the order holding it to be a violation of Art. 14.[26]

The Assam Foodgrains (Licensing & Control) Order, 1961, enumerated five considerations to which the licensing authority was to keep regard in granting or refusing a licence. One of these considerations was that a co-operative society was to be preferred to anyone else in certain circumstances in granting a licence. But when the government directed the licensing authority to grant licences only to a specified co-operative society, in order to create a monopoly in its favour, and the licensing officer acted accordingly, then a discrimination arose against others and this was bad under Art. 14. Under the order, it was open to the licensing authority to give preference to co-operative societies in the matter of granting a licence if in a particular locality it was of the view that that would fulfil the objectives of the statutory provision in question. But to refuse licence to anyone else only to create a monopoly in favour of one co-operative society amounted to discrimination in the administration of the law.[27]

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24. *Shri Rama Sugar Industries v. State of Andhra Pradesh*, AIR 1974 SC 1745 : (1974) 1 SCC 534.

25. *B.Y. Kshatriya v. Union of India*, AIR 1963 SC 1591; *Mohmedali v. Union of India*, AIR 1964 SC 980 : 1963 Supp (1) SCR 993.

26. *Union of India v. Mool Chand*, AIR 1971 SC 2369 : (1972) 3 SCC 273.

27. *Mannalal Jain v. State of Assam*, AIR 1962 SC 386 : (1962) 3 SCR 936.
For a comment on the case see, 4 *JILI*, 458.

When a higher qualification is prescribed having regard to the current social conditions and only graduates and post-graduates in veterinary science are coming out in large number and many degree holders are unemployed and, moreover, new diseases are discovered and new techniques are in use, the prescription of higher qualification is in consonance with the worldwide trend and in the interest of general public. Such qualification provisions are protected under the second part of Art. 19(6). Restrictions on rights of the diploma and certificate holders to continue to hold office of veterinary physician or surgeon or to practice veterinary medicine is reasonable within the meaning of Art. 19(6) and hence not violative of Art. 19(1)(g). Hardship to a section of veterinary professionals or holders of office, because of introduction of the higher qualification could not render the new provisions for higher qualification unconstitutional. Furthermore the qualifications prescribed were to operate prospectively and merely because it affected the rights of diploma and certificate holders to continue in their profession, it could not be said to have retrospective operation. The confusion which some time arises regarding conferring retrospectivity to a statute was explained to some extent by the Supreme Court in Udai Singh Dagar.[28] In that case the qualifications for veterinary practitioners was altered to the effect that their qualification should be a degree or a post-graduate degree instead of existing diplomas. The contention that it operated retrospectively since the diploma holders who are already in service could no longer hold their office was rejected by the Court on the reasoning that a person would have a right to enter into a profession and continue therewith provided he holds the requisite qualification as and when a qualification is laid down by a law within the meaning of Art. 19(1)(g) of the Constitution when the same comes into effect. In other words, it would operate prospectively and, thus those who did not fulfill the qualification from the specified date would not continue to practice from that date.

VIVA VOCE

For selecting candidates for admission to government medical or engineering colleges, or for appointment to government services, a test usually applied is that of *viva voce, i.e.*, interviewing candidates and grading them on that basis. Questions have been raised whether or not oral interview is compatible with Art. 14.

Two considerations arise in connection with the *viva voce* test. On the one hand, such a test is helpful in assessing the personality of the candidate. As the Supreme Court has itself accepted in *Ashok Kumar Yadav v. State of Haryana*,[29] the *viva voce* test "performs a very useful function in assessing personal characteristics and traits" of the candidates. On the other hand, it has been argued that an oral interview is subjective and based on first impressions and could thus lead to arbitrariness. A *viva voce* test can be manipulated. Too much reliance on this test may lead to a sabotage of the purity of the proceedings.

Taking into account these considerations, the Supreme Court has ruled that while *viva voce* test forms an important factor in the selection process but not too great reliance need be placed on it.[30]

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28. *Udai Singh Dagar v. Union of India*, (2007) 10 SCC 306 : AIR 2007 SC 2599.
29. (1985) 4 SCC 417 : AIR 1987 SC 454.
30. *Praveen Singh v. State of Punjab*, (2000) 8 SCC 633 : AIR 2001 SC 152.

While holding that oral interview could not be regarded as an irrelevant or irrational test for purposes of admission to colleges or for public employment, the Supreme Court has also laid down some safeguards to reduce chances of arbitrariness as the Supreme Court is apprehensive that if too high marks are allotted for the *viva voce* test, it may lead to misuse of power by the concerned authorities.

In case of selection for services, a somewhat higher percentage of marks is permissible for *viva voce* than in case of admission to a course for, in the latter case, the personality traits of the students are not fully developed and are still in the formative stage and, therefore, in case of students, greater importance is to be accorded to the written test than to the *viva voce* to which importance attached ought to be minimal. In case of students, *viva voce* should not be relied upon as an exclusive test but should be resorted to only as an additional or supplementary test; it must be conducted by persons of high integrity, calibre and qualification; very high marks (such as 33 per cent of the total marks) should not be allocated to the interview test. For admission to colleges, not more than 15 per cent of the total marks should be fixed for interview.[31]

However, for appointment to public services (such as munsiffs), a higher relative value may be given (say 25 per cent) to the *viva voce* test, the reason being that candidates have mature personality.[32] The Court pointed out that the written test assesses the man's intellect and the interview test the man himself and "the twain shall meet" for a proper selection. In case of services where selection is made out of mature persons, a higher weightage may be given to the *viva voce* test. If, however, selection is to be made out of younger persons whose personalities are still in the process of development, a lower weightage is to be given to *viva voce*. "It must vary from service to service according to the requirement…."

There have been several cases in which the validity of selections made on the basis of *viva voce* test have been challenged. In *Chitralekha v. State of Mysore*,[33] a system of selection of candidates for admission to the State medical colleges by *viva voce* examination was challenged on the ground that it enabled the interviewers to act arbitrarily and manipulate the results. The Supreme Court rejected the contention holding that not only had the government laid down a clear policy and prescribed defined criteria in the matter of giving marks at the interview, but it had also appointed competent men to make the selection on the basis.

On the other hand, in *Periakaruppan*,[34] the interviews were found to be vitiated. For admission to the State medical colleges, certain marks had been allotted to the *viva voce* test and the interviewers were required to take five prescribed criteria into consideration for the purpose. The interviews were quashed because the total interview marks had not been divided into separate prescribed heads and marks had been given to the candidates in a lump and not on itemised basis and also while irrelevant matters had been taken into consideration certain relevant matters had been ignored.

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31. *Ajay Hasia v. Khalid Mujib,* AIR 1981 SC 487 : (1981) 1 SCC 722.
Also, *R. Karuppan v. Ministry of External Affairs,* AIR 1982 Mad. 316: 45 marks for *viva voce* out of 345 marks for admission to the M.L. Degree Course held not arbitrary.

32. *Lila Dhar v. State of Rajasthan,* AIR 1981 SC 1777 : (1981) 4 SCC 159.

33. AIR 1964 SC 1823 : (1964) 6 SCR 368.

34. *A. Peeriakaruppan v. State of Tamil Nadu,* AIR 1971 SC 2303 : (1971) 1 SCC 38.

The most significant pronouncement in this area is *Ajay Hasia*.[35] Here a large number of candidates were given admission to the regional engineering college because of high marks obtained at the interview although they had secured low marks at the written qualifying examination. According to the Supreme Court, this did give rise to the suspicion that marks at the interview had been manipulated to favour candidates but did not prove *mala fides*. The Court did not quash the admissions made by the college because it agreed to take in 50 best students next year in addition to the normal in-take. The Court laid down the following guidelines so that the interview system might not be vitiated under Art. 14:

> "If the marks allocated for the oral interview do not exceed 15% of the total marks and the candidates are properly interviewed and relevant questions are asked with a view to assessing their suitability with reference to the factors required to be taken into consideration, the oral interview test would satisfy the criterion of reasonableness and non-arbitrariness."

The Court further suggested that the interviews be tape-recorded so that there is evidence to judge whether interviews were conducted in an arbitrary manner or not.

In case of *viva voce* test for services, even between one service and another, depending upon the significance and relevance of the personality factor, maximum marks for interview may vary, as for example, higher marks for *viva voce* test may be prescribed for the Provincial Civil Service than in case of any other service. The Supreme Court expressed the view that in Civil Service (Executive), not more than 12.2% of the total marks be allotted to the *viva voce* test. Commenting upon the prescription of 33.3% marks for recruitment to administrative services of the State, the Court said that with this enormously large spread of marks for *viva voce*, this test "tended to become a determining factor in the selection process", and this "opens the door wide for arbitrariness, and in order to diminish, if not eliminate the risk of arbitrariness, this percentage needs to be changed."

In *Ashok Yadav v. State of Haryana*,[36] the Court ruled that the allocation of 33% marks for the Provincial Civil Service was excessive and would suffer from the vice of arbitrariness and, therefore, quashed it. But, in later cases, the Court has changed its opinion and has accepted allocation of high percentage of marks for *viva voce* test for recruitment to Senior State Administrative Services.

In *Mehmood Alam Tariq v. State of Rajasthan*,[37] the Court has accepted a percentage of 33 for the purpose. Distinguishing the situation in the instant case from that which was considered in *Ajay Hasia*, the Court has pointed out that the officers to be selected for higher services would, in course of time, be required "to man increasingly responsible positions in the core services," and, therefore, these men should be endowed with personality traits conducive to the levels of performance in such services. *Ajay Hasia* refers to admission of students to edu-

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35. *Supra*, footnote 31.
Also see, *Nishi Maghu v. State of Jammu & Kashmir*, AIR 1980 SC 1975 : (1980) 4 SCC 95; *Arti Sapru v. State of Jammu & Kashmir*, AIR 1981 SC 1009 : (1981) 2 SCC 484; *Koshal Kumar v. State of Jammu & Kashmir*, AIR 1984 SC 1056 : (1984) 2 SCC 652.
Also, *infra*.

36. AIR 1987 SC 454 : (1985) 4 SCC 417.

37. AIR 1988 SC 1451 : (1988) 3 SCC 241.

cational institutions and the personality of these students "is yet to develop and it is too early to identify the personal qualities." The Court observed:

> "There is nothing unreasonable or arbitrary in the stipulation that officers to be selected for higher services and who are with the passage of time, expected to man increasingly responsible positions in the core services…..should be men endowed with personality traits conducive to the level of performance expected in such services…Academic excellence is one thing. Ability to deal with public with tact and imagination is another. Both are necessary for an officer. The dose that is demanded may vary according to the nature of the service."

A similar view has been propounded in *State of Uttar Pradesh v. Rafiquddin*,[38] where prescription of 35% marks for selection for judicial branch was upheld.

In other services, however, the Court still insists on a low percentage of marks for *viva voce*. Thus, in *Vikram Singh*,[39] allocation of 28.5% marks for interview for selection to the posts of excise inspectors was held to be too high and was thus quashed.

The Court has ruled that for selection to the posts of assistant engineers in the State Electricity Board, a maximum of 15% marks may be allotted for interview and group discussion—10% for interview and 5% for group discussion.[40] Allocation of 33% marks for interview for selection for the posts of Assistant Engineers (Civil) and (Mechanical) for Public Works Dept. was held to be too high and not in accordance with the dictum in *Ashok Yadav*.[41]

The Supreme Court has pointed out in *Indian Airlines Corporation v. Capt. K.C. Shukla*,[42] that a distinction appears to have been made in interviews held for competitive examination or admission in educational institutions and selection for higher posts. In the former case, efforts are made to limit the scope of arbitrariness by lowering down the proportion of marks at the *viva voce* but the same standard cannot be applied for selection for higher posts. This becomes clear from the ruling in *Lila Dhar*.[43] It is thus clear that no hard and fast rule can be laid down because much would depend on the level of the post and the nature of performance expected from the incumbent. Accordingly, in *Shukla*, the basis of evaluation depending on 50% on assessment of confidential reports and 50% on interviews for purposes of promotion was upheld by the Court.

In *Union of India v. N. Chandrasekharan*,[44] for the promotional post of assistant purchase officer from the post of purchase assistant—B, the promotion was based on a written test, interview and assessment of the confidential reports. The weightage given to each component was 50, 30, 20 marks. It was also prescribed that to qualify for promotion, a candidate should secure a minimum of 50% prescribed for each head and also 60% in the aggregate. This scheme of assessment was upheld by the Supreme Court.

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38. AIR 1988 SC 162 : 1987 Supp SCC 401.
Also, *Subhash Chandra Verma v. State of Bihar*, AIR 1995 SC 904 : 1995 Supp (1) SCC 325.

39. *Vikram Singh v. Subordinate Services Selection Board, Haryana*, AIR 1991 SC 1011 : (1991) 1 SCC 686; *C.P. Kalra v. Air India*, (1994) Supp (1) SCC 454.

40. *Munindra Kumar v. Rajiv Govil*, AIR 1991 SC 1607 : (1991) 3 SCC 368.

41. *Supra*, footnote 36.

42. 1993(1) SCC 17.

43. *Liladhar v. State of Rajasthan*, AIR 1981 SC 1777 : (1981) 4 SCC 159.

44. AIR 1998 SC 795 : (1998) 3 SCC 694.

(iii) ARBITRARY STATE ACTION

Art. 14 out-laws arbitrary administrative action. When there is arbitrariness in state action, Art. 14 springs into action and the courts strike down such action. Arbitrary state action infringes Art. 14.[45]

A very fascinating aspect of Art. 14 which the courts in India have developed over time is that Art. 14 embodies "a guarantee against arbitrariness" on the part of the Administration. As the Supreme Court has observed in *Royappa*:[46] "from a positivistic point of view, equality is antithetic to arbitrariness." Any action that is arbitrary must necessarily involve the negation of equality. Abuse of power is hit by Art. 14. The authority endowed with a power must free itself from political interference.[47]

The new orientation being given to Art. 14 by the courts has been explained by BHAGWATI, J., in *Bachan Singh v. State of Punjab*.[48] Rule of law which permeates the entire fabric of the Indian Constitution excludes arbitrariness. "Wherever we find arbitrariness or unreasonableness there is denial of rule of law." Art. 14 enacts primarily a guarantee against arbitrariness and inhibits state action, whether legislative or executive, which suffers from the view of arbitrariness. "Every state action must be non-arbitrary and reasonable. Otherwise, the Court would strike it down as invalid."

To challenge an arbitrary action under Art. 14, the petitioner does not have to show that there is someone else similarly situated as he himself, or that he has been dissimilarly treated. On this point, the Supreme Court has observed in *Kalra*:[49]

> "Article 14 strikes at arbitrariness in executive/administrative action because any action that is arbitrary must necessarily involve the negation of equality. One need not confine the denial of equality to a comparative evaluation between two persons to arrive at a conclusion of discriminatory treatment. An action *per se* arbitrary itself denies equality of protection by law."

This new dimension of Art. 14 transcends the classificatory principle. Art. 14 is no longer to be equated with the principle of classification. It is primarily a guarantee against arbitrariness in state action and the doctrine of classification has been evolved only as a subsidiary rule for testing whether a particular state action is arbitrary or not. If a law is arbitrary or irrational it would fall foul of Art. 14. As an example thereof, it has been held that any penalty disproportionate to the gravity of the misconduct would be violative of Art. 14.[50]

Every action of the state must be informed by reasons and guided by public interest. Actions uninformed by reason may be questioned as arbitrary. Whenever there is arbitrariness in state action, Art. 14 springs to life and judicial review strikes such an action down.[51] Arbitrariness is the antithesis of

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45. *A.P. Aggarwal v. Govt. of NCT of Delhi*, AIR 2000 SC 205.
46. *E.P. Royappa v. State of Tamil Nadu*, AIR 1974 SC 555 : (1974) 3 SCC 3.
47. *Suresh Chandra Sharma v. Chairman, U.P. SEB*, (2005) 3 SCC 153 : AIR 2005 SC 2021.
48. AIR 1982 SC 1325 : (1982) 3 SCC 24.
49. *A.L. Kalra v. P & E Corpn of India, Ltd.*, AIR 1984 SC 1361, 1367.
50. *Bhagat Ram v. State of Himachal Pradesh*, AIR 1983 SC 454, 460 : (1983) 2 SCC 442.
51. *Dwarkadas Marfatia & Sons v. Board of Trustees, Bombay Port*, AIR 1989 SC 1642; *LIC v. Escorts*, AIR 1986 SC 1370 : (1986) 1 SCC 264; *L.I.C. of India v. Consumer Education and Research Centre*, AIR 1995 SC 1811 : (1995) 5 SCC 482; *M.S. Bhut Education Trust v. State of Gujarat*, AIR 2000 Guj 160.

Art. 14.[52] Equality and arbitrariness are sworn enemies. Art. 14 strikes at arbitrariness in state action and ensures fairness and equality of treatment.[53]

In a number of cases, government action has been quashed on the ground of its being arbitrary or discriminatory. Art. 14 strikes not only at discrimination but also at arbitrariness in general. The wage board for working journalists divided the newspapers and news agencies into seven classes on the basis of gross revenues. According to this test, the P.T.I. should have been placed in the third category but the wage board placed it in the second—a higher category, thus placing on the P.T.I. more onerous obligations. This was held to be arbitrary which "singles out the P.T.I. for discrimination."[54]

Spot admissions on the last day for vacant seats without notice in State owned institutions for higher professional education was held bad as it denied equality of opportunity and the test of merit. "The State even in the exercise of its administrative power cannot act arbitrarily. Being the State it is obliged to act in a fair, reasonable and equitable manner."[55]

The State Government exempted only a specified number of prints of the *Gandhi* film (20) from payment of entertainment tax. Viewers of other prints of the film had to pay the tax. The Court held that exempting only a few prints, and not all prints of the film, was discriminatory and arbitrary.[56] When the circumstances provided under specific clauses of the Scheme and the agreement, as to events on which cash subsidy could be recovered as arrears of land revenue were not attracted on the facts, recovery of the subsidy by the State in violation of those clauses was illegal and arbitrary.[57]

The State Government fixed higher quantity of levy sugar for higher income group. The High Court held that this was not based on any rational basis as it allowed better placed persons to get more sugar at the cheapest rate.[58]

In a number of other cases, arbitrary or discriminatory exercise of power by the administration has been quashed by the courts.[59]

When an authority has power to relax a directory rule, its relaxation in particular cases has to be governed by objective considerations. No public authority can pick and choose persons for receiving the benefit of relaxation of the rules. Relaxation must be governed by defined guidelines.[60]

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52. *Express Newspapers (P.) Ltd. v. Union of India*, AIR 1986 SC 872; *Netai Bag v. State of West Bengal*, (2000) 8 SCC 262 : AIR 2000 SC 3313.
53. *Delhi Transport Corp. v. DTC Mazdoor Congress*, AIR 1991 SC 101, 196; *Mahesh Chandra v. Regional Manager, U.P. Financial Corpn.*, AIR 1993 SC 935 : (1993) 2 SCC 279.
54. *The P.T.I. v. Union of India*, AIR 1974 SC 1044 : (1974) 4 SCC 638.
55. *Ajay Kumar v. Chandigarh Adm., Union Territory*, AIR 1983 P & H 8; *Punjab Engineering College, Chandigarh v. Sanjay Gulati*, AIR 1983 SC 580 : (1983) 2 SCC 517.
56. *Globe Theatres v. State of Maharashtra*, AIR 1983 Bom. 265.
57. *Sun Beverages (P) Ltd. v. State of U. P.*, (2004) 9 SCC 116 : AIR 2004 SC 777.
58. *R. Ramanujam v. Commr. and Secretary, T.N. Govt.*, AIR 1982 Mad. 261.
59. *Jitendra Nath v. W.B. Board of Exams.*, AIR 198 3 Cal 275; *Dhudaram v. State of Rajasthan*, AIR 1983 Raj. 29; *M.K. Santhamma v. State of Kerala P.S.C.* AIR 1983 Ker. 84; *J.P. Kulshrestha v. Allahabad University*, AIR 1980 SC 2141 : (1980) 3 SCC 418; *Vishundas Hundumal v. State of Madhya Pradesh*, AIR 1981 SC 1636.
60. *Principal, King George's Medical College v. Vishan Kumar*, AIR 1984 SC 221, 226 : (1984) 1 SCC 416.

When the only reason for the en masse cancellation was that a "controversy" had been raised, there was clear non application of mind to any particular case or cases and more so when infact none of the cases were examined.[61]

The Government of Uttar Pradesh issued an order terminating at one stroke the appointment of all the governmental advocates throughout the entire State. In *Shrilekha Vidyarthi v. State of Uttar Pradesh*,[62] the Supreme Court quashed the order characterising it as arbitrary: "Arbitrariness is writ large in the impugned circular." The Court stated the applicable principle as follows:

> "It is now well-settled that every state action, in order to survive, must not be susceptible to the vice of arbitrariness which is the crux of Art. 14 of the Constitution and basic to the rule of law, the system which governs us, arbitrariness being the negation of the rule of law."

Another notable principle developed by the Supreme Court out of Art. 14 is that every action of the government, or any of its instrumentalities, must be informed by reason. Any state action which is not informed by reason cannot be protected as it would be easy for the citizens to question such an action as being arbitrary. "Non-arbitrariness, being a necessary concomitant of the rule of law, it is imperative that all actions of every public functionary in whatever sphere must be guided by reason and not humour, whim, caprice or personal predilections of the persons entrusted with the task on behalf of the State and exercise of all powers must be for public good instead of being an abuse of power."[63] The decision not to fill up the vacancies has to be taken *bona fide* and must pass the test of reasonableness so as not to fail on the touchstone of Art. 14.[64]

The government and other public authorities must act reasonably and fairly and that each action of such authorities must pass the test of reasonableness.[65]

But a case of arbitrariness is not made out where two views are possible and the view taken by the government cannot be challenged on the ground that the other view is a better one.[66] Mere fact that some hardship or injustice is caused to someone is no ground to strike down the rule altogether if otherwise the rule appears to be just, fair and reasonable and not unconstitutional.[67]

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61. *Onkar Lal Bajaj v. Union of India,* (2003) 2 SCC 673 : AIR 2003 SC 2562.
62. AIR 1991 SC 537.
63. *Style (Dress Land) v. Union Territory, Chandigarh,* (1999) 7 SCC 89, 100 : AIR 1999 SC 3678; *Dolly Chanda v. Chairman, Jee,* (2005) 9 SCC 779 : AIR 2004 SC 5043; Admission—Arbitrary conduct of authorities. *Haryana Urban Development Authority v. Dropadi Devi,* (2005) 9 SCC 514 : AIR 2005 SC 1487. Arbitrary conduct of Development authority in delivering possessions.
64. *Food Corporation of India v. Bhanu Lodh,* (2005) 3 SCC 618 : AIR 2005 SC 2775.
65. *Hansraj H. Jain v. State of Maharashtra,* (1993) 3 SCC 634; *New Horizons Ltd. v. Union of India,* (1995) SCC 478; *Mahesh Chandra v. Regional Manager, U.P. Financial Corp.,* AIR 1993 SC 935 : (1993) 2 SCC 279; *U.P. State Road Transport Corp.v. Mohd. Ismail,* AIR 1991 SC 1099 : (1991) 3 SCC 239; *Common Cause, A Registered Society v. Union of India,* AIR 1997 SC 1886; *Shiv Sagar Tiwari v. Union of India,* AIR 1997 SC 2725 : (1997) 1 SCC 444.
66. *Onkar Lal Bajaj v. Union of India,* (2003) 2 SCC 673 : AIR 2003 SC 2562.
67. *A. P. Coop. Oil Seeds Growers Federation Ltd. v. D. Achyuta Rao,* (2007) 13 SCC 320 : (2007) 4 JT 454.

(a) RIGHT OF HEARING

In some cases, the Courts have insisted, with a view to control arbitrary action on the part of the administration, that the person adversely affected by administrative action be given the right of being heard before the Administration passes an order against him. It is believed that such a procedural safeguard may minimise the chance of the Administration passing an arbitrary order. Thus, the Supreme Court has extracted from Art. 14 the principle that natural justice is an integral part of administrative process.

Art. 14 guarantees a right of hearing to the person adversely affected by an administrative order.[68] As the Supreme Court has observed in the case noted below,[69] "The *audi alteram partem* rule, in essence, enforces the equality clause in Art. 14 and it is applicable not only to *quasi*-judicial bodies but also to administrative orders adversely affecting the party in question unless the rule has been excluded by the Act in question."[70] *Maneka Gandhi*[71] is an authority for the proposition that the principles of natural justice are an integral part of the guarantee of equality assured by Art. 14. An order depriving a person of his civil right passed without affording him an opportunity of being heard suffers from the vice of violation of natural justice and is thus an arbitrary order.[72]

A few cases may be taken note of here to illustrate this proposition.

The Maharashtra Legislature enacted an Act to provide for summary eviction of persons unauthorisedly occupying vacant lands in urban areas. The Act gave power to an authorised authority to order vacation of any land by its occupiers. The Supreme Court held the Act to be invalid in *State of Maharashtra v. Kamal*,[73] under Art. 14 on the ground that it laid down no guidelines to control the exercise of discretion by the concerned authority. The Act prescribed no procedure for the concerned authority to follow before declaring any land as "Vacant land" for the purposes of the Act. The Supreme Court emphasized that the Act conferred 'uncontrolled and arbitrary" power on the authority and, therefore, in the matters covered by the Act, a hearing procedure was of the essence of the matter.

A government company made a service rule authorising it to terminate the service of a permanent employee by merely giving him a three months' notice or salary. The rule was declared to be invalid as being violative of Art. 14 on the ground that it was unconscionable.[74] The rule in question constituted a part of the employment contract between the corporation and its employees. The Court ruled that it would not enforce, and would strike down, an unfair and unreasonable clause in a contract entered into between parties who were *not equal* in bargain-

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68. For a fuller discussion on Natural Justice, see, M.P. JAIN, *A TREATISE OF ADMINISTRATIVE LAW*, I, Chs. X and XI, 304-447; JAIN, *CASES AND MATERIALS ON INDIAN ADM. LAW*, I, Chs. IX and X, 641-919.

69. *Delhi Transport Corporation v. DTC Mazdoor Union*, AIR 1999 SC 564.

70. *Union of India v. Amrik Singh*, AIR 1991 SC 564 : (1991) 1 SCC 654; *D.K. Yadav v. JMA Industries*, (1993) 3 SCC 259.

71. *Maneka Gandhi v. Union of India*, AIR 1978 SC 597 : (1978) 1 SCC 248.
For detailed discussion on this case, see, *infra*, Ch. XXVI.

72. *Haji Abdool Shakoor & Co. v. Union of India*, JT 2001 (10) SC 438.

73. AIR 1985 SC 119 : (1985) 1 SCC 234.

74. *Central Inland Water Transport Corporation Ltd. v. Brojo Nath*, AIR 1986 SC 1571.

ing power. This was in conformity with the mandate of the "great equality clause in Art. 14."

The Court emphasized that the judicial concept of Art. 14 has progressed "from a prohibition against discriminatory class legislation to an invalidating factor for any discriminatory or arbitrary state action." The Court also emphasized that the rule was "both arbitrary and unreasonable" and "as it also wholly ignored and set aside the *audi alteram partem* rule" violated Art. 14. The Court emphasized that "the principle of natural justice has now come to be recognised as being a part of the constitutional guarantee contained in Art. 14." The rule in question was "both arbitrary and unreasonable," and it also wholly ignored and set aside the *audi alteram partem* rule and, thus, it violated Art. 14.

The above proposition has been reiterated by the Supreme Court in *D.T.C. v. D.T.C. Mazdoor Union.*[75] The Court again held, rejecting a clause authorising termination of service at a month's notice, that the freedom of contract must be founded on equality of bargaining power between contracting parties. The freedom of contract must be founded on the equality of bargaining power. There can be myriad situations which result in unfair and unreasonable bargain between parties possessing wholly disproportionate and unequal bargaining power.

The Cantonment Board, Dinapur, granted permission to the respondent to make additions to their buildings situated in the cantonment. Under a provision in the Cantonments Act, 1924, the officer commanding-in-chief had power to suspend a Board's resolution. In the instant case,[76] the OCIC cancelled the Board's resolution after giving it a hearing but not to the respondent to whom the permission had been given. The Supreme Court ruled that OCIC ought to have given a hearing to the respondent as well before cancelling the permission given by the Board. The Court observed: "*Audi alteram partem* is a part of Art. 14 of the Constitution." The real affected party in the fact situation was the party being ultimately affected by cancellation of the Board's resolution. Because of Art. 14, "no order shall be passed at the back of a person, prejudicial in nature to him, when it entails civil consequences."

Merely because in the scheme of merger of two government companies the employees of one of them would suffer in terms of seniority or chances of promotion, the whole scheme could not be treated as discriminatory or arbitrary.[77]

(b) JUDICIAL DISCRETION

Discretion vested in a judicial officer exercisable on the facts and circumstances of each particular case may not amount to a denial of equal protection unless "there is shown to be present in it an element of intentional and purposeful discrimination."

The discretion of judicial officers is not arbitrary as the law provides for revision by superior courts of orders passed by subordinate courts.[78]

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75. AIR 1991 SC 101 : 1991 Supp (1) SCC 600.
76. *Cantonment Board, Dinapore v. Taramani Devi,* (1992) Supp. (2) SCC 501 : AIR 1992 SC 61.
77. *Indian Airlines Officers' Assn. v. Indian Airlines Ltd.,* (2007) 10 SCC 684 : AIR 2007 SC 2747.
78. *Budhan v. State of Bihar,* AIR 1955 SC 191 : (1955) 1 SCR 1045.
For a comment on the case see, 1 *JILI* 181.
Also, *A. Lakshmanrao v. Judicial Magistrate,* AIR 1971 SC 186 : (1970) 3 SCC 501.

The discretion given to the judge to sentence an accused convicted of murder either to death or to imprisonment for life is not invalid under Art. 14. The judge has to balance all the aggravating and mitigating circumstances of the case and record his reasons in writing for awarding lesser punishment.[79] Similarly, discretion available to the judge in other criminal cases in the sentencing policy and the judicial fluctuations in punishment do not violate Art. 14.[80]

The same principle has been extended to discretion given to *quasi*-judicial authorities, *e.g.*, rent controller, disciplinary authority etc.[81]

(iv) GRANT OF BENEFITS BY THE STATE

A welfare state has wide power to regulate and dispense leases, licenses, contracts, etc. The modern state is a source of great wealth and, therefore, questions often arise whether it is bound by any norm in dispensing its largess.

In India, it is now well established that in dispensing its largess, the state is expected not to act as a private individual but should act in conformity with certain healthy standards and norms.[82] The principle of non-discrimination contained in Art. 14 has been applied by the Supreme Court in an area of great contemporary importance, *viz.*, conferment of benefits and award of contracts by the government.

Art. 14 has been applied to the grant of largess or benefit by the state. Even while conferring a benefit or largess, or giving a contract, the government is subject to Art. 14. This means that the Administration cannot act in an arbitrary or discriminatory manner even in the area of grant of largess or conferring benefit by it on individuals. The government is not as free as a private person to pick and choose the recipients of its largess. Whatever its activity, a government is always a government and, as such, is subject to the restraints, inherent in a democratic society. A democratic government cannot exercise its power arbitrarily or discriminately because Art. 14 is always there to regulate its discretion in all spheres. "The state need not enter into any contract with anyone, but if it does so, it must do so fairly without discrimination and without unfair procedure."[83] The government cannot lay down arbitrary and capricious standards for the choice of persons with whom alone it will deal. Every action of the government must be informed with reason and should be free from arbitrariness because government is always a government.[84] BHAGWATI, J., has laid down the principle as follows:[85]

> "Where the government is dealing with the public, whether by giving of jobs or entering into contracts or issuing quotas or licences or granting other forms of largess, the government cannot act arbitrarily at its sweet will and, like a pri-

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79. *Jagmohan Singh v. State of Uttar Pradesh*, AIR 1973 SC 947 : (1973) 1 SCC 20.
80. *Inderjeet v. State of Uttar Pradesh*, AIR 1979 SC 1867 : (1979) 4 SCC 246.
81. *Manindra Sanyal v. State of West Bengal*, AIR 1976 Cal 174; *Parkash Chander v. Haryana State Electricity Board*, AIR 1976 P&H 30.
82. *Netai Bag v. State of West Bengal*, (2000) 8 SCC 262, 274 : AIR 2000 SC 3313.
83. *Erusian Equipment and Chemicals Ltd. v. State of West Bengal*, AIR 1975 SC 266 : (1975) 1 SCC 70.
84. *Asiatic Labour Corp. v. Union of India*, AIR 1983 Guj. 86; *Durga Associates, Raipur v. State of U.P.*, AIR 1982 All 490.
85. *Ramana Dayaram Shetty v. International Airport Authority of India*, AIR 1979 SC 1628 : (1979) 3 SCC 489.

> vate individual, deal with any person it pleases, but its action must be in conformity with standard or norm which is not arbitrary, irrational or irrelevant."

In *Ramana*,[1] the International Airport Authority, a statutory body, floated a tender for running a restaurant at the Bombay Airport. Certain conditions of eligibility were laid down for the contractor. The authority awarded the contract to one who did not fulfil the norms of eligibility laid down. The Supreme Court ruled that the authority ought to have stuck to the conditions prescribed by it. The action of the authority was discriminatory as it did not give an equal chance to other persons similarly situated to tender for the contract. The Court has emphasized that when the government lays down some norms or standards of eligibility, then the government cannot award the contract to some one not fulfilling the prescribed conditions of eligibility. If the authority does so, its action becomes discriminatory since it excludes "other persons similarly situate from tendering for the contract" and that would be "plainly arbitrary and without reason".

BHAGWATI, J., speaking for the Court has expounded the relevant principle as follows:[2]

> "It is well settled rule of administrative law that an executive authority must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them".

The most notable aspect of *Ramana* is that it put a restriction on the discretion of the Administration to award a contract to whomsoever it likes. Instead, the exercise of the power to award contract must be structured by "rational, relevant and non-discriminatory" standards or norms. This means that while inviting tenders to award a contract, the norms or standards governing the tenders should be reasonable and non-discriminatory and the concerned authority should not depart from the same arbitrarily and without justification.

In another case, allotment of quotas of resin by the State to industrial units was quashed as it was based on no reasonable basis.[3]

The principle that the state cannot act in an arbitrary or discriminatory manner in the matter of conferring or not conferring benefits on individuals and that the distribution of the largess should be reasonable has been applied in a large number of cases.[4] For example, the Supreme Court has observed in *Mahabir Auto Stores v. Indian Oil Corporation*:[5]

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1. *Ibid*.
2. AIR 1979 SC, at 1635.
3. *Om Prakash v. State of Jammu & Kashmir*, AIR 1981 SC 1001 : (1981) 2 SCC 270.
4. *Kasturi Lal v. State of Jammu & Kashmir*, AIR 1980 SC 1992 : (1980) 4 SCC 1; *Parashram Thakur Dass v. Ram Chand*, AIR 1982 SC 872; *Premjit Bhat v. Delhi Development Authority*, AIR 1980 SC 738; *Ajoomal Lilaram v. Union of India*, AIR 1983 SC 278; *Kirti Kumar v. Indian Oil Corporation, Ahmedabad*, AIR 1983 Guj 235; *Asiatic Labour Corp. v. Union of India*, AIR 1983 Guj 86; *D.S. Sharma v. Delhi Administration*, AIR 1983 Del 434; *Vikas Enterprises v. State of Uttar Pradesh*, AIR 1982 All 236.

Sri Rama Engineering Contracts v. Dept. of Space, Govt. of India, AIR 1981 AP 165; *Shriram Refrigeration India Ltd. v. State Bank of India*, AIR 1983 Pat 203; *State of Madhya Pradesh v. Nandlal Jaiswal*, AIR 1987 SC 251; *Union of India v. Hindustan Development Corporation*, AIR 1994 SC 988, 997; *Ramniklal N. Bhutia v. State of Maharashtra*, AIR 1997

[Footnote 4 Contd.]

> "It appears to us that rule of reason and rule against arbitrariness and discrimination, rules of fair play and natural justice are part of the rule of law applicable in situation or action by state instrumentality in dealing with citizens in a situation like the present one. Even though the rights of the citizens are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play, natural justice, equality and non-discrimination in the type of the transactions and nature of the dealing as in the present case."

In *Sterling Computers Ltd. v. M & N Publications Ltd.*,[6] the Supreme Court has ruled that even in commercial contracts where there is a public element it is necessary that relevant considerations are taken into account and the irrelevant considerations are kept out. In *Union of India v. Graphic Industries Ltd.*, [7] the Supreme Court has held that even in contractual matters public authorities have to act fairly.

In the area of exercise of contractual powers by governmental authorities, the function of the courts is to prevent arbitrariness and favouritism and to ensure that the power is exercised in public interest and not for a collateral purpose.[8] The Railway Board rejected the tender of the respondent. The Supreme Court ruled that the Board had acted arbitrarily and without applying its mind while doing so. The Court characterised it as a "flagrant violation of the constitutional mandate of Art. 14."[9]

Usually, the courts do not interfere with policy matters. But, in the instant case, the Supreme Court quashed the policy because it was framed in ignorance of the facts. The court stated : "Any decision be it a simple administrative decision or a policy decision, of taken without considering the relevant facts, can only be termed as an arbitrary decision."

When a term of the tender is changed after the parties have filed their offers in response thereto, it amounts to changing the rules of the game after it has begun. In such a situation, the only way out is to begin a fresh process of initial tender all over again.[10]

It is the settled law that no one has a fundamental right to carry on trade or business in liquor.[11] In exercise of its regulatory power, the State is entitled to

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[Footnote 4 Contd.]

SC 1236; *Raunaq International Ltd. v. I.V.R. Construction Ltd.*, AIR 1999 SC 393 : (1999) 1 SCC 492; *Air India Ltd. v. Cochin International Airport Ltd.*, AIR 2000 SC 801 : (2000) 2 SCC 617; *Centre for Public Interest Litigation v. Union of India*, AIR 2001 SC 80 : (2000) 8 SCC 606.

This topic is discussed more fully under Administrative Law, see, M.P. JAIN, *CASES AND MATERIALS IN INDIAN ADMINISTRATIVE LAW*, Vol. II, Ch. XV, M.P. JAIN, A *TREATISE ON ADMINISTRATIVE LAW*, I Ch. XVIII.

5. AIR 1990 SC 1031, 1037 : (1990) 3 SCC 752.

6. (1993) 1 SCC 445, 464 : AIR 1996 SC 51.

7. (1994) 5 SCC 398 : AIR 1995 SC 409.

8. *Tata Cellular v. Union of India*, AIR 1996 SC 11; *Asia Foundation and Construction Ltd. v. Trafalgar House Construction (I) Ltd.*, (1997) 1 SCC 738 : (1997) 1 JT 309.

9. *Union of India v. Dinesh Engineering Corpn.*, (2001) 8 SCC 491 : AIR 2001 SC 3887.

10. *Monarch Infrastructure (P.) Ltd. v. Commissioner, U.M.C.*, AIR 2000 SC 2272 : (2000) 5 SCC 287.

11. *Khoday Distilleries v. State of Karnatka*, (1995) 1 SCC 574; *Ugar Sugar Works Ltd. v. Delhi Administration*, AIR 2001 SC 1447 : (2001) 3 SCC 635.

prohibit absolutely any form of activity in relation to an intoxicant, e.g., manufacture, possession, storage, import, export, etc. The State has the exclusive privilege to manufacture, sale, etc. of liquor. But if the State decides to part with its monopoly, then the State can regulate consistent with the principles of equality enshrined in Art. 14. The Supreme Court has observed in *Doongaji & Co. v. State of Madhya Pradesh*:[12]

> "Further when the State has decided to part with such right or privilege to the others, then State can regulate consistent with the principles of equality enshrined under Art. 14 and any infraction in this behalf at its pleasure is arbitrary violating Art. 14. Therefore, the exclusive right or privilege of manufacture, storage, sale, import and export of the liquor through any agency other than the State would be subject to the rigour of Art. 14…."[13]

The Supreme Court has ruled recently in *TVL Sundarsan Granites v. Imperial Granites Ltd*.,[14] that "while grant of largess is at the discretion of the State Government, its action should be open, fair, honest and completely above board. In the instant case, grant of lease by the State in favour of a party for quarrying coloured, granite was quashed on the ground that in doing so, the State had not acted "fairly and reasonably and had not kept public interest and mineral development in the State in view".

Grant of *tehbazari* by the Nagarpalika without any notice, without any auction or without any advertisement was held to be vitiated.[15]

After the terms and conditions for award of a contract have been announced, the concerned authority cannot go back on them otherwise it may result in undue favour to a particular person.[16]

Although norms and guidelines are generally to be followed, deviations for good reasons are not barred. Thus, where the guidelines issued by the RBI to bankers said that the banks should follow the broad policies contained in the guidelines relating to 'One Time Settlement' of its customers whose accounts have been classified as NPA, deviation in minor matters which does not touch the broad aspects of the policy could not be considered as violating Art. 14.[17]

When tenders are invited for execution of a work, the contract is awarded to the lowest tenderer which is in public interest. The principle of awarding contract to the lowest tenderer applies when all things are equal. The tender system eliminates favouritism and discrimination in awarding public works. It is also in public interest to adhere to the rules and regulations subject to which the tenders are invited.

Ignoring the instructions subject to which the tenders are invited would encourage and provide scope for "discrimination, arbitrariness and favouritism

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12. AIR 1991 SC 1947 : 1991 Supp (2) SCC 324.
13. Also see, *Har Shankar v. Deputy Excise & Taxation Commr*., AIR 1975 SC 1121 : (1975) 1 SCC 737; *State of Madhya Pradesh v. Nandlal Jaiswal, supra.*
14. (1999) 8 SCC 150 : AIR 1999 SC 3835.
15. *0mprakash Tiwari v. District Magistrate, Ballia,* AIR 1996 All 115.
Also see, *Ram and Shyam & Co. v. State of Haryana,* AIR 1985 SC 1147 : (1985) 3 SCC 267.
16. *Ramana Dayaram Shetty, supra*; *Netai Bag, supra.*
17. *Sardar Associates v. Punjab & Sind Bank,* (2009) 8 SCC 257 : (2009) 10 JT 410.

"which are totally opposed to the Rule of Law and our constitutional values". The very purpose of issuing Rules/instructions is to ensure their enforcement lest the Rule of Law should be a casualty". Inclusion of an item in the schedule to the Drugs (Prices Control) Order, 1995 (made under the Essential Commodities Act, 1955) in deviation from a norm fixed in a policy decision may result in violation of Art. 14.[18]

But even if the regulations provide that normally allotment of land should be made by inviting applications, the authorities were not precluded in a given situation to take recourse to a regulation which enabled the authorities to make allotment to a particular company. This is because of the principle that when power exercised by a statutory authority is traceable to a provision of a statute, then in the absence of violation of any mandatory provision therein or illegality of the purpose, a decision taken in furtherance of the statute would not be interfered with.[19] Hence when a high level committee presided over by the Minister authorized under rules of Executive Business framed under Article 166 considers a project and recommends an allotment of land to a company which was to undertake the project and the State Government clears the project, the requirement of consultation is satisfied. In such circumstances the competent authorities were free to evolve their own procedure.[20] It was not imperative that consultation should be by exchange of letter.[21]

"Merely because a bid is the lowest the requirements of compliance of rules and conditions cannot be ignored". Also, the concerned authority is not obliged to award contract to a tenderer at the quoted price bid. The authority can always negotiate with the next lowest tenderer (in case the lowest is out for any reason) for awarding the contract on economically viable price bid.[22]

Section 3(1) of the Capital of Punjab (Development and Regulation) Act, 1952, grants power to the Central Government to "sell, lease or otherwise transfer" any land or building belonging to the government "on such terms and conditions" as it may think fit. The Court has ruled in the following case that the action of the Government under S. 3(1) "is required to be fair and reasonable and not actuated by considerations which could be termed as arbitrary or discriminatory. The Government cannot act like a private individual in imposing the conditions solely with the object of extracting profits from its leassees. Governmental actions are required to be based on standards which are not arbitrary or unauthorised".[23]

Similarly, before the government places the name of a person on the blacklist, he should be given an opportunity of hearing. Blacklisting creates a disability as it pre-

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18. *Secretary, Ministry of Chemicals & Fertilizers, Govt. of India v. CIPLA Ltd.,* (2003) 7 SCC 1 : AIR 2003 SC 3073.
19. *Chairman & MD, BPL Ltd. v. S.P. Gurarajа,* (2003) 8 SCC 567 : AIR 2003 SC 4536.
20. *Chairman & MD, BPL Ltd. v. S.P. Gurarajа,* (2003) 8 SCC 567 : AIR 2003 SC 4536.
21. *Ibid.*
22. *West Bengal Electricity Board v. Patel Engg. Co. Ltd.,* AIR 2001 SC 682 : (2001) 2 SCC 451.
23. *Style (Dress Land) v. Union Territory, Chandigarh,* (1999) 7 SCC 90 : AIR 1999 SC 3678.

vents the person concerned from the privilege of entering into lawful relationship with government for purposes of gain:[24]

Award of contract by the Government of India to a private party for development of medium size oil fields was challenged through a public interest litigation on the ground of non-application of mind. But the Court rejected the contention because on facts the contention was not substantiated. The Court also ruled that whether the oilfield was to be developed by the Oil and Natural Gas Commission on a stand alone basis was a matter of policy and the Court would not interfere with the same. If the Court is satisfied that there have been "unreasonableness, *mala fide*, collateral considerations" in awarding a contract then the Court can quash the award of contract. As to the agreed price for purchase of oil extracted from the oil field in question, the Court said that this was a highly "technical and complex" problem and the Court was not qualified to probe into this matter.[25]

A contract entered into between the Lucknow Municipal Corporation and a builder to build an underground commercial complex in a municipal park was quashed by the Supreme Court in the following case.[26] The Court characterised the contract in question as being against the law and the masterplan. The contract was entered into by the corporation without calling tenders. The contract was held to be wholly unreasonable and one-sided favouring the builder. The general rule is that to dispose of public property, tenders ought to be called or a public auction held.[27] The Court described the contract in the following words:[28]

> "A bare glance at the terms of the agreement shows that not only the clauses of the agreement are unreasonable for the Mahapalika but they are atrocious. No person of ordinary prudence shall even enter into such an agreement. Valuable land in the heart of commercial area has been handed on a platter to the builder for it to exploit and to make runaway profits."

The Court ordered the building constructed to be demolished.

The great importance of disciplining discretion of the Administration in the matter of awarding contracts cannot be lost sight of in the contemporary period. To-day the state is the source of enormous wealth. Many individuals and businesses seek largess of the government in the form of contracts, licences, leases, quotas, jobs, mineral rights, property leases, etc. There is, therefore, need to develop some norms to regulate, structure and discipline government discretion to confer such benefits. The government or any of its agencies should not be allowed to act arbitrarily and confer benefits on whomsoever they want.[29]

The court can, on a finding of arbitrary methodology, itself suggest curative solutions. In *Ravi Development*,[30] the Supreme Court criticized the judgment of the High Court which held that the adoption of a particular method was arbitrary

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24. *Eurasian Equipment & Co. Ltd. v. State of West Bengal*, AIR 1975 SC 266 : (1975) 1 SCC 70; *J. Vilanganson v. Executive Engineer*, AIR 1978 SC 930; *Raghunath Thakur v. State of Bihar*, AIR 1989 SC 620; *Southern Painters v. Fertilizers & Chemicals Travancore Ltd.*, AIR 1994 SC 1277 : 1994 Supp (2) SCC 699.

25. *Centre for Public Interest Litigation v. Union of India*, (2000) 8 SCC 606 : AIR 2001 SC 80.

26. *M.I. Builders v. Radhey Shyam Sahu*, AIR 1999 SC 2468 : (1999) 6 SCC 464.

27. See, *Tata Cellular v. Union of India*, AIR 1996 SC 11 : (1994) 6 SCC 651; *Ram & Shyam v. State of Haryana*, AIR 1985 SC 1147.

28. *M.I. Builders*, AIR 1999 SC 2468 at 2500 : (1999) 6 SCC 464.

29. This question has been discussed further in Ch. XXXIX, entitled "Government Contracts".

30. *Ravi Development v. Shree Krishna Prathisthan*, (2009) 7 SCC 462 : (2009) 5 JT 563.

and unreasonable but the Court put across certain suggestions for the consideration of the State Government in relation to fresh notice being given regarding the method and its applicability so that all persons interested can participate on equal terms promoting healthy competition.

(v) SALE OF GOVERNMENT PROPERTY

The basic principle is that a public authority does not have an open-end discretion to dispose of its property at whatever price it likes. The principle is that the sale should take place openly and the effort should be to get the best price.[31]

The several methods which can be employed for this purpose are : (i) public auction; (ii) inviting tenders for the property. As the Supreme Court has observed in *State of Uttar Pradesh v. Shiv Charan Sharma*:[32] "Public auction with open participation and a reserved price guarantees public interest being fully subserved."

The Supreme Court has laid down that mineral rights ought not be granted through private negotiations but by holding a public auction where those interested in the matter may bid against each other. The Court has observed: "Public auction with open participation and a reserved price guarantees public interest being fully subserved."[33]

In *Haji T.M. Hassan v. Kerala Financial Corpn.*,[34] the Supreme Court has emphasized that public property owned by the state or its instrumentality should be sold generally by public auction or by inviting tenders. Observance of this rule not only fetches the highest price for the property but also ensures fairness in the activities of the state and public authorities. There should be no suggestion of discrimination, bias, favouritism or nepotism. But there may be situations when departure from this rule may become necessary. However, such situations must be justified by compulsions and not by compromise. It must be justified by compelling reasons and not by just convenience.

Balco[35] is the latest pronouncement of the Supreme Court on the disposal of government property. 51% equity in Balco, a government undertaking, was sold to a private company by inviting tenders through global advertisement. The sale was challenged on various grounds but the Supreme Court rejected all the contentions and upheld the sale. The following three main propositions emerge from the Court decision:

(1) Divestment by the government in a public enterprise is a matter of economic policy which is for the government to decide. The Court does not interfere with economic policies unless there is a breach of law.

(2) Sale of an undertaking to the highest bidder after global advertisement inviting tenders at a price which was way above the reserve price fixed by the gov-

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31. *Fertilizer Corp. Kamgar Union v. Union of India*, AIR 1981 SC 344 : (1981) 1 SCC 568.
32. AIR 1981 SC 1722 : 1981 Supp SC 85.
33. *Ram & Sham Co. v. State of Haryana*, AIR 1985 SC 1147 : (1985) 3 SCC 267.
34. AIR 1988 SC 157 : (1988) 1 SCC 166.
Also see, *C. Rami Reddy v. State of Andhra Pradesh*, AIR 1986 SC 1158; *Shri Sachidanand Pandey v. State of West Bengal*, AIR 1987 SC 1109 : (1987) 2 SCC 295; *Bhupal Anna Vibhute v. Collector of Kolhapur*, AIR 1996 Bom 314.
35. *Balco Employees Union (Regd.) v. Union of India*, JT 2001 SC 466 : (2002) 2 SCC 333.

ernment could not be said to be vitiated in any way. The procedure followed was proper.

(3) The matter of fixation of the reserve price, the matter being a question of fact, the Court does not interfere unless the methodology adopted for the purpose is arbitrary.

CHAPTER XXII

FUNDAMENTAL RIGHTS (3)
RIGHT TO EQUALITY (ii)

SYNOPSIS

A. NO DISCRIMINATION ON GROUNDS OF RELIGION ETC.

Article 15(1) specifically bars the state from discriminating against any citizen of India on grounds *only* of religion, race, caste, sex, place of birth, or any of them.

Article 15(2) prohibits subjection of a citizen to any disability, liability, restriction or condition on grounds only of religion, race, caste, sex or place of birth with regard to—

(*a*) access to shops, public restaurants, hotels and places of entertainment, or,

(*b*) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of state funds or dedicated to the use of general public.

Under Art. 15(3), the state is not prevented from making any special provision for women and children.

Article 15(4) or Art. 29(2) does not prevent the state from making any special provisions for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.[1]

Provisions contained in Arts.15 and 16 are merely enabling provisions. No citizen of India can claim reservation as a matter of right and accordingly no writ of mandamus can be issued.[2]

(a) ART. 15(1)

Article 15(1) prohibits differentiation on certain grounds mentioned above. Commenting on Art. 15(1), the Supreme Court has observed:[3]

> "Art. 15(1) prohibits discrimination on grounds of religion or caste identities so as to foster national identity which does not deny pluralism of Indian culture but rather to preserve it".

Article 15(1) is an extension of Art. 14. Art 15(1) expresses a particular application of the general principle of equality embodied in Art. 14.

Just as the principle of classification applies to Art. 14 so it does to Art. 15(1) as well. The combined effect of Arts. 14 and 15 is not that the state cannot pass unequal laws, but if it does pass unequal laws, the inequality must be based on some reasonable ground (Art. 14), and that, due to Art. 15(1), religion, race, caste, sex, or place of birth alone is not, and cannot be, a reasonable ground for discrimination.

Under Art. 15(4), the State can make special provisions for certain sections of the society as stated above. But for any section of population not falling under Art. 15(4), special provisions can be made if there is reasonable classification.

The word 'discrimination' in Art. 15(1) involves an element of unfavourable bias. The use of the word 'only' in the Arts. 15(1) and 15(2) connotes that what is discountenanced is discrimination purely and solely on account of any of the grounds mentioned. A discrimination based on any of these grounds and also on other grounds is not hit by Arts. 15(1) and 15(2) though it may be hit by Art. 14.[4] If religion, sex, caste, race or place of birth is merely one of the factors which the Legislature has taken into consideration, then, it would not be discrimination only on the ground of that fact. But, if the Legislature has discriminated only on one of these grounds, and no other factor could possibly have been present, then, undoubtedly, the law would offend against Art. 15(1).

Further, to adjudge the validity of an Act under these Articles, a distinction is to be drawn between the object underlying the impugned Act and the mode and manner adopted therein to achieve that object. The object underlying the Act may be good or laudable but its validity has to be judged by the method of its operation and its effect on the fundamental right involved. The crucial question to ask therefore is whether the operation of the impugned Act results in a prohibition only on any of the grounds mentioned in Arts. 15(1) and 15(2). It is the effect of the impugned Act that is to be considered and if its effect is to discriminate on any of the prohibited grounds, it is bad.

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1. For comments on Art. 29, see, *infra*, Ch. XXX, Sec. A.
2. *A.P. Public Service Commission v. Baloji Badhavath*, (2009) 5 SCC 1 : (2009) 5 JT 563.
3. *Valsamma Paul v. Cochin University*, AIR 1996 SC 1011 at 1019 : (1996) 3 SCC 545.
4. *Narasappa v. Shaik Hazrat*, AIR 1960 Mys. 59.

Article 15 is a facet of Art. 14. Like Art. 14, Art. 15(1) also covers the entire range of state activities. But, in a way, the scope of Art. 15 is narrower than that of Art. 14 in several respects.

One, while Art. 14 is general in nature in the sense that it applies both to citizens as well as non-citizens, Art. 15(1) covers only the Indian citizens, and does not apply to non-citizens. No non-citizen can claim any right under Art. 15, though he can do so under Art. 14.

Two, while Art. 14 permits any reasonable classification on the basis of any rational criterion, under Art. 15(1), certain grounds mentioned therein can never form the basis of classification.

The residents of Madhya Bharat were exempted from payment of a capitation fee for admission to the State medical college, while the non-residents were required to pay the same. The Supreme Court negatived the plea of discrimination by the non-residents under Art. 15(1) because the ground of exemption was 'residence' and not 'place of birth'. Residence and place of birth are two distinct concepts with different connotations. Art. 15(1) prohibits discrimination on the basis of place of birth but not residence.[5] And, in the instant case, classification on the basis of 'residence' was held to be reasonable. Education is a State subject. A State spends money on the upkeep of educational institutions. There is, therefore, nothing wrong in the State if it so orders the educational system that some advantage ensures for the benefit of the State. Some of the resident students after securing their degree may settle in the State as doctors and serve the community. Thus, the justification for the classification on the basis of residence rested on the assumption that the residents of the State would after becoming doctors settle down and serve the needs of the people of the State.

In *N. Vasundara v. State of Mysore*[6], the Supreme Court has sustained the constitutional validity of reservation based on the requirement of 'residence' within the State for the purpose of admission to medical colleges.

Under the City of Bombay Police Act, while a person born outside Greater Bombay could be externed if he was convicted of any of the offences mentioned therein, no such action could be taken against a person born within Greater Bombay. This was discrimination on the basis of 'place of birth' and so was invalid under Art. 15(1).[7]

Under the U.P. Court of Wards Act, 1912, while a male proprietor could be declared incapable of managing his property only on one of the five grounds mentioned therein, and that too after giving him an opportunity of showing cause as to why such a declaration should not be made, a female proprietor could be declared incapable to manage her property on any ground and without giving her any show cause notice. The provision is bad as it amounts to discrimination on the ground of sex.[8]

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5. *D.P. Joshi v. Madhya Bharat*, AIR 1955 SC 334 : (1955) 1 SCR 1215.
Also see, *infra*.

6. AIR 1971 SC 1439 : (1971) 2 SCC 22.
Also see, *infra*, under "Reservation in Admissions", Sec. D.

7. In re *Shaikh Husein Shaik Mahomed*, AIR 1951 Bom 285.

8. *Rajeshwari v. State of Uttar Pradesh*, AIR 1954 All 608.

A law providing for elections to municipalities on the basis of separate electorates for members of different religious communities,[9] or delimitation of panchayat circles for purposes of election to a panchayat on the basis of castes, would offend Art. 15(1).[10]

If the office of the President of a municipality is not reserved or is meant for general category, all the candidates irrespective of their caste, class or community and irrespective of the fact whether they have been elected from a reserved ward or a general ward are entitled to seek election and contest for the office of the President of the municipality. The unreserved seats euphemistically described as general category seats are open seats available for all candidates who are otherwise qualified to contest to that office. Wherever the office of the President of a municipality is required to be filled in by a member belonging to Scheduled Caste, Scheduled Tribe or Backward Class as the case may be, it would be enough if one belongs to one of those categories irrespective of the fact whether they have been elected from a general ward or a reserved ward.[11]

Acting on reports that the inhabitants of certain villages were harbouring dacoits, the Government of Rajasthan sanctioned posting of additional police in those villages. The expenses were to be borne by the villagers but the Harijan and Muslim inhabitants of these villages were exempt from this liability. This was quashed as being discriminatory on the ground of 'caste' or 'religion' as it discriminated against the peace-loving villagers other than Harijans and Muslims.[12] Allotment of building sites by a municipality only to the members of a particular religion would violate Arts. 15 and 14.[13]

Reservation does not limit number of candidates from reserved category to be elected. They are eligible to contest from the unreserved seats and get elected resulting in increase of their representation in the local bodies.[14]

(b) ART. 15(2)

Article 15(2), mentioned above, contains a prohibition of a general nature and is not confined to the state only. On the basis of this provision, it has been held that if a section of the public puts forward a claim for an exclusive use of a public well, it must establish that the well was dedicated to the exclusive use of that particular section of the public and not to the use of the general public.[15] A custom to that effect cannot be held to be reasonable, or in accordance with enlightened modern notions of utility of public wells because of the force of Art. 15.

In Art. 15(2) occurs the expression 'a place of public resort'. There is difference of opinion on the exact significance of this phrase. One view holds that a place is a 'place of public resort' only if the public have access to it as a matter of legal right.[16] A broader view, however, regards a place of public resort as one to which members of the public are allowed access and where they habitually resort

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9. *Nainsukh v. State of Uttar Pradesh*, AIR 1953 SC 384.
10. *Bhopal Singh v. State of Rajasthan*, AIR 1958 Raj 41.
11. *Bihari Lal Rada v. Anil Jain (Tinu)*, (2009) 4 SCC 1 : (2009) 2 JT 455.
12. *State of Rajasthan v. Pratap Singh*, AIR 1960 SC 1208 : (1961) 1 SCR 222.
13. *Chikkadasappa v. Town Municipal Corporation*, AIR 1983 Kant 201.
14. *Bihari Lal Rada v. Anil Jain (Tinu)*, (2009) 4 SCC 1 : (2009) 2 JT 455.
15. *Arumugha v. Narayana*, AIR 1958 Mad 282.
16. *A.M. Deane v. Commr. of Police*, 64 CWN 348.

to.[17] The latter view appears to be more in accord with the tenor and purpose of the constitutional provision as it would bar discrimination on a wider front.

(c) PERSONAL LAWS

In family matters, India has a system of personal laws, *i.e.* Hindu law for the Hindus, Muslim law for the Muslims and so on.[18] Some of these laws have been amended by statutes; some like Muslim law has been left unamended. Challenges to these laws on the basis of religious differentiation, or on the basis of differentiation between males and females have not been accepted.[19]

Legislation making provisions for Hindus specifically on matters falling within the ambit of Hindu Law has been upheld even though similar provisions have not been made for other groups. A law introducing monogamy among the Hindus, but leaving the Muslims free to take any number of wives, was upheld against the charge of discrimination on the ground of 'religion' only. The court pointed out that the Hindus have been enjoying for long their own indigenous system based on Hindu scriptures in the same way as the Mohammedans were subject to their own personal law.[20]

The Supreme Court has taken the stand that personal laws are immune from being challenged under Fundamental Rights which do not touch upon these laws. Personal laws fall outside the scope of the Fundamental Rights.[21] This seems to be a policy, rather than a legalistic, approach as the courts do not want to adjudicate upon aspects of these systems of laws which would not be able to stand the test of Fundamental Rights. The court desires that Parliament ought to deal with these matters in a rational manner.

Section 15(2)(*b*) of the Hindu Succession Act has been held to be not invalid on the ground of discrimination on the basis of sex. According to the Bombay High Court, the true principle is that the community governed by the given personal law itself forms a recognised class, and that itself a reasonable class of persons, for testing the given legislation and the same has to be examined in the background of the principles by which such class is governed by the tenets of its personal law. If those principles are otherwise reasonable in the context of the

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17. *Liberty Cinema v. Corp. of Calcutta*, AIR 1959 Cal 45.

18. JAIN, *OUTLINES OF INDIAN LEGAL HISTORY*, Ch. XXV.
Also see, *supra*, Ch. XXI, for challenges to these laws under Art. 14.

19. *Gurdial Kaur v. Mangal Singh*, AIR 1968 P & H 396 (Pre-constitution customs cannot be challenged as contravening Fundamental Rights); *Sangannagouda v. Kalkangouda*, AIR 1960 Mys. 147 (non-statutory law of adoption held valid); *Santhamma v. Neelamma*, AIR 1956 Mad. 642 (non-statutory law of partition held valid); *Bibi Maniram v. Mohd. Ishaq*, AIR 1963 Pat. 229 (Mohammedan Law of gift held invalid); *Abdul Khan v. Chand Bibi*, AIR 1956 Bhopal 71 (Muslim law of marriage held not invalid on the ground of sex discrimination).
But, on customs, see, Ch. XX, Sec. E, *supra*.

20. *Srinivasa Aiyar v. Saraswati*, AIR 1952 Mad. 193; *State of Bombay v. N. Appa*, AIR 1952 Bom. 84; *H.B. Singh v. T.N.H.O.B. Devi*, AIR 1959 Mani. 20. A statutory provision regarding divorce applicable to a sect of Hindus held not invalid under Art. 14 in *Sudha v. Sankarappa Rai*, AIR 1963 Mys. 245.

21. *Krishna Singh v. Mathura Ahir*, AIR 1980 SC 707 : (1981) 3 SCC 689; *Sarla Mudgal v. Union of India*, (1995) 3 SCC 635 : AIR 1995 SC 1531; *Madhu Kishwar v. State of Bihar*, (1996) 5 SCC 125; *Ahmedabad Women Action Group v. Union of India*, AIR 1997 SC 3614 : (1997) 3 SCC 573.
Also see, Ch. XX, Sec. E.

history of the given system of personal law, then the challenge is hardly maintainable. The court has made this statement in the context of new legislation enacted to modify personal laws.[22]

The Andhra Pradesh High Court declared S. 9 of the Hindu Marriage Act which provides for the restitution of conjugal rights as invalid on the ground that, in practice, it works against the females and not against the males.[23] The court argued that sexual cohabitation is an inseparable ingredient of a decree of restitution of conjugal rights. To have sex with an unwilling party against her will offends the inviolability of the body and mind. S. 9 of the Hindu Marriage Act infringes Art. 14 for two reasons: (1) S. 9 does not satisfy the traditional classification test. Although, on its face, S. 9 makes the remedy of restitution of conjugal rights available to both, husband and wife, in practice, it is almost exclusively invoked by the husband against his wife, and so the remedy becomes partial and one-sided. (2) S. 9 fails to pass the test of minimum rationality required by any statute law. It subserves no social good and promotes no legitimate public purpose.

On the other hand, the Delhi High Court has upheld the constitutional validity of S. 9 of the Hindu Marriage Act.[24] The court has said that restitution aims at cohabitation and consortium and not merely at sexual intercourse. Agreeing with the Delhi High Court, in *Saroj Rani v. Sudarshan Kumar*[25], the Supreme Court has held the provision to be valid *vis-a-vis* Arts. 14 and 21.[26] The court has emphasized that one must see the decree of restitution of conjugal rights in its proper perspective. In India, conjugal rights, i.e., the right of the husband or wife to the society of the other is not merely a creature of the statute; it is inherent in the very institution of marriage itself. There are sufficient safeguards in S. 9 to prevent it from becoming tyrannical. S. 9 is only a codification of the pre-existing law. Only when the decree is disobeyed wilfully, the court may order attachment of property. "It serves a social purpose as an aid to the prevention of break-up of marriage."

Section 16 of the Hindu Marriage Act confers legitimacy on children born out of a void marriage. The section has been held valid *vis-a-vis* Art. 14 as it treats all illegitimate children similarly circumstanced as forming one class for conferment of legitimacy.[27]

Under S. 6(a) of the Hindu Minority and Guardianship Act, 1956, the father of a Hindu minor is the only guardian and the mother of the minor is relegated to an inferior position. She could become the guardian only 'after' the father. The provision was challenged under Arts. 14 and 15 on the ground of gender discrimination. The argument was that the mother was relegated to an inferior position on the ground of 'gender' alone as her right, as a natural guardian of the minor, is made cognisable only 'after' the father.

The Supreme Court agreed with the premise that 'gender equality' is one of the basic principles of the Constitution. If the word 'after' in S. 6(a) were to be

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22. *Sonubai v. Bala*, AIR 1983 Bom. 156.
Also, *Kaur Singh v. Jaggar Singh*, AIR 1961 Punj. 489.
23. *T. Sareetha v. T. Venkata Subbaiah*, AIR 1983 AP 356.
24. *Harvinder Kaur v. Harmander Singh*, AIR 1984 Del 66.
25. AIR 1984 SC 1562 : (1984) 4 SCC 90.
26. For discussion on Art. 21, see, *infra*, Ch. XXVI.
27. *P.E.K. Kalliani Amma v. K. Devi*, AIR 1996 SC 1963 : (1996) 4 SCC 76.

interpreted to mean that the mother was disqualified to act as the guardian of the minor during the father's lifetime, and that she could act as such only after his death, then the same would definitely run counter to the basic requirement of the Constitutional mandate as it would lead to differentiation between male and female. But the provision in question could be so interpreted as to make it compatible with Art. 14. Accordingly, the Court interpreted S. 6 so as to mean that the mother could act as the natural guardian of the minor during the father's lifetime if the father was not in actual charge of the affairs of the minor. Similar interpretation was given to S. 19(b) of the Guardians and Wards Act, 1890.[28]

Under S. 10, Divorce Act, 1869, a Christian husband can get divorce from his wife on the ground of her adultery *simpliciter*. On the other hand, a Christian wife to get divorce from her husband has to prove not only his adultery but also something more, such as, adultery, incest, bigamy, rape, cruelty or desertion. The Bombay High Court has ruled in *Pragati Varghese v. Cyril George Varghese*,[29] that S. 10 is discriminatory on the ground of sex and is, thus, violative of Art. 15(1). Further, a Christian woman cannot seek divorce on the grounds of cruelty and desertion while women under other systems can do so. This is discrimination based merely on the ground of religion and this is also violative of Arts. 14 and 15.

The validity of the Muslim Women (Protection of Rights and Divorce) Act, 1986, was challenged on the ground that the Act, when compared with s. 125, Cr. P.C., is discriminatory against Muslim divorcee women. But the Supreme Court negatived the contention. The Court has ruled that the purpose of both laws is the same *viz*., to meet a situation where a divorced woman is likely to be led into destitution and vagrancy. The Muslim Act codifies and regulates the obligations due to a Muslim woman divorcee but puts her outside s. 125, Cr. P.C., The Court interpreting s. 3(1)(a) of the Act benevolently has stated that the provision means that in addition to *mehr* and maintenance to her during the *iddat* period, the husband is also obligated to make "a reasonable and fair provision" as provided for under s. 3(3) consistent with the needs of the divorced woman, the means of the husband, and the standard of living the woman enjoyed during her married life. Thus, interpreted, the scheme contained in the impugned Act is equally, if not more, beneficial to the Muslim women than s. 125, Cr.P.C.[30]

A law applicable to Hindu religious endowments only, and not to charitable and religious endowments belonging to other religions, has been upheld. Classification of religious endowments as Hindu, Muslim or Christian is neither arbitrary nor unreasonable keeping in view the purpose of the Act, *viz*., the better management of institutions. The distinction has existed for over a century and was not being made for the first time. The incidents and nature of the endowments belonging to different religious groups differ in several respects, and the classification cannot be said to be based solely on religion as the institutions included in the Act were both religious and secular, and keeping in view the object of the Act, the institutions having several common features can be classified under one group.[31]

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28. *Githa Hariharan v. Reserve Bank of India,* AIR 1999 SC 1149 : (1999) 2 SCC 228.
29. AIR 1997 Bom 349.
30. *Danial Latifi v Union of India*, AIR 2001 SC 3958 : (2001) 7 SCC 740.
31. *Lakshmindra Swamiar v. Commissioner, H.R.E.,* AIR 1952 Mad. 613; *Moti Das v. S.P. Sahi,* AIR 1959 SC 942 : 1959 Supp (2) SCR 563; *Pannalal Bansilal Patil v. State of Andhra Pradesh,* AIR 1996 SC 1023 : (1996) 2 SCC 498.

B. ART. 15(3) : WOMEN AND CHILDREN

Articles 15(3) and 15(4) constitute exceptions to Arts. 15(1) and 15(2).

According to Art. 15(3), the state is not prevented from making any "special provision" for women and children.

Articles 15(1) and 15(2) prevent the state from making any discriminatory law on the ground of gender alone. The Constitution is thus characterised by gender equality. The Constitution insists on equality of status and it negates gender bias. Nevertheless, by virtue of Art. 15(3), the state is permitted, despite Art. 15(1), to make any special provision for women, thus carving out a permissible departure from the rigours of Art. 15(1). Articles 15 and 16 do not prohibit special treatment of women. The constitutional mandate is infringed only where the females would have received same treatment with males but for their sex. In English law 'but-for-sex" test has been developed to mean that no less favourable treatment is to be given to women on gender based criterion which would favour the opposite sex and women will not be deliberately selected for less favourable treatment because of their sex. The Constitution does not prohibit the employer to consider sex in making the employment decisions where this is done pursuant to a properly or legally charted affirmative action plan.[32]

Article 15(3) recognises the fact that the women in India have been socially and economically handicapped for centuries and, as a result thereof, they cannot fully participate in the socio-economic activities of the nation on a footing of equality. The purpose of Art. 15(3) is to eliminate this socio-economic backwardness of women and to empower them in such a manner as to bring about effective equality between men and women. The object of Art. 15(3) is to strengthen and improve the status of women. Art. 15(3) thus relieves the state from the bondage of Art. 15(1) and enables it to make special provisions to accord socio-economic equality to women.[33]

The scope of Art. 15(3) is wide enough to cover the entire range of state activity including that of employment. Art. 15(3) is a special provision in the nature of a proviso qualifying the general guarantees contained in Arts. 14, 15(1), 15(2), 16(1) and 16(2).[34]

A doubt has been raised whether Art. 15(3) saves any provision concerning women, or saves only such a provision as is in their favour.[35] The better view would appear to be that while the state can make laws containing special provisions for women and children, it should not discriminate against them on the basis of their gender only. This appears to be the cumulative effect of Arts. 15(1) and 15(3). Although there can be no discrimination in general on the basis of sex, the Constitution itself provides for special provisions being made for women and children by virtue of Art. 15(3). Reading Arts. 15(3) and 15(1) together, it seems to be clear that while the state may discriminate in favour of women against men,

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32. *Air India Cabin Crew Assn. v. Yeshaswinee Merchant,* (2003) 6 SCC 277 : AIR 2004 SC 187.

33. On this theme, also see, "Directive Principles", *infra,* Ch. XXXIV; "Safeguards to Minorities," *infra,* XXXV.

34. For discussion on Art. 16, see, next Chapter.

35. MUKHARJI, J., in *Mahadeb v. Dr. Sen,* AIR 1951 Cal 563.
Also, *Anjali v. State of West Bengal,* AIR 1952 Cal 825; Cf. BOSE, J., *ibid.,* 825.

it may not discriminate in favour of men against women. However, only such provisions can be made in favour of women under Art. 15(3) as are reasonable and which do not altogether obliterate or render illusory the constitutional guarantee mentioned in Art. 15(2).

The operation of Art. 15(3) can be illustrated by the following few cases:

(a) Under S. 497, I.P.C., the offence of adultery can be committed only by a male and not by a female who cannot even be punished as an abettor. As this provision makes a special provision for women, it is saved by Art. 15(3). The Supreme Court has observed:[36]

> "Sex is a sound classification and although there can be no discrimination in general on that ground the Constitution itself provides for special provisions in the case of women and children by clause (3) of Art. 15. Arts. 14 and 15 thus read together validate the last sentence of Section 497, I.P.C., which prohibits the women from being punished as an abettor of the offence of adultery."

Upholding S. 497, the Bombay High Court had said in an earlier case that the discrimination made by S. 497 is based not on the fact that women have a sex different from that of men, but "women in this country were so situated that special legislation was required in order to protect them."[37]

(b) The discretionary nature of the power of judicial review is illustrated when the supreme Court even after finding that the reservation policy of the State Government in force was contrary to Arts. 14,15 and 16 took into consideration the fact that a large number of young girls below the age of 10 years were taught in primary schools and that it would be preferable that such young girls are taught by women and held that reservation of 50% in favour of female candidates was justified.[38]

In the matter of distribution of state largesse where dealership of retail outlets of petrol pumps were reserved for women, financial capacity and ability to provide infrastructure and facilities are not relevant and material criteria when the instrumentality of the State is providing finance and the concerned outlet site is owned and retail outlet is to be operated by such instrumentality.[39]

(c) Where a female employee's grievance was the writing of a sensuous letter expressing love to her, admiring her qualities and beauty, and extending unsolicited help, it was held that the female employee's grievance ought to have been looked into according to the directions given in *Vishaka* Case.[40]

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36. *Yusuf Abdul Aziz v. State of Maharashtra,* AIR 1954 SC 321 : 1954 SCR 930.
Also see, *Sowmithri Vishnu v. Union of India,* AIR 1985 SC 1618 : 1985 Supp SCC 137; *Revathi v. Union of India,* AIR 1988 SC 835 : (1988) 2 SCC 72.

37. CHAGLA, C.J., in *Yusuf Abdul Aziz v. State of Maharashtra,* AIR 1951 Bom 470.

38. *Rajesh Kumar Gupta v. State of UP,* (2005) 5 SCC 172 : AIR 2005 SC 2540.

39. *A. Ritu Mahajan v. Indian Oil Corpn.,* (2009) 3 SCC 506 : (2009) 2 JT 327.

40. (1997) 6 SCC 241 : AIR 1997 SC 3011; *D.S. Grewal v. Vimmi Joshi,* (2009) 2 SCC 210 : (2009) 1 JT 400.

(d) S. 497, Cr.P.C., 1898, prohibited release of a person accused of a capital offence on bail except a woman or a child under 16 or a sick man. The provision has been held valid as it metes out a special treatment to women which is consistent with Art. 15(3). The Rajasthan High Court observed:[41]

> "The State may make laws containing special provisions for women and children, but no discrimination can be made against them on account of their sex alone."

(e) In *Walter Alfred Baid, Sister Tutor (Nursing) Irwin Hospital v. Union of India*,[42] a rule making male candidates ineligible for the post of Senior Tutor in the School of Nursing was held to be violative of Art. 16(2) and was not saved by Art. 15(3).

The Delhi High Court took the view that the matter relating to employment falls under Art. 16 and not under Art. 15(3). "The equality of opportunity in the matter of employment between the sexes and the corresponding prohibition against discrimination is absolute in nature and no exception has been carved out of it in Art. 16 unlike in Art. 15." The Court refused to read Art. 15(3) into Art. 16 so as to restrict the scope of the prohibition contained in Art. 16(2).[43]

(f) On the other hand, the Punjab & Haryana High Court took a different view in *Shamsher Singh v. State of Punjab*.[44] A rule granting a special allowance to the women principals working in a wing of the Punjab Educational Services was challenged on the ground that their male counterparts were not given the same benefit although both performed identical duties and were part of the same service. The constitutional validity of the rule was challenged under Art. 16(2).

The High Court upheld the impugned rule under Art. 15(3), holding that even though the discrimination was based on the ground of sex, it was saved by Art. 15(3). The court ruled that Art. 15(3) could be invoked for construing and determining the scope of Art. 16(2). According to the court, Art. 15(3) extends to the entire field of state activity, including the field of public employment which has been specifically dealt with in Art. 16. The Court stated that if a particular provision squarely falls within the ambit of Art. 15(3), it cannot be struck down merely because it may also amount to discrimination solely on the basis of sex. "Articles 14, 15 and 16, being the constituents of a single code of constitutional guarantees, supplementing each other, clause (3) of Article 15 can be invoked for construing and determining the scope of Art. 16(2)."

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41. *Mt. Choki v. State of Rajasthan*, AIR 1957 Raj 10.
This provision now is S. 437, Cr.PC, 1973.
Also see, *Nirmal Kumar v. State of Rajasthan*, Cr LJ 1582; *Shehat Ali v. State of Rajasthan*, 1992 Cr LJ 1335.

42. AIR 1976 Del 302.

43. For Art. 16, see, next Chapter.

44. AIR 1970 P & H 372.

The Court however ruled that "only such special provisions in favour of women can be made under Article 15(3), which are reasonable and do not altogether obliterate or render illusory the constitutional guarantee enshrined in Article 16(2)."

(g) A rule was made by the Punjab Government rendering women ineligible for posting in the men's jails except for the posts of clerks and matrons. Thus, a woman could not be appointed as the Superintendent of Jails. This rule was challenged as being discriminatory on the ground of sex only.

The High Court rejected the challenge in *Raghubans Saudagar Singh v. State of Punjab*.[45] The High Court held, "if the sex added a variety of other factors and considerations form a reasonable nexus for the object of classification then the bar of Arts. 15 and 16(2) cannot possibly be attracted." The court said that, testing the proposition in reverse, the state may for identical considerations exclude men from the post of warden and other jail officials who may have to come in direct and close contact with the women inmates of such a jail.

(h) There existed a common cadre of Probation Officers for males and females. However, for the post of the Head of the Institute for destitute women, only females were regarded as eligible. This was challenged as being discriminatory.

In *B.R. Acharya v. State of Gujarat,*[46] the High Court said that only because there was a common cadre, in which the officers of both sexes were appointed, it did not mean that all posts in the higher cadre must also be filled in by persons belonging to both the sexes. Keeping in view the nature of duties to be performed, the State Government may decide that only a woman will head a women's institution. Art. 15(3) enables the State to make any special provision for women and children and so the impugned rule could not be held to be unconstitutional.

(i) The Bombay Government enacted a statutory provision reserving a few seats for women in the municipalities. The provision was challenged as discriminatory. Rejecting the challenge in *Dattatraya v. Motiram More*,[47] the High Court pointed out that whereas under Art. 15(1) discrimination in favour of men only on the ground of sex is not permissible, by reason of Art. 15(3), the State may discriminate in favour of women without offending Art. 15(1). The court went to state:

> "Even if in making special provision for women for giving them reserved seats the State has discriminated against men, by reason of Art. 15(3) the Constitution has permitted the State to do so even though the provision may result in discrimination only on the ground of sex."

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45. AIR 1972 P & H 117.
46. 1988 Lab IC 1465.
47. AIR 1953 Bom 311.

(j) The most significant pronouncement on Art. 15(3) is the recent Supreme Court case *Government of Andhra Pradesh v. P.B. Vijay Kumar*.[48]

The Supreme Court has ruled in the instant case that under Art. 15(3), the State may fix a quota for appointment of women in government services. Also, a rule saying that all other things being equal, preference would be given to women to the extent of 30% of the posts was held valid with reference to Art. 15(3).

It was argued that reservation of posts or appointments for any backward class is permissible under Art. 16(2) but not for women and so no reservation can be made in favour of women as it would amount to discrimination on the ground of sex in public employment which would be violative of Art. 16(2). Rejecting this argument, the Supreme Court has ruled that posts can be reserved for women under Art. 15(3) as it is much wider in scope and covers all state activities. While Art. 15(1) prohibits the State from making any discrimination *inter alia* on the ground of sex alone, by virtue of Art. 15(3), the State may make special provisions for women. Thus, Art. 15(3) clearly carves out a permissible departure from the rigours of Art. 15(1).

The Court has emphasized that an important limb of the concept of gender equality is creating job opportunities for women. Making special provisions for women in respect of employment or posts under the state is an integral part of Art. 15(3). "To say that under Art. 15(3), job opportunities for women cannot be created would be to cut at the very root of the underlying inspiration behind this Article. Making special provisions for women in respect of employment or posts under the state is an integral part of Article 15(3)."[49] This power conferred by Art. 15(3) is not whittled down in any manner by Art. 16.[50]

What does the expression "special provision" for women mean? The "special provision" which the state may make to improve women's participation in all activities under the supervision and control of the state can be in the form of either affirmative action or reservation. Thus, Art. 15(3) includes the power to make reservations for women. Talking about the provision giving preference to women, the Court has said that this provision does not make any reservation for women. It amounts to affirmative action. It operates at the initial stage of appointment and when men and women candidates are equally meritorious. Under Art. 15(3), both reservation and affirmative action are permissible in connection with employment or posts under the state. Art. 15 is designed to create an egalitarian society.

The Supreme Court has explained the relationship between Arts. 15 and 16 as follows. Art. 15 deals with every kind of state action in relation to Indian citizens. Every sphere of state activity is controlled by Art. 15(1) and, therefore, there is no reason to exclude from the ambit of Art. 15(1) employment under the state. Art. 15(3) permits

48. AIR 1995 SC 1648 : (1995) 4 SCC 520.
49. *Ibid.*, at 1651.
50. For discussion on Art. 16, see, next Chapter.

special provisions for women. Arts. 15(1) and 15(3) go together. In addition to Art. 15(1), Art. 16(1) places certain additional prohibitions in respect of a specific area of state activity, *viz.*, employment under the state. These are in addition to the grounds of prohibition enumerated under Art. 15(1) which are also included under Art. 16(2). The Court has observed:

> "Therefore, in dealing with employment under the state, it has to bear in mind both Arts. 15 and 16 the former being a more general provision and the latter, a more specific provision. Since Art. 16 does not touch upon any special provision for women being made by the state, it cannot in any manner derogate from the power conferred upon the state in this connection under Art. 15(3). This power conferred by Art. 15(3) is wide enough to cover the entire range of state activity including employment under the state."

It may be noted that Art. 16(2) is more limited in scope than Art. 15(1) as it is confined to employment or office under the state. The prohibited grounds of discrimination under Art. 16(2) are somewhat wider than those under Art. 15(2) because Art. 16(2) prohibits discrimination on the additional grounds of descent and residence apart from religion, caste, sex and place of birth.

(k) The Punjab University made a rule barring a male lecturer from being appointed as Principal in a Girls' College. The constitutional validity of the rule was challenged and the High Court by a majority of 3:2 held the rule to be unconstitutional. While the minority view was that the said rule fell, and was justified, under Art. 15(3), the majority ruled that the rule in question did not fall under Art. 15(3) and that the rule was discriminatory on the basis of sex.

The majority applied a qualitative test to the rule. The majority opined that discrimination can be made in favour of women under Art. 15(3) if it is found that the women are not equal with the men and are lagging behind the men in the field where reservation is sought to be made. As and when any reservation is made in favour of women, the same is to be tested on the ground of reasonableness. The state has to *prima facie* justify the grounds for making the reservation. In the instant case, it was held by the majority that there was no principle or criterion involved in denying the post of the Principal of a Girls' College to a male when males could be appointed as teachers and heads of departments in such colleges. The functions of Principal are mostly administrative in nature and there is no bar in a female being appointed as the Principal of a Boys' College.[51]

If separate colleges or schools for girls are justifiable, rules providing appointment of a lady Principal or teacher would also be justified. The object sought to be achieved is a precautionary, preventive and protective measure based on public morals and particularly in view of the young age of the girl students to be taught. Hence, rules empowering the authority to appoint only a lady

51. *M.C. Sharma v. Punjab University, Chandigarh,* AIR 1997 P & H 87.

principal or a lady teacher or a lady doctor or a woman Superintendent are not violative of Articles 14, 15 or 16.[52]

C. ARTICLE 15(4) : BACKWARD CLASSES

Article 15(1) would have come in the way of making favourable provisions for backward sections of society. This can be illustrated by referring to two cases.

The Madras Government issued an order [popularly known as the Communal G.O] allotting seats in the State medical colleges community-wise as follows: Non-Brahmin (Hindus) 6; Backward Hindus, 2; Brahmins, 2; Harijans, 2; Anglo-Indians and Indian Christians, 1; Muslims, 1. This G.O. was declared invalid because it classified students merely on the basis of 'caste' and 'religion' irrespective of their merit.[53] A seven Judge Bench of the Supreme Court struck down the classification as being based on caste, race and religion for the purpose of admission to educational institutions on the ground that Art. 15 did not contain a clause such as Art. 16(4).

In another case, a government order requisitioning land for construction of a colony for harijans was held to be discriminatory under Art. 15(1) because the facilities were being given to them as a 'community' as such when other members of the public were equally in need of similar facilities.[54]

To tide over the difficulties created by such decisions in the way of helping backward classes by making discriminatory provisions in their favour, Art. 15(4) was added to the Constitution in 1951. Art. 15(4) says that the state is not prevented from making any special provisions for "the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes".

Thus, an order acquiring land for constructing a colony for harijans is now valid under Art. 15(4).[55] Art. 15(4) does not justify grant of special remission to the prisoners of Scheduled Castes and Scheduled Tribes and not to others. The grant of remission of convicted prisoners belonging to these classes can hardly be said to be a measure for the "advancement" of the Scheduled Castes and Scheduled Tribes.[56]

It may be noted that the Constitution makes a few more provisions for development and amelioration of the condition of these classes of people which are discussed later at the appropriate places.[57]

Article 15(4) confers a discretion and does not create any constitutional duty or obligation. Hence no mandamus can be issued either to provide for reservation or for relaxation.[58]

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52. *Vijay Lakshmi v. Punjab University*, (2003) 8 SCC 440 : AIR 2003 SC 3331.
53. *State of Madras v. Champkam Dorairajan*, AIR 1951 SC 226 : 1951 SCR 525.
Also see, under Art. 29(2), *infra*, Ch. XXX, Sec. A.
54. *Jagwant Kaur v. State of Maharashtra*, AIR 1952 Bom. 461.
55. *Moosa v. State of Kerala*, AIR 1960 Ker. 355.
56. *State of Madhya Pradesh v. Mohan Singh*, AIR 1996 SC 2106 : (1995) 6 SCC 321.
57. See, under Art. 29, *infra*, Ch. XXX, Sec. A; under "Directive Principles of State Policy", *infra*,
Ch. XXXIV, "Safeguards to Minorities" etc., Ch. XXXV.
58. *Union of India v. R. Rajeshwaran*, (2003) 9 SCC 294 : (2001) 10 JT 135.

Under Art. 15(4), in innumerable cases,[59] the reservation of seats for Scheduled Castes, Scheduled Tribes and Backward Classes in engineering, medical and other technological colleges has been upheld. Reservations are possible under Art. 15(4) for the advancement of any backward class of citizens or for Scheduled Castes and Scheduled Tribes. Rejecting the argument that Art. 15(4) envisages "positive action" while Art. 16(4)[60] is a provision warranting programmes of "positive discrimination", the Supreme Court has observed in *Indra Sawhney v. Union of India*:[61]

> "We are afraid we may not be able to fit these provisions into this kind of compartmentalisation in the context and scheme of our constitutional provisions. By now, it is well settled that reservation in educational institutions and other walks of life can be provided under Art. 15(4) just as reservations can be provided in services under Art. 16(4). If so, it would not be correct to confine Art. 15(4) to programmes of positive action alone. Art. 15(4) is wider than Art. 16(4) is as much as several kinds of positive action programmes can also be evolved and implemented thereunder (in addition to reservations) to improve the conditions of SEBCs (Socially and Educationally Backward Classes), Scheduled Castes and Scheduled Tribes, whereas Art. 16(4) speaks only of one type of remedial measure, namely, reservation of appointments/posts."

The scope of Art. 15(4) is wider than Art. 16(4). Art. 15(4) covers within it several kinds of positive action programmes in addition to reservations. However, reservation of posts and appointments must be within reasonable limits, *viz.*, 50% at the maximum. The same limit applies to Art. 15(3). Reservation to a backward class is not a constitutional mandate, but a prerogative of the State.[62]

Reservation for a backward class is not a constitutional mandate. The provisions of Articles 330(1)(b) and (c) show that the Constitution has treated Scheduled Tribes in the autonomous districts of Assam as a separate category distinct from all other Scheduled Tribes. This clearly indicates that when the Constitution makers wanted to make a subclassification of Scheduled Tribes, they have themselves made it in the text of the Constitution itself and have not empowered any legislature or Government to make such a subclassification.[63]

In *Chinnaiah*[64] the Court also said that Art. 341 indicates that there can be only one list of Scheduled Castes in regard to a State and that list should include all specified castes, races or tribes or part or groups notified in that Presidential List. In the entire Constitution wherever reference has been made to "Scheduled Castes" it refers only to the list prepared by the President under Article 341 and there is no reference to any subclassification or division in the said list except, may be, for the limited purpose of Article 330. Therefore, it is clear that the Constitution intended all the castes including the subcastes, races and tribes mentioned in the list to be members of one group for the purpose of the Constitution and this group cannot be subdivided for any purpose. The constitution intended

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59. See below.
60. See Ch. XXIII, Sec. E, *infra*.
61. AIR 1993 SC 477 : 1992 Supp (3) SCC 217.
For a fuller discussion on *Indra Sawhney*, see, *infra.*
62. *E. V. Chinnaiah v. State of A.P.*, (2005) 1 SCC 394 : AIR 2005 SC 162.
63. *E. V. Chinnaiah v. State of A.P.*, (2005) 1 SCC 394: AIR 2005 SC 162.
64. *Ibid.*

that all the castes included in the Schedule under Article 341 would be deemed to be one class of persons.

The principles laid down in *Indra Sawhney* case,[65] for subclassification of other Backward Classes cannot be applied as a precedent for subclassification or subgrouping Scheduled Castes in the Presidential List because that very judgment itself has specifically held that subdivision of other backward classes is not applicable to scheduled castes and scheduled tribes. This is for the obvious reason i.e. the Constitution itself has kept the Scheduled Castes and Scheduled Tribes List out of interference by the State Government.[66]

A woman who by birth did not belong to a backward class or community, would not be entitled to contest a seat reserved for a backward class community merely on the basis of her marriage to a male of that community.[67]

The validity of the Scheduled Castes and Scheduled Tribes (Provision of Transfer of Certain Lands Act, 1978) which restricted the transfer by SC or ST of any land granted to them for particular period of time (e.g. 3 years) has been upheld because of their poverty, lack of education and backwardness which was exploited by the stronger section of the society was not unreasonable and hence not violative of Art. 19(1)(f) of the Constitution. If the object of reservation is to take affirmative action in favour of a class which is socially, educationally and economically backward, the State's jurisdiction while exercising its executive or legislative power is to decide as to what extent reservation should be made for them either in public service or for obtaining admission in educational institutions. Having already fulfilled this part of its constitutional obligation, such a class cannot be subdivided so as to give more preference to a minuscule proportion of the Scheduled Castes in preference to other members of the same class. It is not open to the State to subclassify a class already recognized by the Constitution and allot a portion of the already reserved quota amongst the State created subclass within the list of scheduled casts. Furthermore, the emphasis on efficient administration placed by Art. 335 of the Constitution must also be considered when the claims of Scheduled Castes and Scheduled Tribes to employment in the services of the Union are to be considered. Since the State had already allotted 15% of the total quota of the reservation available for backward classes to the Scheduled Castes the question of allotting any reservation under the impugned Act to the backward classes did not arise. The very fact that a legal fiction has been created is itself suggestive of the fact that the legislature of a State cannot take any action which would be contrary to or inconsistent therewith. The very idea of placing different castes or tribes or group or part thereof in a State as a conglomeration by way of a deeming definition clearly suggests that they are not to be subdivided or sub-classified further. An uniform yardstick must be adopted for giving benefits to the members of the Scheduled Castes for the purpose of the Constitution. For the purpose of identifying backwardness, a further inquiry can be made by appointing a commission as to who amongst the members of the Scheduled Castes is more backward. If benefits of reservation are not percolating to them equitably, measures should be taken to see that they are given such adequate or additional training so as to enable them to compete with the others but

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65. 1992 Supp (3) SCC 217.
66. *E. V. Chinnaiah v. State of A.P.,* (2005) 1 SCC 394 : AIR 2005 SC 162.
67. *Sandhya Thakur v. Vimla Devi Kushwah,* (2005) 2 SCC 731: AIR 2005 SC 909.

the same would not mean that in the process of rationalizing the reservation to the Scheduled Castes the constitutional mandate of Articles 14, 15 and 16 could be violated. Reservation must be considered from the social objective angle, having regard to the constitutional scheme, and not as a political issue and, thus, adequate representation must be given to the members of the Scheduled Castes as a group and not to two or more groups of persons or members of castes.[68]

As regards the identification of the "Scheduled Castes" and "Scheduled Tribes", reference is to be made to Arts. 341 and 342. These constitutional provisions are discussed later in this book.[69]

(a) SOCIALLY AND EDUCATIONALLY BACKWARD CLASSES

A major difficulty raised by Art. 15(4) is regarding the determination of who are 'socially and educationally backward classes.' This is not a simple matter as sociological and economic considerations come into play in evolving proper criteria for its determination. Art. 15(4) lays down no criteria to designate 'backward classes'; it leaves the matter to the state to specify backward classes, but the courts can go into the question whether the criteria used by the state for the purpose are relevant or not.

The question of defining backward classes has been considered by the Supreme Court in a number of cases. On the whole, the Supreme Court's approach has been that state resources are limited; protection to one group affects the constitutional rights of other citizens to demand equal opportunity, and efficiency and public interest have to be maintained in public services because it is implicit in the very idea of reservation that a less meritorious person is being preferred to a more meritorious person. The Court also seeks to guard against the perpetuation of the caste system in India and the inclusion of advance classes within the term backward classes.

From the several judicial pronouncements concerning the definition of backward classes, several propositions emerge. First, the backwardness envisaged by Art. 15(4) is *both* social and educational and *not* either social *or* educational. This means that a class to be identified as backward should be *both* socially and educationally backward.[70] In *Balaji*, the Court equated the "social and educational backwardness" to that of the "Scheduled Castes and Scheduled Tribes". The Court observed: "It was realised that in the Indian society there were other classes of citizens who were equally, or may be somewhat less, backward than the Scheduled Castes and Scheduled Tribes and it was thought that some special provision ought to be made even for them."

Secondly, poverty alone cannot be the test of backwardness in India because by and large people are poor and, therefore, large sections of population would fall under the backward category and thus the whole object of reservation would be frustrated.[71]

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68. *E. V. Chinnaiah v. State of A.P.*, (2005) 1 SCC 394 : AIR 2005 SC 162.
69. See. Ch. XXXV, *infra.*
70. *M.R. Balaji v. State of Mysore,* AIR 1963 SC 649 : 1963 Supp (1) SCR 439.
71. *Janki Prasad Parimoo v. State of Jammu & Kashmir,* AIR 1973 SC 930 : (1973) 1 SCC 420.

Thirdly, backwardness should be comparable, though not exactly similar, to the Scheduled Castes and Scheduled Tribes.

Fourthly, 'caste' may be a relevant factor to define backwardness, but it cannot be the sole or even the dominant criterion. If classification for social backwardness were to be based solely on caste, then the caste system would be perpetuated in the Indian society.[72] Also this test would break down in relation to those sections of society which do not recognise caste in the conventional sense as known to the Hindu society.

Fifthly, poverty, occupations, place of habitation, all contribute to backwardness and such factors cannot be ignored.

Sixthly, backwardness may be defined without any reference to caste. As the Supreme Court has emphasized, Art. 15(4) "does not speak of castes, but only speaks of classes", and that 'caste' and 'class' are not synonymous. Therefore, exclusion of caste to ascertain backwardness does not vitiate classification if it satisfies other tests.

(b) *BALAJI*

After the enactment of the above mentioned first Constitutional Amendment in 1951, *Balaji* was the first case which came up before the Supreme Court.[73]

An order of the Mysore Government issued under Art. 15(4) reserved seats for admission to the State medical and engineering colleges for Backward classes and 'more' Backward classes. This was in addition to the reservation of seats for the Scheduled Castes (15%) and for the Scheduled Tribes (3%). Backward and more Backward classes were designated on the basis of 'castes' and 'communities'.

The Supreme Court characterised Art. 15(4) as an exception to Art. 15(1) [as well as to Art. 29(2)].[74] The Court stated—"there is no doubt that Art. 15(4) has to be read as a proviso or an exception to Arts. 15(1) and 29(2)".

The Court declared the order bad on several grounds in *Balaji v. State of Mysore*[75]. The first defect in the Mysore order was that it was based solely on caste without regard to other relevant factors and this was not permissible under Art. 15(4). Though caste in relation to Hindus could be a relevant factor to consider in determining the social backwardness of a class of citizens, it must not be made the sole and dominant test in that behalf. Christians, Jains and Muslims do not believe in the caste system and, therefore, the test of caste could not be applied to them. In as much as identification of all backward classes under the impugned order had been made solely on the basis of caste, the order was bad. "Social backwardness is in the ultimate analysis the result of poverty to a very large extent."

Secondly, the test adopted by the State to measure educational backwardness was the basis of the average of student-population in the last three high school classes of all high schools in the State in relation to a thousand citizens of that community. This average for the whole State was 6.9 per thousand. The Court

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72. See also, *infra*, *Safeguards to Minorities*, Ch. XXXV.
73. See, note 54, *supra.*
74. For discussion on Art. 29(2), see, *infra*, Ch. XXX, Sec. A.
75. AIR 1963 SC 649 : 1963 Supp (1) SCR 439.

stated that assuming that the test applied was rational and permissible to judge educational backwardness, it was not validly applied. Only a community well below the State average could properly be regarded as backward, but not a community which came near the average. The vice of the Mysore order was that it included in the list of backward classes, castes or communities whose average was slightly above, or very near, or just below the State average, *e.g.*, Lingayats with an average of 7.1 per cent were mentioned in the list of backward communities.

Thirdly, the Court declared that Art. 15(4) does not envisage classification between 'backward' and 'more backward classes' as was made by the Mysore order. Art. 15(4) authorises special provisions being made for really backward classes and not for such classes as were less advanced than the most advanced classes in the State. By adopting the technique of classifying communities into backward and more backward classes, 90 per cent of the total State population had been treated as backward. The order, in effect, sought to divide the State population into the most advanced and the rest, and put the latter into two categories—backward and more backward—and the classification of the two categories was not envisaged by Art. 15(4). "The interests of weaker sections of society which are a first charge on the State and the Centre have to be adjusted with the interests of the community as a whole. The adjustment of these competing claims is undoubtedly a difficult matter, but if under the guise of making a special provision, a State reserves practically all the seats available in all the colleges, that clearly would be subverting the object of Art. 15(4)." The State has "to approach its task objectively and in a rational manner."

In *Balaji*, the Supreme Court could sense the danger in treating 'caste' as the sole criterion for determining social and educational backwardness. The importance of the judgment lies in realistically appraising the situation when the Court said that economic backwardness would provide a much more reliable yardstick for determining social backwardness because more often educational backwardness is the outcome of social backwardness. The Court drew distinction between 'caste' and 'class'. An attempt at finding a new basis for ascertaining social and educational backwardness in place of caste is reflected in the *Balaji* decision.

The Court also ruled that reservation under Art. 15(4) should be reasonable. It should not be such as to defeat or nullify the main rule of equality enshrined in Art. 15(1). While it would not be possible to predicate the exact permissible percentage of reservation it can be stated in a general and broad way that it ought to be less than 50%; "how much less than 50% would depend upon the relevant prevailing circumstances in each case". Also a provision under Art. 15(4) need not be in the form of a law, it could as well be made by an executive order.

(c) AFTER *BALAJI*

An order saying that a family whose income was less than Rs. 1,200 per year, and which followed such occupations as agriculture, petty business, inferior services, crafts etc. would be treated as 'backward', was declared to be valid in *Chitralekha v. State of Mysore*[76]. Here two factors—economic condition and profession—were taken into account to define backwardness, but caste was ignored for the purpose.

76. AIR 1964 SC 1823 : (1964) 6 SCR 368.

In *Balaji*, the Supreme Court had mentioned caste as one of the relevant factors for determining social backwardness. The order in the instant case was challenged on the ground that caste had been completely ignored for the purpose. The Supreme Court ruled that though caste is a relevant circumstance in ascertaining backwardness of a class, there is nothing to preclude the authority concerned from determining social backwardness of a group of citizens if it could do so without reference to caste. Identification or classification of backward classes on the basis of occupation-cum-income, without reference to caste is not bad and would not offend Art. 15(4). SUBBA RAO, J., speaking for the majority of the Constitution Bench stated:

> "…….What we intend to emphasize is that under no circumstances a 'class' can be equated to a 'caste', though the caste of an individual or a group of individuals may be considered along with other relevant factors in putting him in particular class. We would also like to make it clear that if in a given situation caste is excluded in ascertaining a class within the meaning of Art. 15(4) of the Constitution, it does not vitiate the classification if it satisfied other tests."

In course of time, the judicial view has undergone some change in this respect and 'caste' as a factor to assess backwardness has been given somewhat more importance than in *Balaji*. The Supreme Court has taken note of the fact that there are numerous castes in the country which are backward socially and educationally and the state has to protect their interests. A caste is also a 'class' of citizens and, therefore, if an entire caste is found to be socially and educationally backward, as a fact, on the basis of relevant data and material, then inclusion of the caste as such would not violate Art. 15(1). When backwardness is defined with reference to castes, the Court wants to be satisfied that not 'caste' alone, but other factors have also been considered for the purpose.

On this basis, the Court upheld a Madras order defining backward classes mainly with reference to castes. Looking at the history as to how the list had come to be formulated, the Court felt satisfied that caste was not taken as the sole basis of backwardness; the main criterion for inclusion in the list was social and educational backwardness of the castes based on their occupations. Castes were only a compendious indication of the classes of people found to be socially and educationally backward.[77] In *Rajendran*,[78] WANCHOO, C.J., speaking for the Constitution Bench pointed out that "if the reservation in question had been based only on caste and had not taken into account the social and educational backwardness of the caste in question, it would be violative of Art. 15(1). But it must not be forgotten that a caste is also a class of citizens and if the caste as a whole is socially and educationally backward, reservation can be made in favour of such a caste on the ground that it is a socially and educationally backward class of citizens within the meaning of Art. 15(4)."

Similarly, in *Balaram*,[79] a list prepared by the Backward Classes Commission appointed by the Andhra Government was held valid even though backward classes were enumerated mainly by their caste names because the Court found that the Commission had prepared the list after a detailed enquiry and applying several tests like general poverty, occupations, caste and educational backward-

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77. *P. Rajendran v. State of Madras*, AIR 1968 SC 1012 : (1968) 2 SCR 786. Also see, *A Periakaruppan v. State of Tamilnadu*, AIR 1971 SC 2303.
78. *Ibid.*
79. *S.V. Balaram v. State of Andhra Pradesh*, AIR 1972 SC 1375 : (1972) 1 SCC 660.

ness. The Court felt satisfied that the Commission had enough material before it to be satisfied that the persons included in the list were really socially and educationally backward. But where list was prepared solely with reference to castes, and no material was placed before the Court to show that other factors besides caste had been considered in preparing it, the list was quashed as violative of Art. 15(1).[80] The Court observed in *Sagar,* "In determining whether a particular section forms a class, caste cannot be excluded altogether. But in the determination of a class a test solely based upon the caste or community cannot also be accepted."[81]

The judicial approach that castes may be listed as backward classes provided they are found to be backward on the basis of some factors other than mere 'caste', may possibly be more practical in the context of the facts of the Indian life. But there is no doubt that this dilutes, to some extent, the *Balaji* approach. The danger in this judicial thinking is that it will give a lease of life to the caste system in India, and the quest for formulae to define backwardness, delinked from the caste system, will recede into the background. In this way, the goal of evolving a casteless society in India in the foreseeable future will receive a set back.

A government order excluded the candidates belonging to socially and educationally backward classes from claiming the benefit of reservation if the aggregate annual family income was Rs. 10,000 or over. The order was challenged by a candidate belonging to the backward class, but who was denied the privilege of preferential admission to medical college because her family income exceeded Rs. 10,000 annually. The Supreme Court emphasized in *K.S. Jayasree v. State of Kerala,*[82] that social backwardness is the result of caste and poverty. Poverty or economic standard is a relevant factor in determining backwardness, but cannot be the sole determining factor. Caste cannot also be the sole or dominant test for the purpose. "Caste and poverty are both relevant for determining the backwardness. But neither caste alone nor poverty alone will be the determining tests". Both of these factors are relevant to determine backwardness. "Social backwardness which results from poverty is likely to be magnified by caste considerations". Occupations, place of habitation may also be relevant factors for the purpose. With the improvement in economic position of a family, social backwardness disappears. To allow these persons to take advantage of the privileges meant for backward persons, will result in depriving the real backward persons of their chance to make progress.

In a number of cases,[83] it has been held that a lady marrying a Scheduled Caste/Scheduled Tribe/Other Backward Citizen (OBC), or one transplanted by adoption or any other voluntary act, does not *ipso facto* become entitled to claim

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80. *State of Andhra Pradesh v. P. Sagar,* AIR 1968 SC 1379 : (1968) 3 SCR 595.
Also see, 11 *JILI,* 371 (1969); *Chhotey Lal v. State of Uttar Pradesh,* AIR 1979 All 135.

81. Also see, SHAH, J., in *Triloki Nath v. State of Jammu & Kashmir,* AIR 1969 SC 1 : (1969) 1 SCR 103.

82. AIR 1976 SC 2381 : (1976) 3 SCC 730.
Also see, *Chhotey Lal v. State of Uttar Pradesh,* AIR 1979 All 135.

83. *Kumari Madhuri Patil v. Addl. Commissioner, Tribal Development,* (1994) 6 SCC 241 : 1994 SCC (199) 1349 : AIR 1995 SC 94; *A.S. Sailja v. Kurnool Medical College, Kurnool,* AIR 1986 AP 209; *N.B. Rai v. Principal Osmania Medical College,* AIR 1986 AP 196; *Smt. D. Neelima v. The Dean of P.G. Studies, A.P. Agricultural Universities, Hyderabad,* AIR 1993 AP 299.

reservation under either Art. 15(4) or Art. 16(4).[84] In *Valsamma Paul v. Cochin University*,[85] the Supreme Court has explained the rationale behind this ruling as follows:[86]

> "It is seen that Dalits and Tribes suffered social and economic disabilities recognised by Articles 17 and 15(2). Consequently, they became socially, culturally and educationally backward; the OBC also suffered social and educational backwardness. The object of reservation is to remove these handicaps, disadvantages, sufferings and restrictions to which the members of the Dalits or Tribes or OBCs were subjected to and was sought to bring them in the mainstream of the nation's life by providing them opportunities and facilities... Therefore, when a member is transplanted into the Dalits, Tribes and OBCs, he/she must of necessity also undergo same handicaps, be subject to the same disabilities, disadvantages, indignities or sufferings so as to entitle the candidate to avail the facility of reservation".

The Court went on to say that a person who has had an advantageous start in life having been born in forward caste is transplanted into a backward caste by adoption / marriage / conversion does not become eligible to the benefit of reservation either under Art. 15(4) or 16(4). "Acquisition of the status of SC, etc. by voluntary mobility into these categories would play fraud on the Constitution, and would frustrate the foreign constitutional policy under Arts. 15(4) and 16(4) of the Constitution."

What happened in *Valsamma* was that a Syrian Catholic (a forward caste) lady married to a Latin Catholic was appointed as a lecturer as a reserved candidate. This was challenged and the Supreme Court ultimately quashed her appointment on the ground that she was not entitled to the benefit of reservation under Art. 16(4) as a lecturer as the post in question was reserved for the backward class Latin Catholic Community.

The Supreme Court has clarified in *Jagdish Negi v. State of Uttar Pradesh*,[87] that no class of citizens can be perpetually treated as socially and educationally backward. Backwardness cannot continue indefinitely. Every citizen has a right to develop socially and educationally. The State is entitled to review the situation from time to time. There is no rule that once a "backward class of citizens, always such a backward class". Once a class of citizens has been held to be socially and educationally backward class of citizens, it cannot be predicated that in future it may not cease to be so. The State may review the situation from time to time and decide whether a given class of citizens which has been characterised as "socially and educationally backward" has continued to form part of that category or has ceased to fall in that category.

The Supreme Court has observed in *Indra Sawhney*[88] that the policy of reservation has to be operated year-wise and there cannot be any such policy in perpetuity. The State can review from year to year the eligibility of the class of socially and educationally backward class of citizens. Further, it has been held that Art. 15(4) does not mean that the percentage of reservation should be in proportion to the percentage of the population of the backward classes to the total

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84. For Art. 16(4), see, *infra*, Chapter, XXIII, Sec. E.
85. AIR 1996 SC 1010 : (1996) 3 SCC 545; see, *supra*, Ch. XXI.
86. *Ibid*, at 1022.
87. AIR 1997 SC 3505 : (1997) 7 SCC 203.
88. *Indra Sawhney v. Union of India*, see, Ch. XXIII, Sec. F, *infra.*

population. It is in the discretion of the State to keep reservations at reasonable level by taking into consideration all legitimate claims and the relevant factors.

(d) QUANTUM OF RESERVATION

What is the extent of reservation that can be made under Art. 15(4)?

The Supreme Court has set its face, generally speaking, against excessive reservation, for it is bound to affect efficiency and quality by eliminating general competition.

For the first time, in *Balaji*,[89] the question was raised before the Supreme Court relating to the extent of special provisions which the States can make under Art. 15(4). In this case, reservation up to 68% was made by the State of Mysore for backward classes for admission to the State medical and engineering colleges. The break-up of the reservation was as follows: 50% seats for backward and 'more' backward classes; 15% seats for Scheduled Castes; 3% seats for the Scheduled Tribes. In effect, 68% seats were reserved in medical, engineering and other technical colleges for the weaker sections of the society, leaving only 32% seats for the merit pool.

The State even argued that since Art. 15(4) does not contain any limitation on the State's power to make reservation, cent percent reservation could be made in favour of backward classes in the higher educational institution if the problem of backwardness in a State so demanded. The Supreme Court rejected this extreme argument. The Court also rejected the rule of 68% reservation.

The Court agreed, on the one hand, that Art. 15(4) must be read with Art. 46, a directive principle,[90] and steps ought to be taken to redress backwardness and inequality from which the backward classes, Scheduled Castes and Scheduled Tribes suffer otherwise for them political freedom and Fundamental Rights would have little meaning. On the other hand, the Court insisted that Art. 15(4) being a special provision cannot denude Art. 15(1) of all its significance. Art. 15(4) "is not a provision which is exclusive in character, so that in looking after the advancement of those classes, the State would be justified in ignoring altogether the advancement of the rest of the society." The Court observed:

> "It is because the interests of the society at large would be served by promoting the advancement of the weaker elements in the society that Article 15(4) authorises special provision to be made. But if a provision which is in the nature of an exception completely excludes the rest of the society, that clearly is outside the scope of Article 15(4). It would be extremely unreasonable to assume that in enacting Article 15(4) Parliament intended to provide that where the advancement of the Backward Classes or the Scheduled Castes and Tribes was concerned, the fundamental rights of the citizens consisting of the rest of the society were to be completely ignored."

The Court emphasized that a special provision contemplated by Art. 15(4) must be within reasonable limits. The interests of the weaker sections of society have to be adjusted with the interests of the community as a whole. The Court insisted that considerations of national interest and the interests of the community or society as a whole cannot be ignored in determining the reasonableness of a special provision under Art. 15(4). The Court observed on this point:

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89. *M.R. Balaji v. State of Mysore,* AIR 1963 SC 649 : 1963 Supp (1) SCR 439; *supra.*
90. *Infra,* Ch. XXXIV.

> "The demand for technicians, scientists, doctors, economists, engineers and experts for the further economic advancement of the country is so great that it would cause grave prejudice to national interests if considerations of merit are completely excluded by wholesale reservation of seats in all technical, medical or engineering colleges or institutions of that kind".

Thus, the Supreme Court set its face against excessive reservation under Art. 15(4), for it may affect efficiency by eliminating general competition. The general principle laid down by the Court is that the maximum limit of reservation should not be more than 50% for all classes under Art. 15(4), *viz.*, backward classes, Scheduled Castes and Scheduled Tribes. Thus, reservation of 68% was declared void in *Balaji*. The Court observed that the interests of the weaker sections of the society need to be adjusted with interests of the society as a whole.

In *Balaji*, the Supreme Court clearly indicated that in giving effect to reservations for SCs, STs and OBCs, a balance ought to be struck so that the interests of the backward classes, STs and SCs are properly balanced with the interests of the other segments of the society. In order to safeguard the interests of the reserved classes, the interests of the community as a whole cannot be ignored. It has to be remembered that Art. 15(4) is an enabling provision and its objective is to advance the interests of the weaker elements in society. Reservations under Art. 15(4) must be within a reasonable limit. If a provision under Art. 15(4) ignores the interests of the society as a whole, it would be clearly outside the purview of Art. 15(4). It may be noted that the over-all limit of 50% reservation is only for the categories mentioned in Art. 15(4); there could be additional reservation for other classes.

For admission to the State medical colleges, the Madhya Pradesh Government made the following reservation of seats: Scheduled Castes, 15%; Scheduled Tribes, 15%; Women candidates, 15%; Children of military personnel, 3%; Nominees of the Central Government, 3% and nominees of Jammu & Kashmir Government, 3%. The Scheme was challenged but the Supreme Court upheld it in *State of Madhya Pradesh v. Nivedita Jain*.[91]

D. RESERVATION IN ADMISSIONS

The question of reservations has become a very knotty socio-politico issue of the day. Because of keen competition for limited opportunities available in the country, governments are pressurized to indulge in all kinds of reservations for all kinds of groups apart from reservations for Scheduled Castes, Scheduled Tribes and backward classes. Basically, any reservation is discriminatory for reservation means that as between two candidates of equal merit, the candidate belonging to the reserve quota is preferred to the one having no reserve quota. Many deserving candidates thus feel frustrated because of reservation for the less deserving persons and they seek to challenge the scheme of reservation as unconstitutional. The relevant Articles are 14, 15 and 16.

Under Art. 15, reservation in educational institutions can be made for:

(1) Women under Art. 15(3);

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91. AIR 1981 SC 2045 : (1981) 4 SCC 296.

(2) Socially and educationally backward classes and the Scheduled Castes and Scheduled Tribes under Art. 15(4);

(3) Other groups not falling under Arts. 15(3) and 15(4).

Questions arise frequently regarding reservation of seats for administration in educational institutions for categories of persons other than those falling under Arts. 15(3) and 15(4). This can be done under Art. 15(1) itself but the main question to consider is whether the classification is reasonable. The tests applied here are the same as are applicable in case of Art. 14 to adjudge whether the classification is reasonable.[1] Thus, the 'equality' principle contained in Art. 15(1) is not infringed so long reservation is made for a class which can be identified on the basis of a rational, relevant and intelligible differentia, and there is nexus between the differentia and the object to be achieved, *viz.,* to get the best talent for admission to professional colleges. As the Supreme Court has stated, the "socially and educationally backward" can be shown some preferential treatment because of Art. 15(4). The underlying idea is that in course of time, these persons will be able to stand in equal position with the more advanced sections of the society. The same principle may be applied to other handicapped sections which do not fall under Art. 15(4). Thus, reservation of seats for children of defence personnel, ex-defence personnel, political sufferers has been upheld.[2]

Constitution being a living organ, rights are to be determined in terms of judgments interpreting the Constitution. Right of a meritorious student to get admission in a postgraduate course is a fundamental and human right which is required to be protected. Such a valuable right cannot be permitted to be whittled down at the instance of less meritorious students.[3]

Fixation of a district-wise quota on the basis of the district population to the total State population for admission to the State medical colleges has been held to be discriminatory. The object in selecting candidates for admission is to get the best possible material for admission to colleges. Whether selection is from the socially and educationally backward classes or from the general pool, the object of selection must be to secure the best possible talent from the two sources. But this purpose cannot be achieved by allocation of seats district-wise as better qualified candidates from one district may be rejected while less qualified candidates from other districts may be admitted.[4] As the object to be achieved is to get the best talent for admission to professional colleges, the allocation of seats district-wise has no reasonable relation with the object to be achieved. If anything, such allocation will result in the object being destroyed in many cases.

As a sequel to the above pronouncement, the State Government introduced a new scheme of admissions to medical colleges. These colleges in the State were grouped into several units and an applicant could seek admission to a unit. This scheme was also held to be void as being violative of Art. 14 because the students in some of the units were in a better position than those who applied in other units, since the ratio between the applicants and the number of seats in each

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1. *Supra.*
2. *D.N. Chanchala v. State of Mysore,* AIR 1971 SC 1762 : (1971) 2 SCC 293.
3. *Dr. Saurabh Chaudri v. Union of India* (2004) 5 SCC 618 : AIR 2004 SC 2212.
4. *P. Rajendran v. State of Madras,* AIR 1968 SC 1012 : (1968) 2 SCR 786.
Also, *Mohan Bir Singh Chawla v. Punjab University,* AIR 1997 SC 788 : (1977) 2 SCC 171.

unit varied and several applicants who secured lesser marks than the petitioners were selected merely because their applications came to be considered in other units. The Supreme Court characterised the scheme as discriminatory against some students.[5]

Reservation for children of residents of the Union Territories (other than Delhi) in professional institutions has been upheld because of general backwardness of these areas and absence of such institutions there. Also, reservation for children of government servants posted abroad in Indian Missions has also been upheld because these persons face (because of exigencies of service) lot of difficulties in the matter of education.[6] There could be reasonable classification based on intelligible differentia for purposes of Arts. 15(1) and 15(4). The Court said that since the government bears the financial burden of running the medical colleges it can decide the sources from where the students are to be admitted. "If the sources are properly classified on territorial, geographical or other reasonable basis it is not for courts to interfere with the manner and method of making the classification." In the instant case, the Court ruled that there was no discrimination against the appellants on grounds only of religion, race, caste, language, sex or place of birth and the classification made by the Central Government was reasonable and based on intelligible differentia.

Since SCs and STs form a separate class by themselves and outside the creamy layer area and having regard to Art.46, these socially backward categories are to be taken care of at every stage and even in specialized institutions like IITs. The argument of maintenance of high standards made on behalf of Delhi IIT was rejected although the Court accepted the position that 'the petitioners were not able to secure the required credits as against the stipulated minimum requirements for continuation' of their studies.[7] This is close to Arun Shourie's 'Bending over Backwards' and discourages merit and excellence.

For admission to the medical college in the State, 60 per cent seats were to be filled on merit, 20 per cent from Scheduled Castes and other reserved categories including socially and educationally backward classes and the remaining 20 per cent of the seats were earmarked for "ensuring rectification of regional imbalances." In *Nishi Meghu v. State of Jammu and Kashmir*,[8] the classification made for "rectification of regional imbalances" was declared invalid as being too vague as areas suffering from imbalances had not been identified. Thereafter, the State Government identified certain villages as socially and educationally backward for applying the principle of "rectification of regional imbalances" in different parts of the State. The Supreme Court again held in *Arti Sapru v. State of Jammu and Kashmir*[9] that the classification suffered from the vice of arbitrariness, because there was no intelligible data before the Court for sustaining the classification. The Court invoked the principle advocated in *Pradip Tandon*.[10]

The Nagpur University made some reservation for wards of the university employees for admission to the Institute of Technology. The reservation was sought

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5. *A. Periakaruppan v. State of Tamil Nadu*, AIR 1971 SC 2303.
6. *Chitra Ghosh v. Union of India*, AIR 1970 SC 35 : (1969) 2 SCC 228.
Also see, *Narayan Sharma v. Pankaj Kumar Lehkar*, AIR 2000 SC 72 : (2000) 1 SCC 44.
7. *Avinash Singh Bagri v. Registrar, IIT Delhi*, (2009) 8 SCC 220 : (2009) 11 SCALE 535.
8. AIR 1980 SC 1975 : (1980) 4 SCC 95.
9. AIR 1981 SC 1009 : (1981) 2 SCC 484.
10. *Infra*, footnote 21 on 1321.

to be justified on the ground of 'welfare of the employees'. The High Court held the scheme to be irrational. The High Court denied that such a ground could be a relevant basis for purposes of admission of students.[11]

Reservation of seats in medical colleges for sons and daughters of employees serving in the Health Department of the State was quashed as being arbitrary and irrational.[12] Similarly, 5% seats reserved for admission to the B. Tech Course in the University in favour of the sons andwards of the University employees was quashed by the Supreme Court as being violative of Art. 14.[13] The Court observed:

> "The reservation of seats for admission to the B. Tech. Course in favour of the sons and wards of the employees of the University is violative of the doctrine of equality enshrined in Art. 14 of the Constitution. There is no rationale for the reservation of the seats in favour of the sons and wards of the employees of the University nor any such reservation has any rational nexus with the object which is sought to be achieved by the University".

It may be noted that such reservation falls under Art. 15(1) and not under Art. 15(4) and this can be valid only if it fulfils the tests of reasonable classification as laid down under Art. 14.

The same principle has been applied in the case of an unaided technological institution affiliated to the University. The Court has ruled that such an institution has to abide by the University rules and the University is bound by Art. 14. Reservation of seats in the B. Tech course of the Institute in favour of the wards of the college staff does not satisfy the test of admission being given strictly on the basis of merit.[14] The Court has taken the position that any preferential treatment has to be consistent with Art. 14 which permits reasonable classification. Such classification should have a reasonable *nexus* with the object of the rules providing for such admission, namely, to select the most meritorious amongst the candidates to have advantage of such education.

For purposes of admission to the post-graduate courses in medicine, provision was made for weightage of 15 per cent marks on the basis of service in rural areas. The High Court ruled that while some weightage on this basis *per se* might not be discriminatory, the amount of weightage in question was excessive as a second class candidate could get precedence over a first class candidate. Also, reserving seats for medical officers who have been unsuccessful in post-graduate examination outside the State was held not justifiable as this amounted to putting a premium on incompetency.[15]

For admission to the medical course, a common entrance test was prescribed for candidates who had passed the pre-University course and the Higher Secondary course. The candidates were to be admitted on the basis of the results of the test. A reservation of 40 per cent of seats was made in favour of the H.S.C. candidates. The reservation was held discriminatory and arbitrary. There can be no

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11. *Prasanna v. Director-in-Charge, LIT, Nagpur*, AIR 1982 Bom. 176.
12. *Teachers Association, Silchar Medical College v. State of Assam*, AIR 1996 Gau 97.
13. *Chairman/Director, Combined Entrance Examination v. Osiris Das*, (1992) 3 SCC 543.
14. *Thapar Institute of Engineering & Technology v. State of Punjab*, AIR 1997 SC 793 : (1997) 2 SCC 65.
15. *Niranjan Pradhan v. State of Orissa*, AIR 1982 Ori. 153.

valid classification after a common test has been prescribed. Such a classification has no nexus to the object of selecting the best candidates for medical course.[16]

Two per cent seats were reserved in the Kerala University for candidates from other universities in the post-graduate course in medicine. The Supreme Court held in *Charles K. Skaria v. Dr. C. Mathew*,[17] that this paltry reservation for outside candidates was not sufficient and infringed Art. 14 and 15. These articles do not recognise State frontiers or 'the cult of the sons of the soil.' The necessary implication of these constitutional provisions is that every basic degree holder who fills the bill can apply for admission for post-graduate courses. The niggardly quota of 2 per cent of the total number of seats for candidates of the entire country minus Kerala did not represent "a catholic approach informed by nationalist generosity". It is not a sufficient fulfilment of Arts. 14 and 15. "Fundamental rights of candidates do not depend on the grace of governments and Indians are not aliens in their own motherland when asking for seats on the score of equal opportunity."

In *Chanchala's* case,[18] university-wise allocation for admission in medical colleges in the State of Karnataka was held to be valid. The scheme was that students passing from colleges affiliated to one University were first admitted to government medical colleges affiliated to that University and only 20 per cent seats in each of such medical colleges could be allotted to outsiders. This was upheld on the ground that Universities were set up for satisfying the educational needs of different areas. The Supreme Court upheld University-wise distribution of seats, though it was not in conformity with the principle of section based on merit and marked a departure from this principle. The justification for taking this view was that constitutional preference was not constitutionally impermissible for two reasons. One, it would be quite legitimate for students attached to a University to desire to have training in specialised subjects, like medicine, in colleges affiliated to their own University as it would promote institutional continuity which has its own value. Two, any student from any part of the country can pass the qualifying examination of that University, irrespective of the place of his birth or residence.

The scheme of University-wise allocation was then modified by adding the rider that the proportion of admissions should be fixed by the proportion of the number of students presented by the concerned Universities for the pre-degree and B.Sc. examinations. This was held to be bad. The Court could not see any nexus between the registered student-strength and the seats to be allotted. The result of the rider was to discriminate against the backward area where the pre-degree or degree students would be fewer. The fewer the colleges, the fewer the pre-degree or degree students and so the linkage of the division of seats with the registered student-strength would make an irrational inroad into the scheme of University-wise allocation. "Such a formula would be a punishment for backwardness, not a promotion of their advancement."[19] It is clear from this decision that the Court would accept some kind of reservation if it is designed to remove backwardness.

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16. *State of Andhra Pradesh v. U.S.V. Balram*, AIR 1972 SC 1375 : (1972) 1 SCC 660.
17. AIR 1980 SC 1230 : (1980) 2 SCC 752.
See also, *Jagdish Saran v. Union of India, infra*, footnote 34, on 1323.
18. AIR 1971 SC 1762 : (1971) 2 SCC 293; *infra*, footnote 55, on 1330.
19. *State of Kerala v. T.P. Roshana*, AIR 1979 SC 766, 774 : (1979) 1 SCC 572.

Admissions to the LL.B. course of Punjab University were made on merit with the rider that 10% of the marks obtained in the qualifying examination were to be added in case of candidates from the Punjab University. Following *Chanchala*, the Supreme Court upheld the scheme. The Court ruled that "university-wise preference is permissible provided it is relevant and reasonable." But the Court also ruled that 10% preference was on the higher side in this competitive age and such a preference ought not to increase 5%.[20]

The U.P. Government made reservation of seats in the State medical colleges in favour of two classes of candidates—(1) Those who came from hill areas and Uttrakhand; (2) Those who came from rural areas. The Supreme Court upheld reservations in favour of candidates from hill areas and Uttrakhand as it was satisfied that the people therein were socially and educationally backward, but reservation in favour of rural people was held unconstitutional. The rural population being 80 per cent of the entire State population, the Court found it incomprehensible as to how such a large population could be regarded as backward. Thus, the Court ruled that the reservation for rural areas as such could not be sustained on the ground that the rural population represented socially and educationally backward class of citizens. The Court held that rural element did not make it a class.

The Court refused to accept the test of poverty as the 'determining factor of social backwardness'. Poverty is not the common trait of rural people alone; it is widespread in India, and to take poverty as the exclusive test would mean that a large population in India is held backward.[21]

Similarly, in *Janki Prasad*,[22] the Court did not approve declaration of 'small cultivators' and 'low paid pensioners' as backward for this is to form artificial groups to confer certain benefits under the Constitution, and is to place economic considerations above other considerations which go to show whether a particular class is socially and educationally backward. Mere poverty cannot be a test of backwardness because in this country except for a small percentage of the population, the people are generally poor—some being more poor, others less poor.

The Court also held that each of the factors, traditional occupations or residents of certain inaccessible areas, can be applied by itself, to list backward classes. The Court ruled that residents of certain areas may remain in primitive conditions because of lack of communication, inaccessibility, lack of resources etc., and residents of such areas may be validly treated as socially and educationally backward. A government order laying down a list of socially and educationally backward classes but exempting therefrom the families having an aggregate income of Rs. 6,000 annually or more is valid. Poverty is a relevant factor to determine social and educational backwardness, but it cannot be an exclusive or dominant factor.[23]

The Supreme Court has emphasized that the primary consideration for selecting candidates for admission to medical colleges is merit. But departure

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20. *Mohan Bir Sigh Chawla v. Punjab University, Chandigarh*, AIR 1997 SC 788 : (1997) 2 SCC 171.

21. *State of Uttar Pradesh v. Pradip Tandon*, AIR 1975 SC 563 : (1975) 1 SCC 267.
Also see, *Narayan Sharma v. Pankaj Kumar Lekhar*, AIR 2000 SC 70 : (2000) 1 SCC 44.

22. *Janki Pd. v. State of Jammu & Kashmir*, AIR 1973 SC 930 : (1973) 1 SCC 420.

23. *State of Kerala v. Krishna Kumar*, AIR 1976 Ker. 54.

from the merit principle is permissible where it is necessary to do so for the purpose of bringing about real equality of opportunity between those who are unequals. Merit principle may thus be departed from either in State interest,[24] or on the consideration of a region's claim for backwardness.[25]

While 'residence' may be the basis of reservation, according to the Supreme Court in *Pradeep Jain v. Union of India*,[26] it may be tested on the touch stone of Art. 14. Accordingly, the Court has condemned as unconstitutional and void under Art. 14 "wholesale reservation" on the basis, of the 'domicile' or 'residence' requirement within the State,[27] or on the basis of 'institutional' preference for students passing the qualifying examination for admission so as to exclude all students not satisfying the requirement regardless of merit.

The Court pointed out that the principle of selection can be diluted on the ground of regional backwardness. If the State Government starts a medical college in a backward region, and reserves most of the seats therein to the students from the region, then such reservation or preferential treatment cannot be regarded as discriminatory. Students from backward region can hardly compete with the students from advanced region. Reservation or preference in such a case may be of a high percentage but it cannot be total.

The Court however accepted reservation up to 70% of the total number of open seats (after deducting other kinds of reservations validly made) for admission to the M.B.B.S. Course on the ground of 'residence'. The Court accepted this outer limit in order to reconcile the "apparently conflicting claims of equality and excellence". But the 30% of all seats should remain open and available for admission to students on an All-India basis irrespective of the State or University from which they come.

As regards the 30% unreserved seats in the M.B.B.S. Course, the Supreme Court has ruled in *Dinesh Kumar v. Motilal Nehru Medical College*,[28] that these seats must not be filled on the basis of comparison of the marks obtained by the candidates at different qualifying examinations because the standard of judging

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24. *D.P. Joshi*, *supra*, also, *P. Rajendran*, *infra.*

25. Also see, *State of Uttar Pradesh v. Pradip Tandon*, AIR 1975 SC 563 : (1975) 1 SCC 267; *supra*.

26. AIR 1984 SC 1420 : (1984) 3 SCC 654.

27. On this point, BHAGWATI, J., speaking for the Court made the following pithy remark:

> "The entire country is taken as one nation with one citizenship and every effort of the Constitution makers is directed towards emphasizing, maintaining and preserving the unity and integrity of the nation. Now if India is one Nation and there is only one citizenship, namely, citizenship of India, and every citizen has a right to move freely throughout the territory of India and to reside and settle in any part of India, irrespective of the place where he is born or the language which he speaks or the religion which he professes and he is guaranteeed freedom of trade, commerce and intercourse throughout the territory of India and is entitled to equality before the law and equal protection of the law with other citizens in every part of the territory of India, it is difficult to see how a citizen having his permanent home in Tamil Nadu or speaking Tamil language can be regarded as an outsider in Uttar Pradesh or a citizen having his permanent home in Maharashtra or speaking Marathi language be regarded as an outsider in Karnataka. He must be held entitled to the same rights as a citizen having his permanent home in Uttar Pradesh or Karnataka, as the case may be. To regard him as an outsider would be to deny him his constitutional rights and to derecognise the essential unity and integrity of the country by treating it as if it were a mere conglomeration of independent States." AIR 1984 SC 1420 at 1424, 1425 : (1984) 3 SCC 654.

28. AIR 1985 SC 1059 : (1985) 3 SCC 22. This case may be called as *Dinesh* I.

may vary and may not be uniform. "That would indeed be blatantly violative of the concept of equality enshrined in Art. 14." Admissions must be based on evaluation of relative merits through an entrance examination open to all candidates throughout the country. The Court has suggested that a common All-India Entrance examination be held by the Indian Medical Council for the purpose.

In *Dinesh II*[29], the Supreme Court has revised the formula laid down in *Dinesh I.* The Court has now fixed a quota of 15% of the total number of seats in a medical college without taking into account any reservation to be filled through an All-India Entrance Examination. The defect in the old formula was that a State could reduce the number of All-India seats by the simple expedient of increasing the number of reserved seats. The Court has also decided that the medium of the All-India Entrance Examination would be English and no regional language and that the examination would be conducted by the Central Board of Secondary Examination instead of the Medical Council of India which does not have the necessary infrastructure for the purpose of conducting an examination.

In *Ravinder Kumar Rai v. State of Maharashtra*,[30] the Supreme court has rejected the contention of the State that conducting entrance examination would delay the admission process.

The Ahmedabad Municipality started a medical college and reserved admission therein to 'local students to the MBBS Course. However, 15% of the seats were reserved for students on an All-India basis. In *Ahmedabad Municipal Corporation v. Nilaybhai R. Thakore*,[31] the Supreme Court held the rule to be valid. The Court pointed out that the Municipality has started the college out of municipal funds. "Its desire to provide as many seats as possible to its students is a natural and genuine desire emanating from its municipal obligations which deserves to be upheld to the extent possible." The object of the municipality, the Court said, was laudable. The Court also pointed out that the municipality has complied with its constitutional obligation by providing 15% of the seats available to All-India students.[32] The term "local student" has been interpreted by the Court to mean any permanent resident student of Ahmedabad city who has acquired his qualification from an institution situated within the Ahmedabad Urban Development Area.

So far as the undergraduate courses are concerned, the reservations based on domicile, University or Institution are permissible provided that the said reservations are not wholesale.[33] As regards admission to the post-graduate and super-speciality courses, no reservations are possible.[34]

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29. *Dinesh Kumar v. Motilal Nehru Medical College (II),* AIR 1986 SC 1877 : (1986) 3 SCC 727.
30. AIR 1998 SC 1227 : (1998) 3 SCC 183.
31. AIR 2000 SC 114 : (1999) 8 SCC 139.
32. In this connection, see, *Dinesh II, supra.*
33. In this connection, see, *Dinesh II, supra.*
34. AIR 2000 SC 114 at 117 : (1999) 8 SCC 139.
Also see, *D.P. Joshi v. State of Madhya Pradesh,* AIR 1955 SC 334 : (1955) 1 SCR 1215; *supra; D.N. Chanchala v. State of Mysore,* AIR 1971 SC 1762 : (1971) 2 SCC 293, *supra; Dr. Pradeep Jain v. Union of India,* AIR 1984 SC 1420 : (1984) 3 SCC 654, *supra,* footnote 26; *Jagdish Saran v. Union of India,* AIR 1980 SC 820 : (1980) 2 SCC 768; *supra,* footnote 17 on 1320.

In *Nidmarti Maheshkumar v. State of Maharashtra*,[35] for purposes of admission to the MBBS Course, region-wise classification was made in the State. The rule said that the students passing the XII standard examination from institutions within the jurisdiction of one University would claim admission only in the medical colleges in that region and would not be eligible for admission to medical colleges situated within the jurisdiction of another University in the State. This region-wise classification made by the State government was challenged under Art. 14. The Court ruled that Art. 14 is violated if a State is compartmentalized into different regions and mobility of students from one region to another for medical education is completely banned and, thus, they are denied equal opportunity with others in the State for medical education. This cannot be defended even on the ground of regional backwardness. Why should a brilliant student from a so-called backward region be denied admission in a medical college in an advanced region? Why should mobility for educational advancement be impeded by geographical limitations within the State especially when uniform educational standards are being maintained throughout the State, when a common examination is held by the Secondary Board, students are graded uniformly throughout the State, and only results are published and merit list prepared region-wise?

The Court characterised it as discriminatory that a student with lesser marks may be admitted in one region while a student with higher marks may be denied admission in another region. Also, a student in one region could not get admission in another region even though students with lesser marks than him have been admitted there.

The Court distinguished the instant case from *Chanchal* on two grounds: (1) In *Chanchal*, there was no common or uniform examination, while here there was one examination throughout the State; (2) In *Chanchal*, 20% seats were allowed for students from other regions, while in the instant case there was 100% regional reservation.

However, the Court reiterated its earlier view that region-wise reservation upto 70% of the total number of open seats in a medical college after taking into account other kinds of reservations could be made for students who had studied in institutions situated within that region. This could be justified for two reasons:

(1) many students are not able to avail of medical education away from their region, as because of lack of resources, they cannot study far away from their places of residence, and may, thus, be deprived of medical education;

(2) girl students may find it difficult to pursue medical education in another region beyond their places of residence.

But such reservation based on residence requirement or institutional preference should not exceed 70% of the total number of open seats after taking into account all other kinds of reservations validly made. The remaining 30% of the open seats at least should be made available for admission to students from other regions within the State. The Court clarified that the expression "total number of open seats", means the seats after deducting the seats required to be made available on an All-India basis as decided by the Court in Dr. *Pradeep Jain's* case.

35. AIR 1986 SC 1362 : (1986) 2 SCC 534.

In *Jagdish Saran*[36] and *Pradeep Jain*,[37] the Supreme Court has already upheld residential or institutional preference for admission to medical colleges. Following these cases, in *Anant Madan*,[38] the Supreme Court has ruled that the condition that a candidate should have studied in 10th, 10+1 and 10+2 classes in a recognised institution in the State for admission to the medical college is valid. This eligibility criterion is in conformity with the rulings in *Jagdish Saran* and *Pradeep Jain* and is not arbitrary or unreasonable or violative of Art. 14.

On the whole, the impact of judicial pronouncements in the area has been wholesome. The growing tendency to make reservations in technical institutions for all and sundry has been curbed to some extent. In the absence of Judicial control, reservation would have run riot, excluding all merit. Had this tendency not been controlled, it would have led to the inevitable result of falling standards which would have been a national loss. Many deserving and better qualified candidates from the so called advanced sections of society would have been forced to go without education and this would have been unjust to them. The Supreme Court's pronouncements put the whole problem posed by Art. 15(4) within a reasonable mould. It was also necessary to play down the importance of caste lest the caste system instead of being obliterated should be perpetuated.[39] A very important achievement of the Court is that 15% seats in medical colleges are to be filled in on an All India basis.

To this extent, the Court has overruled its earlier decision in *Post-Graduate Institute of Medical Education and Research Chandigarh v. K.L. Narasimham.*[40] However, at the next below stage of post-graduate level, there could be some nominal reservation, but the question has not been finally decided in *Preeti Sagar*.

(a) POST GRADUATE COURSES

While the Supreme Court has shown some flexibility of approach in the matter of fixation of criteria/reservation/preference for admission to graduate courses like M.B.B.S., as discussed above, it has adopted somewhat stringent approach towards admissions to post-graduate courses and still more stringent attitude to admissions to super-specialities. The basic proposition laid down by the Supreme Court is that admission to post-graduate courses should be based strictly on merit and that there should be no dilution of standards in such courses.[41] This judicial approach is illustrated by the following judicial pronouncements.

In a number of cases, the Supreme Court has expressed doubt whether there can be any reservation at the post-graduate level for backward classes. For example, in a post-graduate medical course, only M.B.B.S. candidates can be admitted. Can an M.B.B.S. be regarded as backward even though he may belong to a backward class. Reservation in the higher courses would perpetuate the perni-

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36. *Supra*, note, 15.
37. *Supra*, note 15.
38. *Anant Madaan v. State of Haryana*, AIR 1995 SC 955 : (1995) 2 SCC 135.
39. MARC GALANTAR, *Protective Discrimination for Backward Classes in India*, 3 *JILI*, 39 (1961); I.L.I., *EDUCATIONAL PLANNING*, 56-113 (1967); *Radhakrishnan, Units of Social Economic and Educational Backwardness*: *Caste and Individual*. 7 *JILI*, 263 (1965); I.L.I., *MINORITIES AND THE LAW* (1972); SMITH, *INDIA AS A SECULAR STATE* (1963).
40. AIR 1997 SC 3687 : (1997) 6 SCC 283.
41. *Narayan Sharma (Dr.) v. Pankaj Kr. Lehkar*, AIR 2000 SC 72 : (2000) 1 SCC 44.

cious theory "once backward always backward." The Court has advocated the principle that the higher you go in the ladder of education, the lesser should be the reservation.

Generally speaking, at the post-graduate level, it is merit that ought to count. Thus, the Supreme Court has observed in *Jagdish Saran*,[42] that to encourage SC/ST/OBC students, the State may reserve seats for them at the under graduate level, but at the level of Ph.D., M.D., or levels of higher proficiency, "equality", measured by matching excellence, has more meaning and cannot be diluted much without grave risk." At the highest scales of proficiency or speciality, "the best skill or talent, must be hand-picked by selecting according to capability." At that level, "where international measure of talent is made, where losing one great scientist or technologist-in-the making is a national loss, the considerations we have expanded upon as important lose their potency."

In *Pradeep Jain*,[43] the Supreme Court expressed great reluctance in accepting any reservation for admissions to post graduate courses where ordinarily merit should prevail. The case dealt with reservation of seats for the residents of the State or the students of the same University for admission to the medical colleges.[44] The Court said in the instant case, that considerations for admission to the post-graduate courses such as M.D. and the like for reservation based residence requirements within the State or institutional preference were different from those for admission to the M.B.B.S. course. The Court emphatically stated that excellence cannot be allowed to be compromised by any other considerations because that would be detrimental to national interests. The Court thus opined that in case of admissions to the post-graduate courses, such as M.S., M.D. and the like, "it would be eminently desirable not to provide for any reservation based on residence requirement within the State or on institutional preference. The Court observed further:

> "This proposition has greater importance when we reach the higher levels of education like Post-Graduate Courses. After all, top technological expertise in any vital field like medicine is a nation's human asset without which its advance and development will be stunted. The role of high grade skill or special talent may be less at the lesser levels of education, jobs and disciplines of social consequence, but more at the higher levels of sophisticated skills and strategic employment. To devalue merit at the summit is to temporise with the country's development in the vital areas of professional expertise."

However, the Court directed in *Pradeep Jain* that while residence within the State would not be a ground for reservation in admissions to post-graduate courses, a certain percentage of the seats could be reserved on the basis of 'institutional preference' in the sense that a student who has passed the MBBS course from a medical college or University, may be given preference for admission to the post-graduate course in the same medical college or University. But such reservation on the basis of institutional preference should not in any event exceed 50% of the total number of open seats available for admission to the post-graduate course.

But the Court directed that even in regard to admissions to the post-graduate course, so far as super-specialities such as neurosurgery and cardiology are con-

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42. *Jagdish Saran (Dr.) v. Union of India*, AIR 1980 SC 820 : (1980) 2 SCC 768.
43. *Pradeep Jain (Dr.) v. Union of India*, AIR 1984 SC 1420 : (1984) 3 SCC 654.
44. See, *supra.*

cerned, there should be no reservation at all even on the basis of institutional preference and admissions should be granted purely on merit on an all India basis.[45]

The Court observed further that admission to the non-reserved seats for post-graduate courses such as M.S., M.D. and the like cannot be made on the basis of marks obtained by the students at different MBBS examinations held by different universities since there will be no comparable standard by reference to which the relative merits of the students seeking admission to post-graduate courses can be judged. In order to meet the demands of the equality clause, admissions to 50% non-reserved seats in the post-graduate courses must be made on the basis of comparative evaluation of merits of the students through an entrance examination. The Court preferred such an examination being held by the Indian Medical Council on all India basis. But if this was not possible for some reason, then such an examination could be held by the State Government or the University for the medical colleges situated within the State or affiliated to the University. Again, the Supreme Court has observed in the following case[46] that "with regard to post-graduate and super-specialities, this Court has prohibited any reservation whatsoever".

But, the Supreme Court has now changed its stance on this question and has ruled that there may be reservation of seats for backward classes in admission to post-graduate, speciality or super-speciality courses in medicine. The Court has argued that after admission, every student has to undergo the same courses and the same examination even though at the admission stage the cut-off point may be lower for backward candidates than for general candidates.[47]

In *Dinesh Kumar I*,[48] the Supreme Court has insisted that admission to the open seats in post-graduate medical courses (*viz.* 50%) ought to be made on the basis of the marks obtained in an all India examination and not on the basis of the marks obtained by the candidates at various qualifying examinations held by various bodies where the standard of judging may not be uniform. Some Universities may be very liberal in their marking while others may be strict. There would thus be no comparable standard on the basis of which the relative merits of the students may be judged and that "would indeed be blatantly violative of the concept of equality enshrined in Art. 14 of the Constitution." The Court directed the Indian Medical Council to prepare a scheme for holding the qualifying examination.

In *Dinesh Kumar II*,[49] the Supreme Court reconsidered some of the matters decided by it in *Dinesh Kumar I* and issued some fresh and modified directions as regards admissions to Post-Graduate Medical Courses. One, the medium of the all India examination to be conducted for admission for these courses shall be English. Two, instead of making available 50% of the open seats after taking into

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45. AIR 1984 SC at 1442.
Also see, *Indra Sawhney v. Union of India*, Ch. XXIII, Sec. F, *infra.*

46. *Ahmedabad Municipal Corp. v. Nilaybhai R. Thakore*, AIR 1986 SC 1362.

47. *P.G. Institute of Medical Education & Research v. K.L. Narasimham*, AIR 1997 SC 3687 : (1997) 6 SCC 283.

48. *Dinesh Kumar v. Motilal Nehru Medical College, Allahabad*, AIR 1985 SC 1059 : (1985) 3 SCC 22.

49. *Dinesh Kumar v. Motilal Nehru Medical College, Allahabad*, AIR 1986 SC 1877 : (1986) 3 SCC 727.

account reservations validly made, 25% of the total number of seats without taking into account any reservations should be made available for being filled on the basis of an all India entrance examination. The reason behind the new formula was that a State could, under the old formula, reduce the number of the open seats by increasing reservations on various grounds. The new formula frees the open seats from any reservations which may be made by a State. Three, the entrance examination would be conducted by the All India Medical Science Institute instead of the Medical Council of India which does not have the necessary infrastructure for the purpose. In *Dinesh II*, the Supreme Court also rejected the suggestion that a weightage of 15% of the total marks obtained by a candidate of the All India Entrance Examination for admission to the Post-Graduate Course to the doctors who had put in a minimum of three years of rural service. The Court insisted that selection of candidates for admission to Post- Graduate medical course should be based on merits and no factor other than merit should be allowed to tilt the balance in favour of a candidate.

The University of Rajasthan issued an ordinance providing for the addition of 5% marks to the total marks obtained by a student at the entrance examination by way of college-wise institutional preference which meant that these marks were to be added to the marks obtained by a student applying for admission to the post-graduate course in any of the five medical colleges in the State, provided the student had passed his MBBS course from the same college to which admission was sought in the post-graduate course. In *State of Rajasthan v. Dr. Ashok Kumar Gupta*,[50] the Supreme Court disapproved the college-wise institutional preference as violative of Art. 14.

A rule provided for college-wise institutional preference for admission to post-graduate courses in Medical Science being run in the medical colleges of the State and the Municipal Corporation. The rule meant that the students of each particular college passing their MBBS examination from that college would exclude all other students obtaining their MBBS degree from the other colleges. The Supreme Court declared the rule invalid in *Greater Bombay Municipal Corp. v. Thukral Anjali Deokumar*.[51] The Court ruled that there was no place for college-wise reservation. The Court was in favour of removing institutional preference and pooling together all the candidates from the University. Because of the impugned rule, many meritorious students could not get admission even if they secured higher marks than those admitted in the post-graduate degree course. There arose a patent discrimination in as much as students obtaining lesser marks were preferred to those obtaining higher marks. There was no intelligible differentia for the classification by way of college-wise institutional preference. "So far as educational institutions are concerned, unless there are strong reasons for exclusion of meritorious candidates, any preference other than in order of merit, will not stand the test of Article 14 of the Constitution. So, the impugned rules are discriminatory and do not satisfy the tests of reasonable classification and, as such, cannot be sustained."

Another instance of institutional preference came before the Supreme Court in *Goel*.[52] The State of Uttar Pradesh has seven medical colleges offering post-

50. AIR 1989 SC 177 : (1989) 1 SCC 93.
51. AIR 1989 SC 1194 : (1989) 2 SCC 249.
52. *P.K. Goel v. U.P. Medical Council,* AIR 1992 SC 1475 : (1992) 3 SCC 232.

graduate medical courses. A combined entrance examination was held for admission to these courses and the results of the examination were announced so as to provide for a separate merit list for each college out of the institutional students of that college and seats in each college filled on the basis of the separate merit list. An 'institutional student' meant a student obtaining MBBS degree of that institution. This was challenged.

The Supreme Court declared the issuing of separate merit list for each college invalid under Art. 14 as the classification on the basis of college-wise institutional preference was held to be discriminatory and arbitrary. "There cannot be any vested right in seeking admission in a particular college. Merit as the basis for selection in the speciality in a post-graduate degree course in one college cannot be sacrificed against convenience." If the rule of merit on the basis of institutional preference were applied, "a candidate having secured a very high position in merit in the combined merit list for the whole State of Uttar Pradesh may be deprived of getting a speciality of his choice even though he might be prepared to go in another medical college in the same State of Uttar Pradesh."

Reservation of 70% of seats by the Delhi University for admission to the post-graduate course in Dermatology for Delhi University graduates was frowned upon by the Supreme Court in *Jagdish Saran v. Union of India*.[53] In the instant case, a medical graduate from Madras University was seeking admission to post-graduate degree course in the Delhi University as his father had been transferred to Delhi. Though he qualified in the entrance examination, yet he was denied admission because of the rule reserving 70% of the seats at the post-graduate level to Delhi University graduates. He challenged the validity of the rule.

The Supreme Court emphasized that the primary imperative of Arts. 14 and 15 is equal opportunity for all across the nation to attain excellence. The philosophy and pragmatism of excellence through universal equal opportunity is part of the Indian culture and constitutional creed. This norm of non-discrimination, however, admits of just exceptions geared to equality, and does not forbid such basic measures as are needed to abolish the gaping realities of current inequalities afflicting 'socially and educationally backward classes' and 'the Scheduled Castes and the Scheduled Tribes'. But reservation by a university for its own graduates creates a new kind of discrimination which is not sanctioned by Arts. 14 and 15. Delhi University students do not form an educationally backward class. But the Court also emphasized that at the post-graduate level "equality, measured by matching excellence, has more meaning and cannot be diluted much without grave risk." Further, "it is difficult to denounce or renounce the merit criterion when the selection is for post-graduate or post-doctoral courses in specialized subjects…. To sympathize mawkishly with the weaker sections by selecting sub-standard candidates, is to punish society as a whole by denying the prospect of excellence say in hospital service…So it is that relaxation on merit, by overruling equality and quality altogether, is a social risk where the stage is post-graduate or post-doctoral".[54] It may be pointed out that this reservation could not be justified under Art. 15(4) as the students of the Delhi University could not be regarded as educationally backward.

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53. AIR 1980 SC 820 : (1980) 2 SCC 768.
54. AIR 1980 SC 820 at 829.

Institution-wise reservation has no place in the scheme of Art. 15, although social and educational destitution may be endemic in some parts of the country where a college or university may be started to remedy this glaring imbalance and reservation for those alumni for higher studies may be permitted. Thus, reservation is to be linked to backwardness. However, the Court stressed that reservation should not run riot otherwise that will bring about a fall in medical competence. The very best should not be rejected from admission because that will be a national loss. The Court consequently laid down the following principles for this purpose:

(i) Reservation must be kept in check by the demands of competence. A certain percentage must be available for meritorious students. Shelter of reservation should not be extended where minimum qualifications are absent.

(ii) Reservation on the ground of backwardness cannot prevail in the same measure at the highest scale of speciality where the best skill or talent must be picked up.

Chanchala's case[55] was now explained by the Court as follows: "…University-wise preferential treatment may still be consistent with the rule of equality of opportunity where it is calculated to correct an imbalance or handicap and permit equality in the larger sense." The Court pointed out that advantaged groups are exploiting the propositions applicable to disabled categories. The Court thus stated:[56]

> "If university-wise classification for post-graduate medical education is shown to be relevant and reasonable and the differentia has a nexus to the larger goal of equalisation of educational opportunities the vice of discrimination may not invalidate the rule."

Excessive reservation is an obvious inequality. The basis of classified quota can be promotion of better opportunities to the deprived categories of students or better supply of medical service to neglected regions of the country. The Delhi University reservation did not fit into these criteria as Delhi is in no sense an educationally or economically backward human region. Merit as a criteria should not be renounced for selection to post-graduate or post-doctoral courses in specialised subjects, but the court thought that some reservation for Delhi graduates may be justified for the following reasons:

(i) Delhi students belong to families which are drawn from all over India. This is not based on the 'sons of the soil' doctrine. This reservation is, therefore, qualitatively different.

(ii) Other Universities shut their doors on Delhi students.

(iii) There ought to be institutional continuity.

The Court did not specifically veto 70% reservation rule in this case as there was not sufficient data before the Court to decide the issue. But the Court any way directed that the petitioner be admitted.

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55. *Supra*, footnote 18, on 1320.
56. AIR 1980 SC 831.

The Gujarat University made a rule giving preference to its own students over those from other Universities in admission to super-speciality medical course. The rule in question ran as follows:

> "The first preference is to be given to the candidates from Gujarat University. Second preference to be given to students from other Universities in Gujarat. Any vacancy remaining after this shall remain unfilled."

In *Gujarat University v. Rajiv Gopinath Bhatt*,[57] the Supreme Court upheld the rule with the following remarks:

> "If a rule has been framed that out of the merit list prepared, preference is to be given for admission in the super speciality course to the students of the University in question *per se* it cannot be held to be arbitrary, unreasonable or violative of Art. 14."

The ruling seems to be debatable in view of what the Court had observed earlier in *Pradeep Jain*. The last clause in the rule that the "vacancy shall remain unfilled" was, of course, vetoed by the Court.

In *Mohan Bir Singh Chawla v. Punjab University*,[58] the Supreme Court said that at higher levels of education it would be dangerous to depreciate merit and excellence. The court thus declared:

> "The higher you go in any discipline, lesser should be the reservations—of whatever kind."

In *Narayan Sharma v. Pankaj Kumar Lehkar*,[59] the Supreme Court considered the validity of the following scheme of reservation made by the Assam Government for seats in the post-graduate medical courses in its medical colleges: (*i*) 25% All India quota; (*ii*) 4 seats for North Eastern Council; (*iii*) 6 seats for teachers in medical colleges, (*iv*) 20 seats for doctors who had worked for five years in a health centre outside the municipal limits; (*v*) 7% for Scheduled Caste candidates and (*vi*) 15% OBC candidates. An entrance examination was to be conducted but candidates in categories (*i*), (*ii*), (*iii*) and (*iv*) were not required to appear at such an examination.

The Supreme Court upheld reservation for category (*ii*) as these seats were meant for the five Eastern States having no medical college of their own. The students of these States being handicapped in getting medical education formed a separate class and reserving a few seats for them did not violate Art. 14. But the provision exempting them from appearing at an entrance examination was quashed as selection ought to be based on merit and could not be left to the arbitrary discretion of any administrative body.

Reservation for category (*iii*) was also upheld. It was mandatory for teachers in medical colleges to have a postgraduate degree for their future promotions. They thus formed a separate elan by themselves and the classification was based on an intelligible differentia having rational nexus to the object of the rule. The teachers being constantly in touch with medical subjects could be validly exempted from the entrance examination.

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57. AIR 1996 SC 2066 : (1996) 4 SCC 60.
58. AIR 1997 SC 788 : (1997) 2 SCC 171.
59. AIR 2000 SC 72 : (2000) 1 SCC 44.

Reservation for category (*iv*) was quashed as per the reasoning in *State of U.P. v. Pradip Tandon*[60] and *Dinesh II*,[61] rural element could not be the basis of any classification.

There was absolutely no controversy as regards category (*i*) which was in pursuance of several earlier pronouncements of the Supreme Court.[62]

In a recent case, *A.I.I.M.S. Students' Union v. A.I.I.M.S.*,[63] the Supreme Court has given its powerful support to the test of merit over that of reservation for admission to post-graduate medical courses. The All India Institute of Medical Sciences situated at Delhi is a premier medical institution in India. It runs several post graduate courses. For admission to these courses, the Institute holds an All India Entrance Examination. The Institute followed a rule of reserving 40% seats in these courses for its medical graduates irrespective of their performance in the entrance examination. This resulted in internal students with low marks at the entrance examination being admitted at the cost of other students with higher marks. Accordingly, the rule was challenged and the Supreme Court quashed it. The Court permitted 25% reservation for Institute graduate with the rider that a uniform minimum cut-off of 50% marks at the competitive entrance examination be followed for all students and that the margin of difference between the qualifying marks for Institute's candidates and the general category candidates should not be too wide.

The Court ruled : "Such a reservation based on institutional continuity in the absence of any relevant evidence in justification thereof is unconstitutional and violative of Art. 14 of the Constitution and has therefore to be struck down".[64]

The Court also pointed out that institutional reservation is not supported by the Constitution or constitutional principles. "A certain degree of preference for students of the same institution intending to prosecute further studies therein is permissible on grounds of convenience, suitability and familiarity with an educational environment. Such preference has to be reasonable and not excessive.… Minimum standards cannot be so diluted as to become practically non-existent."[65]

(b) *PREETI SRIVASTAVA*

The Supreme Court has rendered a momentous decision in *Dr. Preeti Sagar Srivastva v. State of Madhya Pradesh*.[66]

The factual context in which this case arose was as follows: For admission to post-graduate degree/diploma courses in medicine, candidates were required to appear at an entrance examination. The State Government fixed a cut-off percentage of 45% marks in this examination for admission of the general category students while no cut off percentage of marks was fixed for SC/ST candidates. This meant that there was no minimum qualifying marks in the entrance examination prescribed for the reserved category candidates for admission to the post-graduate medical courses. This was challenged and the Supreme Court quashed

60. *Supra*, footnote 25.
61. *Supra*, footnote 49.
62. *Supra.*
63. (2002) 1 SCC 428 : AIR 2001 SC 3262.
64. *Ibid*, 461.
65. *Ibid*, 459.
66. AIR 1999 SC 2894 : (1999) 7 SCC 120.

the same in *Dr. Sadhna Devi v. State of Uttar Pradesh*,[67] with the remark that if this was done, merit would be sacrificed altogether.

The Supreme Court was of the opinion that even for the reserved category candidates, there should be some minimum qualifying marks if not the same as prescribed as bench marks for general category students. Thus, there cannot be zero qualifying marks for reserved category candidates in the entrance test for admission to the post-graduate courses. The government having installed the system of holding an admission test, would not be entitled to do away with the requirement of obtaining minimum qualifying marks for the special category candidates. The government cannot say that even if these candidates have not obtained even the minimum qualifying marks they must still be selected for post-graduate courses. This amounts to rendering the admission test an idle formality because these candidates would qualify for admission even though they did not secure any marks. This thus amounts to sacrificing merit altogether. This could not be done. Therefore, if these students fail to secure the minimum qualifying marks, then the seats reserved for them should not go waste but should be released for the candidates of the general category. Otherwise there would be a national loss.[68]

In sum, in *Sadhna*, the Supreme Court insisted that for admission to post-graduate medical course, there ought to be prescribed a minimum cut off percentage of marks at the entrance examination for Scheduled Castes, Scheduled Tribes and other Backward Classes. It would be unconstitutional as being violative of the right to equality to keep this cut off point at zero percent.

As a sequel to the *Sadhna* ruling, the State of Uttar Pradesh prescribed a Post-Graduate Medical Entrance Examination for admission to Post-Graduate Degree/Diploma Course in medicine and fixed a cut-off percentage of 45 at the entrance examination for the general category candidates for admission to the post-graduate medical course. But for admission of reserved category candidates, the cut-off percentage was fixed at 20%. In addition, 50% of the seats in the post-graduate course were reserved for Scheduled Castes, Scheduled tribes and Backward classes candidates. A similar scheme was laid down in Madhya Pradesh. The Supreme Court was called upon to adjudge the validity of these schemes *vis-à-vis* Art. 15(4). However, in *Preeti Sagar* the Supreme Court did not express any opinion on the question whether reservation of seats is permissible at the post-graduate level in medicine as this question was not debated before it. The Court only examined the question whether lower qualifying marks could be prescribed for admission of reserved category candidates.

The Court has pointed out in *Preeti Sagar* that Arts. 15(3) and 15(4) permit compensatory or protective discrimination in favour of certain classes. Every policy pursued under Article 15(4) makes a departure from the equality norm for the benefit of the backward. Therefore, it has to be designed and worked in a manner conducive to the ultimate building up of an egalitarian non-discriminatory society. That is its final constitutional justification. Therefore, programmes and policies of compensatory discrimination under Art. 15(4) have to be designed and pursued to achieve this ultimate national interest. At the same time, these programmes cannot be unreasonable or arbitrary, nor can they be exe-

67. AIR 1997 SC 1120 : (1997) 3 SCC 90.
68. *Ibid*, at 1124.

cuted in a manner which undermines other vital public interests or the general good of all. "All public policies, therefore, in this area have to be tested on the anvil of reasonableness and ultimate public good….Art. 15(4) also must be used, and policies under it framed, in a reasonable manner consistently with the ultimate public interests."[69]

The Court has emphasized: "Consideration of national interest and the interests of the community or society as a whole cannot be ignored in determining the reasonableness of a special provision under Article 15(4)."[70]

Any special provision under Art. 15(4) has to balance the importance of having, at the higher levels of education, students who are meritorious and who have secured admission on their merit, as against the social equity of giving compensatory benefit of admissions to the SC/ST candidates who are in a disadvantaged position. Selection of the right calibre of students is essential in the public interest at the level of specialised post-graduate education. Special provisions for SC/ST candidates at the speciality level have to be minimal.

In the interest of selecting suitable candidates for specialised education, it is necessary that the common entrance examination be of a standard and qualifying marks are prescribed for passing that examination. Accordingly, the Supreme Court has refused to accept the argument that there need not be any qualifying marks prescribed for the qualifying examination for admission to the post-graduate medical courses as the candidates have already passed the M.B.B.S. examination which is the essential pre-requisite to post-graduate medical courses.

The Court has ruled that even if minimum qualifying marks can be lower for the reserved categories candidates, there cannot be a wide disparity between the minimum qualifying marks for the reserved category candidates as against the general category candidates at the post-graduate level. This disparity must be minimal. The Court has held that the disparity between 20% marks for the reserved category and 45% marks for the general category is too great a disparity "to sustain the public interest at the level of post-graduate medical training and education". This is contrary to the mandate of Art. 15(4).

The Court has not itself laid down how much relaxation can be given to the reserved category candidates in the matter of minimum qualifying marks as compared to the general candidates. The Court has left the matter for decision to the Medical Council of India "since it affects standards of post-graduate medical education."[71]

An argument was advanced before the Court that if the threshold requirement for admission of SC/ST candidates was high then the seats allotted to them in medical colleges would not be filled up. The Court rejecting the argument maintained that the purpose of higher education is not to just fill seats by lowering standards. The purpose is to impart education to the SC/ST candidates and to enable them to rise to the standards which are expected of persons having the post-graduate medical qualification. While Art. 15(4) provides for protective discrimination in favour of the weaker sections, one cannot also ignore the wider interests of society while devising special provisions for them. A large differen-

69. AIR 1999 SC 2894 at 2904 : (1999) 7 SCC 120.
70. *Ibid.*, at 2905.
71. *Ibid.*, at 2909.

tiation of the qualifying marks between the two groups of students would make it very difficult to maintain the requisite standard of teaching and training at the post-graduate level.

The Court has also ruled in *Preeti Sagar* that at the level of super-specialization, there cannot be any special provision as it is contrary to national interest. Merit alone can be the basis of selection. This means that no reservation can be made in the super-speciality courses in favour of the reserved classes because any dilution of merit at this stage would adversely affect the national goal of having the best possible candidates at the highest levels of professional and educational training. "Opportunities for such training are few and it is in the national interest that these are made available to those who can profit from them, *viz;* the best brains in the country, irrespective of the class to which they belong."[72] To this extent, the Court has overruled its earlier decision in *Post-Graduate Institute of Medical Education and Research, Chandigarh v. K.L. Narasimham*. However, at the next lower stage of post-graduate level, there could be some nominal reservation, but the question has not been finally decided in *Preeti Sagar.*

So far as admission to the M.B.B.S. Course is concerned, at one stage, the Court did agree that while in the entrance examination for admission to the M.B.B.S. course, a cut off point is fixed as regards the minimum marks which a general candidate must obtain to get admission, there need be no such limit for the reserve categories candidates. For example, in *State of Madhya Pradesh v. Nivedita Jain,*[73] an order issued by the M.P. Government dispensing with the requirement of obtaining any minimum qualifying marks in the pre-medical entrance examination for admission to the M.B.B.S. course for SC/ST candidates has been held valid. The order was passed because of the paucity of qualified SC/ST candidates. The factual context in which the order was passed was as follows: The State reserved 15% seats each for SC and ST candidates for admission to the M.B.B.S. course. This meant 108 seats each for the two groups out of a total of 720 seats. When the result of the Pre-Medical entrance examination was published, only 18 SC candidates and 2 ST candidates qualified. In view of the large unfilled quota of SC/ST candidates, the State completely relaxed the condition relating to the minimum qualifying marks for these two categories. Upholding the relaxation, the Court argued that the relaxation in the admission qualification would not effect any relaxation in the standard of medical education or curriculum of studies in medical colleges for those candidates after their admission to the college, and the standard of examination and the curriculum would remain the same for all students.

But now the Supreme Court has changed its opinion as appears from *Preeti Sagar*. The Court has specifically disagreed with the view expressed by it in several earlier cases that the process of selection of candidates for admission to medical colleges has no real impact on the standard of medical education.[74] The Court has observed in *Preeti Sagar*:

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72. AIR 1997 SC 3687 : (1997) 6 SCC 283; *supra.*
73. AIR 1981 SC 2045 : (1981) 4 SCC 296.
74. *Nivedita Jain, supra; Ajay Kumar Singh v. State of Bihar,* (1994) 4 SCC 401; *Post-Graduate Institute of Medical Education & Research v. K.L. Narasimham,* (1997) 6 SCC 283 : AIR 1997 SC 3687.

> "…the criteria for the selection of candidates have an important bearing on the standard of education which can be effectively imparted in the medical colleges. We cannot agree with the proposition that prescribing no minimum qualifying marks for admission for the Scheduled Castes and the Scheduled Tribes would not have an impact on the standard of education in the medical colleges."

The Court has now disagreed with the view expressed in earlier cases that since all students pass the same examination, standards of education are maintained and it does not matter even if students of lower merit are admitted.[75]

This approach of the Supreme Court is most welcome as it is a very important step towards maintenance of a semblance of standard in medical education. Weak students are bound to pull down the level of teaching as the teacher has to tone down his teaching to the level of weak students in the class. If the teacher talks at a higher level then it will pass over the heads of weak students. Accordingly, the better students will be the sufferer as the weaker students always act as a drag on the entire class.

75. Also see, *supra*, Ch. X, Sec. G(iii)(d).

CHAPTER XXIII

FUNDAMENTAL RIGHTS (4)
RIGHT TO EQUALITY (iii)

SYNOPSIS

A. EQUALITY OF OPPORTUNITY IN PUBLIC EMPLOYMENT

Article16(1) is a facet of Art. 14. Arts. 14 and 16(1) are closely interconnected. Art. 16(1) takes its roots from Art. 14. Art. 16(1) particularizes the generality of Art. 14 and identifies, in a constitutional sense, "equality of opportunity" in matters of employment under the state.

An important point of distinction between Arts. 14 and 16 is that while Art. 14 applies to all persons, citizens as well as non-citizens, Art. 16 applies only to citizens and not to non-citizens.

Article16(1) guarantees equality of opportunity to all citizens "in matters relating to employment" or "appointment to any office" under the state. According to Art. 16(2), no citizen can be discriminated against, or be ineligible for any employment or office under the state, on the grounds only of religion, race, caste, sex, descent, place of birth or residence or any of them.

Adherence to the rule of equality in public employment is a being feature of our constitution and the rule of law is its core, the Court cannot disable itself from making an order inconsistent with Articles 14 and 16 of the Constitution.[1]

Article16(2) is also an elaboration of a facet of Art. 16(1). These two clauses thus postulate the universality of Indian citizenship. As there is common citizenship, residence qualification is not required for service in any State.

Public employment is a facet of right to equality envisaged under Article 16 of the Constitution of India. The State although is a model employer, its right to create posts and recruit people therefor emanates from the statutes or statutory rules and/or rules framed under the proviso appended to Article 309 of the Constitution of India. The recruitment rules are to be framed with a view to give equal opportunity to all the citizens of India entitled for being considered for recruitment in the vacant posts.[2]

On a comparative basis, Art. 16 deals with a very limited subject, *viz.*, public employment. On the other hand, the scope of Art. 15(1) is much wider as it covers the entire range of state activities. The ambit of Art. 16(2) is restrictive in scope than that of Art. 15(1)[3] because Art. 16(2) is confined to employment or office under the state, meaning services under the Central and State Governments and their instrumentalities. However, Art. 15 being more general in nature covers many varied situations of discrimination. Further, the prohibited grounds of discrimination under Art. 16(2) are somewhat wider than those under Art. 15(2) be-

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1. *Reserve Bank of India v. Gopinath Sharma*, (2006) 6 SCC 221 : AIR 2006 SC 2614.
2. *Principal, Mehar Chand Polytechnic v. Anu Lamba*, (2006) 7 SCC 161 : AIR 2006 SC 3074.
3. *Supra*, Ch. XXII.

cause Art. 16(2) prohibits discrimination on the additional grounds of descent and residence apart from religion, race, caste, sex and place of birth.

Article 15 does not mention 'descent' and 'residence' as the prohibited grounds of discrimination, whereas Art. 16 does. Thus, with regard to the grounds of discrimination, Art. 15 is somewhat narrower than Art. 16. What Art. 16 guarantees is that all citizens in matters of state service shall be treated alike under like circumstances both in privileges and obligations. There should be no discrimination between one employee and another on the basis of any prejudice, bias or any extraneous ground.

The word 'discrimination' in Art. 16(2) involves an element of unfavourable vice. As already noted, Art. 14 guarantees right of equality generally; Arts. 15 and 16 are instances of the same right of equality in specific situations. Art. 14 is the genus while Art. 16 is a species. Arts. 14 and 16 form part of the same constitutional code of guarantees and supplement each other. In other words, Art. 16 is only an instance of the application of the general rule of equality laid down in Article 14 and it should be construed as such. Accordingly, 'equality' in Art. 16(1) means equality as between member of the same class of employees, and not equality between members of separate, independent, classes.

Equal protection of the laws does not postulate equal treatment of all persons without distinction; it merely guarantees the application of the same laws alike without discrimination to all persons similarly situated.[4] Therefore, Art. 16 does not bar a reasonable classification of employees or reasonable tests for selection. Equality of opportunity of employment means selection. Equality of opportunity of employment means equality as between members of the same class of employees and not equality between members of separate, independent, classes. There can be no denial of equality of opportunity unless the person who complains of discrimination is equally situated with the person or persons who are alleged to have been favoured. Those who are similarly circumstanced are entitled to equal treatment.

To illustrate the above proposition, reference may be made to *Bagari*.[5] The Army Act classifies army officers into various categories based on the requirements of the armed forces. The Supreme Court has ruled that such a classification cannot be regarded as arbitrary. Art. 14 or 16 is not violated if different pay, perks or other privileges are granted to these officers. Thus, the distinction drawn between the commissioned officers, on the one hand, and the non-commissioned officers, on the other, in the matter of grant of study leave is not "discriminatory, arbitrary or irrational". It cannot be said that this distinction in the instant case is not founded on any intelligible differentia and that it has no relation with the object sought to be achieved. The character and duties of the two classes of officers are different.[6]

The State cannot amend the statutory rules adversely affecting the pension of retired employees with retrospective effect who became entitled to the benefits of

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4. *All India Station Masters' and Assistant Station Masters' Association Delhi v. Gen. Man., Central Railway*, AIR 1960 SC 384 : (1960) 2 SCR 311; *Jagannath Prasad Sharma v. State of Uttar Pradesh*, AIR 1961 SC 1245; *Indian Rly. SAS Staff Association v. Union of India*, (1998) 2 SCC 651 : AIR 1998 SC 805.

5. *Union of India v. S.C. Bagari*, AIR 1999 SC 1412 : (1999) 3 SCC 709.

6. *Ibid*., at 1415.

the revised scales of pay, and consequently to the pension calculated on such basis[7]

Article 16(1) is much wider in scope than Art. 16(2) and the grounds of discrimination expressly mentioned in Art. 16(2) are not exhaustive. Art. 16(2) brings out emphatically, in a negative form, what is guaranteed affirmatively by Art. 16(1). Discrimination is a double edged weapon; it would operate in favour of some persons but against some others. Art. 16(2) prohibits discrimination and, thus, assures the effective enforcement of the Fundamental Right guaranteed in Art. 16(1).

The emphasis in Art. 16(2) is on the word '*only*'. Where there is discrimination *only* on the grounds mentioned therein, that Article may be attracted; but where discrimination is based partly on one such ground and partly on some other ground not mentioned in Art. 16(2), the matter may fall under Art. 16(1), but not under Art. 16(2). If the other ground is relevant for the purpose of appointment to the post, there is no contravention of the constitutional provision.

Article 16 uses the term 'office' which is synonymous with the term 'office' used in Arts. 102(a) and 191(a) discussed earlier.[8] 'Office' means a subsisting, permanent, substantive position, having an existence independent of the person who fills it, which is filled in succession by successive holders and which has more or less a public character to which duties are attached.[9]

The equality guaranteed by Art. 16(1) takes within its fold all stages of service. The expression 'matters relating to employment' in Art. 16(1) is not restricted only to the initial stage of appointment; the expression "appointment to an office" in Art. 16(1) does not mean merely the initial appointment. Art. 16(1) includes all matters in relation to employment both prior, and subsequent, to the employment which are incidental to the employment or which form part of the terms and conditions of such employment, such as, salary, periodical increments, leave, promotion, fixation of seniority, gratuity, pension, superannuation and even termination of employment. The guarantee of Art. 16(1) could become illusory if narrowly construed, for then the state could comply with its formal requirement by affording equality at the initial stage, but defeat its object by making discriminatory provisions as regards other matters subsequently.[10]

Articles 16(1) and 16(2) give effect to Arts. 14 and 15. All these Articles form part of the same constitutional code of guarantees and supplement each other. Art. 16(1) should, therefore, be construed in a broad and general way, and not in a pedantic and technical way. When so construed, the expression "matters relating to employment" cannot mean merely matters prior to the act of appointment nor can "appointment to any office" mean merely the initial appointment; it must include all matters relating to employment, whether prior or subsequent to the

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7. *U.P. Raghavendra Acharya v. State of Karnataka*, (2006) 9 SCC 630 : AIR 2006 SC 2145.
8. *Supra*, Chs. II and VI.
9. *Kanta Kathuria v. Manak Chand Surana, supra*, Ch. II*; State of U.P. v. Bhola Nath*, AIR 1972 All. 460.
10. *Gen. Manager, S. Rly. v. Rangachari*, AIR 1962 SC 36 : (1962) 2 SCR 586; *Ganga Ram v. Union of India*, AIR 1970 SC 2178 : (1970) 1 SCC 377; *State of Kerala v. Thomas*, AIR 1976 SC 490 : (1976) 2 SCC 310; *ABSK Sangh (Rly.) v. Union of India*, AIR 1981 SC 298 : (1981) 1 SCC 246.

employment, or whether these are either incidental to such employment or form part of its terms and conditions.[11]

The protection of Arts. 14 and 16 is available even to a temporary government servant if he has been arbitrarily discriminated against and singled out for harsh treatment in preference to his juniors, similarly circumstanced.[12]

As under Art. 14, so under Art. 16, equality cannot be a mathematical equality. Reasonable classification is permissible for various purposes relating to employment. The onus to establish discrimination is on him who asserts it. He has to show that the classification does not rest on any just or reasonable basis.[13] Thus, differentiation made between graduate and non-graduate supervisors in the matter of promotion has been held not to be violative of Art. 16.

A warning has however been sounded against "mini-classifications based on micro-distinctions".[14] "Every inconsequential differentiation between two things does not constitute the vice of discrimination, if law clubs them together ignoring venial variances." But when recruitment rules are made, employer is bound to comply with the same and in case of non compliance the appointment would be *ultra vires* the regulations as well as Articles 14 and 16 where the employer is a state owned or operated corporation.[15]

SEXUAL HARASSMENT

An incident of sexual harassment of a female at the place of work, amounts to violation of her Fundamental Right to gender equality under Art. 16(2).[16]

B. MATTERS OF EMPLOYMENT

(a) SERVICE CONDITIONS

Under Art. 309, rules regulating service conditions of government servants can be made by the government,[17] but such rules have to stand the tests of Arts. 14 and 16 and, thus, have to be reasonable and fair and not grossly unjust.[18] In the absence of a rule or regulation, service conditions may be prescribed by executive instructions.

The legal position of a government servant is more one of status rather than that of contract and his rights and duties are no longer determined by contract or consent of parties but by statutes or statutory rules, which may be unilaterally

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11. *State of Kerala v. Thomas*, AIR 1976 SC 490 : (1976) 2 SCC 310; see, *infra*; *Akhil Bharatiya Soshit Karamchari Sangh (Railway) v. Union of India*, AIR 1981 SC 298 : (1981) 1 SCC 246.

12. *Govt. Branch Press v. D.B. Belliappa*, AIR 1979 SC 429 : (1979) 1 SCC 477.

13. *Mohd. Shujat Ali v. Union of India*, AIR 1974 SC 1631 : (1975) 3 SCC 76. Also, *Prabhakar v. State of Maharashtra*, AIR 1976 SC 1093 : (1976) 2 SCC 890.

14. *State of Jammu & Kashmir v. T.N. Khosa*, AIR 1974 SC 1; *State of Kerala v. T.P. Roshana*, AIR 1979 SC 765, 770 : (1979) 2 SCR 974.

15. *National Fertilizers Ltd. v. Somvir Singh*, (2006) 5 SCC 493 : AIR 2006 SC 2319.

16. *Apparel Export Promotion Council v. A.K. Chopra*, AIR 1999 SC 625 : (1999) 1SCC 759.
For further discussion on this question, see, *infra*, Chs. XXVI and XXXIV.

17. *Infra*, Ch. XXXVI.

18. *State of Uttar Pradesh v. Ramgopal*, AIR 1981 SC 1041 : (1981) 3 SCC 1.
For further discussion on Art. 309, see, *infra*, Ch. XXXVI.

altered without the consent of the employees.[19] But these rules have to be consistent with the Fundamental Rights.[20]

Reading Arts. 14 and 16 together, the Supreme Court has laid down several propositions regulating various aspects of service—from appointment to dismissal—of public servants. The endeavour of the Court has been to eliminate administrative discrimination, favouritism, arbitrariness and misuse of power from this area.

Seniority is not a Fundamental Right. It is merely a civil right. Article 16 is applicable in the case of an appointment. It does not speak of fixation of seniority.[21] Unilateral change of status of its employee by an instrumentality of the State is arbitrary violating Arts. 14 and 16.[22]

(b) APPOINTMENT

Appointments can be made under executive power if no statutory service rules have been made. In the case noted below,[23] power to make service rules for improvement trusts in the State vested in the State Government, but no such rules were made. The Supreme Court ruled that, in the absence of the rules, a trust could make appointments under its administrative power. The Court enunciated the following proposition: "In the absence of any statutory rules governing the service conditions of the employees, the executive instructions and/or decisions taken administratively would operate in the field; appointments/promotions can be made in accordance with such executive instructions, administrative directions".

But if statutory rules are made, then the executive power to make appointments has to be exercised in accordance with them. The executive power can supplement the rules by filling the gaps therein, but cannot supplant the same.[24] Appointments ought to be made strictly according to the rules. Appointments made in violation of the rules infringe Arts. 14 and 16 and, as such, the government cannot later regularise them.[25]

If *ad hoc* appointments have been made *de hors* the rules, these appointees ought to be replaced as soon as possible by regularly selected persons according to the rules. Such a temporary employee can also compete along with others for such regular selection. If he is selected, well and good; if he is not selected, he

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19. *Calcutta Dock Labour Board v. Jaffar Imam*, AIR 1966 SC 282 : (1965) 3 SCR 453; *Roshanlal Tandon v. Union of India*, AIR 1967 SC 1889 : (1968) 1 SCR 185; *Sirsi Municipality v. Cecelia Francis Tellis*, AIR 1973 SC 855 : (1973) 1 SCC 409; *D.T.C. v. D.T.C. Mazdoor Congress*, AIR 1991 SC 101, 186.

20. *Chairman, Railway Board v. C.R. Rangadhamaiah*, AIR 1997 SC 3828 : (1997) 6 SCC 623. For discussion on rule-making power under Art. 309, see, *infra*, Ch. XXXVI.

21. *Bimlesh Tanwar v. State of Haryana*, (2003) 5 SCC 604 : AIR 2003 SC 2000.

22. *BALCO Captive Power Plant Mazdoor Sangh v. National Thermal Power Corpn.* (2007) 14 SCC 234 : AIR 2008 SC 336.

23. *Nagpur Improvement Trust v. Yadaorao Jagannath Kumbhare*, (1999) 8 SCC 99 : AIR 1999 SC 3084.

24. *J&K Public Service Commission v. Narinder Mohan*, AIR 1994 SC 1808 : (1994) 2 SCC 630.

25. *State of Orissa v. S. Mohapatra*, (1993) 2 SCC 486 : AIR 1993 SC 1650; *Dr. M.A. Haque v. Union of India*, (1993) 2 SCC 213; *J&K Public Service Comm. v. Dr. Narendra Mohan*, (1994) 2 SCC 630 : AIR 1994 SC 1808.

must give way to the regularly selected candidates. The government cannot relax rules for appointment. The Supreme Court has observed in this connection:[26]

> "Backdoor *ad hoc* appointments at the behest of power source or otherwise and recruitment according to rules are mutually antagonistic and strange bed partners. They cannot co-exist in the same sheath. The former is in negation of fair play. The later are the product of order and regularity."

Ad hoc appointees who had been working for more than 13 years asked for regularisation of their appointments. The Supreme Court refused. Under the rules, regular appointments were to be made by the Public Service Commission. The principle is that recruitment to the service ought to be governed by the service rules and ought to be made by the appropriate authority. Consequently, *ad hoc* appointments would be only temporary appointments *de hors* the rules pending regular recruitment without conferring any right to regularisation of service.[27]

These qualifications to regularization have ultimately resulted in the Supreme Court declaring the regularization route impermissible. In *Umadevi(3)*[28] a Constitution Bench held that any public employment has to be in terms of the Constitutional scheme. The Court also lamentably referred to the Courts' (perhaps including the Supreme Court also) issuing orders for regularizing recruitment.

The argument advanced on behalf of the employees that an equity has arisen in their favour as a result of such appointments and their continuance of working was repelled by the Court. It also pointed out that the concept of "equal pay for equal work" is different from the concept of conferring permanency on those who have been appointed on adhoc or temporary or on no process of selection as envisaged in the concerned rules. Such regularization would also attract the vice of treating "unequals as equal" violating Articles 14 and 16.

Appointments fall within the executive sphere, and can be made under administrative directions without formal rules having been made. But posts and conditions of service should be advertised before making the selections so that every one eligible for the posts may have an opportunity of being considered by the appointing authority.[29]

When a rule requires that before appointment to a post, it should be suitably publicised, appointment made to the post without publicity is invalid.[30] An authority must be rigorously held to the standards by which it professes its action to be judged.[31] Also, compliance with such a rule seems to be necessary in the

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26. *J.K. Public Service Comm. v. Dr. Narinder Mohan,* (1994) 2 SCC 630, 637 : AIR 1994 SC 1808.
Also, *State of Haryana v. Piara Singh,* (1992) 4 SCC 118; *V. Sreenivasa Reddy v. Govt. of A.P.,* AIR 1995 SC 586 : 1995 Supp (1) SCC 572.

27. *J&K Public Service Comm. v. Dr. Narinder Mohan, supra.*
Also, *Dr. Surinder Singh Jamwal v. State of Jammu & Kashmir,* AIR 1996 SC 2775 : (1996) 9 SCC 619.

28. *Secretary, State of Karnataka v. Umadevi (3),* (2006) 4 SCC 1 : AIR 2006 SC 1806.

29. *B.N. Nagarajan v. State of Mysore,* AIR 1966 SC 1942 : (1966) 3 SCR 682; *supra.*
But see, *State of U.P. v. Bhola Nath,* AIR 1972 All. 460, saying that advertisement may not be necessary in some situations, *e.g.*, for filling the posts of government law officers who are appointed from the Bar to look after government work in the High Court.

30. *B.S. Minhas v. Indian Statistical Institute,* AIR 1984 SC 363, 371 : (1983) 4 SCC 582.

31. *R.D. Shetty v. International Airport Authority,* AIR 1979 SC 1628, 1635 : (1979) 3 SCC 489; *supra,* Ch. XXI.

name of fairplay. If a vacancy is advertised, all eligible persons may apply and the selection committee will have a large field to choose from. There will be no doubt of arbitrariness in the minds of eligible candidates for the post.[32]

Only so many posts ought to be filled as are advertised. It would be an improper exercise of power to make appointments over and above the posts advertised. It is only in a rare and exceptional circumstance and emergency situation that this rule can be deviated from. It is not as a matter of course that the appointing authority can fill up posts over and above those advertised. It should be clearly spelled out under what policy such a decision has been taken. Exercise of such power has to be tested on the touchstone of reasonableness.[33]

Where selection is to be made only on the basis of interview, and the number of applications for the posts are enormous with reference to the number of posts available to be filled up, the selection board should adopt some rational and reasonable basis to short list the candidates who have to be called for interview. The Supreme Court has decried the practice of calling a large number of candidates for interview for each post as it gives an opportunity for manipulation. Also, when large number of candidates have to be interviewed, interviews tend to be casual, superficial and sloppy and the true personality of the candidates cannot be assessed properly.[34]

Reasonable rules can be made, qualifications laid down,[35] or reasonable selective tests and processes employed, for making selections for any employment.[36] This means that there should be reasonable relation between the prescribed test for suitability of the candidate and the post as such.[37] It is permissible for the government to prescribe appropriate qualifications for appointment or promotion to various posts.[38] Qualifications for a particular post can be a "rational differentia" within the meaning of Art. 16. Prescription of stenographic ability of 100 words per minute is a relevant qualification.

Educational qualification is an acceptable criterion for determining suitability for an appointment to a particular post or cadre. For example, a requirement that the professor in orthopaedics must have a post-graduate degree in the particular speciality is valid.[39] Prescribing a first or second class post-graduate degree for the head of an educational institution has a direct nexus with the object of excellence sought to be achieved, and it cannot be said to be discriminatory. The posts of principals are not purely administrative; the principals have to take up teaching work in addition to their administrative duties.[40]

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32. The Court has cautioned that the rule of advertising or publicising the vacancy cannot apply to each and every post, such as, high constitutional posts as there is no provision for publicity in such cases.

33. *Surinder Singh v. State of Punjab,* AIR 1998 SC 18 : (1997) 8 SCC 488.

34. *M.P. Public Service Comm. v. Navnit Kumar Potdar,* AIR 1995 SC 77 : (1994) 6 SCC 293; *State of Haryana v. Subash Chander Marwaha,* AIR 1973 SC 2216 : (1974) 3 SCC 220; *Ashok Kumar Yadav v. State of Haryana,* AIR 1987 SC 454 : (1985) 4 SCC 417.

35. *Banarasi Dass v. State of Uttar Pradesh,* AIR 1956 SC 520 : 1956 SCR 357.

36. Rules for selection were held violative of Arts. 14 and 16 in *State of Maharashtra v. Raj Kumar,* AIR 1982 SC 1301 : (1982) 3 SCC 313.

37. *In State of Maharashtra v. Raj Kumar, supra,* footnote 36, rules for selection for certain posts were quashed as there was no nexus between the rules and the object sought to be achieved.

38. *State of Jammu & Kashmir v. Shiv Ram Sharma,* AIR 1999 SC 2012 : (1999) 3 SCC 653.

39. *Union of India v. Dr. Kohli,* AIR 1973 SC 811 : (1973) 3 SCC 592.

40. *B. Venkata Reddy v. State of Andhra Pradesh,* AIR 1983 S C 1108 : (1984) 1 SCC 645.

Educational qualifications can be made the basis for classification of employees in State service in the matter of pay scales, promotion, etc. Higher pay scale can be prescribed for employees possessing higher qualifications.[41] Similarly, in the matter of promotion, classification on the basis of educational qualification so as to deny eligibility to a higher post to an employer possessing lesser qualifications is valid. Educational qualifications can justifiably be made the basis for qualification for the purpose of promotion to the higher post.[42]

A candidate for appointment for a post must have the requisite qualifications prescribed in the rules.[43] When qualification has been prescribed for a post, that cannot be obliterated by posting those who do not fulfil that qualification as against those who have that qualification.[44]

For selection to an ex-cadre selection post, seniority is not relevant; the government can appoint to such a post a person whom it considers as the most suitable, and the Court will not interfere except on the ground of *mala fides*.[45]

Appointments based on the hereditary principle are bad because 'descent' is a prohibited ground of discrimination under Art. 16(2).[46] Abolition of hereditary posts of village officers is neither arbitrary nor unreasonable because such posts are feudalistic in character and anachronisms in the modern age.[47] A provision in the Punjab Police Rules, 1934, provided for giving preference in recruitment to sons and near relations of the police personnel. The provision was held to be invalid *vis-a-vis* Arts. 16(1) and (2).[48]

For the combined competitive examination—civil services examination, 1979, the candidates hailing from the Eastern States (Mizoram, Meghalaya, Negaland etc.) were given an option to take or not to take the paper on Indian languages. This was held to be non-discriminatory as these States have handicaps in the matter of language. These linguistically less advanced groups who are outside the Eighth Schedule to the Constitution may suffer serious disabilities if forced to take examinations in the languages set out in that Schedule. "This concession is not contravention of equality but conducive to equality. It helps a handicapped group and does not hamper those who are ahead."[49]

Appointment of candidates by 'pick and choose' without preparing any merit list amounts to an arbitrary exercise of power.[50]

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41. *State of Mysore v. P. Narasingh Rao,* AIR 1968 SC 349; *V. Markandeya v. State of Andhra Pradesh,* AIR 1989 SC 1308.
42. *State of Jammu & Kashmir v. Triloki Nath Khosa,* AIR 1974 SC 1 : (1974) 1 SCC 19; *Roop Chand Adalakha v. Delhi Development Authority,* AIR 1989 SC 307 : 1989 Supp (1) SCC 116; *RSEB Accountants Association, Jaipur v. RSEB,* AIR 1997 SC 882 : (1997) 3 SCC 103; *J.N. Goel v. Union of India,* AIR 1997 SC 729 : (1997) 2 SCC 440.
43. *M.C. Bindal v. R.C. Singh,* AIR 1989 SC 134 : (1989) 1 SCC 136.
44. *Subhash Chand v. Delhi Electricity Supply Undertaking,* AIR 1981 SC 75.
45. *J.N. Sharma v. State of Bihar,* AIR 1971 SC 1318.
46. *Gazula Dasharatha Rama Rao v. State of Andhra Pradesh,* AIR 1961 SC 564 : (1961) 2 SCR 931.
47. *K. Rajendran v. State of Tamil Nadu,* AIR 1982 SC 1107 : (1982) 2 SCC 273.
48. *Yogender Pal Singh v. Union of India,* (1987) 1 SCC 631.
49. *Javed Niaz Beg v. Union of India,* AIR 1981 SC 794 : 1980 Supp SCC 155.
For the Eighth Schedule to the Constitution, see, *supra,* Ch. XVI.
50. *State of Bihar v. Kaushal Kishore Singh,* AIR 1997 SC 2643.

Generally speaking, the judicial approach is that appointments ought to be made on the basis of a written test plus a *viva voce* test and not *solely* on the basis of a *viva voce* test. While *viva voce* is an important factor, it ought not to be the sole factor in the process of selection. The reason is that reliance thereon may lead to "sabotage of the purity of the proceedings". There is always room for suspicion if common appointments are made through oral interview only. There may be posts requiring persons of mature personality and such posts may be filled solely on the basis of a *viva voce* test. The Supreme Court has ruled in *Praveen Singh v. State of Punjab*[51] that the posts of block development officers at the panchayat level in the State do not require persons of mature personality and, therefore, appointment to these posts ought to be made on the basis of a written test and *viva voce* and not solely through *viva voce*.[52]

An individual applicant for any particular post does not get any right to be enforced by a *mandamus* unless and until he is selected in the process of selection and gets the letter of appointment.[53] Mere inclusion of a candidate's name in the list of selected candidates does not confer on him any indefeasible right to be appointed unless the relevant rules so indicate. Such a candidate could feel aggrieved by his non-appointment only when the Administration does so either arbitrarily or for no valid or *bona fide* reason.[54]

Merely because the name of a candidate has been placed on the waiting list, it does not confer on him any right of being appointed to any post.[55] A waiting list can remain in force only for a reasonable time and not *in infinitum* so that other qualified persons are not deprived of their chance of applying for the posts in the succeeding years and being selected for appointment.[56] A waiting list cannot be used as a perennial source of recruitment filling up the vacancies not advertised.

A candidate put on the waiting list cannot be appointed to a post arising subsequently without notifying the same for recruitment. Under Arts. 14 and 16, every one is entitled to claim consideration for appointment to a post under the State. The vacant posts arising or expected should be notified. No one can be appointed without due notification of vacancies and selection according to the rules.[57]

Termination of the services of temporary employees when duly selected candidates are available is valid in law.[58]

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51. AIR 2001 SC 152 : (2000) 8 SCC 633.

52. See, *supra*, Ch. XXI on *viva voce*.
Also see, *Lila Dhar v. State of Rajasthan*, AIR 1981 SC 1777 : (1981) 4 SCC 159.

53. *Union of India v. Tarun K. Singh*, AIR 2001 SC 2196.

54. *State of Haryana v. Subash Chander Narwaha*, AIR 1973 SC 2216 : (1974) 3 SCC 220; *Shankar Das v. Union of India*, AIR 1991 SC 1583; *Union Territory of Chandigarh v. Dilbagh Singh*, (1993) 1 SCC 154 : AIR 1993 SC 796; *State of Bihar v. Secretariat Assistants Successful Examinees Union*, (1994) 1 SCC 126 : AIR 1994 SC 736; *N. Mohanam v. State of Kerala*, AIR 1997 SC 1826.

55. *K. Jayamohan v. State of Kerala*, AIR 1997 SC 2619 : (1997) 5 SCC 170.

56. *Nagar Mahapalika, Kanpur v. Vinod Kumar Srivastava*, AIR 1987 SC 847 : (1987) 1 SCC 602; *Babita Prasad v. State of Bihar*, (1993) Suppl (3) SCC 268.

57. *Ashok Kumar v. Chairman, Banking Service Recruitment Board*, AIR 1996 SC 976; *K. Jayamohan*, AIR 1997 SC 2619; *Prem Singh v. Haryana State Electricity Board*, (1996) 4 SCC 319; *Gujarat State Dy. Executive Engineers Ass. v. State of Gujarat*, (1994) Supp (2) SCC 591; *Surinder Singh v. State of Punjab*, AIR 1998 SC 18.

58. *Surendra Kumar v. State of Rajasthan*, AIR 1993 SC 115 : (1992) 4 SCC 464.

Articles 16 and 14 do not forbid the government from creating different cadres or categories of posts carrying different emoluments. Also, there is no bar in the way of the state integrating different cadres into one cadre. "It is entirely a matter for the state to decide whether to have several different cadres or one integrated cadre in its services. That is a matter of policy which does not attract the applicability of the equality clause."[59]

The Supreme Court has deprecated the tendency of denying appointment to a person in government service on the ground of his political beliefs. In *State of Madhya Pradesh v. Ramashankar Raghuvanshi*,[60] the Court has emphasized that one cannot be turned back at the very threshold on the ground of his past political activities. According to the Court "it offends the Fundamental Rights guaranteed by Arts. 14 and 16 of the Constitution to deny employment to an individual because of his past political affinities, unless such affinities are considered likely to affect the integrity and efficiency of the individual's service.[61] The Court has emphasized that "the whole idea of seeking a police report on the political faith and the past political activity of a candidate for public employment appears to our mind to cut at the very root of the Fundamental Rights of equality of opportunity in the matter of employment, freedom of expression and freedom of association."[62] Report on his involvement in any criminal or subversive activity can however be sought to determine his suitability for public employment.

A State Public Service Commission announced the list of selected candidates for certain posts. Thereafter, the State Government forwarded to the Commission a list of candidates who were also selected for these posts under a rule authorising the Commission to consider any candidate who had requisite qualifications but did not apply. The Supreme Court quashed these appointments holding that the rule was intended not to bypass selections based on merit but only to cover candidates of exceptional merit. Here many of the candidates selected under the rule were found to be less meritorious than those selected earlier.[63]

A rule empowered the State Government to appoint any successful candidate at a service competitive examination to any cadre. A candidate was appointed to a lower cadre while other candidates lower in rank at the examination were appointed to a higher cadre. The rule was held to be discriminatory as it made no provisions for testing the candidate's suitability for a particular cadre, did not give an opportunity to a candidate to join the cadre of his preference and vested arbitrary power of patronage in the government as it could say at its sweet will that a particular candidate was more suitable for a particular cadre.[64]

In *Janki Pd. v. State of Jammu & Kashmir*,[65] the Supreme Court set aside the selections as it found the interview process to be thoroughly unsatisfactory. The interview committee did not take into account the service records of the candidates and the candidates who had secured even less than 30 per cent marks at the

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59. *Kishori Mohanlal Bakshi v. Union of India*, AIR 1962 SC 1139; *Reserve Bank of India v. N.C. Paliwal*, AIR 1976 SC 2345, 2357 : (1976) 4 SCC 838.
60. AIR 1983 SC 374 : (1983) 2 SCC 145.
61. *Ibid.*, 376.
62. *Ibid.*, 375.
63. *Channabasavaih v. State of Mysore*, AIR 1965 SC 1293 : (1965) 1 SCR 360.
64. *State of Mysore v. Jayaram*, AIR 1968 SC 346 : (1968) 1 SCR 349.
65. AIR 1973 SC 930 : (1973) 1 SCC 420.

interview were selected. The Court ruled that selection made on such a poor basis cannot be regarded as a real selection at all.

Where selection was made without interview or fake or ghost interviews, final records were tampered with and documents were fabricated, an inference can be drawn that the whole selection process was motivated by extraneous considerations. The entire selection process was set aside as being arbitrary. The selectees had no right to assume office.[66] The Supreme Court commented on the whole episode as follows:[67]

> "The whole examination and the interview have turned out to be farcical exhibiting base character of those who have been responsible for this sordid episode. It shocks our conscience to come across such a systematic fraud."

Reservation of 25% of posts for sons of bank employees and relaxation of educational qualifications and percentage of marks in their favour for appointment violates Arts. 16(1) and 16(2).[68]

Under Art. 16(2), residential requirement will be unconstitutional as a condition of eligibility for employment or appointment to an office under the State or its instrumentality.[69]

A service rule made by the Andhra Pradesh Government provided for 5% weightage to be given to Telugu medium candidates in the competitive examination held by the Public Service Commission in all Group II Service Examination. The Supreme Court declared the rule invalid *vis-à-vis* Arts. 14 and 16. The Court ruled that such a rule would frustrate the very concept of recruitment on merits to public posts. The Court also pointed out that the object of Arts. 14 and 16 is to ensure equality to all those who are similarly situated. In other words, all the citizens applying for employment under the State are entitled to be treated alike. If that is so then how having once allowed all candidates having minimum graduation qualification in any medium to compete for the posts, a further special benefit could be given only to the candidates having passed the minimum qualifying examination in the Telugu medium.[70]

A service rule requiring a female employee to obtain written permission of the government before solemnization of her marriage and denial of her right to be appointed on the ground that she was a married woman are discriminatory. The Supreme Court has said:[71]

> "We do not mean to universalize or dogmatise that men and women are equal in all occupations and all situations and do not exclude the need to pragmatise where the requirements of particular employment, the sensitivities of sex or the peculiarities of societal sectors or the handicaps of either sex may compel selectivity. But save where the differentiation is demonstrable, the rule of equality must govern."

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66. *Krishan Yadav v. State of Haryana,* AR 1994 SC 2166 : (1994) 4 SCC 165.

67. *Ibid,* at 2172.
Also see, *Union of India v. Tarun K. Singh,* AIR 2001 SC 2196 : AIR 2001 SC 2196.

68. *Auditor General of India v. G. Ananta Rajeswara Rao,* AIR 1994 SC 1521 : (1994) 1 SCC 192.

69. *Dr. Pradeep Jain v. Union of India,* AIR 1984 SC 1420 : (1984) 3 SCC 654; *V.N. Sunanda Reddy v. State of Andhra Pradesh,* AIR 1995 SC 914 : 1995 Supp (2) SCC 235.

70. *V.N. Sunanda Reddy v. State of Andhra Pradesh,* AIR 1995 SC 914 : 1995 Supp (2) SCC 235.

71. *C.B. Muthamma v. Union of India,* AIR 1979 SC 1868 : (1979) 4 SCC 260.

Giving preference in appointment to government posts on the basis of residence within a district or rural areas of a district has been held to run counter to the peremptory language of Art. 16(2). It has overtones of parochialism and runs counter to "our constitutional ethos founded on unity and integrity of the nation". Residence by itself—be it within a state, region, district or a lesser area within a district—cannot be a ground to accord preferential treatment or reservation, save as provided in Art. 16(3). "It is not possible to compartmentalize the State into districts with a view to offer employment to the residents of that district on a preferential basis."[72]

(c) COMPASSIONATE APPOINTMENT

Appointment on compassionate grounds of a son, daughter or widow to assist the family to relieve economic distress because of the sudden demise in harness of a government servant has been held to be valid *vis-a-vis* Arts. 16(1) and 16(2). The rationale underlying provision of compassionate appointments to the heirs of the deceased employee is that he was the bread winner for the family and his exit has left the family in the lurch and in precarious and vulnerable economic position.[73]

Appointment in public services on compassionate ground has been carved out, as an exception, in the interests of justice, to the general rule that appointments in the public services should be made strictly on the basis of open invitation of applications and merit and no other mode of appointment nor any other consideration is permissible.[74]

Such an appointment is to be made according to the rules and guidelines that may have been framed by the concerned authority. No person can claim appointment on compassionate grounds in disregard of such rules and guidelines.[75] No such appointment can be made if no post is available. "It will be a gross abuse of power of a public authority to appoint persons when vacancies are not available. If persons are so appointed and paid salaries, it will be a mere misuse of public funds, which is totally unauthorised."[76]

But if a vacancy is available, such an appointment should be made as soon as possible. "It is improper to keep such case pending for years…"[77] Such appointment should be made immediately to redeem the family in distress. In *Sushma Gosain*,[78] the candidate was kept waiting for four years. Criticising this, the Supreme Court observed: "The denial of appointment is patently arbitrary and cannot be supported in any view of the matter". There was absolutely no reason to make her to wait for such a long time.

A rule denying compassionate employment if the employee dies within two years from the date of superannuation has been held to be valid under Art. 14 as the rule is not discriminatory.[79]

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72. *Kailash Chand Sharma v. State of Rajasthan,* (2002) 6 SCC 562 : AIR 2002 SC 2877.
73. *Balbir Kaur v. Steel Authority of India Ltd.,* AIR 2000 SC 1596 : (2000) 6 SCC 493.
74. *Indian Bank v. Usha,* AIR 1998 SC 866, 874 : (1998) 2 SCC 663.
75. *Umesh Kumar Nagpal v. State of Haryana,* (1994) 4 SCC 138 : (1994) 3 JT 525.
76. *Life Insurance Corp. v. Asha Ramchandra Ambekar,* 1994 AIR SCW 1947.
77. *Indian Bank v. K. Usha,* AIR 1998 SC 566, 874 : (1998) 2 SCC 663.
78. *Himachal Road Transport Corporation v. Dinesh Kumar,* 1996 AIR SCW 2727 : (1996) 4 SCC 560.
Also see, *Hindustan Aeronautics Ltd. v. A. Radhika Thirumalai,* AIR 1997 SC 123 : (1996) 6 SCC 394.
79. *Smt. Sushma Gosain v. Union of India,* AIR 1989 SC 1976 : (1989) 4 SCC 468.

The Supreme Court has ruled that compassionate appointment is not to be made as a matter of course but only after examining the financial condition of the family. It is only if the concerned authority is satisfied that, but for the provision of employment, the family of the deceased employee will not be able to meet the crisis that a job is to be offered to an eligible member of the family. Such an appointment can be made only against the lowest post in non-manual and manual categories.[80]

(d) PROBATION

As regards probation, the employer has the prerogative to put an employee on probation and watch his performance.[81]

(e) PROMOTION

No employee has a vested right to promotion but he certainly has the right to be considered for promotion according to the rules. Chances of promotion are not conditions of service and are defeasible by law. A rule which merely affects the chances of promotion does not amount to a change in the conditions of service. But if a rule confers a right of actual promotion, or a right to be considered for promotion, is a service rule.[82] As the Supreme Court has observed in *State of Maharashtra v. Chandrakant Anant Kulkarni*:[83]

> "Mere chances of promotion are not conditions of service and the fact that there was reduction in the chances of promotion did not tantamount to a change in the conditions of service. A right to be considered for promotion is a term of service, but mere chances of promotion are not".

A change in promotional policy by the Government was challenged by the employee concerned on the ground that, as a result thereof, his service conditions were adversely affected since his chances of promotion were adversely affected thereby. The Supreme Court rejected the challenge saying that a mere chance of promotion is not a condition of service, and the fact that there was reduction in the chances of promotion would not be tantamount to a change in the conditions of service. A right to be considered for promotion is a term of service, chances of promotion are not.[84]

The government can formulate or change the policy regarding promotions but the policy must conform to the principle of equality.[85] Accordingly, promotion

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Also, *West Bengal State Electricity Board v. Samir K. Sarkar*, (1999) 7 SCC 672 : AIR 1999 SC 3415.

80. *Umesh Kumar Nagpal v. State of Haryana*, (1994) 4 SCC 138 : (1994) 4 JT 525.
Also, *Smt. Sushma Gosain v. Union of India*, AIR 1989 SC 1976 : (1989) 4 SCC 468; *Director of Edcuation (Secondary) v. Pushpendra Kumar*, AIR 1998 SC 2230 : (1998) 5 SCC 192.

81. *Ajit Singh v. State of Punjab*, AIR 1983 SC 494 : (1983) 2 SCC 217.

82. *High Court of Calcutta v. Amol Kumar Roy*, AIR 1962 SC 1704; *Mohd. Shujat Ali v. Union of India*, AIR 1974 SC 1631 : (1975) 3 SCC 76; *Mohd. Bhakar v. Y. Krishna Reddy*, 1970 SLR 768 (SC); *Ramachandra Shankar Deodhar v. State of Maharashtra*, (1974) 1 SCC 317; *Syed Khalid Rizvi v. Union of India*, (1993) Supp (3) SCC 575; *State of Mysore v. G.N. Purohit*, 1967 SLR 753 (SC).

83. AIR 1981 SC 1990 : (1981) 4 SCC 130.
Also, *K. Jagadeesan v. Union of India*, AIR 1990 SC 1072 : (1990) 2 SCC 228.

84. *State of West Bengal v. Pranab Ranjan Roy*, AIR 1998 SC 1882 : (1998) 3 SCC 209.
Also, *Union of India v. S.L. Dutta*, AIR 1991 SC 363, 367 : (1991) 1 SCC 505.

85. *A.S. Sangwan v. Union of India*, AIR 1981 SC 1545 : 1980 Supp SCC 559.

rules were held to be discriminatory and unjust in *State of Uttar Pradesh v. Ramgopal*.[86]

Persons holding posts in different grades or categories cannot claim equality in matters of promotion. Because of multifarious state activities, persons have to be employed in different cadres and classes. Each class may be a separate entity having its own rules of promotion.[87] The railways provide the guards with a better channel of promotion to higher grade station-masters than to the roadside station-masters. This is not discriminatory as the guards and the station-masters belong to separate categories with separate avenues of promotion. Equality of opportunity cannot be predicated between them.[88] 'Equality' under Art. 16 means equality as between members of the same class of employees and not equality between members of separate, independent classes.

Difficult questions have at times arisen in matters of promotion from lower to a higher grade within the same category. How far distinctions are permissible within the same class for promotion purposes? The general rule is that inequality of opportunity of promotion among members of a single class, which is based on no rational criteria, is not valid under Art. 16.[89]

The Supreme Court, generally speaking, does not countenance non-egalitarian 'micro-distinctions' in the area of promotions. The Supreme Court has warned that the doctrine of classification should not be taken to a point where instead of being a useful servant, it becomes a dangerous master. However, conditions designed to promote efficiency and best service have been accepted as valid, *e.g.*, the basis of seniority-*cum*-merit.[90] In a State, mamlatdars were recruited partly directly and partly by promotion from a lower grade. But after appointment, all mamlatdars were integrated into one cadre as they had the same designation, pay scale, functions, etc. It was held that as all mamlatdars formed one class, it would not be valid to accord a favoured treatment to the appointed mamlatdars *qua* the promotee mamlatdars, and thus to discriminate them, for purposes of promotion to the posts of deputy collectors.[91]

Once a cadre is formed by recruiting persons drawn from various departments, there would normally be no justification for discriminating between them by subjecting one class to more onerous terms in the matter of promotional chances.[92] If, however, people being appointed to a cadre from different sources are not fully integrated into one class, then differential rules of further promotion according to the original source may be valid.[93]

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86. AIR 1981 SC 1041.
87. *Sham Sunder v. Union of India*, AIR 1969 SC 212 : (1969) 1 SCR 312.
88. *All India Station-Masters' Ass. v. Gen. Manager, C. Rly.*, AIR 1960 SC 384 : (1960) 2 SCR 311.
89. *State of Mysore v. Krishna Murthy*, AIR 1973 SC 1146 : (1973) 3 SCC 559.
Also, *Mohd. Shujat Ali v. Union of India*, AIR 1974 SC 1631 : (1975) 3 SCC 76.
90. *Union of India. v. V.J. Karnik*, AIR 1970 SC 2092 : (1970) 3 SCC 658.
Also, *State of Jammu & Kashmir v. T.N. Khosa*, AIR 1974 SC 1 : (1974) 1 SCC 19.
91. *S.M. Pandit v. State of Gujarat*, AIR 1972 SC 252 : (1972) 4 SCC 778.
92. *S.L. Sachdev v. Union of India*, AIR 1981 SC 411 : (1980) 4 SCC 562.
93. *Ram Lal Wadhwa v. State of Haryana*, AIR 1972 SC 1982.
Also, *General Manager, S.C. Rly. v. A.V.R. Sidhanti*, AIR 1974 SC 1755.
For discrimination in promotion see : *Roshan Lal Tandon v. Union of India*, AIR 1967 SC 1889 : (1968) 1 SCR 185; *Distt. Registrar, Palghat v. M.B. Royakutty*, AIR 1979 SC 1060.

Usually, the Supreme Court has upheld classification, for the purposes of promotion, based on educational qualifications. However one has always to bear in mind the facts and circumstances of the case in order to judge the validity of a classification.[1] For example, in *Kothandaraman*,[2] the Supreme Court has reiterated that higher educational qualification is a permissible basis of classification but the acceptability thereof will depend on the facts and circumstances of each case. In the instant case, the Court found that differentiation between degree holders and diploma holders existed for a long time; that the degree holders were given different designation and gazetted status and a higher scale of pay whereas diploma holders did not enjoy these benefits. Thus, the higher educational qualification had relevance insofar as the higher promotional post was concerned, in view of the nature of the functions and duties attached to that post. "The classification has, therefore, nexus with the object to be achieved." Thus, validity of classification has to be judged on the facts and circumstances of each case.

In the Maharashtra Industrial Development Corporation, promotion to the post of superintending engineer was available to both degree-holder and diploma-holder executive engineers according to merit-cum-seniority. In 1988, the Corporation passed a resolution reserving 75% of the posts of superintending engineers to degree-holder executive engineers and 25% of these posts to diploma-holder executive engineers. The resolution was challenged on the ground that all executive engineers formed one cadre and did the same kind of work and, therefore, the classification made on the basis of educational qualifications was discriminatory under Arts. 14 and 16. But the Court rejected the contention and held the resolution valid saying that, for the purposes of promotion, a valid classification could be made among the members holding the same post on the basis of their qualifications. The Court also ruled that in the absence of a rule or regulation, service condition could be prescribed by executive instructions.[3]

On the other hand, there are some cases where in the context of the specific facts and circumstances, classification for the purpose of promotion, on the basis of educational qualifications has been held to be not reasonable. In the following case,[4] a quota was fixed between diploma-holders and non-diploma holders among linemen for promotion to line superintendent. The Supreme Court struck down the classification made saying that "all the linemen either diploma-holders or non-diploma-holders are performing the same kind of work and duties and they belong to the same cadre having a common/joint seniority list for promotion to the post of line Superintendent." In the instant case, because of the quota, linemen junior to the petitioner had been promoted and the Court regarded this as discriminatory and violative of the equality clause contained in Arts. 14 and 16.

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1. *State of Jammu & Kashmir v. Triloki Nath Khosa*, AIR 1974 SC 1 : (1974) 1 SCC 19; *Roop Chand Adlakha v. Delhi Development Authority*, AIR 1989 SC 307 : 1989 Supp (1) SCC 116; *P. Murugesan v. State of Tamil Nadu*, (1993) 2 SCC 340; *Rajasthan State Electricity Board Accountants Association v. Rajasthan State Electricity Board*, (1997) 3 SCC 103 : AIR 1997 SC 882 : (1994) 6 JT 157.

2. *T.R. Kothandaraman v. Tamil Nadu Water Supply and Drainage Board*, (1994) 6 SCC 282.

3. *Shamkant Narayan Deshpande v. Maharashtra Industrial Development Corp.*, AIR 1993 SC 1173 : 1993 Supp (2) SCC 194.

4. *Punjab State Electricity Board, Patiala v. Ravinder Kumar Sharma*, AIR 1987 SC 367 : (1986) 4 SCC 617.

In an earlier case *Mohammad Shujat Ali v. Union of India*,[5] the Supreme Court had observed that "it cannot be laid down as an invariable rule" that any classification made on the basis of "variant educational qualification" would be valid, "irrespective of the nature and purposes of the classification or the quality and extent of the differences in the educational qualifications". The Court emphasized that the test of reasonable classification ought to be applied in each case on its peculiar facts and circumstances. In the instant case, a quota for promotion fixed for graduates and non-graduates was quashed. As both were regarded fit for promotion, fixing a quota between them and giving preferential treatment to graduates in the matter of promotion was held violative of the equality clause.

Similarly, fixation of quota for promotion to the posts of excise inspectors between graduate and non-graduate preventive officers was held to be violative of Arts. 14 and 16. For all purposes they were being effectively treated as equal. They all constituted a single cadre and they were all equal members of it. More non-graduates were recruited to the service. The Court noted that all preventive officers whether graduate or non-graduate-performed the same type of work. Once they were promoted as excise inspectors, there was no distinction between graduate or non-graduate excise inspectors.[6]

In Food Corporation of India v. Om Prakash Sharma,[7] for purposes of promotion, the eligibility criterion was fixed at three years of service for graduates and five years of service for matriculates. This differentiation was quashed by the Supreme Court on the ground that the nature of work performed by the promotees was not such as to make differentiation between graduates and non-graduates. All promotees performed the same type of work. The corporation had placed no material before the Court to justify the classification between graduates and non-graduates. The differentiation was thus held unconstitutional as offending the equality clause.

For purposes of promotion, two tests are generally applied, *viz.*, "merit-cum-seniority" or "seniority-cum-merit". The second test involves consideration of *inter se* seniority of the employees who are eligible for consideration for promotion. The test means that "given the minimum necessary merit requisite for efficiency of administration, the senior, even though less meritorious, shall have priority and a comparative assessment of merit is not required to be made."[8] On the other hand, if the test of "merit-cum-seniority" is adopted then a comparative assessment of merit of the candidates is required to be made. This test lays greater emphasis on merit and not on length of service which plays a less significant role. Seniority is to be given weight if merit and ability are approximately equal.[9]

The Supreme Court has suggested to the Union and State Governments a complete change in the system of maintaining confidential rolls of their employees because a solution has to be found to the long delays in communicating the adverse entries against the employees and also against the misuse of the powers

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5. AIR 1974 SC 1631 : (1975) 3 SCC 76.
6. *N. Abdul Basheer v. K.K. Karunakaran*, AIR 1989 SC 1624 : 1989 Supp (2) SCC 344.
7. AIR 1998 SC 2682 : (1998) 7 SCC 676.
8. *State of Mysore v. C.R. Sheshadri*, AIR 1974 SC 460 : (1974) 4 SCC 308; *State of Kerala v. N.M. Thomas*, AIR 1976 SC 490 : (1976) 2 SCC 310.
9. *Union of India v. Mohan Lal Capoor*, AIR 1974 SC 87; *B.V. Sivaiah v. K. Addanki Babu*, AIR 1998 SC 2565 : (1998) 6 SCC 720.

by officials who write the confidential reports. Under the prevailing system, entries are first made in the confidential report of an officer behind his back and then he is given an opportunity to make a representation against the entry by communicating the same to him after considerable time. Any representation made by him is considered by a higher authority some years later by which time any evidence that may be there to show that the entries made were baseless may have vanished. Suspensions, adverse remarks and frequent transfers from one place to another are ordered many a time without justification and without giving a reasonable opportunity to the employee concerned. Such actions surely result in the demoralisation of the services. The Courts could give very little relief in such cases. Hence the government itself should devise effective means to mitigate the hardship caused to the employees who are subjected to such treatment.

The Court has made these observations while disposing of the case of Amar Kant Choudhary, a 1964 directly-recruited Deputy Superintendent of Police in Bihar, who was wrongly left out of the list by the selection committee for promotion on the basis of adverse entries in his confidential rolls which were not communicated to him for several years, and which were later expunged by the government. The Court directed that within four months, the selection committee must consider Mr. Choudhary's case for promotion, and if he is selected, he would be entitled to the seniority and all other consequential benefits flowing therefrom.[10]

The Supreme Court has clarified the position as regards promotion of an employee against whom disciplinary proceedings have been initiated. The Court has stated in *State of Madhya Pradesh v. J.S. Bansal*,[11] that if disciplinary proceedings are pending on the date on which names of other employees are considered for promotion to the next higher post, the delinquent employee if he is similarly circumstanced as other employees and is also eligible, has a right to be considered for promotion to the next higher post along with other employees. His name cannot be omitted from consideration merely because of the pendency of the departmental proceedings against him. An employee cannot be denied his right at the interlocutory stage of the departmental proceedings as he is still to be found to be guilty on the basis of the evidence to be produced against him. Only because of the suspicion against him, till the charges are proved, he cannot be deprived of his right to be considered for promotion. "Mere suspicion is not a substitute for proof". To consider him for promotion along with other eligible candidates is to effectuate his fundamental right which is available even to a delinquent employee under Arts. 14 and 16 of the Constitution. After considering him for promotion, the recommendation of the promotions committee is to be kept in a sealed cover so that if he is exonerated from the charge against him, he may be promoted immediately to the next higher post.

(f) SENIORITY

Difficult questions arise from time to time regarding fixation of *inter se* seniority in a cadre. Seniority is governed by service rules. No one has a vested right

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10. *Amar Kant Choudhary v. State of Bihar*, AIR 1984 SC 531 : (1984) 1 SCC 694.
Also, *Gurdial Singh Fiji v. State of Punjab*, AIR 1979 SC 1622 : (1981) 4 SCC 419.

11. AIR 1998 SC 1015, at 1019 : (1998) 3 SCC 714.
Also see, *Union of India v. Tejinder Singh*, (1991) 4 SCC 129; *Union of India v. K.V. Jankiraman*, (1991) 4 SCC 109 : AIR 1991 SC 2010.

to seniority but an employee has an interest in seniority acquired by working out the rules. It can be taken away only by operation of a valid law.[12]

The rule-making authority can determine with objectivity and fairness what rules should govern the *inter se* seniority and ranking of the personnel working in the concerned department. But the rules so formulated should be reasonable, just and equitable.[13] The rules ought not to be arbitrary and irrational resulting in inequality of opportunity amongst employees belonging to the same class.[14] Revision of seniority *inter se* of employees in a grade arbitrarily without any rule or principle has been held to be invalid under Art. 16(1).[15]

Seniority of an officer is determined with reference to the date of his regular appointment made according to the rules. This is consistent with Arts. 14 and 16.[16] Any earlier temporary or *ad hoc* service before regular appointment is to be considered as fortuitous and is not to be counted for purposes of seniority.[17] Appointment in accordance with the rules is a condition precedent to count seniority.[18] Temporary, *ad hoc* or fortuitous appointment, not being appointment according to the rules, cannot be counted towards seniority.[19] The date of promotion to a particular grade or category determines the seniority in that grade or category.[20] However, if the circumstances so require, a group of persons can be treated as a class separate from the rest, for any preferential or beneficial treatment while fixing their seniority.[21]

A University has merit promotee Professors and Readers and directly recruited Professor and Readers. The two constitute distinct classes as they are not at par with each other but are unequal in several respects. They cannot all be treated equally for the purposes of seniority. Fixation of *inter se* seniority of directly recruited Readers and Professors and those promoted on merit on the yardstick of

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12. *A.K. Bhatnagar v. Union of India*; *Indian Adm. Service (S.C.S.) Assn. v. Union of India; Akhil Bhartiya Soshit Karamchari Sangh v. Union of India*, AIR 1981 SC 298 : (1981) 1 SCC 246.

13. *R.S. Makashi v. I.M. Menon*, AIR 1982 SC 101, 116 : (1982) 1 SCC 379.
Reasonableness of the specific rules for fixing seniority has been considered in the following cases: *Mervyn Continho v. Collector of Customs*, AIR 1967 SC 52 : (1966) 3 SCR 600; *Govind D. Kelkar v. Chief Controller of Imports & Exports*, AIR 1967 SC 839 : (1967) 2 SCR 29; SC. *Jai Singhani v. Union of India*, AIR 1967 SC 1427; *Bishan Sarup Gupta v. Union of India*, AIR 1972 SC 2627; *Union of India v. Bishan Sarup Gupta*, AIR 1974 SC 1618; *Prabhakar v. State of Maharashtra*, AIR 1976 SC 1093; *N.K. Chauhan v. State of Gujarat*, AIR 1977 SC 251 : (1977) 1 SCC 308.

14. *Reserve Bank of India v. N.C. Paliwal*, AIR 1976 SC 2345, 2357 : (1976) 4 SCC 838; *Amarjit Singh v. State of Punjab*, AIR 1975 SC 984, 990.

15. *S.K. Ghosh v. Union of India*, AIR 1968 SC 1385 : (1968) 3 SCR 631.

16. *Pushpa Vishnu v. State of Maharashtra*, AIR 1995 SC 1346; *Direct Recruitment, Class II Engineering Officers' Ass. v. State of Maharashtra*, AIR 1990 SC 1607 : (1990) 2 SCR 900; *State of West Bengal v. Aghore Nath Dey*, (1993) 3 SCC 371.

17. *K.C. Joshi v. Union of India*, AIR 1991 SC 284; *Union of India v. S.K. Sharma*, (1992) 2 SCC 728; *D.N. Agrawal v. State of Madhya Pradesh*, AIR 1990 SC 311; *V. Sreenivasa Reddy v. Govt. of A.P*, AIR 1995 SC 586 : 1995 Supp (1) SCC 572.

18. *Direct Recruits Class II Officers Ass. v. State of Maharashtra*, (1990) 2 SCR 900.

19. *D.N. Agrawal v. State of Madhya Pradesh*, AIR 1990 SC 1311; *K.C. Joshi v. Union of India*, AIR 1991 SC 284 : 1992 Supp (1) SCC 272; *V. Sreenivasa Reddy v. Govt. of Andhra Pradesh*, AIR 1995 SC 586 : 1995 Supp (1) SCC 572; *J&K Public Service Comm. v. Dr. Narinder Mohan*, (1994) 2 SCC 630.

20. *Karam Chand v. Haryana State Electricity Board*, AIR 1989 SC 261 : 1995 Supp (1) SCC 572.

21. *Ram Janam Singh v. State of Uttar Pradesh*, AIR 1994 SC 1722 : (1994) 6 SCC 622.

continuous officiation has been held to be illegal and unconstitutional under Arts. 14 and 16(1).

Seniority is to be fixed within the same class on the basis of continuous officiation.[22] An ex cadre employee cannot be treated as a cadre employee for determining their *inter se* seniority as unequals cannot be treated as equals.[23]

A rule leaving "the valuable right of seniority to depend upon the mere accident of confirmation", notwithstanding the length of service is hit by Art. 16.[24] Appointment of a person with retrospective effect so as to affect the seniority of others violates Arts. 14 and 16.[25]

Service conditions pertaining to seniority are liable to alteration, by subsequent changes in the relevant rules. Except to the extent of protecting promotions that have already been earned under the previous rules, the revised rules will govern the seniority and future promotion prospects of all the persons in the concerned service. The Court can, however, assess whether the principle for determining seniority laid down in the rules is "just, fair and reasonable", or whether it is unreasonable or arbitrary.[26]

The Supreme Court has said in *Makashi* that there is no invariable normal rule that seniority is to be determined only on the basis of the respective dates of appointment to the post and that any departure from such a rule will be *prima facie* unreasonable and illegal. The rule-making authority can formulate rules of seniority. However, such rules must be "reasonable, just and equitable."[27]

(g) TRANSFER

An order of transfer of an employee is a part of the service conditions. The Court does not interfere with such an order unless it is *mala fide*, or that the service rules prohibit such an order, or that the authority issuing the order was not competent to do so.[28]

A government employee, or a servant of a public undertaking, has no legal right to insist for being posted at any particular place unless specifically provided in his service conditions.[29]

When an honest officer was transferred by the Government because of the pressure of vested interests, the Supreme Court quashed the same characterising it as *mala fide*, a case of "victimisation of an honest officer" and not in public interest. The Court said, "the transfer of the appellant is nothing but *mala fide*

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22. *Rashm Srivastava v. Vikram University*, AIR 1995 SC 1694 : (1995) 3 SCC 653.
23. *Direct Recruit Class II Engineering Officers Association v. State of Maharashtra*, AIR 1990 SC 1607 : (1990) 2 SCC 715.
24. *S.B. Patwardhan v. State of Maharashtra*, AIR 1977 SC 2051, 2066 : (1977) 3 SCC 399; *Pushpa Vishnu v. State of Maharashtra*, AIR 1995 SC 1346 : 1995 Supp (20) SCC 276.
25. *Ramendra Singh v. Jagdish Prasad*, AIR 1984 SC 885 : 1984 Supp SCC 142.
26. *J. Kumar v. Union of India*, AIR 1982 SC 1964, 1970.
27. Fixation of seniority was held reasonable in *K .B. Shukla v. Union of India*, AIR 1979 SC 1136 : (1979) 4 SCC 673, but unreasonable and legally erroneous in *G.R. Luthra v. Lt. Gov. of Delhi*, AIR 1979 SC 1900, and *B.L. Goal v. State of Uttar Pradesh*, AIR 1979 SC 228.
28. *State Bank of India v. Anjan Sanyal*, AIR 2001 SC 1748 : (2001) 5 SCC 508.
29. *Chief General Manager, N.E. Telecom Circle v. Rajendra Bhattacharjee*, AIR 1995 SC 813 : (1995) 2 SCC 532.

exercise of the power to demoralise honest officers who would efficiently discharge the duties of a public office."[30]

(h) COMPULSORY RETIREMENT

Provision for compulsory retirement of government servants in public interest does not infringe Arts. 14 and 16. These Articles do not prohibit the prescription of reasonable rules for compulsory retirement[31] which neither involves any civil consequences,[32] nor any stigma.[33]

It is valid to put a ban on re-appointment of persons compulsorily retired as it has a reasonable basis and has some relation to the suitability for employment or appointment to an office.[34]

(i) RETIREMENT

The expression "conditions of service" would take within its fold, fixation of the age of superannuation. Therefore, service rules made under Art. 309 may revise and reduce the age of retirement. In *Nagaraj*,[35] the age of superannuation was reduced from 58 to 55 years by amending the service rules. The Supreme Court ruled that service rules can be amended under Art. 309.[36]

(j) TERMINATION

There should be no discrimination in the matter of termination of service. Out of the 2000 officiating sub-inspectors of police, only the respondent was reverted while persons junior to him were allowed to officiate. This was held to be discriminatory and so bad under Art. 16.[37] Dismissal of a person on the sole ground that he is a 'non-Andhra' was held void as amounting to discrimination only on the ground of place of birth which is prohibited by Art. 16(2).[38] The constitutional provision draws no distinction between temporary and permanent posts and applies to all posts with equal rigour.

Retrenchment of employees in a department by applying a selective test which is not arbitrary, unreasonable or discriminatory would not offend Art. 16. A selective test cannot be reasonable unless there is some proximate connection between the test and the efficient performance of duties and obligations of the particular office. Therefore, while retrenching staff, preference given to 'political sufferers' and 'displaced persons' and thus retained in service was not valid, for the circumstance of a person being a 'political sufferer' had no bearing on the question whether or not he would efficiently perform his duties.[39]

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30. *Arvind Dattatraya Dhande v. State of Maharashtra*, AIR 1997 SC 3067 : (1997) 6 SCC 169.
31. *Shiv Charana Singh v. State of Mysore*, AIR 1965 SC 280; *P. Radhakrishna Naidu v. State of Andhra Pradesh*, AIR 1977 SC 854 : (1977) 1 SCC 561.
32. *Union of India v. J.N. Sinha*, AIR 1971 SC 40 : (1970) 2 SCC 458; *Tara Singh v. State of Rajasthan*, AIR 1975 SC 1487 : (1975) 4 SCC 86.
33. See, *infra*, Ch. XXXIII.
34. *P.R. Naidu, supra*, footnote 31.
35. *K. Nagaraj v. State of Andhra Pradesh*, AIR 1985 SC 551 : (1985) 1 SCC 523; *State of Andhra Pradesh v. S.K. Mohinuddin*, AIR 1994 SC 1474.
36. For discussion on Art. 309, see, *infra*, Ch. XXXVI.
37. *State of Uttar Pradesh v. Sughar Singh*, AIR 1974 SC 423 : (1974) 1 SCC 218.
38. *Jankiraman v. State of Andhra Pradesh*, AIR 1959 AP 185.
39. *Sukhnandan Thakur v. State of Bihar*, AIR 1957 Pat. 617; *Ghulam Ahmad v. Inspector-General of Police*, AIR 1959 J.K. 136.

The services of a person employed in the Central Tractor Organisation were terminated after six years as being "no longer required". The Government also placed a ban on his being ever taken into service. Declaring the ban bad, the Court stated that the ban should have a reasonable basis and must have some relationship to his suitability for employment to an office. An arbitrary imposition of a ban against employment of a certain person under the government amounts to a denial of the right of equal opportunity of employment under Art. 16(1) which includes the right of being considered on merits for the post applied for.[40]

A rule empowering the government to terminate the services of a government employee by giving him one month's notice was held not invalid under Art. 16(1). Division of government service into permanent, *quasi*-permanent and temporary, and applying different rules of termination of service to different classes of government servants, does not involve discrimination. Nor would it amount to discrimination if the services of a person are dispensed with on the ground of unsatisfactory conduct, and persons junior to him are continued in service. It would, however, be a different matter if temporary employees were to be retrenched in which case qualifications and length of service of those holding temporary posts may be relevant, but not so in case of termination of service.[41]

Retaining the services of a junior while terminating the services of a senior, when it is not shown that the services of the latter are worse than those of the junior, is discriminatory and arbitrary.[42] The services of a temporary employee were terminated without any reason while several employees similarly situated and junior to him in the same temporary cadre had been retained. This was held to be discriminatory and arbitrary and was hit by Art. 16. No discrimination may arise under Art. 16 if the services of a temporary servant are dispensed with because of "unsatisfactory work or his unsuitability for the job". But if his services are terminated arbitrarily, and not on the ground of his "unsuitability, unsatisfactory conduct or the like" which put him in a class apart from his juniors in the same service, then a question of unfair discrimination may arise."[43]

Services of eleven executive officers of several improvement trusts were terminated by the State Government. The Government justified this action by pleading that all the improvement trusts in the State were dissolved and hence these officers were rendered redundant. The Court found as a fact that the trusts were functioning as before and discharging their normal functions; the whole of the staff of the trusts was intact except the eleven officers. What had actually been dissolved were the boards of trustees of the trusts and not the trusts themselves. A trust had a corporate personality independent of the board of trustees. The Court thus found the reasons for dispensing with the services of the petitioners as untenable and the action of the Government arbitrary and violative of Arts. 14 and 16. The Court observed: "..... Such thoroughly arbitrary action cannot be sustained."[44]

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40. *Krishan Chander Nayar v. Chairman, C.T.O.*, AIR 1962 SC 602 : (1962) 3 SCR 187.
41. *Champak Lal v. Union of India*, AIR 1964 SC 1854 : (1964) 5 SCR 190.
42. *R.X.A de Monte Furtado v. Administrator, Goa*, AIR 1982 Goa 34.
43. *Government Branch Press v. D.B. Belliappa*, AIR 1979 SC 429 : (1979) 1 SCC 477.
44. *Ajit Singh v. State of Punjab*, AIR 1983 SC 494 : (1983) 2 SCC 217.
On termination of service, also see, *Jaswant Singh v. Union of India*, AIR 1980 SC 115 : (1979) 4 SCC 440.
Reversion of an employee from a higher to a lower post after six years was held unreasonable and arbitrary; *C.C. Padmanabhan v. Director, Public Instruction*, AIR 1981 SC 64 : 1980 Supp SCC 668.

The respondent never participated in any illegal, vicious or subversive activity after his appointment in government service. Nevertheless, he was dismissed from service on account of his political beliefs prior to his appointment. The Supreme Court held this to be invalid. Membership of a political party prior to his appointment is irrelevant for government service. Seeking of a report on the political faith of a candidate for government service is repugnant to the Constitution. Of course, a person cannot engage in political activity after entry in government service.[45]

A rule providing for a subsistence allowance of Re 1/- to a civil servant under suspension, and convicted of an offence, but pending appeal to a higher Court, is unreasonable and illusory and infringes Art. 16. He should get his normal allowance irrespective of whether he is in jail or on bail otherwise he cannot pursue his appeal effectively.[46]

Under a regulation made by the Delhi Transport Corporation, a public sector undertaking, services of an employee could be terminated by giving one month's notice. The Supreme Court declared the regulation to be arbitrary, unjust, unfair and unreasonable offending Arts. 14 and 16(1).[47]

C. EQUAL PAY FOR EQUAL WORK

The Supreme Court has deduced the principle of "equal pay for equal work" from Arts. 14, 16 and 39(d) and the Preamble to the Constitution. No such principle is expressly embodied in the Constitution but the principle has now matured in a Fundamental Right. As the Supreme Court has explained in *State of Madhya Pradesh v. Pramod Bhartiya,*[48] the doctrine of "equal pay for equal work" is implicit in the doctrine of equality enshrined in Art. 14, and flows from it. The rule is as much a part of Art. 14 as it is of Art. 16(1). The doctrine is also stated in Art. 39(d), a directive principle, which ordains the State to direct its policy towards securing equal pay for equal work for both men and women.[49]

The Court has enunciated the doctrine as follows:[50]

> "The doctrine of equal work for equal pay would apply on the premise of similar work but it does not mean that there should be complete identity in all respects. If the two classes of persons do some work under the same employer, with similar responsibility, under similar working conditions, the doctrine of 'equal work equal pay', would apply and it would not be open to the State to discriminate one class with the other in paying salary."

But it cannot be said that being a Directive Principle, it is not enforceable in a Court of law because it is also a part of Art. 14. The Fundamental Rights and Di-

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45. *State of Madhya Pradesh v. Ramashanker Raghuvanshi*, AIR 1983 SC 374 : (1983) 2 SCC 145.
46. *State of Maharashtra v. Chandrabhan*, AIR 1983 SC 803 : (1983) 3 SCC 387.
47. Also, *Delhi Transport Corp. v. DTC Mazdoor Corporation*, AIR 1991 SC 101, 206; *Central Inland Water Transport Corporation v. Brojonath*, AIR 1986 SC 1571 : (1986) 3 SCC 156.
On termination of services of a government employee, also see, *infra,* Ch. XXXVI.
48. AIR 1993 SC 286 : (1993) 1 SCC 539.
49. For discussion on Directive Principles, see, *infra*, Ch. XXXIV.
For Preamble to the Constitution, see, Ch. I, *supra* and Ch. XXXIV, *infra.*
50. *Jaipal v. State of Haryana,* AIR 1988 SC 1504, at 1509 : (1988) 3 SCC 354.

rective Principles are not supposed to be exclusionary of each other; they are complimentary to each other.[51]

The parameters for invoking the principle of equal pay for equal work include, *inter alia*, the nature of the work and common employer.[52] The principle may properly be applied to the cases of unequal scales of pay based on no classification or irrational classification though those drawing the different scales of pay do identical work under the same employer.[53] Thus, where all relevant considerations are the same, persons holding identical posts and discharging similar duties should not be treated differentially.

Employees under one and the same employer holding the same rank, performing similar functions and discharging similar duties and responsibilities must also be given similar scales of pay. The Court has emphasized that this is not an abstract doctrine but one of substance. Though not declared expressly in the Constitution, it is certainly a constitutional goal. The principle has been applied in a large number of cases.[54]

The principle of equal pay for equal work does not apply when the employers are different. Employees of Regional Rural Banks sponsored by a co-operative bank cannot claim the same salary and allowances as are payable to the employees of Regional Rural Bank which are sponsored by the commercial and nationalised banks.[55]

Article 14, as already stated, permits reasonable classification which means that the classification is to be based on an intelligible basis which distinguishes persons or things grouped together from those that are left out of the group and that differentia must have a rational nexus with the object to be achieved by the differentia made. In other words, there ought to be causal connection between the basis of classification and the object of classification. The doctrine of equal pay for equal work applies in case of unequal scales of pay based on no classification or irrational classification, though those drawing the different scales of pay do identical work under the same employer.

Accordingly, the Court has found it difficult to envisage a situation in research institutes where persons holding Doctorate qualification and enjoying the status of professor are governed by two different scales even though their duties, functions and responsibilities are identical.

Difference in salary of driver constables in the Delhi Police Force and other drivers in the service of the Delhi Administration has been held to be irrational as there is no reason to give driver constables a lower scale than other drivers as

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51. For further discussion on this point, see, *infra*, Ch. XXXIV.
52. *Alvaro Noronha Ferriera v. Union of India*, AIR 1999 SC 1356 : (1999) 4 SCC 408.
53. *P.K. Ramachandra Iyer v. Union of India*, AIR 1984 SC 541 : (1984) 2 SCC 141.
54. *Dhirendra Chamoli v. State of Uttar Pradesh*, (1986)1 SCC 637; *Union of India v. R.G. Kashikar*, AIR 1986 SC 431 : (1986) 1 SCC 458; *TRC Scientific Officers (Class I) Ass. v. Union of India*, AIR 1987 SC 490; *Bhartiya Dak Tar Mazdoor Manch v. Union of India*, AIR 1987 SC 2342; *M.P. Singh v. Union of India*, AIR 1987 SC 485; *Mewa Ram Kanojia v. AIIMS*, (1989) 2 SCC 235 : AIR 1989 SC 1256; *Employees of T & F Corporation of India v. Union of India*, AIR 1991 SC 1367; *S.M. Ilyas v. Indian Council of Agricultural Research*, AIR 1993 SC 384 : (1993) 1 SCC 182; *Ajay Jadhav v. Govt. of Goa*, AIR 2000 SC 451 : (1999) 9 SCC 4.
55. *Kshetriya Kisan Gramin Bank v. D.B. Sharma*, AIR 2001 SC 168 : (2001) 1 SCC 353.

their duties are more, not less, onerous than those of other drivers.[56] The Court refused to accept the argument of the Delhi Administration that the circumstance that persons belong to different departments of the government is itself a sufficient reason to justify different scales of pay irrespective of the identity of their powers, duties and responsibilities.

In *Savita*,[57] classification between two groups of senior draughtsmen was held to be without any basis as they performed the same duties and the differentiation between them was not based on any intelligible ground.

In *Bhagwan Dass v. State of Haryana*,[58] the Supreme Court has said that "once the nature and functions and the work are not shown to be dissimilar the fact that the recruitment was made in one way or the other would hardly be relevant from the point of view of "equal pay for equal work" doctrine".

Also, the fact that appointments are for temporary periods and the schemes are temporary in nature is irrelevant. Once it is shown that the nature of the duties and functions discharged and the work done are similar, the doctrine of "equal pay for equal work" is attracted.[59]

But this principle cannot be applied invariably to professional services. For example, dressing of a wound by a doctor or a compounder cannot be equated and be compensated on an equal basis. Similarly, a senior or a junior lawyer cannot be treated equally in the matter of remuneration. "In the field of rendering professional services at any rate the principle for equal work would be inapplicable." Therefore, doctors with different qualifications (Graduate or licensiates in indigenous medicine) can be graded differently for purposes of remuneration even though they are in charge of dispensaries.[60]

Classification on the basis of educational qualifications has always been upheld by the Supreme Court as reasonable and permissible under Art. 14. In the instant case,[61] the Government of Karnataka had prescribed two different scales of pay for the tracers—a higher scale for matriculate tracers and a lower pay scale for non-matriculate tracers. The Court negatived the plea of discrimination by the non-matriculate tracers. The Court ruled that prescribing two different scales for matriculates and non-matriculates is not violative of Arts. 14 and 16 and that distinction made on the basis of technical qualifications or for that matter even on the basis of general educational qualifications relevant to the suitability of the candidate for public service is permissible. The Court proceeded on the assumption that both matriculates and non-matriculates "were doing the same kind of work", and yet the classification made was upheld as permissible under Arts. 14 and 16.

In *State of Jammu & Kashmir v. Triloki Nath Khosa*,[62] the Assistant Engineers were classified into diploma holders and degree holders and more promotional

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56. *Randhir Singh v. Union of India*, AIR 1982 SC 879 : (1982) 1 SCC 618.
57. *P. Savita v. Union of India*, AIR 1985 SC 1124 : 1985 Supp SCC 94.
58. AIR 1987 SC 2049 : (1987) 4 SCC 634.
59. *Jaipal v. State of Haryana*, AIR 1988 SC 1504 : (1988) 3 SCC 354.
60. *Dr. C. Girijambal v. Govt. of Andhra Pradesh*, AIR 1981 SC 1537, 1539 : (1981) 2 SCC 155.
61. *State of Mysore v. P. Narasingha Rao*, AIR 1968 SC 349 : (1968) 1 SCR 407. Also see, *Mohd. Shujat Ali v. Union of India*, AIR 1974 SC 1631 : (1975) 3 SCC 76.
62. AIR 1974 SC 1 : (1974) 1 SCC 19.

avenues were provided to degree holders. This was upheld as reasonable. In *Sita Devi*,[63] the Supreme Court upheld the distinction drawn by the Haryana Government between matriculate and under-matriculate instructors in the Adul literacy Programme. The under-matriculate petitioners had not made any attempt in their writ petition to allege and establish that their qualifications, duties and functions were similar to the matriculate teachers.

In *Markendeya v. State of Andhra Pradesh*,[64] difference in pay scales between graduate supervisors holding degree in Engineering and non-graduate supervisors being diploma and licence-holders was upheld. It was held that on the basis of difference in educational qualifications such difference in pay scales was justified and would not offend Arts. 14 and 16. The Court pointed out that where two classes of employees perform identical or similar duties and carry out the same functions with the same measure of responsibility having the same academic qualifications, they would be entitled to equal pay. "Principle of equal pay for equal work is applicable among equals. It cannot be applied to unequals". Equal treatment cannot be accorded to totally distinct and unequal categories of employees.[65] Thus, daily-rated workers cannot be equated with regular employees of the state in the matter of wages. There are differences of qualifications, age, manner of selection between the two categories of employees.[66] The Court observed in *Markandeya*:[67]

> "Relief to an aggrieved person seeking to enforce the principle of equal pay for equal work can be granted only after it is demonstrated before the Court that invidious discrimination is practised by the State in prescribing two different scales for the two classes of employees without there being any reasonable classification for the same."

Equality under Art. 16(1) means equality between members of the same class of employees and not between members of separate classes.[68] Thus, giving special pay to members of Rajasthan Administrative Service, but not to the members of Secretarial Service, is not discriminatory as methods of recruitment, qualifications etc. of the two services are not identical.[69]

In *Purshottam v. Union of India*,[70] implementation of revised pay scales as recommended by the Pay Commission for certain categories of servants but non-implementation thereof for certain other categories was held to be discriminatory. The Government had made a reference to the Commission in respect of all its employees, and when it accepted its recommendations it should implement them in respect of all employees. Not to implement the recommendations with respect to some employees only violated Arts. 14 and 16.[71]

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63. Also see, *Sita Devi v. State of Haryana,* AIR 1996 SC 2764 : (1996) 10 SCC 1.
64. AIR 1989 SC 1308 : (1989) 3 SCC 191.
65. *State of Tamil Nadu v. M.R. Alagappan*, AIR 1997 SC 2006 : (1997) 4 SCC 401.
66. *State of Haryana v. Jasmer Singh,* 1997 (1) Supreme 137 : (1996) 11 SCC 77; *Babu Lal, Convenor v. New Delhi Municipal Committee,* (1994) Suppl. 2 SCC 633 : AIR 1994 SC 2214; *State of Orissa v. Balram Sahu,* (2002) 8 JT 477 : AIR 2003 SC 33.
67. Paras 9, 10, 13 of AIR 1989 SC 1308.
68. *C.A. Rajendran v. Union of India,* AIR 1968 SC 507 : (1968) 1 SCR 721; *Sham Sunder v. Union of India*, AIR 1969 SC 212 : (1969) 1 SCR 312.
69. *Menon v. State of Rajasthan*, AIR 1968 SC 81 : (1967) 3 SCR 430.
70. AIR 1973 SC 1088 : (1973) 1 SCC 651.
71. Also see, *Laljee Dubey v. Union of India,* AIR 1974 SC 252 : (1974) 1 SCC 230.

An army instruction conferring some benefit on those joining the Army Medical Corps after acquiring the post-graduate qualification was held not violative of Arts. 14 and 16. It was given as an incentive with a view to attract more persons having higher qualifications.[72]

In judging the equality of work, consideration may be given to educational qualifications, qualitative difference between posts and quantum of responsibilities associated with the posts. If the classification has reasonable nexus with the objective of achieving efficiency in administration, the State would be justified in prescribing different pay scales. As the Supreme Court has emphasized: "Equality must be among the equals. Unequal cannot claim equality".[73]

A classification based on difference in educational qualifications justifies a difference in pay scales. A mere nomenclature designating a person as say a carpenter or a craftsman is not enough to come to the conclusion that he is doing the same work as another carpenter or craftsman in regular service. The quality of work which is produced may be different and even the nature of work assigned may be different. It is not just a comparison of physical activity. The application of the principle of equal pay for equal work requires consideration of various dimensions of a given job. The accuracy required and the dexterity that the job may entail may differ from job to job. It cannot be judged by the mere volume of work. There may be qualitative difference as regards reliability and responsibility. Functions may be the same but the responsibilities make a difference. Thus normally the applicability of this principle must be left to be evaluated and determined by an expert body. These are not matters where a writ Court can lightly interfere.[74]

In *Federation of A.I. Custom and Central Excise Stenographers (Recog.) v. Union of India*,[75] the Supreme Court has emphasized that equal pay must depend on the "nature of the work done", and not "mere volume of work" as "there may be qualitative difference as regards reliability and responsibility". "Functions may be the same but the responsibilities make a difference." The Court has further observed:

> "The same amount of physical work may entail different quality of work, some more sensitive, some requiring more tact, some less—it varies from nature and culture of employment. The problem about equal pay cannot always be translated into a mathematical formula....."

In the instant case, stenographers attached with officers in the pay scales of Rs. 2500-2750 claimed parity with the stenographers attached with the Joint Secretaries and Officers above that rank. Their contention was that they held identical posts and discharged same functions. Nevertheless, the Court rejected their contention saying that "it is not possible to say that the differentiation is based on no rational nexus with the object sought for to be achieved". The Government had justified the differentiation amongst the two classes of stenographers on the

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72. *D.D. Joshi v. Union of India*, AIR 1983 SC 420.

73. *State of Uttar Pradesh v. J.P. Chaurasia*, (1989) 1 SCC 121 : AIR 1989 SC 19; *Gopal Krishna Sharma v. State of Rajasthan*, AIR 1993 SC 81 : 1993 Supp (2) SCC 375.
Also see, *Babulal v. New Delhi Municipal Committee*, AIR 1994 SC 2214 : 1994 Supp (4) SCC 633.

74. *State of Haryana v. Charanjit Singh* (2006) 9 SCC 321 : AIR 2006 SC 161.

75. AIR 1988 SC 1291 : (1988) 3 SCC 91.

ground of difference in their responsibility, confidentiality and the relationship with public.

The claim of the employees of *grih kalyan kendras* for pay parity with the employees working in the New Delhi Municipal Committee and other departments of the Delhi Administration was rejected by the Supreme Court.[76] These *kendras* are run by a welfare organisation working under the aegis of the Deptt. of Personnel and Administrative Reforms. Employment in these *kendras* is unique in character and not comparable with any other employment. "It is difficult to conceive of any other service which one can enter at any age, regardless of educational qualifications, and from which one can retire when one chooses". Therefore, the principle of equal pay for equal work cannot be applied to *kendra* employees. It is trite that the concept of equality implies and requires equal treatment for those who are situated equally. One cannot draw comparisons between unequals.

In *State of Madhya Pradesh v. Pramod Bhartiya*,[77] the lecturers working in the higher secondary schools in Madhya Pradesh claimed parity in pay with lecturers working in Technical schools. The qualifications prescribed for, and service conditions of, both groups of lecturers were the same and the status of both types of schools was also the same. Nevertheless, the Court still refused to concede to the lecturers in higher secondary schools the same pay as the lecturers in the Technical schools were getting on one ground, *viz.*, there was no material to suggest that the functions and responsibilities of both the categories of lecturers was qualitatively speaking similar. On this crucial point, the Court observed:[78]

> "It is not enough to say that the qualifications are same nor is it enough to say that the schools are of the same status. It is also not sufficient to say that the service conditions are similar. What is more important and crucial is whether they discharge similar duties, functions and responsibilities."

The Court went on to observe that the quality of work may vary from post to post, institution to institution. "We cannot ignore or overlook this reality. It is not a matter of assumption but one of proof."

The Court also clarified another significant point. Since the plea of equal pay for equal work has to be examined with reference to Art. 14, the burden is upon the petitioners to establish their right to equal pay, or the plea of discrimination, as the case may be.[79] In the instant case, the petitioners (respondents before the Supreme Court) failed to discharge this onus.

The principle of "equal pay for equal work" does not apply to two sets of employees working in different organisations and when there is qualitative difference in the duties and functions discharged by them.[80]

At times, it may prove very difficult for the Court to apply the principle of equal pay for equal work as there are inherent difficulties in comparing and evaluating work done by different persons in different organizations, or even in

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76. (1991) 1 SCC 619.
77. AIR 1993 SC 286; *supra.*
78. *Ibid,* at 291.
79. *Supra*, Ch. XXI, Sec. B.
Also see, *State Bank of India v. M.R. Ganesh,* JT 2002 (4) SC 129, 136 : (2002) 4 SCC 556 : AIR 2002 SC 1955.
80. *Garhwal Jal Sammelan Karmachari v. State of U.P.,* AIR 1997 SC 2143 : (1997) 4 SCC 24.

the same organization.[81] Often the difference is a matter of degree and there is an element of value judgment. The Supreme Court has observed in this connection:[82]

> "So long as such value judgment is made *bona fide* reasonably on an intelligible criterion which has a rational nexus with the object of differentiation, such differentiation will not amount to discrimination. It is important to emphasize that equal pay for equal work is a concomitant of Art. 14 of the Constitution. But it follows naturally that equal pay for unequal work will be a negation of that right."

The above discussion reveals that the initial zeal to do justice got tempered by too many claims for equality requiring the Court to take up intensive factual enquiry beyond its competence. However in *Dineshan*, after noticing the restrictive approach of the Supreme Court in relation to the principle of "equal pay for equal work" it was held held that it would not be correct to lay down as an absolute rule that merely because determination and granting of pay scale is the prerogative of the executive, the Court had no jurisdiction to examine any pay structure and an aggrieved employee has no remedy if he is unjustly treated by arbitrary State action or inaction. It was pointed out that when there is no dispute with regard to the duties and responsibilities of the persons who held identical posts or ranks but they are treated differently merely because they belonged to different departments or the basis of classification of posts which is *ex facie* irrational, arbitrary or unjust, the Court had power to intervene.[83] The case, however, is important because of the virtual resurrection of the principle as to the reviewability of an issue relating to equal pay for equal work and Article 14 in that context.

Like in some other areas the Court has adopted a restrictive approach perhaps because of realizing that it had opened the doors wider than what was required. On the authority of *Charanjit Singh*[84] it has been held that Art. 39(d) could be of no assistance for application of the rule of equal pay for equal work unless the Court is satisfied that the incumbents are performing equal and identical work as discharged by the employees vis-à-vis whom the claim is made.[85] The Court could have avoided the 'identity' criterion since the claim in the case involved obviously different classes of teachers on the one hand and clerical staff on the other.

D. EXCEPTIONS TO ARTS. 16(1) & 16(2)

The right of equality guaranteed by Arts. 16(1) and (2) are subject to a few exceptions.

(a) ART. 16(3)

First, under Art. 16(3), Parliament may make a law to prescribe a requirement as to residence within a State or Union Territory for eligibility to be appointed

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81. See, *State of Haryana v. Jasmer Singh,* 1997 (1) Supreme 137 : (1996) 11 SCC 77 : AIR 1997 SC 1788.

82. *Federation of All India Customs and Central Excise Stenographers (Recognized) v. Union of India,* AIR 1988 SC 1291 : (1988) 3 SCC 91.
Also see, *State of Uttar Pradesh v. Ministerial Karmachari Sangh,* AIR 1998 SC 303 : (1988) 1 SCC 422; *State Bank of India v. Ganesh, op. cit.*

83. *Union of India v. Dineshan KK,* (2008) 1 SCC 586 : AIR 2008 SC 1026, here, the Union of India's affidavit, however, admitted the disparity in the pay scales.

84. *State of Haryana v. Charanjit Singh,* (2006) 9 SCC 321 : AIR 2006 SC 161.

85. *S. C. Chandra v. State of Jharkhand,* (2007) 8 SCC 279, 288 : AIR 2007 SC 3021.

with respect to specified classes of appointments or posts. Thus, Art. 16(2) which bans discrimination of citizens on the ground of 'residence' only in respect of any office or employment under the state, can be qualified as regards residence, and a 'residential qualification' imposed on the right of appointment in the State for specified appointments. This provision, therefore, introduces some flexibility, and takes cognisance of the fact that there may be some very good reasons for restricting certain posts in a State for its residents.

Article 16(3), however, incorporates a safeguard to ensure that it is not abused. Power has been given to Parliament and not to the State Legislatures to relax the principle of non-discrimination on the ground of residence so that only a minimum relaxation is made in this regard. The State Legislatures being subjected to greater local pressures might have been tempted to create all kinds of barriers in the matter of public services.

Under Art. 16(3), Parliament has enacted the Public Employment (Requirement as to Residence) Act, 1957. The Act repeals all laws in force prescribing a requirement as to residence within a State or Union Territory except Himachal Pradesh, Manipur, Tripura and Telengana—the area transferred to Andhra Pradesh from the erstwhile State of Hyderabad. Due to the backwardness of these areas, the Act permits prescription of a residential qualification for a period up to March 21, 1974, in regard to non-gazetted services.

In *A.V.S. Narasimha Rao v. State of Andhra Pradesh*,[86] the Supreme Court declared that part of the Act unconstitutional which prescribed a residence qualification for government services in Telengana—a part of the State of Andhra Pradesh. The Court took the view that under Art. 16(3), Parliament can impose a residential qualification for services in the whole State, but not in a part of the State, for Art. 16(3) uses the word 'State' which signifies 'State' as a unit and not parts of a State as districts, taluqs, cities, etc. Art. 16(3) speaks of the whole state as the venue for residential qualification. Thus, while Parliament can reserve certain posts in the State of Andhra Pradesh for the residents of the State, it cannot reserve posts in Telengana (which is a part of the State) for the residents of Telengana. The life of this Act came to an end in 1974. For Andhra Pradesh, however, some special provisions have been made under Art. 371D.[87]

(b) ART. 16(5)

Secondly, Art. 16(5) provides that a law may prescribe that the incumbent of an office in connection with the affairs of a religious or denominational institution, or a member of the governing body thereof, shall belong to the particular religion or denomination.

(c) ART. 16(4)

Thirdly, Art. 16(4) constitutes a very significant exception to the principle of equality embodied in Art. 16(1) and, therefore, needs to be discussed in some detail.

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86. AIR 1970 SC 422 : (1969) 1 SCC 839. Further, on the Telengana issue see, *Director of Industries & Commerce v. V. Venkata Reddy*, AIR 1973 SC 827 : (1973) 1 SCC 99.
See, *infra*, Ch. XXXIII, Sec. E, under Art. 35.

87. See, *supra*, Ch. IX.

E. RESERVATIONS IN SERVICES : ART. 16(4)

Under Art. 16(4), the state may make reservation of appointments or posts in favour of any 'backward class' of citizens which, in the opinion of the state, is not adequately represented in the public services under the state. The term 'state' denotes both the Central and the State Governments and their instrumentalities.[88] State as an employer is entitled to fix separate quotas of promotion for degree holders, diploma holders and certificate holders in exercise of its rule making power under Art. 309.[89]

Explaining the nature of Art. 16(4), the Supreme Court has stated in *Mohan Kumar Singhania v. Union of India*,[90] that it is "an enabling provision" conferring a discretionary power on the state for making any provision or reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the state, is not adequately represented in the service of the state. Art. 16(4) neither imposes any constitutional duty nor confers any Fundamental Right on any one for claiming reservation.[91]

Under Art. 16(4), it is incumbent on a State Government to reach a conclusion that the backward class/classes for which the reservation is made is not adequately represented in the State services. Different States may have different methods of reservation and it is not for the Court to look into the wisdom of the method adopted.[92] While doing so, the State Government may take the total population of a particular backward class and representation in the State services. When the State Government after doing the necessary exercise makes the reservation and provides the extent of percentage of posts to be reserved for the said backward class, then the percentage has to be followed strictly. If some Scheduled Caste or backward class candidates are appointed or promoted against the general posts, they are not to be counted against the reserved posts. The number ofreserved posts cannot be reduced on this account. The State may, however, on an overall view of the situation review the matter and refix the percentages of reservation.[93]

Reservation does not rule out merits. Judging of merit may be at several tiers. It may undergo several filtrations. Ultimately, the constitutional scheme is to have the candidates who would be able to serve the society and discharge the functions attached to the office. Vacancies are not filled up by way of charity. Emphasis has all along been made, times without number, to select candidates and/or students based upon their merit in each category. The disadvantaged group or the socially backward people may not be able to compete with the open category people but that would not mean that they would not be able to pass the basic minimum criteria laid down therefor.[94]

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88. See, *supra*, Ch. XX, Sec. D.
89. *Chandravathi P. K. v. C. K. Saji*, (2004) 5 SCC 618 : AIR 2004 SC 2212.
90. AIR 1992 SC 1, 26 : 1992 Supp (1) SCC 594.
91. *Indra Sawhney v. Union of India, infra*, Sec. G; *Ajit Singh v. State of Punjab*, (2000) 1 SCC 430.
92. *Nair Service Society v. Dr. T. Beermasthan*, (2009) 5 SCC 545 : (2009) 4 JT 614.
93. *R.K. Sabharwal v. State of Punjab*, AIR 1995 SC 1371, 1375 : (1995) 2 SCC 745.
94. *Andhra Pradesh Public Service Commission v. Baloji Badhavath*, (2009) 5 SCC 1 : (2009) 5 JT 563.

One of the tests to be applied when a statutory provision for reservation is challenged is whether the width of the power has given rise to excessive reservation and that as to whether this wide extent would make an inroad into the principles of equality under Article 16(1) and it is for the state concerned to show in each case the extent of the existence of compelling reasons, namely backwardness, inadequacy of representation and overall administrative efficiency before making provision for reservation. Since, however, the constitutional amendments which were under challenge were enabling provision, it was open to the state to exercise their discretion to make such provisions after collecting quantifiable date showing backwardness of the class and inadequacy of representation of that class in public employment in addition to compliance with Art. 355 subject to the clarification that the reservation provision does not exceed the ceiling limit of 50% or obliterate the creamy layer or extend the reservation indefinitely.[1]

Further Art. 16(4) has to be interpreted in the background of Art. 335.[2]

The equality of opportunity guaranteed by Art. 16(1) is to each individual citizen of the country while Art. 16(4) contemplates special provision being made in favour of the socially disadvantaged classes. Both must be balanced against each other. Neither should be allowed to eclipse the other. Accordingly, the rule of 50% reservation in a year should be taken as a unit and not the entire strength of the cadre, service or the unit as the case may be.[3]

The term 'Backward Class', as used in Art. 16(4), takes within its fold Scheduled Castes and Scheduled Tribes. Art. 15(4) speaks about "socially and educationally backward classes of citizens". Art. 16(4) speaks only of "any backward class of citizens." However, it has been settled by a series of judicial pronouncements that the expression "backward class of citizens" in Art. 16(4) means the same thing as the expression "any socially and educationally backward classes of citizens" in Art. 15(4). Thus, to qualify for being called a 'backward class citizen' under Art. 16(4), one must be a member of a 'socially and educationally backward class'.[4]

It has been emphasized that the expression "Backward Class" is not synonymous with "backward caste" or "backward community". In determining whether a section of population forms a Backward Class for purposes of Art. 16(4), a test *solely* based on caste, community, race, religion, sex, descent, place of birth or residence cannot be adopted because it would directly be violative of Art. 16(2).[5]

Article 16(4) does not, however, cover the entire ground covered by Arts. 16(1) and 16(2). Some of the matters relating to employment in respect of which equality of opportunity has been predicated by Arts. 16(1) and 16(2) do not fall within the scope of the *non-obstante* clause in Art. 16(4). For instance, as regards conditions of service relating to employment, such as, salary increment, gratuity, pension and age of superannuation are matters relating to employment and, as

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1. *M.Nagaraj v. Union of India,* (2006) 8 SCC 212 : AIR 2006 SC 71.
2. For discussion on Art. 335, see, *infra,* Ch. XXXV, Sec. F.
3. *Indra Sawhney v. Union of India,* AIR 1993 SC 477 : 1992 Supp (3) SCC 217; see, *infra,* Sec. G.
4. *Janki Prasad Parimoo v. State of Jammu & Kashmir,* AIR 1973 SC 930 : (1973) 1 SCC 420.
5. *Triloki Nath v. State of Jammu & Kashmir,* AIR 1969 SC 1 : (1969) 1 SCR 103.
Also see, *State of Uttar Pradesh v. Pradip Tandon,* AIR 1975 SC 563 : (1975) 1 SCC 267.

such, they do not form the subject matter of Art. 16(4). It means that, in these matters, there can be no exception even in regard to the backward classes of citizens. In other words, these matters relating to employment are absolutely protected by the doctrine of equality and do not form the subject-matter of Art. 16(4).

Article 16(4) neither confers a right on anyone to claim, nor imposes a constitutional duty on the government to make, any reservation for any one in public services. It is merely an enabling provision and confers a discretionary power on the state to reserve posts in favour of backward classes of citizens, which, in its opinion, are not adequately represented in the state services. A balance needs to be struck between individual rights under Arts. 14 and 16(1), on the one hand, and the affirmative action taken by the state under Art. 16(4). Therefore, reservation under Art. 16(4) has to be within reasonable and legitimate limits. In making reservation under Art. 16(4), the state cannot ignore the Fundamental Rights of the rest of the citizens.[6]

The amalgamation of two classes of people for reservation would be unreasonable as two different classes are treated similarly which is in violation of the mandate of Article 14 which mandates 'to treat similar similarly and to treat different differently". It is well settled that to treat different unequals as equals violates Article 14 of the Constitution.[7]

Article 16(4) does not envisage any reservation in services independent of backwardness. Reservation of posts was made in a State on the basis of various castes and communities like Harijans, backward Hindus, Muslims, Hindu Brahmins, non-Brahmins and Christians. The Supreme Court ruled in *Venkataraman*[8] that Art. 16(4) expressly permits reservation of posts in favour of backward classes but not with regard to those not regarded as backward. While reservation of posts in favour of any backward class of citizens cannot be voided, reservation of posts between Hindus, Muslims and Christians infringes Arts. 16(1) and (2).[9] This is not reservation for backward classes but distribution of posts on the basis of community, a ground prohibited by Art. 16(2). The expression 'backward class' used in Art. 16(4) is not synonymous with 'backward caste' or 'backward community'. To determine whether a section of the population forms a 'class' for purposes of Art. 16(4), a test solely based on caste, community, race, religion, sex, descent, place of birth or residence cannot be adopted.

In *Rangachari*,[10] the validity of the circulars issued by the Railway Administration providing for reservation in favour of the Scheduled Castes/Scheduled Tribes in promotions (by selection) was questioned. The argument was that Art. 16(4) was confined to direct recruitment only and did not comprehend reserva-

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6. *C.A. Rajendran v. Union of India,* AIR 1968 SC 507 : (1968) 1 SCR 721.
Also see, *P & T Scheduled Caste/Tribe Employees Welfare Ass. (Regd.) v. Union of India,* AIR 1989 SC 139 : (1988) 4 SCC 147; *S.B.I. SC/ST Employees Welfare Ass. v. State Bank of India,* AIR 1996 SC 1838, 1841; *Ajit Singh v. State of Punjab,* (1999) 7 SCC at 229.

7. *Atyant Pichhara Barg Chhatra Sangh v. Jharkhand State Vaishya Federation,* (2006) 6 SCC 718 : AIR 2006 SC 2814.

8. *Venkataramana v. State of Madras,* AIR 1951 SC 229.

9. Also see, *Triloki Nath Tiku v. State of Jammu & Kashmir,* AIR 1969 SC 1 : (1969) 1 SCR 103; *Makhan Lal v. State of Jammu & Kashmir,* AIR 1971 SC 2206.

10. *General Manager, Southern Rly. v. Rangachari,* AIR 1962 SC 36 : (1962) 2 SCR 586, for a comment on the case see, 3 *JILI* 367 (1961).
Also, *State of Punjab v. Hira Lal,* AIR 1971 SC 1777 : (1970) 3 SCC 567.

tion in the matter of promotions as well. The Supreme Court ruled by a majority of 3 : 2 that under Art. 16(4), reservation in government services can be made not only at the initial stage of recruitment, but even in the matter of promotion from a lower to a higher post or cadre. Thus, selection posts can also be reserved for backward classes.

The Court went on to explain that the expression 'adequately represented' in Art. 16(4) imports considerations of 'size' as well as 'values', numbers as well as the nature of appointments held and so it involves not merely the numerical test but also the qualitative one. Adequacy of representation of backward classes in any service has to be judged by reference to numerical as well as qualitative tests. The advancement of the socially and educationally backward classes require not only that they should have adequate representation in the lowest rung of services but that they should secure adequate representation in selection posts as well. Inadequacy of representation of backward classes can be cured by applying reservation to senior posts as well.

The Courts have interpreted Art. 16(4) liberally because the Constitution attaches great importance to advancement of backward classes. However, reservation should not be excessive for two reasons. One, Art. 335[11] enjoins that in taking into consideration the claims of the members of the Scheduled Castes and Scheduled Tribes in the making of appointments in connection with the affairs of the Union or a State, the policy of the State should be consistent with "the maintenance of efficiency of administration". Insisted the Court: "It must not be forgotten that the efficiency of administration is of such paramount importance that it would be unwise and impermissible to make any reservation at the cost of efficiency of administration." Therefore, the Court observed:[12]

> "There can be no doubt that the Constitution-makers assumed …….. that while making adequate reservation under article 16(4) care would be taken not to provide for unreasonable, excessive or extravagant reservation….Therefore, like the special provision improperly made under Article 15(4), reservation made under article 16(4) beyond the permissible and legitimate limits would be liable to be challenged as a *fraud on the* Constitution."

Secondly, because Art. 16(4) forms an exception to Arts. 16(1) and 16(2), Art. 16(4) could not be given such an operation as to destroy the main Articles. Reservation for backward classes could not be so excessive which would in effect efface the guarantee under Art. 16(1) of equal opportunity in the matter of public employment, or at best make it illusory.

(a) *BALAJI*

The *locus classicus* on this question is the *Balaji* case.[13] In this case, the Court attempted to impose a constitutional limit on the extent of preference, not on the "narrower ground of reservation," but on the broader grounds of policy. The Court spoke of adjusting the interests of the weaker sections of society with the interests of the community as a whole. The Court declared that a formula must be evolved which would strike a reasonable balance between the several relevant considerations.

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11. *Infra*, Ch. XXXV, Sec. F.
12. *Rangachari*, AIR 1962 SC 36, at 42-44; see, *supra*, footnote 10.
13. *Balaji v. State of Mysore*, AIR 1963 SC 649 : 1963 Supp (1) SCR 439; *supra*, Ch. XXII.

While striking down as unconstitutional a government order by which 68% of the seats in educational institutions were reserved for Scheduled Castes, Scheduled Tribes and other Backward Classes on the ground of excessive reservation and as a fraud on the Constitution, the Court observed:[14]

> "Speaking generally and in a broad way, a special provision should be less than 50 per cent; how much less than 50 per cent would depend upon the relevant prevailing circumstances in each case."

(b) *DEVADASAN*

Immediately thereafter came the *Devadasan*[15] case before the Supreme Court in which the Court was required to adjudge the validity of the 'carry forward' rule.

The 'carry forward' rule envisaged that in a year, 17½ per cent posts were to be reserved for Scheduled Castes/Tribes; if all the reserved posts were not filled in a year for want of suitable candidates from those classes, then the shortfall was to be carried forward to the next year and added to the reserved quota for that year, and this could be done for the next two years. The result of the rule was that in a year out of 45 vacancies in the cadre of section officers, 29 went to the reserved quota and only 16 posts were left for others. This meant reservation upto 65% in the third year, and while candidates with low marks from the Scheduled Castes and Scheduled Tribes were appointed, candidates with higher marks from other classes were not taken.

Basing itself on the *Balaji* principle, the Supreme Court declared that more than 50 per cent reservation of posts in a single year would be unconstitutional as it *per se* destroys Art. 16(1). The Court emphasized that in the name of advancement of backward communities, the Fundamental Rights of other communities should not be completely annihilated. By a majority of 4:1, the Court held that as Art. 16(4) was a proviso or an exception to Art. 16(1), it should not be interpreted so as to nullify or destroy the main provision, as otherwise it would in effect render the guarantee of equality of opportunity in the matter of public employment under Art. 16(1) wholly illusory and meaningless. The Court observed:

> "The overriding effect of Cl. (4) of Art. 16 on Cls. (1) and (2) could only extend to the making of a reasonable number of reservations of appointments and posts in certain circumstances. A 'reasonable number' is one which strikes a reasonable balance between the claims of the backward classes and those of other citizens."

The Court emphasized that each year of recruitment has to be considered by itself and the reservation for backward communities should not be so excessive as to create a monopoly or to disturb unduly the legitimate claims of other communities.

The Supreme Court has ruled in *Arati*[16] that in order to effectuate the guarantee contained in Art. 16(1), each year of recruitment has to be considered separately by itself and "the reservation for backward communities should not be so excessive as to create a monopoly or to disturb unduly the legitimate claims of

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14. AIR 1963 SC 649, at 663.
15. *T. Devadasan v. Union of India,* AIR 1964 SC 179 : (1964) 4 SCR 680.
16. *Arati Ray Choudhury v. Union of India,* AIR 1974 SC 532 : (1974) 1 SCC 87.

other communities". Reservation for vacancies up to 45% in a year has been held valid in the instant case.

The Supreme Court has observed in the case noted below,[17] that Art. 16(4) is an enabling provision and the reservation thereunder should not exceed legitimate limits. In making reservations for the backward classes, the State cannot ignore the Fundamental Rights of the rest of the citizens.

The above-mentioned judicial decisions did, on the whole, improve the position of the Scheduled Castes, etc. But an optimum limit on reservation of posts in their favour in any one year was also placed. Underlying the *Devadasan* case was the feeling on the part of the judiciary that filling of senior posts by not so qualified candidates in preference to the better qualified candidates, while discriminatory to the latter, was also subversive of administrative efficiency. It was this feeling which had led the minority in the *Rangachari* case to confine Art. 16(4) to initial appointments only. But the majority thought otherwise. That the majority view in the *Rangachari* case was full of pit-falls was soon revealed in the *Devadasan* case.

The governments in India have been under a great political pressure to make larger and larger reservations in favour of various categories of persons both in the services as well as admission to technical institutions.[18] By prescribing the optimum limit on such reservations, both under Arts. 15(4) and 16(4), the Supreme Court did seek to help the governments to withstand these pressures to some extent in the interests of administrative efficiency or educational standards.

(c) THOMAS

In *State of Kerala v. N.M. Thomas*,[19] the Supreme Court held that it was permissible to give preferential treatment to Scheduled Castes/Tribes under Art. 16(1) outside Art. 16(4). In *Devadasan*, the majority had taken the view that Art. 16(4) was an exception to Arts. 16(1) an 16(2). This was the view expressed also in *Balaji* and *Rangachari*. On the other hand, in *Devadasan*, in a dissenting opinion, SUBBA RAO, J., had expressed the opinion that Art. 16(4) was not an exception to Art. 16(1), but was a legislative device by which the framers of the Constitution had sought to preserve a power untrammelled by the other provisions of the Article. It was a facet of Art. 16(1) as "it fosters and furthers the idea of equality of opportunity with special reference to under privileged and deprived classes of citizens."

In *Thomas*, the majority accepted this view of SUBBA RAO, J. Accordingly, the Court observed: "Art. 16(4) is not in the nature of an exception to Art. 16(1). It is a facet of Art. 16(1) which fosters and furthers the idea of equality of opportunity with special reference to an under privileged and deprived class of citizens…." Thus, Art. 16(1) being a facet of the doctrine of equality enshrined in Art. 14 permits reasonable classification just as Art. 14 does. The majority ruled in *Thomas* that Art. 16(4) is not an exception to Art. 16(1). Art. 16(1) itself permits reasonable classification for attaining equality of opportunity assured by it.

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17. *P.G. Institute of Medical Education & Research v. Faculty Ass.*, AIR 1998 SC at 1780 : (1998) 4 SCC 1.
18. The question of reservations in admissions has been discussed in Ch. XXII, Sec. D, *supra.*
19. AIR 1976 SC 490 : (1976) 2 SCC 310.

For assuring equality of opportunity, it may be necessary in certain situations to treat unequally situated persons unequally. Not doing so would perpetuate and accentuate inequality. Art. 16(4) is an instance of classification implicit in, and permitted by, Art. 16(1). The "backward class of citizens" are classified as a separate category deserving a separate treatment in the nature of reserving appointments or posts in the services of the state. Art. 16(4) should be read along, and in harmony, with Art. 16(1). Indeed even without Art. 16(4), the state could have reserved posts for backward classes. Art. 16(4) merely puts the matter beyond any doubt or controversy in specific terms.

However, two judges expressing a dissenting view in *Thomas* adhered to the majority view in *Devadasan* that Art. 16(4) was an exception to Arts. 16(1) and (2). In their view, Art. 16(1) only embodied the notion of formal or legal equality and, therefore, there was no scope for spelling out any concept of preferential treatment from the language of Art. 16(1).

Thomas marks the beginning of a new judicial thinking on Art. 16 and leads to greater concessions to S/C, S/T and other backward persons. If the Supreme Court had stuck to the view propagated in earlier cases that Art. 16(4) was an exception to Art. 16(1), then no reservation for any other class, such as army personnel, freedom fighters, physically handicapped, could have been made in services.[20]

The fact situation in *Thomas* was that the Kerala Government made rules to say that promotion from the cadre of lower division clerks to the higher cadre of upper division clerks depended on passing a test within two years. For S/Cs and S/Ts, exemption could be granted for a longer period. These classes were given two extra years to pass the test. This exemption was challenged as discriminatory under Art. 16(1) on the ground that Art. 16 permitted only reservation in favour of backward classes but it was not a case of reservation of posts for S/Cs and S/Ts under Art. 16(4) and that these persons were not entitled to any favoured treatment in promotion outside Art. 16(4).

By majority, the Supreme Court rejected the argument. It ruled that Art. 16(1) being a facet of Art. 14, would permit reasonable classification and, thus, envisaged equality between the members of a the same class of employees but not equality between members of a separate, independent class. Classification on the basis of backwardness did not fall within Art. 16(2) and was legitimate for the purposes of Art. 16(1). Giving preference to an under-represented backward community was valid and would not contravene Arts. 14, 16(1) and 16(2). Art. 16(4) removes any doubt in this respect. In the words of RAY, C.J.: "The classification of employees belonging to Scheduled Castes and Scheduled Tribes for allowing them an extended period of two years for passing the special tests for promotion is a just and reasonable classification having rational nexus to the object of providing equal opportunity for all citizens in matters relating to employment or appointment to public office."[21]

It was emphasized that the basic qualification for promotion, *viz*., seniority, was not being relaxed in case of S/Cs and S/Ts. Only a temporary relaxation was being given in the passing of the qualification test. This was warranted by their

20. Also see, *Indra Sawhney*, *infra*, Sec. F.
21. AIR 1976 SC, at 500.

inadequate representation in the services and their over-all backwardness. Without providing for such a relaxation for a temporary period, it would not have been possible to give adequate promotion to the lower division clerks belonging to the S/Cs and S/Ts. To achieve equality, differential treatment of persons who are unequal was permissible. This is characterised as "compensatory discrimination" or "affirmative action".

It was also emphasized that Scheduled Caste was not a caste within the ordinary meaning of caste as envisaged by Art. 16(2). S/Cs were notified by the President under Art. 341.[22] The object of Art. 341 was to provide protection to the members of the S/Cs having regard to the economic and educational backwardness from which they suffer. However, the over-all needs of administrative efficiency must be kept in view. A view was also expressed that the rule of 50% reservation evolved in *Balaji* was "a mere rule of caution" and was not meant to be exhaustive of all categories.[23]

The minority view, on the other hand, was that the principle of classification could not be extended so as to confer a preferential treatment on members of the S/Cs and S/Ts outside Art. 16(4). The principle of preferential treatment for backward classes was contained in Art. 16(4) and Art. 16(1) would not warrant any preference to any citizen against the other. A classification based upon the consideration that an employee belonged to a particular section of the population with a view to accord preferential treatment for promotion would be a clear violation of Art. 16(1). Classification and differential treatment for purposes of promotion among employees who possessing the same educational qualifications were initially appointed, as in the present case, to the same category of posts was not permissible. Any exemption, temporary or otherwise, could not validly be granted to one set of employees withholding the same from the other.

The majority adopted a very liberal attitude in *Thomas* as regards S/Cs and S/Ts and backward classes. The result of the pronouncement is to enable the state to give the backward classes a preferential treatment in many different ways other than reservation of posts as envisaged in Art. 16(4). This would, no doubt, help the backward classes a great deal. But there lurks a danger also in this formulation. The guarantee of equality could be completely eroded if this preferential treatment is overdone under political pressure. Thus, the obligation of the Courts to be ever vigilant in this area does correspondingly increase. After all, preferential treatment for one is discriminatory treatment for another and, therefore, it is necessary to draw a balance between the interests of the backward classes and the other classes. The Supreme Court has shown consciousness of this danger and, therefore, has laid down a few criteria which a classification must fulfil, *viz.*:

(*i*) the basis of the classification has to be backwardness;

(*ii*) the preferential treatment accorded to backward classes has to be reasonable and must have a rational nexus to the object in view, namely, adequate representation of the under-represented backward classes;

(*iii*) the overall consideration of administrative efficiency should be kept in view in giving preferential treatment to the backward classes.

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22. *Infra*, Ch. XXXV, Sec. B.
23. Per FAZAL ALI, J., in *Thomas.*

It is obvious that in *Thomas*, the Court has taken a more flexible view of Art. 16(1) than had been taken by it in earlier cases. It is now clearly established that Art. 16(4) does not cover the entire field covered by Arts. 16(1) and (2) and some of the matters relating to employment in respect of which equality of opportunity is guaranteed by Arts. 16(1) and (2) do not fall within Art. 16(4). The *Thomas* decision threw into the melting pot the decision in *Devadasan* in which the "carry forward rule" was called in question. Even the rule requiring that the overall limit of reservation should not exceed 50% was now sought to be diluted as this rule was characterised by FAZL ALI, J., as a rule of 'caution' rather than an 'absolute' rule. In *Thomas*, the Court upheld filling of 34 vacancies out of 51 by members of SCs and STs on the basis of the carry forward rule relating to Class III posts.

Thomas represents a new trend—a high water mark—on the question of reservation in services for, and grant of other concessions to, the backward classes.

(d) AFTER THOMAS

In *A.B.S.K. Sangh (Rly.) v. Union of India,*[24] the Supreme Court again went into the question of reservation in public services *vis-a-vis* Art. 16. The Court upheld reservation of posts at various levels and making of various concessions in favour of the members of the Scheduled Castes and Scheduled Tribes.

The Court reiterated the *Thomas* proposition that under Art. 16(1) itself, the state may classify, "based upon substantial differentia, groups or classes" for recruitment to public services, and "this process does not necessarily spell violation of Articles 14 to 16."[25]

Article 16(2) expressly forbids discrimination on the basis of 'caste'. Scheduled Castes and Scheduled Tribes are not castes within the ordinary meaning of caste. These are backward human groups. There is a great divide between these persons and the rest of the community. As Scheduled Castes and Scheduled Tribes suffer from socio-economic backward status, the fundamental right of equality of opportunity justifies categorisation of Scheduled Castes and Scheduled Tribes separately for the purpose of 'adequate representation' in the state services. This is constitutionally sanctioned in terms, as Arts. 16(4) and 46 specificate.[26] The Court emphasized that equality of opportunity of employment means equality as between members of the same class of employees and not equality between members of separate and independent classes.

Thus, reservation in selection posts in railways for Scheduled Castes and Scheduled Tribes was held valid. The quantum of reservation (17½%) in railway services for Scheduled Castes and Scheduled Tribes was held not excessive and the field of eligibility was not too unreasonable. The 'carry forward' rule for three years was held not bad. In the *Devadasan* case,[27] the 'carry forward' rule for backward classes was struck down as it far exceeded 50%. In the instant case, under the carry forward rule, the quota for Scheduled Castes/Tribes could go up to a maximum of 66% of posts. This was upheld with the remark that figures on

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24. *Akhil Bhartiya Soshit Karmachari Sangh (Railway) v. Union of India*, AIR 1981 SC 298 : (1981) 1 SCC 246.
25. *Ibid*.
26. For Art. 46, a Directive Principle, see, *infra*, Ch. XXXIV.
27. AIR 1981 SC, at 321.

paper were not so important as the facts and circumstances in real life which showed that the quota was never fully filled. But this fixation was subject to the rider that, as a fact, in any particular year, there would not be a substantial increase over 50% in induction of reserved candidates. According to the Court: "There is no fixed ceiling to reservation or preferential treatment in favour of the Scheduled Castes and Scheduled Tribes though generally reservation may not be far in excess of fifty percent."

Reservation in promotion posts based on seniority-cum-suitability as well as in non-selection posts was also held valid. If reservation in selection posts where the role of merit is functionally more relevant than in the non-selection posts is valid, then reservation in non-selection posts is a *fortiori* valid.

The Court sounded a warning regarding backward classes outside the Scheduled Castes and Scheduled Tribes. Such classes cannot bypass Art. 16(2) save where any substantial cultural and economic disparity stares at society. In the words of the Court: "The dubious obssession with 'backwardness' and the politicking with castes labelled backward classes may, on an appropriate occasion, demand judicial examination. The politics of power cannot sabotage the principles of one man, one value."[28]

In *A.B.S.K. Sangh*, the Court took the actual facts, rather than the paper rules, into consideration. As a fact, the Court found that the actual intake of the Scheduled Castes and Scheduled Tribes against vacancies reserved for them in recruitment and promotion categories in the railways had been slow and painful. The Court also administered a warning with respect to Art. 16(4). It observed:

> "The success of state action under Art. 16(4) consists in the speed with which result oriented reservation withers away as no longer a need, not in the ever widening and everlasting operation of an exception [Art. 16(4)] as if it were a super-fundamental right to continue backwardness all the time. To lend immortality to the reservation policy is to defeat its *raison d'etre*; to politicise this provision for communal support and party ends is to subvert the solemn undertaking of Art. 16(1), to casteify 'reservation' even beyond the dismal groups of backward most people, euphemistically described as scheduled castes and scheduled tribes, is to run a grave constitutional risk. Caste, *ipso facto*, is not class in a secular State."

Whether or not reserved vacancies would be deserved or not is a matter primarily for the government to decide. De-reservation could be resorted to only when it is not reasonably possible within the contemplation of the law to fill the reserved vacancies.[29]

(e) SINGLE POST : NO RESERVATION

It has been ruled by the Supreme Court in *Chakradhar Paswan v. State of Bihar*,[30] that where there is only one post in the cadre, "there can be no reservation for the backward classes (ST, SC, and OBC) with reference to that post either for recruitment at the initial stage or filling up a future vacancy in respect of that post. A reservation which would come under Art. 16(4), pre-supposes the availability of at least more than one post in that cadre.' According to *Devadasan*, no reservation could be made under Art. 16(4) so as to create a monopoly. Other-

28. AIR 1981 SC at 330.
29. *S.S. Sharma v. Union of India*, AIR 1981 SC 588.
30. AIR 1988 SC 959 : (1988) 2 SCC 214.

wise, the guarantee of equal opportunity contained in Arts. 16(1) and 16(2) would be rendered wholly meaningless and illusory.

A single promotional post cannot also be reserved.[31] The Constitution Bench of the Supreme Court has upheld this principle and has observed in *Post-Graduate Institute of Medcial Edcuation and Research, Chandigarh v. Faculty Association*:[32]

> "In a single post cadre, reservation at any point of time on account of rotation or roster is bound to bring about a situation where such single post in the cadre will be kept reserved exclusively for the members of the backward classes and in total exclusion of the general members of the public. Such total exclusion of general members of the public and cent per cent reservation for the backward classes is not permitted within the constitutional framework."

Hence, until there is plurality of posts in a cadre, the question of reservation does not arise.[33] The Court has emphasized: "Articles 14, 15 and 16 including Arts. 16(4), 16(4A) must be applied in such a manner so that the balance is struck in the matter of appointments by creating reasonable opportunities for the reserved classes and also for the other members of the community who do not belong to reserved classes."[34] The Court has further observed in this regard:

> "It cannot, however, be lost sight of that in the anxiety for such reservation for the backward classes, a situation should not be brought by which the chance of appointment is completely taken away so far as the members of other segments of the society are concerned by making such single post cent per cent reserved for the reserved categories to the exclusion of other members of the community even when such member is senior in service and is otherwise more meritorious."[35]

Adequate reservation does not mean proportional representation. Thus when or rule has been inserted mechanically without taking into consideration the prerequisites for making such a provision as required under Article 16(4-A) of the Constitution of India.[36]

This proposition has since been reiterated by the Court in *S.R. Murthy v. State of Karnataka*.[37]

F. WHAT ARE BACKWARD CLASSES?

In *K.C. Vasanth Kumar v. State of Karnataka*,[38] the Supreme Court had an occasion to consider the question of characterising backward classes. The Karnataka Government wanted to appoint a commission to go into this question and the Government requested the Court to lay down guidelines for the commission in the discharge of its task. However, the judges expressed a diversity of views on this complex question. Five Judges participating in the decision wrote five separate opinions.

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31. *Chetna Dilip Motghare v. Bhide Girls Education Society, Nagpur*, AIR 1994 SC 1917 : 1995 Supp (1) SCC 157.
32. AIR 1998 SC 1767 : (1998) 4 SCC 1.
33. On this point, the Supreme Court has overruled several of its own earlier decisions holding that a single post in a cadre could be reserved: *State of Bihar v. Bageshwari Prasad*, (1995) Supp (1) SCC 432; *Union of India v. Madhav*, (1997) 2 SCC 332 : AIR 1997 SC 3074; *Union of India v. Brij Lal Thakur*, (1997) AIR SCW 1937; *Post Graduate Institute of Medical Education and Research v. Faculty Association*, (1997) AIR SCW 2274 : (1998) 4 SCC 1.
34. AIR 1998 SC, at 1780.
35. *Ibid*.
36. *Anil Chandra v. Radha Krishna Gaur*, (2009) 9 SCC 454 : (2009) 5 JT 147.
37. AIR 2000 SC 450 : (1999) 8 SCC 176.
38. AIR 1985 SC 1495 : 1985 Supp SCC 714.

According to CHANDRACHUD, C.J., two tests should be conjunctively applied for identifying backward classes: one, they should be comparable to the Scheduled Castes and Scheduled Tribes in the matter of their backwardness; and, two, they should satisfy the means test, that is to say, the test of economic backwardness, laid down by the State Government in the context of the prevailing economic conditions.[39]

DESAI, J., was against 'caste' being regarded as a major determinant of backwardness. He argued, "If State patronage for preferred treatment accepts caste as the only insignia for determining social and educational backwardness, the danger looms large that this approach alone would legitimise and perpetuate caste system which contradicts secular principles and also run against Art. 16(2). Also, caste based reservation had been usurped by the economically well-placed section in the same caste". According to DESAI, J., the only criterion which can be realistically devised is the one of economic backwardness."[40] Adoption of an economic criterion would translate into reality two constitutional goals: one, to strike at the perpetuation of the caste stratification of the Indian society and to take a firm step towards establishing a casteless society; and, two, to progressively eliminate poverty.[41]

According to CHINNAPPA REDDY, J., "poverty, caste, occupation and habitation are the principal factors contributing to social backwardness". As regards caste, his view was that the caste-system has firm links with economic power and that "caste is the primary index of social backwardness, so that social backwardness is often readily identifiable with reference to a person's caste."[42]

According to SEN, J.: "The predominant and the only factor for making special provisions under Art. 15(4) or for reservation of posts and appointments under Art. 16(4) should be poverty, and caste or a sub-caste or a group should be used only for purposes of identification of persons comparable to Scheduled Castes and Scheduled Tribes". VENKATARAMIAH, J., stressed upon the relevance of caste factor as an index of backwardness. According to him, the expression 'backward classes' can only refer to certain castes, races, tribes or communities or parts thereof other than Scheduled Castes, Scheduled Tribes and Anglo-Indian community, which are backward', and "caste or community is an important relevant factor in determining social and educational backwardness". He, however, suggested caste-cum-means test as a 'rational test' to identify backward people for purposes of Arts. 15(4) and 16(4) for all members of a caste need not be treated as backward.

The only points on which there appears to be a unanimity of views are: 'caste' cannot be the sole determinant of backwardness, but it is not an irrelevant test either and can be taken into account along with certain other factors. Also, backwardness is something comparable to the position of the Scheduled Castes and Scheduled Tribes. Poverty is also a relevant factor to determine backwardness.

In *Vasanth Kumar*,[43] it was emphasized that the doctrine of protective discrimination embodied in Arts. 15(4) and 16(4) and the mandate of Art.

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39. *Ibid.*, at 1499.
40. *Ibid.*, at 1506.
41. *Ibid.*, at 1507.
42. *Ibid.*, at 1512.
43. *Supra*, footnote 38.

29(2)[44] were subject to the requirements of Art. 335[45] and could not be stretched beyond a particular limit. The Court sounded a caution:[46]

> "The State's objective of bringing about and maintaining social justice must be achieved reasonably having regard to the interests of all. Irrational and unreasonable moves by the State will slowly but tear apart the fabric of society. It is primarily the duty and function of the State to inject moderation into the decisions taken under Arts. 15(4) and 16(4), because justice lives in the hearts of men and a growing sense of injustice and reverse discrimination, fuelled by unwise state action, will destroy, not advance, social justice. If the state contravenes the constitutional mandates of Art. 16(1) and Art. 335 this Court will of course have to perform its duty."

An idea was thrown in this case that there could be some services where expertise and skill are of the essence, such as, medical services which directly affect and deal with the health and life of the populace; pilots and aviation engineers where a high degree of technical knowledge and operation skill is required. Besides, "there are other similar fields of governmental activity where professional technological, scientific or other special skill is called for". In such services or posts under the Union or the States, suggested the Court, "there can be no room for reservation of posts; merit alone must be the sole and decisive consideration for appointments."[47] This idea has been further projected by the Court in *Indra Sawhnay*.[48]

The policy of reservation gives rise to some evils. This has been brought out in the following observation by KRISHNA IYER, J., who was one of the most liberal Supreme Court Judges. IYER, J., observed in *State of Kerala v. N.M. Thomas*:[49]

> "A word of sociological caution. In the light of experience, here and elsewhere the danger of 'reservation', it seems to me, is three-fold. Its benefits, by and large, are snatched away by the top creamy layer of the 'backward' caste or class, thus keeping the weakest among the weak always weak and leaving the fortunate layers to consume the whole cake. Secondly, this claim is over-played extravagantly in democracy by large and vocal groups whose burden of backwardness has been substantially lightened by the march of time and measures of better education and more opportunities of employment, but wish to wear the "weaker section" label as a means to score over their near-equals formally categorised as the upper brackets. Lastly, a lasting solution to the problem comes only from improvement of social environment, added educational facilities and cross fertilisation of castes by inter-caste and inter-class marriages…."

The ideas thrown out in the above quotation have been further projected by the Supreme Court in *Indra Sawhney*.[50]

G. THE MANDAL COMMISSION CASE : INDRA SAWHNEY V. INDIA

Indra Sawhney v. Union of India,[51] known as the Mandal Commission case, is a very significant pronouncement of the Supreme Court on the question of reser-

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44. *Infra*, Ch. XXX, Sec. A.
45. *Infra*, Ch. XXXV, Sec. F.
46. *Ibid.*, at 1531—per SEN J.
47. *Ibid.*—SEN, J.
48. See below, Sec. G.
49. AIR 1976 SC 490 : (1976) 2 SCC 310.
50. See, *infra*, Sec. G.
51. AIR 1993 SC 477 : 1992 Supp (3) SCC 217.

vation of posts for backward classes. The Court has dealt with this question in a very exhaustive manner.

The Mandal Commission was appointed by the Government of India in terms of Art. 340 of the Constitution in 1979 to investigate the conditions of socially and educationally backward classes.[52] One of the major recommendations made by the Commission was that, besides the Scheduled Castes (SCs) and Scheduled Tribes (STs), for Other Backward Classes (OBCs) which constitute nearly 52% component of the population, 27% government jobs be reserved so that the total reservation for all, SCs, STs and OBCs, amounts to 50%.

No action was taken on the basis of the Mandal Report for long after it was submitted, except that it was discussed in the Houses of Parliament twice, once in 1982 and again in 1983. On Aug. 13, 1990, the V.P. Singh Government at the centre issued an office memorandum accepting the Mandal Commission recommendation and announcing 27% reservation for the socially and educationally backward classes in vacancies in civil posts and services under the Government of India.

This memorandum led to widespread disturbances in the country. In 1991, the Narasimha Rao Government modified the above memorandum in two respects: one, the poorer sections among the backward classes would get preference over the other sections; two, 10% vacancies would be reserved for other "economically backward sections" of the people who were not covered by any existing reservation scheme.

Ultimately, the constitutional validity of the memorandum came to be questioned in the Supreme Court through several writ petitions. The question of constitutional validity of the memorandum was considered by a Bench of 9 Judges. Six opinions were delivered. The leading opinion was delivered by JEEVAN REDDY, J., on behalf of himself, KANIA, C.J., VENKATACHALIAH, and AHMADI, JJ. Two judges, PANDIAN and SAWANT, JJ., in separate opinions concurred with REDDY, J. Three judges, THOMMEN, KULDIP SINGH and SAHAI, JJ., in separate opinions dissented from REDDY, J., on several points.

After referring to the previous decisions of the Supreme Court on Arts. 15 and 16,[53] and also after taking note of some of the decisions of the U.S. Supreme Court on racial discrimination, REDDY, J., in his elaborate judgment answered the several questions which emerged in the instant case. Some of the significant points emerging from REDDY, J.'s opinion are noted below:

1. A measure of the nature contemplated by Art. 16(4) can be provided not only by the Parliament/Legislature but also by the executive through administra-

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52. For Art. 340, see, *infra*, Ch. XXXV, Sec. E.

53. Reference was made *inter alia* to the following cases: *State of Madras v. Champakam, Dorairajan, supra*; *Venkataramana v. State of Madras, supra*; *Balaji v. State of Mysore, supra*; *General Manager, Southern Rly. v. Rangachari, supra*; *Devadasan v. Union of India, supra*; *Chitralekha v. State of Mysore, supra*; *P. Rajendran v. State of Madras, supra*; *Trilokinath v. State of Jammu & Kashmir, supra*; *Peeriakaruppan v. State of Tamil Nadu, supra*; *State of Andhra Pradesh v. U.S.V. Balram, supra*; *Janki Prasad Parimoo v. State of J&K, supra*; *State of Uttar Pradesh v. Pradip Tandon, supra*; *State of Kerala v. N.M. Thomas, supra*; *K.C. Vasanth Kumar v. State of Karnataka, supra; Comptroller & Auditor-General v. Mohan Lal Mehrotra,* AIR 1991 SC 2288 : (1992) 1 SCC 20.

tive instructions in respect of Central/State services and by the local bodies and 'other authorities' as contemplated by Art. 12, in respect of their services.

2. The provision made by the executive under Art. 16(4) becomes effective and enforceable by itself without its being enacted into a law made by a legislature.[54]

3. The Court has reiterated the view, expressed by it earlier in *Thomas*,[55] that Art. 16(1) permits classification for ensuring attainment of equality of opportunity assured by Art. 16(1) itself. Art. 16(1) is a facet of Art. 14. Just as Art. 14 permits reasonable classification so does Art. 16(1). A classification may involve reservation of seats or vacancies, as the case may be. In other words, under Art. 16(1), appointments and/or posts can be reserved in favour of a class.

Article 16(4) is not an exception to Art. 16(1), but only an instance of classification implicit and permitted by Art. 16(1). Even without Art. 16(4), the State could have classified "backward class of citizens" in a separate category for special treatment in the nature of reservation of posts/appointments in government services. Art. 16(4) merely puts the matter beyond any shadow of doubt in specific terms.

4. Art. 16(4) permits reservation in favour of any "backward classes of citizens". Backward classes having been classified by the Constitution itself as a class deserving special treatment, and the Constitution having itself specified the nature of special treatment, it should be presumed that no further classification or special treatment is permissible in their favour apart from or outside of Art. 16(4).

Article 16(4) is exhaustive of the provisions that can be made in favour of the backward classes in the matter of employment. No reservations can be provided outside Art. 16(4) in favour of backward classes though it may not be exhaustive of the very concept of reservation.

Reservations for other classes can be provided under Cl. 16(1). If for backward classes, reservations are made both under Clause (4) as well as Cl. (1), then "the vacancies available for free competition as well as reserved categories would be correspondingly whittled down and that is not a reasonable thing to do".

In one sense, the Court has given a broad interpretation to Art. 16(4). The Court has broadly interpreted the word 'reservation" therein. "Reservation" does not mean "reservation *simpliciter"* but takes in "other forms of special provisions like preferences, concessions and exemptions." "Reservation is the highest form of special provision" while "preference, concession and exemption are lesser forms", and the former includes the latter. Thus, the Court has observed:

> "The Constitutional scheme and context of Article 16(4) induces us to take the view that larger concept of reservations takes within its sweep all supplemental and ancillary provisions as also lesser types of special provisions like exemptions concessions and relaxations, consistent no doubt with the requirement of maintenance of efficiency of administration—the admonition of Art. 335."[56]

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54. *State of Kerala v. N.M. Thomas, supra.*
55. *Ibid.*
56. For Art. 335, see, *infra*, Ch. XXXV.

This means that all supplemental and ancillary provisions to ensure full availment of provisions for reservations can be provided as part of reservation itself under Art. 16(4) and there is no need to fall back upon Art. 16(1) for this purpose as was done in *Thomas*.[57] In this sense, Art. 16(4) is exhaustive of the special provisions that can be made in favour of the backward classes. The Court has observed in this regard:

> "Backward classes having been classified by the Constitution itself as a class deserving special treatment and the Constitution having itself specified the nature of special treatment, it should be presumed that no further classification or special treatment is permissible in their favour apart from or outside of clause (4) of Art. 16."[58]

5. Even under Art. 16(1), reservations cannot be made on the basis of economic criterion alone.

6. What is the meaning of the expression "backward class of citizens" used in Art. 16(4)? What does the expression signify and how should such classes be identified? The accent of Art. 16(4) is on social backwardness. From a review of the previous case-law in the area, the Court has concluded that the judicial opinions emphasize the integral connection between caste, occupation, poverty and social backwardness. Social, educational and economic backwardness are closely intertwined in the Indian context. As regards identification of backward classes, caste may be used as a criterion because caste often is a social class in India. But caste cannot be the sole criterion for reservation. Reservation is not being made under Art. 16(4) in favour of a caste but a backward class. Once a caste satisfies the criteria of backwardness, it becomes a backward class for purposes of Art. 16(4). "Besides castes (whether found among the Hindus or others) there may be other communities, groups, classes and denominations which may qualify as backward class of citizens. REDDY, J., has observed in this connection:[59]

> "..... the classification is not on the basis of the caste but on the ground that that caste is found to be a backward class not adequately represented in the services of the State."

Among the non-Hindus, there are several occupational groups, sects and denominations which, for historical reasons, are socially backward. They too represent backward social collectivities for the purposes of Art. 16(4).

7. Backwardness under Art. 16(4) need not be social as well as educational as is the case under Art. 15(4).[60] Art. 16(4) does not contain the qualifying words "socially and educationally" as does Art. 15(4). It is not correct to say that "backward class of citizens" in Art. 16(4) are the same as the "socially and educationally backward classes" in Art. 15(4). "Saying so would mean and imply reading a limitation into a beneficial provision like Art. 16(4)." Backwardness contemplated by Art. 16(4) is mainly social backwardness.

A backward class cannot be identified only and exclusively with reference to economic criterion. A backward class may, however, be identified on the basis of occupation-cum-income without any reference to caste. There is no constitutional

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57. *Supra*, footnote 49.
58. AIR 1993 SC, at 541.
59. AIR 1993 SC 477, at 555.
60. See, *Supra*, Ch. XXII, Sec. C.

bar in the State categorising the backward classes as 'backward' and 'more backward'.

8. The Court has left the task of actually identifying backward classes to the commission/authority to be appointed by the Government. This body would evolve a proper and relevant criteria and test the several groups, castes, classes and sections of people against that criteria. (See point 20 below).

9. A very important recommendation made by the Court is that the "creamy layer", the socially advanced members of a backward class, should be excluded from the benefit of reservation. Such exclusion would benefit the truly backward people and, thus, more appropriately serve the purpose of Art. 16(4). But the real difficulty is how and where to draw the line? "For, while drawing the line, it should be ensured that it does not result in taking away with one hand what is given by the other." REDDY, J., has opined that the basis of exclusion should not merely be economic, unless, of course, "the economic advancement is so high that it necessarily means social advancement".

There are however certain positions, the occupants of which can be treated as "socially advanced" without any further inquiry. Thus, when a member of a designated backward class becomes a member of IAS or IPS or any other All India Service, his status in society rises; he is no longer socially disadvantaged. His children get full opportunity to realise their potential. They are in no way handicapped in the race of life. His salary is also such that he is above want. It is but logical that in such a situation, his children are not given the benefit of reservation. For giving them benefit of reservation, other disadvantaged members of that backward class may be deprived of that benefit.

However, instead of itself laying down finally the test to identify the 'creamy layer', the Court has directed the Government to specify the basis of exclusion—whether on the basis of income, extent of holding or otherwise.

This ruling aims at ensuring that the benefit of reservation reaches the proper and the weakest section of the backward class. For the idea of excluding the 'creamy layer' of a backward class from the benefit of reservation, reference may be made to the opinion of KRISHNA IYER, J., in *Thomas*.[61]

10. Not only should a class be a backward class for meriting reservations, it should also be inadequately represented in the services under the state. This matter lies within the subjective satisfaction of the State under Art. 16(4). However, there must be some material upon the basis of which the opinion is formed by the state.

11. The total reservation cannot exceed 50% in any one year. Art. 16(4) speaks of 'adequate representation' and not 'proportional representation'. The power under Art. 16(4) must be exercised in a fair manner and within reasonable limits. Therefore, reservation under Art. 16(4) should not exceed 50% of the appointments or posts "barring certain extraordinary situations" as explained hereafter. Accordingly, 27% reservation in favour of backward classes together with reservation in favour of Scheduled Castes and Scheduled Tribes, comes to a total of 49.5%.

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61. *Supra*, footnotes 49 and 54.

12. The extraordinary situations meriting exceptions from the 50% rule have been explained thus by REDDY, J.:[62]

> "While 50% shall be the rule, it is necessary not to put out of consideration certain extraordinary situations inherent in the great diversity of this country and the people. It might happen that in far-flung and remote areas the population inhabiting those areas might, on account of their being out of the mainstream of national life and in view of conditions peculiar to and characteristical to them, need to be treated in a different way, some relaxation in this strict rule may become imperative. In doing so, extreme caution is to be exercised and a special case made out."

13. Further, if a member belonging to, say, a Scheduled Caste gets selected in the open competition on the basis of his own merit, he will not be counted against the quota reserved for the Scheduled Castes; he will be treated as open competition candidate.[63]

14. The Court has divided the total reservation of 50% into "vertical" and "horizontal" reservations. The reservation in favour of S/C, S/T and other backward classes (OBC) under Art. 16(4) may be called vertical reservation whereas reservation made in favour of physically handicapped [under Art. 16(1)] can be referred to as horizontal reservation. Horizontal reservations cut across the vertical reservations what is called interlocking reservations.

To be more precise, suppose 3% of the vacancies are reserved for physically handicapped persons. This reservation is relatable to Art. 16(1). The persons selected against this quota will be placed in the appropriate category, i.e. if he belongs to the S/C category, he will be placed in that quota by making necessary adjustments; similarly, if he belongs to the open competition category, he will be placed in that category by making necessary adjustments. Even after providing for those horizontal reservations, the over-all percentage of reservations in favour of Backward class of citizen "remain and should remain the same".

15. A year is to be taken as a unit for the purposes of applying the 50% rule. The Court has now overruled the *Devadasan* case[64] which ruled out the 'carry forward' rule. Thus, reserved posts remaining unfilled in one year may be carried forward to the next year but subject to the over-all limit that over-all reservation in any one year ought not to be more than 50%.

16. A significant point made by the Court is not to apply the rule of reservation to promotions. Under Art. 16(4), reservation is permissible only at the stage of entry into the State service, *i.e.* only at the initial stage of direct recruitment and not at the subsequent promotional stage. The Court has now disagreed with the proposition that Art. 16(4) "contemplates or permits reservation in promo-

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62. AIR 1993 SC, at 566.

63. This proposition has been applied by the Supreme Court in *Ritesh R. Sah v. Y.L. Yamul*, AIR 1996 SC 1378 : (1996) 3 SCC 253.

But see, *K. Duraisamy v. State of Tamil Nadu*, AIR 2001 SC 717 : (2001) 2 SCC 538, where the Court refused to apply this proposition. Where quotas for admission to super speciality and post-graduate medical courses were fixed for in-service candidates and non-service candidates. This was done not under Art. 16(4). The Court drew a line of distinction between "reservation" and "fixation of quota". The two "drastically differ in their purport and contents as well as the object".

64. *T. Devadasan v. Union of India*, AIR 1964 SC 179 : (1964) 4 SCR 680.

tions as well". The Court has reached this conclusion as a result of the combined reading of Art. 16(4) and Art. 335.[65] REDDY, J., has observed on this point:[66]

> "While it is certainly just to say that a handicap should be given to backward class of citizens at the stage of initial appointment, it would be a serious and unacceptable inroad into the rule of equality of opportunity to say that such a handicap should be provided at every stage of promotion throughout their career. That would mean creation of a permanent separate category apart from the mainstream—a vertical division of the administrative apparatus..... All this is bound to affect the efficiency of administration... At the initial stage of recruitment reservation can be made in favour of backward class of citizens but once they enter the service, efficiency of administration demands that these members too compete with others and earn promotion like all others; ....They are expected to operate on equal footing with others....."

Thus, the Court now overruled *Rangachari*[67] which had held the field for the last thirty years. To soften the adverse impact of the new ruling, the Court directed that it would be operative only prospectively and wherever reservations had been provided in promotions, it would continue for a period of five years.[68]

The Court has also ruled that "it would not be impermissible for the state to extend concessions and relaxations to members of reserved categories in the matter of promotion without compromising the efficiency of the administration".

17. For the reserved category in service, minimum standards can be prescribed. In fact, Art. 335 demands that some such standards be prescribed. In the words of REDDY, J.;[69]

> "It may be permissible for the Government to prescribe a reasonable lower standard for Scheduled Castes/Scheduled Tribes/Backward Classes—consistent with the requirements of efficiency of administration—it would not be permissible not to prescribe any such minimum standard at all. While prescribing the lower minimum standard for reserved category, the nature of duties attached to the post and the interest of the general public also should be kept in mind."

18. For certain services and certain posts, it may not be advisable to apply the rule of reservation. These are posts where merit alone counts. The Court has included the following posts in this category:

(i) Defence services including all technical posts therein but excluding civil posts;

(ii) All technical posts in establishments engaged in Research and Development including those connected with atomic energy and space and establishments engaged in production of defence equipment;

(iii) Teaching posts of Professors—and above, if any;

(iv) Posts in super-specialities in Medicine, engineering and other scientific and technical subjects;

(v) Posts of pilots (and co-pilots) in Indian Airlines and Air India.

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65. For Art. 335, see, *infra*, Ch. XXXV, Sec. F.
66. AIR 1993 SC, at 573.
67. *Gen. Manager, Southern Rly. v. Rangachari*, AIR 1962 SC 36 : (1962) 2 SCR 586.
68. On the doctrine of Prospective Overruling, see, *infra*, Ch. XL.
69. AIR 1993 SC, at 576.

These are some of the posts mentioned. The above list is only illustrative and not exhaustive. It has been left to the Government of India "to consider and specify the service and posts to which the rule of reservation shall not apply". Justifying exclusion of certain posts from the rule of reservation, REDDY, J., has observed:[70]

> "We may point out that the services/posts enumerated above, on account of their nature and duties attached, are such as call for highest level of intelligence, skill and excellence. Some of them are second level and third level posts in the ascending order. Hence, they form a category apart. Reservation therein may not be consistent with "efficiency of administration" contemplated by Art. 335."

19. It is open to the Government to notify which classes among the several designated OBCs are more backward and apportion reserved vacancies/posts among 'backward' and more 'backward'.

20. The Court has rejected the reservation of 10% posts (made by the Narasimha Rao Government) in favour of "other economically backward sections of the people who are not covered by any existing schemes of reservations." Such a category cannot be related to Art. 16(4). If at all, it can be related to Art. 16(1). Even so, the Court could not sustain it. Reservation of 10% vacancies among open competition candidates on the basis of income/property-holding means exclusion of those who are above the demarcating line from those 10% seats. It is not permissible to debar a citizen from being considered for appointment to an office under the state solely on the basis of his income or property-holding. Any such bar would be inconsistent with the guarantee of equal opportunity held out by Art. 16(1).

21. The Court has directed that there ought to be established a permanent body—commission or tribunal, both at the Centre and in each State, which can look into the complaints of wrong inclusion or non-inclusion of groups, classes and sections in the lists of OBCs. Such a body would go a long way in redressing genuine grievances. A body of this type can be created under Art. 16(4) itself. Persons aggrieved can approach it for appropriate redress.

22. There should be a periodic revision of lists of OBCs so as to exclude those who have ceased to be backward or to include new classes. The above-mentioned body may be consulted in this exercise.

In *Indra Sawhney*, the Supreme Court has taken cognizance of many complex but very momentous questions having a bearing on the future welfare and stability of the Indian society. The Supreme Court has delivered a very thoughtful, creative and exhaustive opinion dealing with various aspects of the reservation problem. Basically reservation in government services, is anti-meritocracy, because when a candidate is appointed to a reserved post, it inevitably excludes a more meritorious candidate. But reservation is now a fact of life and it will be the ruling norm for years to come. The society may find it very difficult to shed the reservation rule in the near future. But the Court's opinion has checked the system of reservation from running riot and has also mitigated some of its evils.

Three positive aspects of the Supreme Court's opinion may be highlighted.

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70. *Ibid.*, 577.

One, the over-all reservation in a year is now limited to a maximum of 50%.

Two, amongst the classes granted reservation, those who have been benefited from reservation and have thus improved their social status (called the 'creamy layer' by the Court), should not be allowed to benefit from reservation over and over again. This means that the benefit of reservation should not be misappropriated by the upper crust but that the benefit of reservation should be allowed to filter down to the lowliest so that they may benefit from reservation to improve their position.

This proposition raises the ticklish question of finding suitable socio-economic tests to identify the creamy layer among the backward classes. The Court admits that identifying the elite classes may not be an easy exercise. Accordingly, the Court has left the task of chalking out the criteria for the purpose to the government concerned. However, the Court has given one clear indication of its thinking on this issue. The Court has said that if a member of a backward family becomes a member of IAS, IPS or any other All-India Service, his social status rises; he is no longer socially disadvantaged. This means that, in effect, a family can avail of the reservation only once.

Three, an element of merit has now been introduced into the scheme of reservation. This has been done in several ways, *e.g.*:

(a) promotions are to be merit-based and are to be excluded from the reservation rule;

(b) certain posts are to be excluded from the reservation rule and recruitment to such posts is to be merit-based;

(c) minimum standards have to be laid down for recruitment to the reserved posts. In fact, the Court has insisted that some minimum standards must be laid down even though the same may be lower than the standards laid down for the non-reserved posts.

(a) AFTER *INDRA SAWHNEY*

The Court has not been able to completely eliminate the caste factor in identifying the backward classes. However, the Court has sought to keep the caste factor within limits. Caste can be one of the factors, but not the sole factor, to assess backwardness.

Reservation has become the bane of the contemporary Indian life. More and more sections of the society are demanding reservation for themselves in government services. The politicians are also vying among themselves for demanding reservations to all and sundry groups whether deserved or not. Needless to say, reservation is inequitable insofar as a meritorious candidate may have to be passed over in favour of a much less meritorious candidate in the reserved category.

Reservation normally implies a separate quota which is reserved for a special category of persons. Within that category, appointments to the reserved posts may be made in the order of merit. However, the category for whose benefit reservation is provided is not required to compete on equal terms with the open category. Their selection and appointment to the reserved posts is made independently on their *inter se* merit and not as compared with the merit of candi-

dates in the open category. The very purpose of reservation is to protect the weak category against competition from the general category candidates. As the Supreme Court has explained in *Indra Sawhney*, "The very idea of reservation implies selection of a less meritorious person." The only justification for reservation is social justice. It is a constitutionally recognised method of overcoming backwardness. This may adversely affect efficiency in administration.

But, for the present, the system of reservation has to be accepted as necessary. However, while accepting reservation upto a point as a present day politico-sociolo-gical necessity, it does not mean that it must not be kept within strict limits. The defects of the system of reservation ought not to be minimised as far as possible.

The Supreme Court's opinion in *Indra Sawhney* makes a signal contribution to this end. For example, there should be prescribed some minimum qualifications for the candidates of the reserved categories. Also, the list of services where merit will prevail may be enlarged. Above all, it seems to be essential that reservation for more than 50% ought to be declared unconstitutional as adversely affecting the 'basic' feature of the constitutions, *viz.*, equality, so that reservation may not be increased beyond 50% even by a constitutional amendment. This is necessary to contain the growing demand of politicians for more and more reservation in favour of groups they seek to represent.

The reservation should be made on the basis of quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment. The Court appears to have introduced the principle of proportionality by saying that "even if the State has compelling reasons ….. the State will have to see that its reservation provision does not lead to excessiveness so as to breach the ceiling limit of 50% or obliterate the creamy layer or extend the reservation indefinitely."[71]

What is needed for the future socio-economic development of the nation, as a whole, is progressively lessening, not increasing, reservation, so that ultimately meritocracy may have some chance to prevail over mediocrity. Art. 335 lays down the ideal of "efficiency of administration". It is suggested that Art. 335 should be treated not only as a "directive principle" but as an "operative and binding constitutional principle" so that any move towards reservation, and any administrative decision concerning reservation, should be assessed by the Court on the touchstone laid down in Art. 335, *viz.*, "efficiency of administration". [72]

Art. 335 refers only to the Scheduled Castes and Scheduled Tribes. There is no specific provision insisting on the need for maintenance of "efficiency of administration" so far as the backward classes are concerned. But the Supreme Court has insisted in *Indra Sawhney II*[73] that the principle of efficiency of administration is equally paramount and is implied in Arts. 14 and 16 of the Constitution so far as backward classes are concerned. To hold otherwise would not only be irrational but even discriminatory between the two classes of backward citizens, *viz.*, Scheduled Castes/Sche-duled Tribes and Other Backward Classes. Therefore, considerations underlying Art. 335 prevail even while making provisions in favour of Other Backward Classes under Art. 16(4). "Reservation even

71. *M. Nagaraj v. Union of India*, (2006) 8 SCC 212 : AIR 2007 SC 71.
72. For discussion on Art. 335, see, *infra*, Ch. XXXV, Sec. F.
73. *Indra Sawhney v. Union of India (II)*, AIR 2000 SC 498, at 515 : (2000) 1 SCC 168.

for Backward Classes can be made only if it will not undermine the efficiency of the administration in the particular department".[74] As the Supreme Court has observed in *Ajit Singh v. State of Punjab (II)*:[75]

> "It is necessary to see that the rule of adequate representation in Art. 16(4) for the Backward Classes….do not adversely affect the efficiency in administration….. Thus, in the matter of due representation in services for Backward Classes…. maintenance of efficiency in administration is of paramount importance".

The Court has also suggested a periodic review of the list of backward classes. The Court has opined that inclusion of castes in the list of backward classes should not be done without adequate relevant data. Forward castes should not get included in this list. The process of periodic review of the list of OBCs may lead to the exclusion of a backward class if it ceases to be socially backward or if it is adequately represented in the services. The maxim "Once backward, always backward is not acceptable."[76]

Even policy matters have to be tested on the touchstone of arbitrariness and to be struck down if it is held to be discriminatory or arbitrary.[77] The Supreme Court has explained that the effect of Indra *Sawhney*[78] in the determination of the question of categorisation of the backward classes did not provide for any mandatory requirement for adducing empirical evidence or materials to show that the community in question was adequately represented before taking away of benefit of reservation.[79] The Court has also said that sub-division of class is not unconstitutional and it was open to the state to categorize backward classes as backward and more backward. There is no Constitutional bar to a State categorising the backward classes as backward and more backward class. The actions of the State Government while including or excluding classes to the list is subject to judicial review.

(b) CREAMY LAYER

In the *Mandal* case, the Supreme Court has clearly and authoritatively laid down that the "socially" advanced members of a backward class, the "creamy layer", has to be excluded from the backward class and the benefit of reservation under Art. 16(4) can only be given to the "class" which remains after the exclusion of the 'creamy layer'. This would more appropriately serve the purpose and object of Art. 16(4).

The reason underlying this approach is that an effort be made so that the most deserving section of the backward class is benefited by reservations under Art. 16(4). At present, the benefits of job reservations are mostly chewed up by the more effluent sections of the backward class and the poorer and the really backward sections among them keep on getting poorer and more backward. The jobs are few in comparison to the population of the backward classes and it is not possible to give them adequate representation in state services. Therefore, it is neces-

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74. *Ibid.*
75. AIR 1999 SC 3471 : (1999) 7 SCC 209.
76. *Indra Sawhney II,* AIR 2000 SC, at 505 : (2000) 1 SCC 168.
77. *Atyant Pichhara Barg Chhatra Sangh v. Jharkhand State Vaishya Federation,* (2006) 6 SCC 718 : AIR 2006 SC 2814.
78. 1992 Supp (3) SCC 217.
79. *Ibid.*

sary that the benefit of reservation should reach the poorer and the weakest section of the backward class.

In his opinion in *Indra Sawhney*, JEEVAN REDDY, J., has emphasized that upon the member of a backward class reaching an "advanced social level or status", he would no longer belong to the backward class and would have to be weeded out. The Court has opined that exclusion of creamy layer, *i.e.*, socially advanced members, will make the class a truly backward class and would more appropriately serve the purpose and object of Art. 16(4). JEEVAN REDDY, J., has stated that there are sections among the backward classes who are highly advanced socially and educationally, and they constitute the forward section of the community. These advanced sections do not belong to the true backward class. "After excluding them alone, would the class be a compact class. In fact, such exclusion benefits the truly backward."

A line has to be drawn between the forward in the backward class and the rest of the backward. If the creamy layer is not excluded, the truly disadvantaged members of the backward class to which they belong will be deprived of the benefits of reservation. If the creamy layer among backward classes were given same benefits as backward classes, it will amount to treating unequals equally which amounts to the violation of the equality clause.

According to JEEVAN REDDY, J., the exclusion of the creamy layer must be on the basis of social advancement and not on the basis of economic interest alone. It is difficult to draw a line where a person belonging to the backward class ceases to be so and becomes part of the 'creamy layer'. It is not possible to lay down the criteria exhaustively. But JEEVAN REDDY, J., specifically laid down one criterion.

There are certain positions the occupants of which can be treated as socially advanced without any further inquiry. The Court has specifically declared that the children of the I.A.S., I.P.S., or any other All India Services in the Backward Classes constitute the creamy layer and this is true without further inquiry. The social status of any such officer rises and he is no longer socially disadvantaged. His children get full opportunity to realise their potential. They are in no way handicapped in the area of life. It is but logical that his children be not given the benefit of reservation for by giving them the benefit of reservation other disadvantaged members of that backward class may be deprived of the benefit. In other cases, in a big country like India, norms may differ from State to State or from region to region. Accordingly, the Court has directed that a body be constituted both at the Centre and at the State level to identify the creamy layer within the backward classes.

The Supreme Court has observed in this connection:

> "The backward class under Art. 16(4) means the class which has no element of "creamy layer" in it. It is mandatory under Art. 16(4)—as interpreted by this Court—that the State must identify the 'creamy layer' in a backward class and thereafter by excluding the 'creamy layer' extend the benefit of reservation to the 'class' which remains after such exclusion."

There has been a good deal of resistance on the part of the States to the idea of excluding the creamy layer. The States have adopted various devices to continue to confer benefits of reservation on the creamy layer. The reason may be that the

policy-making power vests in the creamy layer and such persons do not like to curtail their own privileges. This is illustrated by the following two cases.

In *Ashoka Kumar Thakur v. State of Bihar*,[80] the Supreme Court has assessed the validity of unrealistically high levels of income or holding of other conditions prescribed by the Legislatures of Uttar Pradesh and Bihar as criteria to identify the creamy layer. For example, while the Supreme Court in the *Mandal* case has categorically said that the Children of IAS or IPS, etc. without anything more could not avail the benefit of reservation, in the scheme drawn in UP and Bihar, a few more conditions were added for falling in the creamy layer, such as, he/she should be getting a salary of Rs. 10,000/- p.m. or more; the wife or husband to be a graduate and owning a house in an urban area. Or, if a professional doctor, surgeon, lawyer, architect, etc., he should be having an income not less than Rs. 10 lakhs, his/her spouse is a graduate and having family property worth Rs. 20 lakhs. Similar conditions were added in case of others, such as, traders, artisans, etc.

The Supreme Court has quashed these conditions as discriminatory. The Court has ruled that these conditions laid down by the two States have no 'nexus' with the object sought to be achieved. The criteria laid down by the two States to identify the creamy layer are violative of Art. 16(4), wholly arbitrary, violative of Art. 14, and against the law laid down by the Supreme Court in the *Mandal* case, where the Court has expressed the view that a member of the All India Service without anything more ought to be regarded as belonging to the "creamy layer". The Court has observed in this regard:[81]

> "The backward class under Article 16(4) means the class which has no element of 'creamy layer' in it. It is mandatory under Art. 16(4)—as interpreted by this Court—that the state must identify the 'creamy layer' in a backward class and thereafter, by excluding the 'creamy layer' extend the benefit of reservation to the 'class' which remains after such exclusion. This Court has laid down, clear and easy to follow guidelines for the identification of 'creamy layer'. The States of Bihar and Uttar Pradesh have acted wholly arbitrary and in utter violation of the law laid down by this Court in *Mandal* case. It is difficult to accept that in India where the per capita national income is Rs. 6929 (1993-94), a person who is a member of the IAS and a professional who is earning less than Rs. 10 lakhs per annum is socially and educationally backward. We are of the view that the criteria laid down by the States of Bihar and Uttar Pradesh, for identifying the 'creamy layer' on the face of it is arbitrary and has to be rejected."

The Kerala Legislature passed an Act in 1995 declaring that there was no creamy layer in the State of Kerala. The validity of the State Act was challenged in the Supreme Court. In *Indra Sawhney v. Union of India (II)*,[82] the Court has explained further the rationale underlying the rule of exclusion of 'creamy-layer'. As the 'creamy layer' is not entitled to the benefits of reservation, non-exclusion thereof will be discrimination and violation of Arts. 14 and 16 in as much as unequals cannot be treated as equals, *i.e.*, equal to the rest of the backward class. Therefore, any executive or legislative action refusing to exclude the creamy

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80. AIR 1996 SC 75 : (1995) 5 SCC 403.
81. AIR 1996 SC, at 85.
82. AIR 2000 SC 498 : (2000) 1 SCC 168. The case is also known as the *Kerala Creamy Layer* case.

layer from the benefits of reservation will amount to violation of Arts. 14, 16(1) and 16(4).

In the instant case, the Court has declared the Kerala Act declaring that there are no socially advanced sections in any backward class in the State as unconstitutional as being violative of Arts. 14 and 16(1). According to the Court, the Act has shut its eyes to the realities and facts; it has no factual basis. "The declaration is a mere cloak and is unrelated to facts in existence". The Court has emphasized that equality is the basic feature of the Constitution and neither Parliament nor any State Legislature can transgress this principle.[83] Non-exclusion of creamy layer will not only be a breach of Art. 14 but even of the basic structure of the Constitution and, therefore, totally illegal.[84] The Court has criticised the attitude of the State of Kerala in this matter in trenchant terms, characterising the State action as being against Rule of Law and amounting to "deliberate violation of the directions of the Court". The Court has observed:[85]

> "……. the unreasonable delay on the part of the Kerala Government and the discriminatory law made by the Kerala Legislature have been in virtual defiance of the rule of law and also an indefensible breach of the equality principle which is a basic feature of the Constitution. They are also in open violation of the judgments of this Court which are binding under Article 141 and the fundamental concept of separation of powers which has also been held to be a basic feature of the constitution. The State has already been held guilty of contempt."

The Court has directed the State to make provision for the exclusion of the creamy layer among the backward classes in the State.

Just as the Court has insisted on the exclusion of the creamy layer from the backward classes, so also the Court has insisted on the exclusion of the forward classes from the list of backward classes. The Court has again referred to this matter in *Indra Sawhney II*. This exclusion is necessary with a view to confer full benefits of reservation on the real backward classes. If forward classes are included in the list of backward classes, most of the benefits will be knocked away by the forward classes and the same will not reach the really backward among the backward classes. "That will leave the truly backward, backward for ever".

The Court has emphasized that to include a forward class as a backward class will amount to treating unequals as equals and this will amount to violation of Arts. 14 and 16.

The Court seems to have reacted to excessive affirmative action following Indra Sawhney-I.[86] In *Nagaraj*[87] a Constitution Bench pointed out that although the State was free to exercise its discretion in providing for reservation, such discretion was not unfettered but subject to limitation, namely, that there must exist compelling reasons of backwardness, inadequacy of representation in a class of posts keeping in mind the overall administrative efficiency, and that, even if the State had reasons to make reservation but the law enacted for implementing such

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83. For the Doctrine of "Basic features of the Constitution", see, *infra*, Ch. XLI.
84. *Ibid*.
85. The *State of Kerala Creamy Layer* case, *supra*, footnote 82, at 521.
86. 1992 Supp. (3) SCC 217 : AIR 2007 SC 71.
87. *M. Nagaraj v. Union of India*, (2006) 8 SCC 212 : AIR 2007 SC 71.

reservation was liable to be set aside if it violated any of the substantive limits on the width of the power.

(c) ART. 16(4) : A TRANSITORY PROVISION

Article 16(4) is an enabling provision and confers a discretionary power on the State to make reservation in the matter of appointments in favour of backward classes of citizens which in its opinion are not adequately represented either numerically or qualitatively in services of the State. But it confers no Constitutional right upon the members of the backward classes to claim reservation. This article does not say that only such Scheduled Castes and Scheduled Tribes which are mentioned in the Presidential Order issued under Arts. 341(1) or 342(1) for a particular State alone would be recognized as backward classes of citizens and none else. If a State or Union Territory makes a provision whereunder the benefit of reservation is extended only to such Scheduled Castes or Scheduled Tribes which are recognized as such in relation to that State or Union Territory then such a provision would be perfectly valid. The UT of Pondicherry having adopted a policy of the Central Government whereunder all Scheduled Castes or Scheduled Tribes, irrespective of their State are eligible for posts which are reserved for SC/ST candidates, no legal infirmity can be ascribed to such a policy and the same cannot be held to be contrary to any provision of law.[88]

In *Preeti Sagar*[89] that the Constitution permits preferential treatment for historically disadvantaged groups in the context of entrenched and clearly perceived social inequalities. That is why Art. 16(4) permits reservation of appointments or posts in favour of any backward class which is not adequately represented in the services under the State. Reservation is linked with adequate representation in the services. Reservation is thus a dynamic and flexible concept. The departure from the principle of equality of opportunity has to be constantly watched. So long as the backward group is not adequately represented in the services under the State, reservations should be made.

From the above it is clear that the mechanism of reservation has been considered as a transitory measure that will enable the backward to enter and be adequately represented in the state services against the backdrop of prejudice and social discrimination. But, finally, as the social backdrop changes—and a change in the social backdrop is one of the constitutional imperatives, as the backward are able to secure adequate representation in the services, the reservations will not be required. Art. 335 enters a further caveat on reservations, *viz.*, while considering the claims of the Scheduled Castes and Scheduled Tribes as well as backward classes, for appointments, the maintenance of efficiency of administration is to be kept in sight.

(d) RESERVATION IN JUDICIAL SERVICES

Reference has already been made earlier to *State of Bihar v. Bal Mukund Sah*[90] The Supreme Court declared a State Act seeking to make reservation for SCs, STs and OBCs in subordinate judiciary unconstitutional, as the State enacted the Act without any consultation with the concerned High Court.

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88. *S. Pushpa v. Sivachanmugavelu,* (2005) 3 SCC 1 : AIR 2005 SC 1038.
89. *Dr. Preeti Sagar v. State of Madhya Pradesh,* (1997) 7 SCC 120, 142 143 : AIR 1999 SC 2894; *supra.*
90. AIR 2000 SC 1296 : (2000) 4 SCC 640; *supra,* Ch. VIII, Sec. G(h).

The Court has insisted that Art. 16(4) must be read with Art. 335. This means that maintenance of efficiency of administration in the making of appointments to services and posts is a *sine qua non* before considering the case for reservation in judicial services. Further, the High Court must be consulted before enacting any such law as according to Art. 235, the High Court is entrusted with full control over subordinate judiciary. The Supreme Court has asserted that the "independence of the judiciary" and "separation of powers between the Legislature, Executive and the judiciary" are the two principles which constitute the "basic structure of the Constitution and thus these principles cannot be violated by any law.[91]

H. CONSTITUTIONAL AMENDMENTS

After *Indra Sawhny*, two Constitutional Amendments have been incorporated in Art. 16(4) to somewhat tone down the impact of the Supreme Court pronouncement.

(a) ART. 16(4A)

In *Rangachari*,[92] the Supreme Court by majority had held that Art. 16(4) permitted reservation of posts not only at the initial stage of appointment but also included promotion to selection posts. This proposition was reiterated in several subsequent pronouncements by the Supreme Court.[93] The Supreme Court had thus interpreted the term 'appointment' in Art. 16 liberally as including initial appointment as well as promotion. This position continued till the *Indra Sawhney* pronouncement.

In *Indra Sawhney*, as stated above, eight out of nine Judges opined that Art. 16(4) was confined to initial appointments only and it did not permit or warrant reservations in the matter of promotion as such, as this gave rise to several untoward and inequitous results.[94] The Court however permitted the existing rules in that behalf to operate for a period of five years from the date of the judgment. Thus, *Rangachari* decision was overruled.

Since then, however, the 77th Constitutional Amendment has been brought into effect permitting reservation in promotion to the Scheduled Castes and Scheduled Tribes.[95] The following clause [4A] has been added to Art. 16 in 1995:

> "Nothing in this Article shall prevent the State from making any provision for reservation in matters of promotion to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which in the opinion of the State are not adequately represented in the services under the State."

The Constitutional Amendment was brought into effect before the expiry of the time-limit set by the Supreme Court, *viz.*, five years from the date of the

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91. For the Doctrine of Basic Features, see, Ch. XLI, *infra.*
92. *Supra*, footnote 67.
93. See, for example, *State of Kerala v. Thomas*, *supra*, note 39 and 42; also, Sec. E(c), *supra; Akhil Bharatiya Soshit Karmachari Sangh (Railway) v. Union of India*, AIR 1981 SC 298 : (1981) 1 SCC 246, *supra*, Sec. E(d), *supra.*
94. *Supra*, 1130; also see below under (b).
95. Also see, *infra*, Ch. XLII.

judgment for the rule permitting reservation in promotion to end. Art. 16(4A) came into force from 17-6-1995.

Thus, by amending the Constitution, Parliament has removed the base as interpreted by the Supreme Court in *Indra Sawhney* that "appointment" does not include "promotion". Art 16(4A) thus revives the interpretation put on Art. 16 in *Rangachari*. Rule of reservation can now apply not only to initial recruitment but also to promotions as well where the state is of the opinion that the Scheduled Castes and Scheduled Tribes are not adequately represented in promotional posts in services under the state.[1]

It may however be noted that Art 16(4A) permits reservation in promotion posts only for the members of the Scheduled Castes and Scheduled Tribes but not for other Backward Classes. This means that the position taken by the Supreme Court in *Indra Sawhney* still prevails as regards OBCs in respect of promotion posts. No reservation can be made in promotion posts for the OBCs.

The Supreme Court has emphasized that Art. 16(4A) ought to be applied in such a manner that a balance is struck in the matter of appointments by creating reasonable opportunities for the reserved classes as well as for other members of the society.[2]

It has also been held that Art. 16(4A) is an enabling provision. It the State makes no reservation, the High Court has no jurisdiction under Art. 226 of the Constitution to issue any direction therefor.[3]

(b) PROMOTION & SENIORITY

Promotion of S/C and S/T employees out of turn because of the scheme of reservation gives rise to several problems, especially, pertaining to seniority of such persons over the employees belonging to the general category. The Supreme Court has sought to grapple with such problems keeping in view considerations of equity and fairness.

In *Union of India v. Virpal Singh Chauhan*,[4] a two-Judge Bench of the Supreme Court reiterated what the Court had said in *Indra Sawhney* that providing reservation in promotion was not warranted by Art. 16(4). The rule of reservation in promotion factually created a very poignant and objectionable situation in *Virpal*.

Of the 33 candidates being considered for promotion to 11 vacancies, all were SC/ST candidates. Not a single candidate among them belonged to the general category. The Court described the resultant situation arising out of reservation in promotion posts as follows:[5]

> "Not only the juniors are stealing a march over the seniors but the march is so rapid that not only erstwhile compatriots are left far behind but even the persons who were in the higher categories at the time of entry of Scheduled Castes/

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1. See, *Commissioner of Commercial Taxes, Andhra Pradesh v. G Sethumadhava Rao,* AIR 1996 SC 1915 : (1996) 7 SCC 512; *G.S.I.C. Karmachari Union v. Gujarat Small Scale Industries Corpn.,* (1997) 2 SCC 339.
2. *P.G. Institute of Medical Education and Research v. Faculty Association,* AIR 1998 SC 1767 : (1998) 4 SCC 1.
3. *A.P. Sarpanch Association v. Govt. of A.P.*, AIR 2001 AP 474.
4. AIR 1996 SC 448 : (1995) 6 SCC 684.
5. *Ibid.*, at 461.

> Scheduled Tribes candidates in the service have also been left behind. Such a configuration could not certainly have been intended by the framers of the Constitution or the framers of the rules of reservation".

The Court stated in *Virpal* that there is no uniform or prescribed method of providing reservation. The extent and nature of reservation is a matter for the state to decide having regard to the facts and requirements of each case. It is open to a state to say that while the reservation is to be applied and the roster followed in the matter of promotions to or within a particular service, class or category, the candidate promoted earlier by virtue of the rule of reservation/roster shall not be entitled to seniority over his senior in the feeder category and that as and when a general candidate who was senior to him in the feeder category is promoted, such general candidate would regain his seniority over the reserved candidate notwithstanding that he has been promoted subsequent to the reserved candidate. There is no unconstitutionality involved in this. It is permissible for the state to so provide.

In *Ajit Singh Januja v. State of Punjab*,[6] a three-Judge Bench of the Supreme Court has gone a step ahead than *Virpal*. Reading Arts. 14, 16 and 335, the Supreme Court has now categorically laid down that when there arises a question to fill up a post reserved for a SC/ST candidate in a still higher grade, then a SC/ST candidate is to be promoted first, but when the question is in respect of promotion to a general category post, then the general category candidate who has been promoted later would be considered first for promotion applying either the principle of seniority cum merit or merit cum seniority.

The Court has agreed with the *Virpal* ruling that seniority between the reserved category candidates and the general candidates in the promoted category shall continue to be governed by their panel position, *i.e.*, with reference to their *inter se* seniority in the lower grade. The rule of reservation gives accelerated promotion, but it does not give the accelerated "consequential seniority". Explaining the rationale underlying this ruling, the Court has observed:

> "If this rule and procedure is not applied then result will be that majority of the posts in the higher grade shall be held at one stage by persons who have not only entered in service on basis of reservation and roster but have excluded the general category candidates from being promoted to the posts reserved for general category candidates merely on the ground of their initial accelerated promotions. This will not be consistent with the requirement or spirit of Articles 16(4) or Article 335 of the Constitution."[7]

Accordingly, the Court ruled that the question of seniority at the promotional level must be decided according to the provisions of Arts. 14 and 16(1) and "if any order, circular or rule provided that such reserved candidates who got promotions at roster points were to be treated as senior to the senior candidates who were promoted later, then such an order, circular or rule would be violative of Articles 14 and 16(1)".

The position, however, would be different if before the senior general candidate got his promotion under the normal rule of seniority or selection, the reserved candidate who was promoted earlier at the roster point, had got a further promotion. The Court said in *Ajit Singh I*, that the balance must be maintained in

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6. AIR 1996 SC 1188 : (1996) 2 SCC 715.
7. *Ibid.*, at 1201.

such a manner that there is no reverse discrimination against the general candidates and that any rule, circular or order giving seniority to the reserved candidates promoted at roster point, would be violative of Arts. 14 and 16(1) of the Constitution of India.

But, then, in *Jagdish Lal v. State of Haryana*,[8] a three Judge Bench differed from the above rulings. The Court now argued that the normal rule of seniority ought to prevail in this area as well, *viz.*, that the seniority rule ought to apply meaning thereby that the seniority is to be counted from the date of promotion.

Ultimately, the Court reconsidered the whole matter in *Ajit Singh II*.[9] A Constitution Bench has now overruled *Jagdish Lal* and has restored the view as expressed in *Ajit Singh I.*

The Court has now stated that the primary purpose of Art. 16(4) is due representation of certain classes in certain posts. But, along with Art. 16(4), there are Arts. 14, 16(1) and 335 as well. Arts. 14 and 16 lay down the permissible limits of the affirmative action by way of reservation which may be taken under Arts. 16(4) and 16(4-A). While permitting reservations, Art. 14 and 16(1) also lay down certain limitations at the same time. Art. 335 ensures that the efficiency of administration is not jeopardized.[10]

The right to equal opportunity in the matter of promotion in the sense of a right to be "considered" for promotion is a Fundamental Right guaranteed by Art. 16(1). Art. 16(1) provides to every employee otherwise eligible for promotion, or who comes within the zone of consideration, a Fundamental Right to be "considered" for promotion. If a person satisfies the eligibility and zone criteria but is not considered for promotion, then there will be a clear infraction of his Fundamental Right to be "considered" for promotion, which is his personal right.

Article 16(4) or 16(4A) contains no directive or command; it is only an enabling provision;[11] it imposes no constitutional duty on the state and confers no Fundamental Right on any one. It is necessary to balance Art. 16(1) and Arts. 16(4) and 16(4A). The interests of the reserved classes must be balanced against the interests of other segments of society.[12]

The doctrine of equality of opportunity in Art. 16(1) is to be reconciled in favour of backward classes under Art. 16(4) in such a manner that Art. 16(4), while serving the cause of backward classes shall not unreasonably encroach upon the field of equality. It is necessary to strike such a balance so as to attract meritorious and talented persons to the public services. It is also necessary to ensure that the rule of adequate representation in Art. 16(4) for the backward classes and the rule of adequate representation in promotion for SC/ST under Art. 16(4-A) do not adversely affect the efficiency in administration as warranted by Art. 335.

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8. AIR 1997 SC 2366 : (1997) 6 SCC 538.
9. AIR 1999 SC 3471 : (1999) 7 SCC 209.
10. See, *infra*, Ch. XXXV, Sec. F, for Art. 335.
11. See, *C.A. Rajendran v. Union of India, supra; P & T Scheduled Caste/Tribe Employees' Welfare Assn. v. Union of India,* (1988) 4 SCC 147 : AIR 1989 SC 139; *State Bank of India Scheduled Caste/Tribe Employees' Welfare Assn. v. State Bank of India,* (1996) 4 SCC 119. The Court overruled *Ashok Kumar Gupta v. State of Uttar Pradesh,* (1997) 5 SCC 201 : 1997 SCC (L&S) 1299 and *Jagdish Lal*.
12. See, *M.R. Balaji v. State of Mysore, supra, Indra Sawhney, supra; Post Graduate Institute of Medical Education and Research v. Faculty Assn.,* (1998) 4 SCC 1 : AIR 1998 SC 1767; see also *Mangat Ram v. State of Punjab,* (2005) 9 SCC 323.

When a reserved candidate is recruited at the initial level he does not go through the same normal process of selection which is applied to a general candidate. A reserved candidate gets appointment to a post reserved for his group. He is promoted to a higher post without competing with general candidates. The normal seniority rule, *viz.,* from the date of "continuous officiation" from the date of promotion applies when a candidate is promoted in the normal manner and not to the promotion of a reserved candidate. Accordingly, in *Ajit Singh II,* the Court has laid down the following principle to regulate the seniority of the promoted reserved candidates:[13]

> "…. the roster-point promotees (reserved category) cannot count their seniority in the promoted category from the date of their continuous officiation in the promoted post—*vis-a-vis* the general candidates who were senior to them in the lower category and who were later promoted. On the other hand, the senior general candidate at the lower level, if he reaches the promotional level later but before the further promotion of the reserved candidate—he will have to be treated as senior, at the promotion level, to the reserved candidate even if the reserved candidate was earlier promoted to that level."

The Court has ruled that *Virpal* and *Ajit Singh I* have been correctly decided but not *Jagdish Lal.*

In *M.G. Badappanavar v. State of Karnataka,*[14] the Supreme Court has again confirmed its earlier ruling in *Ajit Singh II* and directed that the seniority lists as between the general and reserved promotees, and promotions, be reviewed in the light of the ruling in that case. The Court directed that the seniority of the general candidates be restored accordingly.

(c) ART. 16(4B)

The Constitution (Eighty-First Amendment) Act, 2000, has added Art. 16(4B) to the Constitution. Art. 16(4B) runs as follows:

> "Nothing in this Article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty percent reservation on total number of vacancies of that year."

The Amendment envisages that the unfilled reserved vacancies in a year are to be carried forward to subsequent years and that these vacancies are to be treated as distinct and separate from the current vacancies during any year. The rule of 50% reservation laid down by the Supreme Court is to be applied only to the normal vacancies and not to the posts of backlog of reserved vacancies. This means that the unfilled reserved vacancies are to be carried forward from year to year without any limit, and are to be filled separately from the normal vacancies.

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13. *Ajit Singh v. State of Punjab II,* AIR 1999 SC 3471, 3491 : (1999) 7 SCC 209; *supra,* note 81.
This ruling has been followed in *Jatindra Pal Singh v. State of Punjab,* AIR 2000 SC 609 : 1999 (7) SCC 257; *Ram Prasad v. D.K. Vijay,* AIR 1999 SC 3563 : (1999) 7 SCC 251.

14. JT 2000 (Suppl. 3) SC 408 : AIR 2001 SC 260 : (2001) 2 SCC 666.
Also see, *Sube Singh Bahanani v. State of Haryana,* (1999) 8 SCC 213 : 1999 SCC (L&S) 1453.

This Amendment also modifies the proposition laid down by the Supreme Court in *Indra Sawhney.*

The Amendment does increase the employment opportunities for the S/C, S/T and OBC candidates.

I. ABOLITION OF UNTOUCHABILITY

Article 17 abolishes untouchability and forbids its practice in any form. The enforcement of any disability arising out of "untouchability" is to be an offence punishable in accordance with law.

Abolition of untouchability in itself is complete and its effect is all pervading applicable to state action as well as acts or omissions by individuals, institutions or juristic body of persons.[15]

The main object of Art. 17 is to ban the practice of untouchability in any form. To give effect to Art. 17, Parliament enacted the Untouchability (Offences) Act, 1955, prescribing punishments for practising untouchability in various forms. In 1976, the Act was renamed as the "Protection of Civil Rights Act, 1955".

The word "untouchability" has not been defined either in the Constitution or in the Act, because it is not capable of any precise definition.

It has however been held that the subject-mater of Art. 17 is not untouchability in its literal or grammatical sense but the "practice as it had developed historically in this country". Therefore, treating of persons as untouchables either temporarily or otherwise for various reasons, *e.g.*, suffering from an epidemic or a contagious disease, or social observances associated with birth or death, or social boycott resulting from caste or other disputes do not come within the purview of Art. 17. Art. 17 is concerned with those regarded untouchables in the course of historic development.[16] Thus, instigation of a social boycott of a few individuals, or their exclusion from worship, religious services or food, etc., is not within the contemplation of Art. 17.[17] It is not clear whether Art. 17 would prohibit outcasting or ex-communication of a person of a higher caste from his caste.[18]

The State Legislature passed a law to improve the conditions of living of untouchables. Accordingly, the Act provided for acquisition of land for constructing a colony for them. It was argued against the validity of the law that the construction of a colony would not be in conformity with Art. 17. The Madras High Court rejected the argument.[19] The Court stated that what Art. 17 prohibits is singling out the Harijan community for hostile treatment as a socially backward community. By no process of reasoning, could Art. 17 be held to prohibit the State from

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15. *State of Karnataka v. Appa Balu Ingale,* AIR 1993 SC 1126 : 1995 Supp (4) SCC 469.

16. Denial of access to a Jain temple to a person on the ground of his being a non-JAIN, but not on the ground of his being a *harijan,* does not constitute an offence under the Act; *State of Madhya Pradesh v. Puranchand,* AIR 1958 MP 352.
Also see, MARC GALANTER, *Caste Disabilities and Indian Federalism,* 3 *JILI,* 205 (1961).
See, *infra,* Ch. XXIX, Sec. B, under Art. 25.

17. *Devarajiah v. Padmanna,* AIR 1961 Mad 35, 39.
Also see, *I.L.I.,* MINORITIES AND THE LAW, 143-170(1972).

18. *Hadibandhu Behera v. Banamali Sahu,* AIR 1961 Ori. 33.

19. *Pavadai v. State of Madras,* AIR 1973 Mad 458.

introducing a scheme for improving the condition of living of such persons. The Court also referred to Art. 15(4) in this connection.[20]

Parliament has also enacted the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, in order—(i) to prevent the commission of atrocities against the members of the Scheduled Castes and the Scheduled Tribes; (ii) to provide for setting up of special Courts for the trial of offences under the Act and (iii) also to provide for the relief and rehabilitation of victims of such offences. The statement of Objects and Reasons accompanying the corresponding Bill stated as follows:

> "Despite various measures to improve the socio-economic conditions of the Scheduled Castes and the Scheduled Tribes, they remain vulnerable. They are denied number of civil rights. They are subjected to various offences, indignities, humiliations and harassment. They have, in several brutal incidents, been deprived of their life and property. Serious crimes are committed against them for various historical, social and economic reasons…."[21]

Art. 15(2) also helps in the eradication of untouchability, as no person shall, on the grounds only of "religion, race, caste, sex, place of birth or any of them", be denied access to shops, etc., as mentioned therein.[22]

An interesting point to note is that while the Fundamental Rights, generally speaking, are restrictions mainly on government activities, Arts. 17 and 15(2) protect an individual from discriminatory conduct not only on the part of the state but even on the part of private persons in certain situations.

The Supreme Court has stated that whenever any Fundamental Right like Art. 17 is violated by a private individual, it is the constitutional obligation of the state to take the necessary steps for the purpose of interdicting such violation and ensuring observance of the Fundamental Right by the private individual who is transgressing the same. The state is under a constitutional obligation to see that there is no violation of the Fundamental Right of such person. Reference may also be made in this connection to Arts. 14, 21, 23, 25 and 29, discussed later.[23]

The Directive Principles, especially Arts. 38 and 46, obligate the state to render socio-economic and political justice to *Dalits* and improve the quality of their life. [24] "The abolition of untouchability is the arch of the Constitution to make its preamble meaningful and to integrate the *Dalits* in the national mainstream".[25]

J. ABOLITION OF TITLES

Article 18(1) prohibits the state from conferring any 'title' except a military or academic distinction. Art. 18(2) prohibits citizens of India from accepting any title from a foreign government. A foreigner holding any office of profit or trust under the state cannot accept any title from any foreign state without the consent

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20. *Supra*, Ch. XXII, Sec. C.
21. For comments on this Act, see, *Jai Singh v. Union of India*, AIR 1993 Raj 177; *State of Madhya Pradesh v. Ram Krishna Balothia*, AIR 1995 SC 1198 : (1995) 3 SCC 221.
22. *Supra*.
23. See, Ch. XXI, *supra*, for Art. 14; Ch. XXVI, *infra*, for Art. 21; Ch. XXVIII, Sec. A, *infra*, for Art. 23; Ch. XXIX, Sec. B, *infra*, for Art. 25 and Ch. XXX, Sec. A, *infra*, for Art. 29.
24. For discussion on Directive Principles, see, *infra*, Ch. XXXIV.
25. K. RAMASWAMY, J., *in Appa Balu Ingale*, *supra*, at 1134.

of the President [Art. 18(3)]. No person holding any office of profit under the state is to accept, without the consent of the President, any present, emolument, or office of any kind from or under any foreign state [Art. 18(4)].

It is not clear as to what would happen if a citizen accepts a title in contravention of Art. 18(2). It is open to Parliament, under its residuary powers, to make a law prescribing what should be done with regard to an individual who accepts a title contrary to the Article.[26]

The Supreme Court has ruled in *Balaji Raghavan v. Union of India*,[27] that the national awards like "Bharat Ratna", "Padma Vibhushan", etc. awarded by the Government of India, are not 'titles' within the meaning of Art. 18(1). These awards are not violative of the principles of equality as guaranteed by Arts. 14 and 18. The Court has observed in this connection:[28]

> "The theory of equality does not mandate that merit should not be recognized. Art. 51A of the Constitution speaks of the fundamental duties of every citizen of India. In this context, we may refer to the various clauses of Art. 51A and specifically clause (j) which exhorts every citizen "to strive towards excellence in all spheres of individual and collective activity, so that the nation constantly rises to higher levels of endeavour and achievement". It is, therefore, necessary that there should be a system of awards and decorations to recognize excellence in the performance of these duties".[29]

However, awards conferred by the state are not to be used as suffixes or prefixes. The Court has also suggested that the Prime Minister in consultation with the President should appoint a high level committee to lay down criteria for selection of persons for these awards. In the words of KULDIP SINGH, J., "Conferment of Padma awards without any firm guidelines and foolproof method of selection is bound to breed nepotism, favouritism, patronage and even corruption."[30]

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26. *Supra*, Ch. X, Sec. I.
27. AIR 1996 SC 770 : (1996) 1 SCC 361.
28. AIR 1996 SC 770, at 777 : (1996) 1 SCC 361.
29. For discussion on "Fundamental Duties" under Art. 51A, see, *infra*, Ch. XXXIV, Sec. E.
30. AIR 1996 SC 770, at 778 : (1996) 1 SCC 361.

CHAPTER XXIV

FUNDAMENTAL RIGHTS (5)
SIX FREEDOMS OF A CITIZEN

SYNOPSIS

A. RIGHT TO FREEDOM

Clauses (*a*) to (*g*) of Art. 19(1) guarantee to the citizens of India six freedoms, *viz.*, of 'speech and expression', 'peaceable assembly' 'association', 'free movement', 'residence', and 'practising any profession and carrying on any business'.

These various freedoms are necessary not only to promote certain basic rights of the citizens but also certain democratic values in, and the oneness and unity of, the country. Art. 19 guarantees some of the basic, valued and natural rights inherent in a person.

According to the Supreme Court, it is possible that a right does not find express mention in any clause of Art. 19(1) and yet it may be covered by some clause therein.[1] This gives an additional dimension to Art. 19(1) in the sense that even though a right may not be explicit, it may yet be implicit, in the various clauses of Art. 19.[2]

It has been said that these rights are great and basic rights which are recognized and guaranteed as the natural rights, inherent in the status of a citizen of a free country but not absolute in nature and uncontrolled in operation. The scheme of Article 19 shows that a group of rights are listed as clauses (a) to (g) and are recognized as Fundamental Rights conferred on citizens. All the rights do not stand on a common pedestal but have varying dimensions and underlying philosophies. The common thread that runs throughout clauses (2) to (6) is that the operation of any existing law or the enactment by the State of any law which imposes reasonable restrictions to achieve certain objects, is saved; however, the quality and content of such law would be different by reference to each of sub clauses (a) to (g) of clause (1) of Article 19.[3]

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1. *Maneka Gandhi v. Union of India*, AIR 1978 SC 597 : (1978) 1 SCC 248; *Kharak Singh v. State of Uttar Pradesh*, AIR 1963 SC 1295 : (1964) 1 SCR 332; For conjoint reading see also *State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamal*, (2005) 8 SCC 534 : AIR 2006 SC 212.
Also see, *infra*, Sec. F, under Art. 19(1)(d) .
2. See, *supra*, Ch. XX; *infra*, Chs. XXVI, XXXIV and XL.
3. *Dharam Dutt v. Union of India*, (2004) 1 SCC 712 : AIR 2004 SC 1295.

Originally, Art. 19 guaranteed seven freedoms. The freedom to hold and acquire property was deleted in 1978.[4]

However, the freedoms guaranteed by Art. 19(1) are not absolute as no right can be. Each of these rights is liable to be controlled, curtailed and regulated to some extent by laws made by Parliament or the State Legislatures. Accordingly, clauses (2) to (6) of Art. 19 lay down the grounds and the purposes for which a legislature can impose 'reasonable restrictions' on the rights guaranteed by Arts. 19(1)(*a*) to (*g*).

Article 19 confers the several freedoms on the citizens. Therefore, a municipal committee,[5] deity,[6] or a foreigner[7] cannot invoke Art. 19. The question of citizenship of a company or a corporation has already been discussed earlier.[8]

Article 19 protects the six freedoms of an Indian citizen from state action, and violation of these freedoms by private conduct of an individual is not within its purview.[9]

Inspite of there being a general presumption in favour of constitutionality of a legislation, in a challenge laid to the validity of any legislation allegedly violating any right or freedom guaranteed by clause (1) of Art. 19, on a *prima facie* case of such violation having been made out, the onus would shift upon the respondent State to show that the legislation comes within the permissible limits of restrictions set out in clauses (2) to (6) of Art. 19, and that the particular restriction is reasonable. The Constitutional Court would expect the State to place before it sufficient material justifying the restriction and its reasonability. Thus the onus of proof in such cases is an ongoing shifting process to be consciously observed by the Court called upon to decide the constitutional validity of a legislation by reference to Article 19 of the Constitution.[10] These rights have been advisedly set out in broad terms leaving scope for their expansion and adaptation, through interpretation, to the changing needs and evolving notions of a free society.[11] Every right is coupled with a duty. Part III of the Constitution of India although confers rights, duties and restrictions are inherent thereunder. Such reasonable restrictions have been found to be contained in the provisions of Part III of the constitution of India, apart from clauses (2) to (4) and (6) of Article 19 of the Constitution of India. Thus, the right to fly the National Flag is subject to certain restrictions which can be read from chapter IV-A.[12]

FOREIGNERS

A foreigner enjoys no rights under Art. 19. Art. 19 confers certain Fundamental Rights on the citizens and not on non-citizens of India.[13]

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4. See, *infra*, Chs. XXXI and XXXII.
5. *Amritsar Municipality v. State of Punjab*, AIR 1969 SC 1100 : (1969) 1 SCC 475.
6. *Deity L.P. v. Chief Commr.*, AIR 1960 Man 20.
7. *British I.S.N. Co. v. Jasjit Singh*, AIR 1964 SC 1451 : 1964 (2) SCJ 543.
8. *Supra*, Ch. XVIII.
9. *Shamdasani v. Central Bank of India*, AIR 1952 SC 59 : 1952 SCR 391; *Supra*, 463.
10. *Dharam Dutt v. Union of India*, (2004) 1 SCC 712 : AIR 2004 SC 1295.
11. *People's Union for Civil Liberties v. Union of India*, (2004) 2 SCC 476 : AIR 2004 SC 1442.
12. *Union of India v. Naveen Jindal*, (2004) 2 SCC 510 : AIR 2004 SC 1559.
13. *State Trading Corp. of India Ltd. v. Commercial Tax Officer*, AIR 1963 SC 1811 : (1964) 4 SCR 99; *Hans Muller of Nuremberg v. Superintendent, Presidency Jail, Calcutta*, AIR 1955 SC 367 : (1955) 1 SCR 1284; *Anwar v. State of Jammu & Kashmir*, AIR 1971 SC 337 : (1971) 3 SCC 104; *Gilles Pfeiffer v. Union of India*, AIR 1996 Mad 322.

A foreigner can thus claim no right "to reside and settle in India", as mentioned in Art. 19(1)(*e*).[14] The Government thus has an unrestricted right to expel a foreigner. As regards the right to be heard, there is no hard and fast rule about the manner in which a person concerned has to be given such an opportunity.

A foreigner who came to India in 1937 on a Belgian passport engaged himself in Christian missionary work. He had been staying continuously in India since 1937. By an order dated 8-7-1987, his request for further stay in India was rejected and he was ordered to leave the country. He challenged the order through a writ petition under Art. 32 which was rejected.

The Court ruled that he had not become a citizen of India under Art. 5 of the Constitution as he had not acquired his domicile in India.[15] For this purpose, "He must prove that he had formed the intention of making his permanent home in the country of residence and of continuing to reside there permanently. Residence alone, unaccompanied by this state of mind, is insufficient. "In the instant case, there was nothing to suggest even remotely that the petitioner had formed any intention of permanently residing here."[16]

A foreigner does, however, enjoy the Fundamental Right to life and personal liberty under Art. 21.[17] According to the tenor of the language of Art. 21, it is available not only to every citizen of this country, but also to a person who may not be a citizen of this country. Even those who come to India merely as tourists or in any other capacity are entitled to the protection of their lives under Art. 21.[18]

B. REASONABLE RESTRICTIONS: ARTS. 19(2) TO 19(6)

Limitations imposed by Arts. 19(2) to 19(6) on the freedoms guaranteed by Arts. 19(1)(*a*) to (*g*) serve a twofold purpose, *viz.*, on the one hand, they specify that these freedoms are not absolute but are subject to regulation; on the other hand, they put a limitation on the power of a legislature to restrict these freedoms. A legislature cannot restrict these freedoms beyond the requirements of Arts. 19(2) to 19(6).

Three significant characteristics of clauses 19(2) to 19(6) may be noted:

(1) The restrictions under them can be imposed only by or under the authority of a law; no restriction can be imposed by executive action alone without there being a law to back it up.

(2) Each restriction must be *reasonable*.

(3) A restriction must be related to the purposes mentioned in Clauses 19(2) to 19(6).

There is thus a double test to adjudge the validity of a restriction:

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14. See, *infra*, Sec. F.
15. *Louis De Raedt v. Union of India*, AIR 1991 SC 1886 : (1991) 3 SCC 554; *supra*, Ch. XVIII.
16. *Supra*, Chap. XVIII.
17. *Anwar v. State of Jammu & Kashmir*, AIR 1971 SC 337 : (1971) 3 SCC 104; see, infra, Ch. XXVI.
18. *The Chairman, Railway Board v. Mrs. Chandrima Das*, JT 2000 (1) SC 426 : AIR 2000 SC 988.

(a) whether it is reasonable; and

(b) whether it is for a purpose mentioned in the clause under which the restriction is being imposed?

Both these questions are to be determined finally by the Courts when a law is challenged as unconstitutional. The legislative determination of what restrictions to impose on a freedom is not final and conclusive as it is subject to judicial review.

(a) TEST FOR REASONABLENESS

It is difficult to give an exact definition of the word "reasonable".[19] There is no definite test to adjudge reasonableness of a restriction. Each case is to be judged on its own merits, and no abstract standard, or general pattern of reasonableness is applicable uniformly to all cases. As the Supreme Court has observed in *State of Madras v. V.G. Row*:[20] "It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard or general pattern, of reasonableness can be laid down as applicable to all cases."

However, the Courts have laid down a few broad propositions in this respect.

When the law contains 'substantive' restrictions with regard to the exercise of the right, as well as 'procedural' provisions, the Courts would consider the reasonableness of both.

For adjudging reasonableness of a restriction, the Courts consider such factors as: the duration and the extent of the restrictions; the circumstances under which, and the manner in which, that imposition has been authorised. The nature of the right infringed, the underlying purpose of the restrictions imposed, the extent and the urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, all these considerations enter into the judicial verdict.[21]

The Court, confronted with a challenge to the constitutional validity of any legislative enactment by reference to Article 19 of the Constitution, shall first ask what is the sweep of the Fundamental Right guaranteed by the relevant sub clause out of sub clauses (a) to (g) of clause (1). If the right canvassed falls within the sweep and expanse of any of the sub-clauses of clause (1), then the next question to be asked would be, whether the impugned law imposes a reasonable restriction falling within the scope of clauses (2) to (6) respectively. However, if the right sought to be canvassed does not fall within the sweep of the Fundamental Rights but is a mere concomitant or adjunct or expansion or incidence of that right, then the validity thereof is not to be tested by reference to clauses (2) to (6). The test which it would be required to satisfy for its constitu-

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19. *Gujarat Water Supply v. Unique Electro* (*Gujarat*) (*P*), AIR 1989 SC 973 : (1989) 1 SCC 532.

20. AIR 1952 SC 196 : 1952 SCR 597.

21. *Chintaman Rao v. State of Madhya Pradesh*, AIR 1951 SC 118 : 1950 SCR 759; *State of Madras v. Row*, AIR 1952 SC 195 : 1952 SCR 583; *Maneklal Chhotalal v. M.G. Makwana*, AIR 1967 SC 1373 : (1967) 3 SCR 65; *State of Bihar v. K.K. Misra*, AIR 1971 SC 1667 : (1969) 3 SCR 337; *Laxmi v. State of Uttar Pradesh*, AIR 1968 SC 1323 : (1969) 1 SCR 22; *Harakchand v. Union of India*, AIR 1970 SC 1453 : (1969) 2 SCC 166; *Krishnan Kakkanth v. Govt. of Kerala*, AIR 1997 SC 128, 135 : (1997) 9 SCC 495.

tional validity is one of reasonableness, as propounded in the case of V.G. Row[22] or if it comes into conflict with any other provisions of the constitution.

The questions : (i) whether the right claimed is a Fundamental Right, (ii) whether the restriction is one contemplated by any of clauses (2) to (6) of Article 19, and (iii) whether the restriction is reasonable or unreasonable, are all questions which shall have to be decided by keeping in view the substance of the legislation and not beguiled by the mere appearance of the legislation.[23]

Thus, the standard of reasonableness is to be judged with due reference to the subject-matter of the legislation in question, economic and social conditions in India and the surrounding circumstances. The Supreme Court has emphasized in *Pathumma*[24] that in interpreting the constitutional provision, the Court should keep in mind the social setting of the country so as to show a complete consciousness and deep awareness of the growing requirements of the society, the increasing needs of the nation, the burning problems of the day and the complex issues facing the people which the legislature in its wisdom through beneficial legislation seeks to solve. The judicial approach should be dynamic rather than static, pragmatic and not pedantic, and elastic rather than rigid.

The concept of reasonableness must change with passage of time and absorb the current socio-economic values as exemplified in Telecasting case involving the State owned Doordarshan. The complaint of violation of the Fundamental Right under Art. 19(1)(a) of the Constitution was made against Doordarshan when it decided not to telecast a documentary film titled "Father, Son and Holy War". The film was the third part of a trilogy of documentary film against communal violence. In this film the respondent film maker looked at the question of gender along with the issue of religious violence (prompted by the understanding of Sati in Deorala and thousands of young men celebrating the death of Roop Kanwar). The filmmaker challenged the refusal of Doordarshan to telecast the film which was disposed of by a Division Bench of the Bombay High Court by directing Doordarshan to take a decision on the application of the film maker. A selection committee was constituted by Doordarshan to pre-view the film and according to the Committee the violence depicted in the film would have adverse effect on the minds of the viewers. This decision came up for consideration before the Supreme Court. The Supreme Court came to the conclusion that the film maker had a right to convey his perception on the oppression of women, flawed understanding of manhood and evils of communal violence throughout the film. The film, according to the Court, in its entirety had a serious message to convey which was relevant in the present context and Doordarshan, being a state controlled agency funded by public funds, could not have denied access to screen the documentary. The Court pointed out that the test of fairness has to be looked into from various angles and common sense point of view; the manner in which the film maker has handled the thinking the absence of offensive matters like vulgarity and obscenity etc. The Court considered the implications of the states power to impose reasonable restrictions under Article 19(2). It also took note of the fact that India was a party to the International Covenant on Civil and Political Rights and observed:

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22. AIR 1952 SC 196.
23. *Dharam Dutt v. Union of India*, (2004) 1 SCC 712 : AIR 2004 SC 1559.
24. *Pathumma v. State of Kerala*, AIR 1978 SC 771 : (1978) 2 SCC 1.

> "The catchword here is reasonable restriction which corresponds to societal norms of decency. In the present matter, the documentary film Father, Son and Holy War depicts social vices that are eating into the very foundation of our Constitution. Communal riots, caste and class issues and violence against women are issues that require every citizen's attention for a feasible solution. Only the citizens especially the youth of our nation who are correctly informed can arrive at a correct solution. This documentary film in our considered opinion showcases a real picture of crime and violence against women and members of various religious groups perpetrated by politically motivated leaders for political, social and personal gains."[25]

The limitation imposed on a freedom should not be arbitrary or excessive, or beyond what is required in the situation in the interests of the public.[26] A legislation arbitrarily or excessively invading the right cannot be characterised as reasonable. A restriction should strike a proper balance between the freedom guaranteed by any of the clauses and the social control, so that the freedom is limited only to the extent necessary to protect society of which a citizen is only a part.[27] This introduces the principle of proportionality. This means that the Court would consider whether the restriction imposed by legislation on the Fundamental Right are disproportionate to the situation and are "not the least restrictive of the choices".

The burden to show that the restriction is reasonable, lies on the state. The restrictions are imposed by law on the Fundamental Rights contained in Art. 19(1)(a) to (g) and the Courts are entitled to consider the "proportionality" of these restrictions which means that the restrictions should not be "arbitrary or of an excessive" nature, beyond what is required for achieving the objects of the legislation. Legislation which arbitrarily or excessively invades the Fundamental Right, cannot be said to contain the quality of reasonableness unless it strikes a proper balance between the Fundamental Right guaranteed and the restriction imposed thereon.[28]

Further, a restriction to be valid must have a direct and proximate nexus, or a rational relation with the object which the legislature seeks to achieve and must not be in excess of the object.[29] It is the substance of the legislation, and not merely its appearance or form, which is to be taken into consideration while assessing its validity. It is the direct, inevitable and the real, not the remote, effect of the legislation on the Fundamental Right which is to be considered,[30] subject to the rider that the legislature cannot indirectly take away or abridge a Fundamental Right when it cannot do so directly.[31]

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25. *Director General, Directorate General of Doordarshan v. Anand Patwardhan,* (2006) 8 SCC 433 : AIR 2006 SC 3346.
26. *M.R.F. Ltd. v. Inspector Kerala Govt.,* AIR 1999 SC 188, 191 : (1998) 8 SCC 227.
27. *Om Kumar v. Union of India,* AIR 2000 SC 3689. Also see, *infra*.
28. See, *Chintaman Rao v. State of Madhya Pradesh*, AIR 1951 SC 118 : 1950 SCR 188; *State of Madras v. V.S. Rao*, AIR 1952 SC 196 : 1952 SCR 597; *Om Kumar v. Union of India,* JT 2000 (Suppl. 3) SC 92 : AIR 2000 3689.
29. *Arunachala Nadar v. State of Madras*, AIR 1959 SC 300 : 1959 Supp (1) SCR 92; *M.R.F. v. Inspector, Kerala Govt., supra.*
30. *Express Newspapers v. Union of India*, AIR 1958 SC 578 : 1959 SCR 12; *Bachan Singh v. State of Punjab*, AIR 1980 SC 898 : (1980) 2 SCC 684.
31. *In re Kerala Education Bill*, AIR 1958 SC 956 : (1959) SCR 995; *Supra*. On this point, see, the *Bennett Coleman* case, *infra*.

The Directive Principles of State Policy are also relevant in considering whether a restriction on a Fundamental Right is reasonable or not.[32] A restriction which promotes a Directive Principle is generally regarded as reasonable.[33] As the Supreme Court has observed in *Kasturi Lal Lakshmi Reddy*,[34] "Any action taken by the Government with a view to giving effect to any one or more of the Directive Principles would ordinarily, subject to any constitutional or legal inhibitions or other overriding considerations, qualify for being regarded as reasonable, while an action which is inconsistent with or runs counter to a Directive Principle would incur the reproach of being unreasonable. So also the concept of public interest must as far as possible receive its orientation from the Directive Principles."[35]

In *Papnasam*,[36] the Supreme Court has stated that the following principles and guidelines should be kept in view while considering the constitutionality of a statutory provision imposing restriction on a Fundamental Right guaranteed by Art. 19(1)(a) to (g) when challenged on the ground of unreasonableness of the restriction imposed by it:

(a) The restriction must not be arbitrary or of an excessive nature so as to go beyond the requirement of felt need of the society and object sought to be achieved.

(b) There must be a direct and proximate *nexus* or a reasonable connection between the restriction imposed and the object sought to beachived.

(c) No abstract or fixed principle can be laid down which may have universal application in all cases. Such consideration on the question of qualify of reasonableness, therefore, is expected to vary from case to case.

(d) In interpreting constitutional provisions, the Court should be alive to the felt need of the society and complex issues facing the people which the legislature intends to solve through effective legislation.

(e) In appreciating such problems and felt need of the society the judicial approach must necessarily be dynamic, pragmatic and elastic.

(f) It is imperative that for consideration of reasonableness of restriction imposed by a statute, the Court should examine whether the social control as envisaged in Art. 19 is being effectuated by the restriction imposed on the Fundamental Right.

(g) The Rights guaranteed to a citizen by Art. 19 do not confer any absolute or unconditional right. Each Right is subject to reasonable restriction which the legislature may impose in public interest. It is therefore

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32. On Directive Principles, see, *infra*, Ch. XXXIV.

33. *State of Bombay v. Balsara*, AIR 1951 SC 318 : 1951 SCR 682; *Quraishi v. State of Bihar*, AIR 1958 SC 731 : 1959 SCR 629; *Jalan Trading Co. v. D.M. Aney*, AIR 1979 SC 233 : (1979) 3 SCC 220; *Laxmi Khandsari v. State of Uttar Pradesh*, AIR 1981 SC 873 : (1981) 2 SCC 600.
Also see, Ch. XXXIV, *infra.*

34. *Kasturi Lal Lakshmi Reddy v. State of Jammu & Kashmir*, AIR 1980 SC 1992 : (1980) 4 SCC 1.

35. *Maneka Gandhi v. Union of India*, AIR 1978 SC 597 : (1978) 1 SCC 248; *Union of India v. Hindustan Development Corp.*, AIR 1994 SC 988 : (1993) 4 SCC 499.

36. *Papnasam Labour Union v. Madura Coats Ltd.*, AIR 1995 SC 2200 : (1995) 1 SCC 501.

necessary to examine whether such restriction is meant to protect social welfare satisfying the need of prevailing social values.

(h) The reasonableness has got to be tested both from the procedural and substantive aspects. It should not be bound by procedural perniciousness or jurisprudence of remedies.

(i) A restriction imposed on a Fundamental Right guaranteed by Art. 19 must not be arbitrary, unbridled, uncanalised and excessive and also not unreasonably discriminatory. *Ex hypothesi*, therefore, a restriction to be reasonable must also be consistent with Art. 14 of the Constitution.[37]

(j) In judging the reasonableness of the restriction imposed under Art. 19(6), the Court has to bear in mind Directive Principles of State Policy.[38]

(k) Ordinarily, any restriction so imposed which has the effect of promoting or effectuating a Directive Principle can be presumed to be reasonable restriction in public interest.

It is clear from the above that a Court evaluating the reasonableness of a restriction imposed on a Fundamental Right guaranteed by Art. 19 enjoys a lot of discretion in the matter.

A statute imposing a restriction with retrospective effect is not *prima facie* unreasonable; but retrospectivity is an element to be taken into consideration in determining whether the restriction is reasonable or not.[39]

A law affecting a Fundamental Right may be held bad for sheer vagueness and uncertainty.[40] The word 'restriction' includes 'prohibition'. Under certain circumstances, therefore, a law depriving a citizen of his Fundamental Right may be regarded as reasonable.[41]

A restriction to be valid must have a rational relation with the grounds for which the legislature is entitled to impose restrictions. These grounds are laid down in Arts. 19(2) to (6). Too remote connection between a restriction and the constitutionally authorized ground for restriction will render the law invalid.[42]

When a law is found to infringe a right guaranteed by Art. 19(1)(a) to (g), the law will be invalid unless it can be brought under the protective provisions of Arts. 19(2) to (6). The burden to show this is on those who seek that protection and not on the citizen to show that the restrictive enactment is invalid.[43] Thus, the onus is on the state to justify that the restriction imposed on any Fundamental Right guaranteed by Arts. 19(1)(*a*) to (*g*) is reasonable under clauses 19(2) to (6).[44]

Where a law purports to authorise the imposition of restrictions on a Fundamental Right in language wide enough to cover restrictions both within and with-

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37. *Supra*, Ch. XXI.
38. *Infra*, Ch. XXXIV.
39. See Sec. G., *infra*.
40. *K.A. Abbas v. Union of India*, AIR 1973 SC 123; see *infra*.
41. *Narendra Kumar v. Union of India*, AIR 1960 SC 430 : (1960) 2 SCR 375; see *infra*.
42. *Superintendent, District Jail v. Lohia*, AIR 1960 SC 633 : (1960) 2 SCR 821.
43. *Vrajlal M. & Co. v. State of Madhya Pradesh*, AIR 1970 SC 129 : (1969) 2 SCC 248.
44. *Laxmi Khandsari v. State of Uttar Pradesh*, *infra*.

out the limits of constitutionally permissible legislative actions affecting such right, it is not possible to uphold it even insofar as it may be applied within the constitutional limits as it is not severable.[45] So long as the possibility of such a provision being applied for purposes not sanctioned by the Constitution cannot be ruled out, it may be held to be wholly unconstitutional and void. For example, Art. 19(2) allows imposition of restrictions on the freedom of speech and expression only in cases where danger to the state is involved (Public order/Security of State), an enactment which is capable of being applied to cases where no such danger could arise cannot be held to be constitutional and valid to any extent.[46]

The above are only a few general guiding norms and not absolutes applicable with mathematical precision in judging the reasonableness of a restriction. The Judges enjoy a broad discretion in this respect as the Supreme Court itself has stated: [47]

> "In evaluating such elusive factors and forming their own conception of what is reasonable in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the judges participating in the decision should play an important part, and limit to their interference with legislative judgment in such cases can only be dictated by their sense of responsibility and self-restraint and the sobering reflection that the Constitution is meant not only for people of their way of thinking but for all, that the majority of the elected representatives of the people have, in authorising the imposition of the restrictions, considered them to be reasonable."

A consequence of such judicial discretion is the creation of uncertainty as to what constitutes a 'reasonable' restriction on a Fundamental Right. It is not always easy to find a common denominator in the various judicial pronouncements in this area as will be evident from the discussion that follows.

It needs to be emphasized that any restriction under Arts. 19(2) to 19(6) on any right guaranteed by Arts. 19(1)(*a*) to (*g*) can be imposed only by a law and not through a mere administrative direction or departmental instructions which have no statutory force.[48]

(b) EFFECT V. SUBJECT-MATTER TEST

A significant point which arises from a study of the above cases deserves to be mentioned here. What is the test to be applied to ascertain whether a law violates Art. 19(1)(*a*), or any other Fundamental Right? Should the Courts look into its subject-matter or the effect of the legislation for this purpose?

In *Bennett Coleman*,[49] the Central Government argued in support of the newsprint policy that its subject-matter was rationing of imported commodity and not freedom of speech, and the test to adjudge the validity of a regulatory provision should be its subject-matter, its pith and substance, and not its effect or result. The Court rejected this approach and enunciated the test: What is the 'direct' or 'inevitable' consequence or effect of the impugned state action on the Funda-

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45. On the doctrine of severability, see, *supra*, Ch. XX, Sec. H.
Also see, Ch. XL, *infra.*

46. *Romesh Thappar v. State of Madras*, AIR 1950 SC 124 : 1950 SCR 594.

47. *State of Madras v. Row*, AIR 1952 SC 196 : 1952 SCR 597.

48. *Kharak Singh v. State of Uttar Pradesh*, AIR 1963 SC 1295 : (1964) 1 SCR 332; *infra; Bijoe Emmanual v. State of Kerala*, AIR 1987 SC 748 : (1986) 3 SCC 615; *infra.*

49. *Bennett Coleman & Co. v. Union of India*, AIR 1973 SC 106 : (1972) 2 SCC 788; see, *infra.*

mental Right of the petitioner? "The true test is whether the effect of the impugned action is to take away or abridge Fundamental Rights."

A legislation or government action may have a direct effect on a Fundamental Right although its subject-matter may be different. The object of the law or executive action is irrelevant when it infringes a Fundamental Right although its subject-matter may be different. Even a law dealing directly with a purpose mentioned in Art. 19(2) would be invalid if it is not reasonable. The Court stated that "no law or action would state in words that rights of freedom of speech and expression are abridged or taken away. That is why Courts have to protect and guard Fundamental Rights by considering the scope and provisions of the Act and its effect upon the Fundamental Rights."

The Court held that, in the instant case, the object of the restrictions imposed on newspapers has nothing to do with the availability of newsprint or foreign exchange because these were post-quota restrictions which fell outside the purview of Art. 19(2). Thus, in the instant case, the Court applied the test of 'direct effect' of law on a Fundamental Right.

The 'effect' test has been applied by the Supreme Court in *Maneka Gandhi*[50] and several other cases.[51] For example, in the *Bank Nationalization* case,[52] the Supreme Court has said that it is the direct operation of the Act upon the rights which form the real test. However, earlier, in the *Gopalan* case,[53] the Supreme Court had applied the test of subject-matter in order to uphold the validity of the Preventive Detention Act against a challenge under Art. 19(1)(*a*).[54]

Logically, the *Bennett Coleman* approach should mean that the validity of the Preventive Detention Act should be adjudged with reference to Art. 19(1)(*a*) as well along with Arts. 21 and 22.[55] In course of time, the *Bennett Coleman* approach has been accepted and the *Gopalan* approach discarded.[56] This approach gives greater protection to Fundamental Rights.

It may, however, be noted that under the *Bennett Coleman* doctrine, it is the 'direct' effect on a Fundamental Right which is determinative. A difference of judicial opinion is possible on the question whether the 'effect' of a provision on a Fundamental Right is 'direct' or 'indirect'.[57]

C. FREEDOM OF SPEECH: ARTICLES 19(1)(*A*) AND 19(2)

(a) IMPORTANCE OF FREEDOM OF SPEECH

Freedom of speech is the bulwark of democratic government. This freedom is essential for the proper functioning of the democratic process. The freedom of speech and expression is regarded as the first condition of liberty. It occupies a

50. *Infra*, Ch. XXVI.
51. As for example, see, the *Sakal Papers* case, *infra*.
52. *Infra*, Ch. XXXI.
53. See *infra*, Ch. XXVI, Sec. B.
54. The subject-matter test was also applied in the *Hamdard Dawakhana* case, *infra*. Also, *Ram Singh v. Delhi*, *infra*, Ch. XXVI.
55. See, *infra*, Chs. XXVI and XXVII.
56. *Infra*, Chs. XXVI and XXVII.
57. This test has been applied in the *Express Newspapers* case, *infra*; Also see the judgment of MATHEW, J., in the *Bennett Coleman* case, *supra*.

preferred position in the hierarchy of liberties giving succour and protection to all other liberties. It has been truly said that it is the mother of all other liberties.[58]

In a democracy, freedom of speech and expression opens up channels of free discussion of issues. Freedom of speech plays a crucial role in the formation of public opinion on social, political and economic matters. Freedom of speech and expression, just as equality clause and the guarantee of life and liberty has been very broadly construed by the Supreme Court right from the 1950s. It has been variously described as a "basic human right", "a natural right" and the like. It embraces within its scope the freedom of propagation and interchange of ideas, dissemination of information which would help formation of one's opinion and view point and debates on matters of public concern. So long as the expression is confined to nationalism, patriotism and love for the motherland, the use of the National Flag by way of expression of those sentiments would be a Fundamental Right. It cannot be used for commercial purpose or otherwise. The law in USA not only recognizes the right to fly National Flag but it has gone to the extent of holding flag burning as an expression of free speech and free expression of its citizens against the establishment but our constitution does not approve the latter part of the right as envisaged in the U.S.[59]

In *Maneka Gandhi v. Union of India*,[60] BHAGWATI, J., has emphasized on the significance of the freedom of speech and expression in these words:

> "Democracy is based essentially on free debate and open discussion, for that is the only corrective of government action in a democratic set up. If democracy means government of the people by the people, it is obvious that every citizen must be entitled to participate in the democratic process and in order to enable him to intelligently exercise his right of making a choice, free and general discussion of public matters is absolutely essential."

In 1927, in *Whitney v. California*,[61] LOUIS BRANDEIS, J., made a classic statement on the freedom of speech in the context of the U.S. Constitution:

> "Those who won our independence believed that the final end of the state was to make men free to develop their faculties... They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that the freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile.... that public discussion is a political duty; and that this should be a fundamental principle of the American government."

Talking about the First Amendment to the U.S. Constitution which guarantees freedom of speech in the U.S.A. The U.S. Supreme Court has observed:[62]

> "It is the purpose of the First Amendment to preserve an uninhibited market place of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market whether it be by the Government itself or a private licensee".

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58. *Report of the Second Press Comm.*, Vol. I, 34-35.
59. *Union of India v. Naveen Jindal*, (2004) 2 SCC 510 : AIR 2004 SC 1559.
60. AIR 1978 SC 597 : (1978) 1 SCC 248.
61. 247 U.S. 214.
62. *Associated Press v. U.S.*, 326 US 1.

(b) ARTICLE 19(1)(A) OF THE CONSTITUTION

Out of the several rights enumerated in clause (1) of Article 19, the right in sub-clause (a) is not merely a right of speech and expression but a right to freedom of speech and expression. The enumeration of other rights is not by reference to freedom.[63]

Article 19(1)(*a*) guarantees to all citizens the right to 'freedom of speech and expression'. Under Art. 19(2), 'reasonable restrictions can be imposed on the exercise of this right for certain purposes. Any limitation on the exercise of the right under Art. 19(1)(*a*) not falling within the four corners of Art. 19(2) cannot be valid.

The freedom of speech under Art. 19(1)(*a*) includes the right to express one's views and opinions at any issue through any medium, *e.g.*, by words of mouth, writing, printing, picture, film, movie, etc. It thus includes the freedom of communication and the right to propagate or publish opinion. But this right is subject to reasonable restrictions being imposed under Art. 19(2). Free expression cannot be equated or confused with a licence to make unfounded and irresponsible allegations against the judiciary.[64]

Article 19(1)(*a*) corresponds to Amendment I of the U.S. Constitution which says: "Congress shall make no law....abridging the freedom of speech or of the press." Unlike Art. 19(1)(*a*) of the Indian Constitution, the provision in the U.S. Constitution has two notable features, *viz.*,

(1) Freedom of Press is specifically mentioned therein;

(2) No restrictions are mentioned on the freedom of speech unlike Art. 19(2) which spells out the restrictions on Art. 19(1).

The Courts in the U.S.A. have to spell out the restrictions on this right from case to case.[65] This provision protects the right to receive information and ideas. The First Amendment preserves "an uninhibited market place of ideas in which truth will ultimately prevail...It is the right of the public to receive suitable access to social, political, aesthetic, moral and other ideas and experiences".[66]

As stated earlier, in case of a conflict between the freedom of speech under Art. 19(1)(*a*) and the privilege of Parliament or a State Legislature under Art. 105 or 194 respectively, the freedom of speech will give way to accommodate the legislative privilege.[67] It has also been ruled by the Supreme Court that the freedom of speech available to a Member of Parliament under Art. 105(1) (as well as to a Member of a State Legislature under Art. 194(1)] is wider in amplitude than the right to freedom of speech and expression guaranteed under Art. 19(1)(*a*) since the freedom of speech of the members of a Legislature on the floor of the House under Art. 105(1) is not subject to the limitations contained in Art. 19(2).[68]

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63. *Dharam Dutt v. Union of India*, (2004) 1 SCC 712 : AIR 2004 SC 1295.
64. *Radha Mohan Lal v. Rajasthan High Court*, (2003) 3 SCC 427 : AIR 2003 SC 1467.
65. For a discussion on the American provision, see, *Secretary, Ministry of Information & Broadcasting v. Cricket Association, Bengal*, AIR 1995 SC 1236 : (1995) 2 SCC 161, *et. seq.*
66. *Kleindiest v. Mandel*, 408 US 753, 763.
67. *Supra*, Chs. II and VI.
68. *P.V. Narasimha Rao v. State*, AIR 1998 SC 2120 : (1958) 4 SCC 626; *supra*, Ch. II.

The Jammu & Kashmir Legislature has passed an anti-defection law requiring a member of the legislature to resign his seat in the legislature if he defects from the party to which he belonged at the time of his election to the legislature. The purpose of the law is to discourage defection which has so much vitiated the country's political atmosphere. The law was challenged under Art. 19(1)(*a*) on the ground that it unreasonably curbs the right of dissent and violates the freedom of speech and expression of a legislator. Rejecting the challenge, the Court has pointed out that the totality of rights enjoyed by a legislator including the freedom to speak on the floor of the House are merely privileges governed by Art. 105 and not Fundamental Rights.[69]

In *Kihota Hollohon v. Zachilhu*,[70] the Supreme Court has refused to test the anti-defection law passed by Parliament to prohibit defection of members of Legislatures and Parliament from one political party to another against the touchstone of Art. 19(1)(*a*). Here arises a clash of two values—(*i*) freedom of speech and expression; (*ii*) to improve and strengthen the democratic fabric of the country. The Court has given preference to promotion of democracy over freedom of speech and expression if there is any inconsistency between the two. "Unprincipled defection is a political and social evil." It subverts democracy.

An exhibitor of video films, it has been held, cannot claim protection of Art. 19(1)(*a*) as he is not propagating or circulating any of his own views. The producer of a film can, but a mere exhibitor of video films cannot, claim protection of Art. 19(1)(*a*).A right of a film maker to make and exhibit his film is a part of his Fundamental Right of freedom of speech and expression under Article 19(1)(a) and the restrictions imposed under Sections 4 and 5A of the Cinematograph Act, 1952 relating to certification by Censor Board by applying the guiding principles set out in Section 5B is a reasonable restrictions contemplated under Article 19(2).[71] The exhibitor shows films merely to earn profit and not to propagate any ideas or arousing any public opinion. An exhibitor of films cannot be equated with circulation or distribution of newspapers. Exhibiting films is a commercial activity. Circulation of newspapers and magazines continues with the publisher but the film after production goes out of the producer's hands for being exhibited by such persons as are totally unconnected with production.[72]

The phrase 'speech and expression' used in Art. 19(1)(*a*) has broad connotation. The right to paint or sing or dance or to write poetry or literature is also covered by Art. 19(1)(*a*) because the common basic characteristic of all these activities is freedom of speech and expression.[73]

THE RIGHT TO FLY NATIONAL FLAG AND SING NATIONAL ANTHEM

The right to fly the national flag however is neither unfettered, unsubscribed, unrestricted nor unchannellised. Right to fly the flag is regulated by the Emblems and Names (Prevention of Improper Use) Act, 1950 and Prevention of Insults to National Honour Act, 1971.

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69. *Mian Bashir v. State of Jammu & Kashmir*, AIR 1982 J & K 26.
70. AIR 1993 SC 412 : 1992 Supp (2) SCC 651; *supra*, Ch. II, Sec. F(a).
71. *Director of Film Festivals v. Gaurav Ashwin Jain*, (2007) 4 SCC 737 : AIR 2007 SC 1640.
72. *Star Video v. State of Uttar Pradesh*, AIR 1994 All 25.
73. *Maneka Gandhi v. Union of India*, AIR 1978 SC 597 : (1978) 1 SCC 248; *Usha Uthup v. State of West Bengal*, AIR 1984 Cal. 268.

National Anthem, National Flag and National Song are secular symbols of the nationhood. They represent the supreme collective expression of commitment and loyalty to the nation as well as patriotism for the country. They are necessary adjuncts of sovereignty being symbols and actions associated therewith. If the unity and integrity of India is to be perceived in diverse situations, the feeling of loyalty, commitment and patriotism can be judged not only by giving effect to constitutionalism but also on their secular symbols. Unrestricted use of the National Flag may result in commercial exploitation of the flag. The unrestricted use of the National Flag may result in its indiscriminate use in procession, meetings etc. Instances of insults to the National Flag as a matter of protest may also occur. It must certainly be treated with the utmost respect and dignity. This might not be possible without imposing any restrictions on its use. Flag Code although is not a law within the meaning of Article 13(3) (a) of the Constitution of India, for the purpose of clause (2) of Article 19 it would not restrictively regulate the free exercise of the right of flying the National Flag. But the Flag Code to the extent it provides for preserving respect and dignity of the National Flag, the same deserves to be followed.[74] In other words, our National Flag cannot suffer any indignity.

In *Baragur Ramachandrappa*[75] The Supreme Court rejected the challenge that Section 95 of the Criminal Procedure Code which confers power on the State Government to forfeit certain publications referred to in that section including news papers, was violative of Article 19(1) (a). The issue as to the validity of the section arose in relation to a book which was considered by the petitioner to be objectionable, inflammatory, hurtful and insulting to the sentiments and feelings of a religious sect known as Veerashaivas who were the followers of Basaveshwara, a great saint of the twelfth century. On behalf of the author it was contended that the entire matter should be examined in the backdrop of the philosophy and principles underlying sub clause (h) of the Article 51A of the Constitution which envisaged the development of a scientific temperament, a feeling of humanism and a spirit of inquiry and reform as well as the Fundamental Right to freedom of speech under Article 19(1)(a). The Court after taking into consideration the vast disparities in language, culture and religion in the country, was of the view that unwarranted and malicious criticism or interference in the faith of others could not be accepted, and after referring to certain earlier cases of the Court[76] held that the challenge could not be sustained on the finding that publication of a book which endangers public order and held that the extracts quoted from "The Book" from chapter XII were not in sync with the rest of the novel and had been deliberately designed to be hurtful.

(c) RIGHT TO SILENCE

The right to speech implies the right to silence. It implies freedom, not to listen, and not to be forced to listen. The right comprehends the freedom to be free

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74. *Union of India v. Naveen Jindal*, (2004) 2 SCC 510 : AIR 2004 SC 1559.
75. *Baragur Ramachandrappa v. State of Karnataka*, (2007) 5 SCC 11 : (2007) 6 JT 411.
76. *Indian Express Newspapers (Bombay) Pvt. Ltd. v. Union of India*, (1985) 1 SCC 641; *The State of Uttar Pradesh v. Lalai Singh Yadav*, (1976) 4 SCC 213; *S. Rangarajan v. P. Jagjivan Ram*, (1989) 2 SCC 574.

from what one desires to be free from. A loudspeaker forces a person to hear what he wishes not to hear. The use of a loudspeaker may be incidental to the exercise of the right but, its use is not a matter of right, or part of the rights guaranteed by Article 19(1).[77]

(d) RIGHT TO RECEIVE INFORMATION

The expression "freedom of speech and expression" in Art. 19(1)(a) has been held to include the right to acquire information and disseminate the same. It includes the right to communicate it through any available media whether print or electronic or audio-visual, such as, advertisement, movie, article or speech, etc. This freedom includes the freedom to communicate or circulate one's opinion without interference to as large a population in the country, as well as abroad, as is possible to reach.

In People's Union for Civil Liberties, the Supreme Court dealt with this aspect of the freedom elaborately. The right of the citizens to obtain information on matters relating to public acts flows from the Fundamental Right enshrined in Art. 19(1)(a). Securing information on the basic details concerning the candidates contesting for elections to Parliament or the State Legislature promotes freedom of expression and therefore the right to information forms an integral part of Article 19(1)(a).[78]

Freedom of expression, as contemplated by Article 19(1) (a) which in many respects overlaps and coincides with freedom of speech, has manifold meanings. It need not and ought not to be confined to expressing something in words orally or in writing. Even a manifestation of an emotion, feeling etc. without words would amount to expression. Communication of emotion and display of talent through music, painting etc. is also a sort of expression. The Court noted that ballot is the instrument by which the voter expresses his choice between candidates.[79]

While expounding the scope of "expression" in Article 19(1) (a), the Supreme Court has drawn a distinction between the conferment of the right to vote on fulfillment of requisite criteria and the culmination of that right in the final act of expressing choice towards a particular candidate by means of ballot. The Court pointed out that though the initial right cannot be placed on the pedestal of a fundamental right, but, at the stage when the voter goes to the polling booth and casts his vote, his freedom to express arises. The casting of vote in favour of one or the other candidate tantamounts to expression of his opinion and preference and that final stage in the exercise of voting right marks the accomplishment of freedom of expression of the voter and that is where Article 19(1) (a) is attracted.[80]

Since right to information is a constituent of the freedom of expression under Art. 19(1)(a), the amended S. 33-B of Representation of People Act, 1951 which provides that notwithstanding anything contained in the judgment of any Court or directions issued by the Election Commission, no candidate shall be liable to disclose or furnish any such information in respect of his election which is not re-

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77. *Noise Pollution (V), In re,* (2005) 5 SCC 733 : AIR 2005 SC 3136.
78. *PUCL v. Union of India,* (2003) 4 SCC 399 : AIR 2003 SC 2363.
79. *Ibid.*
80. *PUCL v. Union of India,* (2003) 4 SCC 399.

quired to be disclosed or furnished under the Act or the rules made thereunder, is on the face of it beyond the legislative competence, as the Supreme Court has held that the voter has a Fundamental Right under Article 19(1)(a) to know the antecedents of a candidate and was therefore *ultra vires* Act. 19(1)(a).[81]

It has been said that although elections are fought by political parties, the same would be a farce if the voters are unaware of the antecedents of candidates contesting elections and it would be a vote without any basis. Such elections cannot be considered as free or fair. The concomitant of the right to vote which is the basic postulate of democracy is two fold:

First, formulation of an opinion about the candidates; and

Secondly the expression of choice by casing a vote in favour of the candidate preferred by the voter.[82] In Peoples Union for Civil Liberties[83] the petitioners sought disclosure of information relating to safety violations and defects in various nuclear power plants, the Court upheld the contention of Union of India that data about fissile materials are matters of sensitive character which may enable the enemies of the nation to monitor strategic activities and therefore any information relating to training features, processes or technology of nuclear plants cannot be disclosed.

Right to information is a facet of the right to freedom of speech and expression as contained in Article 19(1)(a) of the Constitution. Right to information, thus, indisputably is a Fundamental Right.

But the right does not carry with it an unrestricted right to gather information. A reasonable restriction on the exercise of the right to know or right to information is always permissible in the interest of the security of the State. Generally, the exemptions/exceptions under the laws referred to in Article 19(2) entitled the Government to withhold information relating to the following matters :

(i) International relations,

(ii) National security (including defence) and public safety;

(iii) Investigation, detection and prevention of crime;

(iv) Internal deliberations of the Government;

(v) Information received in confidence from a source outside the Government;

(vi) Information, which if disclosed, would violate the privacy of the individual;

(vii) Information of an economic nature, (including trade secrets) which, if disclosed, would confer an unfair advantage on some persons or concern, or, subject some person or Government to an unfair disadvantage;

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81. *People's Union for Civil Liberties (PUCL) v. Union of India*, (2003) 4 SCC 399 : AIR 2003 SC 2363.

82. *People's Union for Civil Liberties (PUCL) v. Union of India*, (2003) 4 SCC 399 : AIR 2003 SC 2363.

83. *Peoples Union for Civil/Liberties v. Union of India*, (2004) 2 SCC 476 : AIR 2004 SC 1442.

(viii) Information which is subject to a claim of legal professional privilege, e.g. communication between a legal adviser and the client; between a physician and the patient;

(ix) Information about scientific discoveries.[84]

(x) Much of this has been covered by the Right to Information Act, 2006

The Supreme Court has given a broad dimension to Art. 19(1)(*a*) by laying down the proposition that freedom of speech involves not only communication, but also receipt, of information. Communication and receipt of information are the two sides of the same coin. Right to know is a basic right of the citizens of a free country and Art. 19(1)(*a*) protects this right. The right to receive information springs from the right to freedom of speech and expression enshrined in Art. 19(1)(*a*). The freedom to receive and to communicate information and ideas without interference is an important aspect of the freedom of speech and expression. Without adequate information, a person cannot form an informed opinion.

When allegations of political patronage are made, the public in general has a right to know the circumstances under which their elected representatives got such allotment.[85]

In case of a matter being part of public records, including Court records cannot be claimed.[86]

In *State of Uttar Pradesh v. Raj Narain*,[87] the Supreme Court has held that Art. 19(1)(a) not only guarantees freedom of speech and expression, it also ensures and comprehends the right of the citizens to know, the right to receive information regarding matters of public concern. The Supreme Court has underlined the significance of the right to know in a democracy in these words:

> "In a government of responsibility like ours, where all the agents of the public must be responsible for their conduct there can be but few secrets. The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearings. The right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security. To cover with veil of secrecy, the common routine business, is not in the interest of the public. Such secrecy can seldom be legitimately desired. It is generally desired for the purpose of parties and politics or personal self-interest or bureaucratic routine. The responsibility of officials to explain and to justify their acts is the chief safeguard against oppression and corruption".

In *Secretary, Ministry of Information and Broadcasting, Govt. of India v. Cricket Association of Bengal*,[88] the Supreme Court reiterated the proposition

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84. *People's Union for Civil Liberties v. Union of India*, (2004) 2 SCC 476 : AIR 2004 SC 1442.
85. *Onkar Lal Bajaj v. Union of India*, (2003) 2 SCC 673.
86. *District Registrar and Collector v. Canara Bank* (2005) 1 SCC 496 : AIR 2004 SC 1442.
87. *State of Uttar Pradesh v. Raj Narain*, AIR 1975 SC 865, 884 : (1975) 4 SCC 428.
Also see, *Reliance Petrochemicals Ltd. v. Indian Express*, AIR 1989 SC 190 : (1988) 4 SCC 592; *infra*, footnote 38 on 1430.
88. *Secretary, Ministry of Information and Broadcasting, Govt. of India v. Cricket Association of Bengal*, AIR 1995 SC 1236; *infra*, 1177-78.

that the freedom of speech and expression guaranteed by Art. 19(1)(a) includes the right to acquire information and to disseminate the same.

In *Dinesh Trivedi, M.P. and Others v. Union of India*,[89] the Supreme Court dealt with the right to freedom of information and observed "in modern constitutional democracies, it is axiomatic that citizens have a right to know about the affairs of the government which, having been elected by them, seek to formulate sound policies of governance aimed at their welfare". The Court further observed:

> "Democracy expects openness and openness is concomitant of a free society and the sunlight is a best disinfectant".

The Delhi High Court in *Association for Democratic Reforms v. Union of India*,[90] has emphasized that the right to receive information acquires great significance in the context of elections.[91]

It is now common knowledge that there is criminalisation of politics in India. It is a matter of great concern that anti-social and criminals are seeking to enter the political arena through the mechanism of elections to State Legislatures and even to Parliament. Parliament has not yet been able to enact a law to uproot the evil. In this scenario, the Delhi High Court has sought to cleanse the electoral process through the mechanism of the right to know of the people. The Delhi High Court has ruled that from every candidate for election, the Election Commission shall secure for the voters the following information:

(1) Whether the candidate is accused of any offence punishable with imprisonment.

(2) Assets possessed by the candidate, his or her spouse and dependant children.

(3) Facts denoting the candidate's competence and suitability for being a parliamentarian. This should include the candidate's educational qualification.

(4) Any other relevant information regarding candidates' competence to be a member of Parliament or State Legislature.

It needs to be emphasized that through its pronouncement, the Delhi High Court is not seeking to impose any additional qualification on a candidate over and above what the Constitution and the relevant law prescribe. What the Court is seeking to achieve is that a voter after knowing the background of the candidate will vote properly. As the Court has said, "… since the future of the country depends upon the power of the ballot, the voters must be given an opportunity for making an informed decision." Exercise of the informed option to vote in favour or against a candidate will strengthen democracy in the country and root out the evil of corruption and criminality at present extant in politics.

On appeal, the Supreme Court substantially agreed with The Delhi High Court. The Court has upheld the right of a voter to know about the antecedents of

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89. (1997) 4 SCC 306 : (1997) 1 SCJ 697.

90. *Association for Democratic Reforms v. Union of India*, AIR 2001 Del 126, 137. Also see, *infra*, 1431.

91. *Supra*, Ch. XIX.

his candidate as a part of his Fundamental Right under Art. 19(1)(a). Democracy cannot survive without free and fairly informed voters. The Court has observed:

> "... one-sided information, disinformation, mis-information and non-information will equally create an uniformed citizenary which makes democracy a faree... Freedom of speech and expression includes right to impart and receive information which includes freedom to hold opinions".[1]

The Court has ruled that candidates for the Lok Sabha or State Legislative Assemblies would have to disclose their antecedents, assets and educational qualifications to help the electorate make the right choice. The Court has said: "Votes cast by uninformed voters in favour of a candidate would be meaningless." The common man may think twice before electing law-breakers as law-makers. Reiterating that law-makers are public servants and, therefore, the people of the country have a right to know about every public act by public functionaries, including MPs and MLAs who are public functionaries.

Rejecting the argument that the voters do not have a right to know about the "private" affairs of public functionaries, the Court has observed:

> "There are widespread allegations of corruption against persons holding post and power. In such a situation, the question is not of knowing personal affairs but to have openness in democracy for attempting to cure the cancerous growth of corruption by a few rays of light".

The Court has said that the Election Commission must make it mandatory for the candidates to give details on the following counts:

- Whether the candidate is convicted or acquitted or discharged of any criminal offence in the past—whether he has been punished with imprisonment or fine?
- Prior to six months of filing of nomination, whether the candidates has been accused in any pending case, of any offence punishable with imprisonment for two years or more. Whether charge is framed or cognisance is taken by the Court of law, if so details thereof;
- The assets (immovable, movable, bank balances etc) of a candidate and of his/her spouse and that of dependants;
- Liabilities, if any, particularly whether there are any overdues of any public financial institution or government dues;
- The educational qualification of the candidate.

It will be appreciated that the judiciary has used its craftsmanship to harness the right to information to achieve an extremely laudable social objective, viz., that of preventing criminalisation of the Indian politics.

Since right to information is not absolute, a report made by Committee of Judges regarding the conduct of High Court Judges to the Chief Justice of India is wholly confidential and is only for the purpose of satisfaction of the Chief Justice of India. It is purely preliminary in nature, *ad hoc* and not final. The authority by which the Chief Justice of India can exercise this power of inquiry is moral or ethical and not in the exercise of powers under any law. Exercise of such

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1. *Union of India v. Association for Democratic Reforms*, JT 2002(4) SC 501.
Also see, Ch. II, Sec. D(e), *supra*; Ch. XIX, Sec. D(b), *supra*.

power of the Chief Justice of India based on moral authority cannot be made the subject matter of a writ petition to disclose a report made to him.[2]

(e) FREEDOM OF THE PRESS

In the U.S.A., the First Amendment, mentioned above, specifically protects a free press. The view developed by the U.S. Supreme Court is that freedom of the press includes more than merely serving as a "neutral conduit of information between the people and their elected leaders or as a neutral form of debate."

The prime purpose of the free press guarantee is regarded as creating a fourth institution outside the government as an additional check on the three official branches—executive, legislative and the judiciary.[3] It is the primary function of the press to provide comprehensive and objective information on all aspects of the country's social, economic and political life. The press serves as a powerful antidote to any abuse of power by government officials and as a means for keeping the elected officials responsible to the people whom they were elected to serve.

The democratic credentials of a state are judged today by the extent of the freedom press enjoys in that state. DOUGLAS, J., of the U.S. Supreme Court has observed that "acceptance by Government of a dissident press is a measure of the maturity of the nation."[4] Suppression of the right of the press to praise or criticise government agents and to clamour and contend for or against change violates the First Amendment by restraining one of the very agencies the framers of the U.S. Constitution selected to improve the American society and to keep it free.[5] The freedom of speech and of the press is protected not only from direct government encroachment but also from more subtle government interference. The U.S. Supreme Court has emphasized that it has power to nullify "action which encroaches on freedom of utterance under the guise of punishing libel."[6]

In India, freedom of the press is implied from the freedom of speech and expression guaranteed by Art. 19(1)(*a*). There is no specific provision ensuring freedom of the press as such. The freedom of the press is regarded as a "species of which freedom of expression is a genus."[7] Thus, being only a right flowing from the freedom of speech, the freedom of the press in India stands on no higher footing than the freedom of speech of a citizen, and the press enjoys no privilege as such distinct from the freedom of the citizen.

The Supreme Court has laid emphasis in several cases on the importance of maintaining freedom of press in a democratic society. The press seeks to advance public interest by publishing facts and opinions without which a democratic electorate cannot make responsible judgments. Articles and news are published in the press from time to time to expose the weaknesses of the government. This leads at times to the suppression of the freedom of the press by the government.

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2. *Indira Jaising v. Registrar General, Supreme Court of India*, (2003) 5 SCC 494.
3. *New York Times v. Sullivan*, 376 U.S. 254; *New York Times Company v. United States*, 403 U.S. 713 (1971) (known as the Pentagon Papers case).
4. *Terminiello v. Chicago*, 337 U.S. 1.
5. *Mills v. Alabama*, 384 U.S. 214.
6. *Beauharnais v. Illinois*, 72 S. Ct. 1070.
7. *Sakal Papers v. Union of India*, AIR 1962 SC 305 : (1962) 3 SCR 842.

It is, therefore, the primary duty of the Courts to uphold the said freedom and invalidate all laws or administrative actions which interfere with the freedom of the press contrary to the constitutional mandate.[8]

In *Printers (Mysore) Ltd. v. Assistant Commercial Tax Officer*,[9] the Supreme Court has reiterated that though freedom of the press is not expressly guaranteed as a Fundamental Right, it is implicit in the freedom of speech and expression. Freedom of the press has always been a cherished right in all democratic countries and the press has rightly been described as the fourth estate. The democratic credentials of a state are judged by the extent of freedom the press enjoys in that state.

The Supreme Court has emphasized that the freedom of the press is not so much for the benefit of the press as for the benefit of the general community because the community has a right to be supplied with information and the government owes a duty to educate the people within the limits of its resources.

Article 19(1)(*a*) applies to citizens only and so a non-citizen running a newspaper cannot seek the guarantee of this constitutional provision.

Imposition of pre-censorship on a newspaper,[10] or prohibiting it from publishing its own views or those of its correspondents on a burning topic of the day,[11] constitute an encroachment on the freedom of speech and expression. The freedom of speech and expression includes freedom to propagate ideas which is ensured by freedom of circulation of a publication, as a publication is of little value without circulation. Therefore, imposition of a ban upon entry and circulation of a journal within a State is restriction of Art. 19(1)(*a*).[12]

Olivier v. Buttigieg,[13] a Privy Council case from Malta, is interesting on the point of circulation. The constitutional provisions in India and Malta regarding freedom of speech are practically synonymous. The church authorities condemned 'Voice of Malta', a paper run by the opposition party. The Health Minister thereupon issued a circular prohibiting the entry of the newspaper in the various hospitals and branches of the Health Department. The entry of any other newspaper was not prohibited. The Privy Council decided that the Minister's order amounted to a hindrance in the way of the editor of the paper in the enjoyment of his freedom to impart ideas and information which is an essential part of the freedom of speech and expression. The Privy Council refused to accept the argument that the hindrance was slight and that it could be ignored as being *de minimis.*

(f) SAKAL PAPERS

An Act[14] and a government order[15] thereunder sought to regulate the number of pages according to the price charged, prescribed the number of supplements to

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8. *Indian Express Newspapers* (*Bombay*) *P. Ltd. v. Union of India*, AIR 1986 SC 515 at 527 : (1985) 1 SCC 641.
9. (1994) 2 SCC 434.
10. *Brij Bhushan v. Delhi*, AIR 1950 SC 129 : 1950 SCR 605.
11. *Virendra v. State of Punjab*, AIR 1957 SC 896 : 1958 SCR 308.
12. *Romesh Thappar v. State of Madras*, AIR 1950 SC 124 : 1950 SCR 594.
13. (1966) 2 All E.R. 459.
14. The Newspaper (Price and Page) Act, 1956.
15. The Daily Newspaper (Price and Page) Order, 1960.

be published, and regulate the size and area of advertisements in relation to other matter contained in a newspaper. Thus, the number of pages published by a newspaper depended upon the price charged to the readers.

The Supreme Court ruled it invalid for its purpose was to reduce circulation of some newspapers by making their price unattractively high for their readers. Reduction in the area for advertisements would reduce revenues forcing the newspapers to raise their prices which was also bound to affect circulation. This directly affected the freedom of speech and expression because inherent in this freedom is the right to publish and circulate the publication.

Art 19(1)(*a*) guarantees not only what a person circulates but also the volume of circulation. "The freedom of a newspaper to publish any number of pages or to circulate it to any number of persons is each an integral part of the freedom of speech and expression. A restraint placed upon either of them would be a direct infringement of the right of freedom of speech and expression" Being a restriction on Art. 19(1)(*a*), it was not related to any of the purposes mentioned in Art. 19(2), and so it was invalid.[16]

In the instant case, the Central Government sought to support the Act and the order by pleading that they regulated the commercial aspects of the newspapers, and not dissemination of news and views by them, and amounted to reasonable restrictions under Art. 19(6).[17] The Court agreed that newspapers have two aspects—dissemination of news and views and commercial. The two aspects are different, the former falls under Art. 19(1)(*a*) read with Art. 19(2), and the latter falls under Art. 19(1)(*g*) and can be regulated under Art. 19(6).[18] However, the state cannot seek to place restrictions on business by directly and immediately curtailing any other freedom of the citizen guaranteed by the Constitution and which is not susceptible of abridgement on the same grounds as are set out in Art. 19(6). "Therefore, the right of freedom of speech cannot be taken away with the object of placing restrictions on the business activities of a citizen."

The grounds on which the two freedoms—of speech and of trade and commerce—can be curtailed are different. The freedom of speech cannot be curtailed 'in the interests of the general public', but the freedom to carry on business can be. If a law directly affecting freedom of speech is challenged, "it is no answer that the restrictions enacted by it are justifiable under clauses (3) to (6)."

Article 19 enumerates different freedoms separately and then specifies the extent of restrictions to which each of them can be subjected and the objects for securing which this could be done.[19] A citizen is entitled to enjoy each and every one of the freedoms together and Art. 19(1) does not prefer one freedom to another. The state cannot make a law which directly restricts one freedom even for securing the better enjoyment of another freedom. "All the greater reason, therefore, for holding that the state cannot directly restrict one freedom by placing an otherwise permissible restriction on another freedom." Therefore, referring the press as a business and justifying the impugned restriction under Art. 19(6) as a proper restriction on the right to carry on the business of publishing a newspaper

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16. For discussion on Art. 19(2), see *below*.
17. *Sakal Papers v. Union of India*, AIR 1962 SC 305, at 314 : (1962) 3 SCR 842.
18. For discussion on Arts. 19(1)(*g*) read with 19(6), see, *infra*, Sec.H.
19. See, *infra*, for discussion on restrictions on the freedoms guaranteed by Arts. 19(1)(*a*) to 19(1)(*g*).

"would be wholly irrelevant for considering whether the impugned Act infringes or does not infringe the freedom guaranteed by Art. 19(1)(*a*)." This means that freedom of speech cannot be restricted for the purpose of regulating the commercial aspect of the activities of the newspapers.

As the purpose of the law in question was to effect directly the right of circulation of newspapers "which would necessarily undermine their power to influence public opinion it cannot but be regarded as a dangerous weapon which is capable of being used against democracy itself." The Court emphasized, "The freedom of speech and expression of opinion is of paramount importance under a democratic constitution which envisages changes in the composition of legislatures and Governments and must be preserved."[20]

(g) *BENNETT COLEMAN*

Bennett Coleman & Co. v. Union of India,[21] is a case of great significance in the area of freedom of speech and expression. India faces a shortage of indigenous newsprint. Therefore, newsprint has to be imported from foreign countries. Because of the shortage of foreign exchange, quantity of newsprint imported was not adequate to meet all requirements. Some restrictions, therefore, became necessary on the consumption of newsprint. Accordingly, a system of newsprint quota for newspapers was evolved. The actual consumption of newsprint by a newspaper during the year 1970-71 or 1971-72, whichever was less, was taken as the base. For dailies with a circulation up to 100,000 copies, 10 per cent increase in the basic entitlement was to be granted, but for newspapers with a larger circulation, the increase was to be only 3 per cent. Newspapers with less than 10 pages daily could raise the number of pages by 20 per cent subject to the ceiling of 10. A few more restrictions were imposed on the user of newsprint.

The dominant direction of the policy was to curtail the growth of big newspapers which could not increase the number of pages, page-area or periodicity by reducing circulation to meet their requirements even within their admissible quota of newsprint. This newsprint policy was challenged in the Supreme Court.

By a majority, the Supreme Court declared the policy unconstitutional. While the Government could evolve a policy of allotting newsprint on a fair and equitable basis, keeping in view the interests of small, medium and big newspapers, the Government could not, in the garb of regulating distribution of newsprint, control the growth and circulation of newspapers. In effect, here the newsprint policy became the newspaper control policy. While newsprint quota could be fixed on a reasonable basis, post-quota restrictions could not be imposed. The newspapers should be left free to determine their pages, circulation and new editions within their fixed quota. The policy of limiting all papers whether small or large, in English or an Indian language, to 10 pages was held to be discriminatory as it treated unequals as equals. The restrictions imposed cut at the very root of the guaranteed freedom. The Court stated:[22]

> "The effect and consequence of the impugned policy upon the newspapers is directly controlling the growth and circulation of newspapers. The direct effect

20. AIR 1962 SC at 314-15 : 91962) 3 SCR 842.
21. AIR 1973 SC 106 : (1972) 2 SCC 788.
For a comment on the case by the author, see 15 *JILI* 154.
22. *Ibid*, at 120-121.

> is the restriction upon circulation of newspapers. The direct effect is upon growth of newspapers through pages. The direct effect is that newspapers are deprived of their area of advertisement. The direct effect is that they are exposed to financial loss. The direct effect is that freedom of speech and expression is infringed."

The Court maintained that the freedom of the press embodies the right of the people to speak and express. The freedom of speech and expression is not only in the volume of circulation but also in the volume of news and views. The press has the right of free publication and their circulation without any obvious restraint on publication. In the words of the Court: "Freedom of the press is both qualitative and quantitative. Freedom lies both in circulation and in content."[23]

(h) INDIAN EXPRESS

Several newspapers filed writ petitions challenging the constitutional validity of the notifications issued by the Centre imposing from March 1, 1981, specified rates of customs duty and auxiliary duty on newsprint imported by different categories of newspapers. The levy was challenged in the Supreme Court. The main plea of the petitioners was that the impugned levy of duty on imported newsprint was excessive and had the direct effect of crippling the freedom of speech and expression and the carrying on of the business of publishing newspapers as it had led to an increase in the price of newspapers resulting in reduction of their circulation.

The Supreme Court accepted the plea of the newspapers with the following observation:[24]

> "What may, however, have to be observed in levying a tax on newspaper industry is that it should not be an overburden on newspapers which constitute the Fourth Estate of the country. Nor should it single out newspaper industry for harsh treatment. A wise administrator should realise that the imposition of a tax like the customs duty on newsprint is an imposition on knowledge and would virtually amount to a burden on a man for being literate."

The fundamental principle involved was the "people's right to know". Freedom of speech and expression should, therefore, receive a generous support from all those who believe in the participation of the people in the administration. The Court noted that with a view to checking malpractices interfering with the free flow of information, democratic constitutions the world over make provisions guaranteeing freedom of speech and expression and laying down the limits of interference therewith. It is, therefore, the primary duty of all national Courts to uphold this freedom and invalidate all laws or administrative actions which interfere with this freedom, contrary to the constitutional mandate.

The Court pointed out that the imposition of customs duty on newsprint amounts to an imposition of tax on knowledge and virtually amounts to a burden imposed on a man for being literate and for being conscious of his duty as a citizen to inform himself of the world around him. It is on account of the special interest which society has in the freedom of speech and expression that the approach of the government must be more cautious while levying taxes on matters concerning newspaper industry than while levying taxes on other matters.

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23. *Ibid*, at 130.
24. *Indian Express Newspapers (Bombay) Pvt. Ltd. v. Union of India,* AIR 1986 SC 515 at 539 : (1985) 1 SCC 641.

But instead of quashing the impugned notification itself, the Court directed the Government to consider within six months the entire question of levy of import duty or auxiliary duty on newsprint with effect from March 1, 1981. If on such reconsideration, the government decided to modify the levy of the duty, it should take necessary steps to that end. Quashing the impugned notifications would have led to the petitioners paying much higher duty and the result would have been disastrous to them.

The Court emphasized that it did not wish the Government to be deprived of the legitimate duty which the petitioners would have to pay on the imported newsprint. The Court thus rejected the plea of the petitioners that no duty could be levied on the newspaper industry. Having regard to the facilities like telephones, teleprinters, postal, transport and other communication amenities provided by the state at considerable cost to itself, the newspapers "have to bear the common fiscal burden like the others." However, such a levy was "subject to review by Courts in the light of the provisions of the Constitution."[25] The Court has to reconcile the social interest involved in the freedom of speech and expression with the public interest involved in the fiscal levies imposed by the Government specially because newsprint constitutes the body, if expression happens to be the soul.

Underlining the importance of the freedom of the press in democratic society, the Court has stated that in to-day's free world, freedom of press is the heart of social and political intercourse. The purpose of the press is to advance the public interest by publishing facts and opinions without which a democratic electorate cannot make responsible judgments. With a view to checking malpractices interfering with the free flow of information, democratic constitutions all the world over make provisions guaranteeing the freedom of speech and expression and laying down the limits of interference with it. "It is, therefore, the primary duty of all the national Courts to uphold the said freedom and invalidate all laws or administrative actions which interfere with it contrary to the constitutional mandate."[26]

(i) HINDUSTAN TIMES

Executive orders issued by State Government under Art. 162 directing deduction of an amount of 5% from the bills payable to newspapers having circulation of more than 25,000 copies for publication of government advertisements for implementation of its "Pension and Social Security Scheme for Full time Journalists" has been held to be *ultra vires*. The Court observed that advertisements in newspapers play an important role in the matter of revenue of the newspapers and have a direct nexus with its circulation by making the newspapers available to the readers at a price at which they can afford and they have no other option but to collect more funds by publishing commercial and other advertisements and as such the State cannot, in view of the equality doctrine contained in Article 14 of the Constitution, resort to the theory of "take it or leave it". Every executive action which operates to the prejudice of any person must have the sanction of

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25. *Indian Express Newspapers (Bombay) Pvt. Ltd. v. Union of India,* AIR 1986 SC 515 at 539 : (1985) 1 SCC 641.
26. *Ibid*, at 527.

law and the executive cannot interfere with the rights and liabilities of any person unless the legality thereof is supportable in any Court of law.[27]

(j) OTHER ASPECTS OF THE FREEDOM OF PRESS

The newspaper reporters can interview the prisoners condemned to death if they are willing to be interviewed. Unless, in a given case, there are weighty reasons for denying the opportunity to interview a condemned prisoner, the right of the press to interview the prisoners should not be denied. The reasons for denying the interview should be recorded in writing.[28] In the instant case, the President had declined to commute the death sentence to life imprisonment; the convicted prisoners were willing to be interviewed. Accordingly, the Court ruled that the denial of right to the petitioner press reporter to interview these condemned prisoners, in the absence of any weighty considerations, was not justified.

Again in *M. Hasan v. State of Andhra Pradesh*,[29] the Andhra Pradesh High Court has held that denial of permission to a press reporter to interview a willing condemned prisoner on a ground not falling within Art. 19(2) is not valid. "Any such denial is deprivation of a citizen's Fundamental Right of freedom of speech and expression". Convicts are not wholly denuded of their Fundamental Rights.

During the course of a trial of a suit for damages, the judge ordered that the evidence of a witness should not be published in the newspapers. The Supreme Court rejected the plea that the order infringed the Fundamental Right of a press reporter under Art. 19(1)(*a*). The Court observed that, as a judicial decision purports to decide the controversy between the parties before the Court and nothing more, a judicial verdict pronounced by a Court in relation to a matter brought before it for its decision would not affect the right of citizens under Art. 19(1).[30]

An Act[31] enacted to regulate conditions of service of employees of newspaper establishments, *e.g.*, gratuity, hours of work, leave, wages, *etc.* does not violate Art. 19(1)(*a*). An argument against its validity was that it would adversely affect the financial position of the marginally situated newspapers which might be forced to close down and thus the tendency of the Act was to curtail circulation, which violated Art. 19(1)(*a*). The Court held, on the other hand, that the press had no immunity from general laws like tax or industrial laws. The purpose of the Act was to ameliorate the conditions of the workmen in the newspaper industry. The burden on marginally viable newspapers was an extraneous consequence or incidental disadvantage and not what the legislature aimed at in enacting the measure. The burden on the industry was remote which might or might not come about, and unless the burden was the direct and inevitable consequence of the Act itself, it could not be held invalid under Art. 19(1)(*a*).[32]

The press is not immune from taxation or general labour laws or civil or criminal laws. The prohibition is upon the imposition of any restriction directly

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27. *Hindustan Times v. State of U.P.*, (2003) 1 SCC 591 : AIR 2003 SC 250.
28. *Smt. Prabha Dutt v. Union of India*, AIR 1982 SC 6 : (1982) 1 SCC 1.
29. AIR 1998 AP 35.
Also see, *State v. Charulata Joshi*, AIR 1999 SC 1379 : (1999) 4 SCC 65, on the question of interviewing an under-trial prisoner.
30. *Naresh Mirajkar v. State of Maharashtra*, AIR 1967 SC 1 : 1966 (3) SCR 744.
31. The Working Journalists (Conditions of Service) and Miscellaneous Provisions Act, 1955.
32. *Express Newspapers v. Union of India*, AIR 1958 SC 578 : 1959 SCR 12. Also see, *Indian Express Newspapers (P.) Ltd. v. Union of India*, AIR 1995 SC 965.

relatable to the right to publish, to the right to disseminate information and to the circulation of newspapers.[33]

It is not inconsistent with Art. 19(1)(*a*) for the Central Government to appoint a committee to enquire into the economics of the newspaper industry.[34]

A legal provision requiring printing of the name of the printer, place of printing, name of the publisher and the place of publication on every paper or book does not infringe Art. 19(1)(*a*) for the intention of the provision is to inform the public as to who the printer or publisher is.[35]

Under S. 99A, Cr. P.C., a State Government can forfeit any book or newspaper if it appears it to contain any seditious matter, or matter intended to promote feelings of enmity or hatred between different classes of citizens, or matter intended to outrage the religious feelings of a class of citizens. The aggrieved party can move the High Court against the order of forefeiture. The provision has been held valid under Art. 19(2) as having been made in the interest of public order, decency or morality.[36]

Reliance Petrochemicals undertook a mega issue of debentures worth more than Rs. 500 crores. Suits and writ petitions were filed in various Courts seeking injunction against the said public issue. On an application by Reliance, the Supreme Court transferred all these cases to itself for decision, and also made an *ex parte* direction that the issue of debentures should go on "without let or hindrance". The Indian Express published an article questioning the validity of the consent given by the Controller of Capital Issues to the issue in question. Reliance secured from the Supreme Court an order of injunction prohibiting the newspaper from publishing anything questioning the legality or validity of the issue of debentures—a matter which at the time was *sub judice*.

The debentures were over-subscribed though not allotted yet when the concerned newspaper sought vacation of the Court's order against it. Reliance opposed vacation of the injunction at that stage on the ground that before allotment was made, the subscribers could withdraw their applications which might adversely affect the issue and so they pleaded that "the danger still persists". The newspaper argued that pre-stoppage of newspaper publication on matters of public importance was contrary to the freedom of the press enshrined in the Constitution. The Supreme Court adopted the test laid down in *Anita Whitney v. California*[37] that there must be reasonable ground to believe that the danger apprehended was "real and imminent". BRANDEIS, J., has said in *Whitney* that the fact that speech was likely to result in some violence or in destruction of property was not enough to justify its suppression. There must be probability of serious injury to the state.

In *Reliance Petrochemicals Ltd. v. Indian Express*,[38] the Court has underscored the right of the people to know. The Court has pointed out that in the instant case it had to balance two interests of great public importance-freedom of speech and administration of justice. "A balance, in our opinion, has to be struck

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33. *Printers (Mysore) Ltd. v. Asst. Commercial Tax Officer*, (1994) 2 SCC 434.
34. *The Statesman v. Fact Finding Committee*, AIR 1975 Cal. 14.
35. *In re G. Alavander*, AIR 1957 Mad 427.
36. *Veerabrahman v. State*, AIR 1969 AP 572. For discussion on Art. 19(2), see, *infra.*
37. (1926) 71 Law Ed. 1095.
38. AIR 1989 SC 190 : (1988) 4 SCC 592.

between the requirements of free press and free trial..." The Court has observed in this regard:[39]

> "We must see whether there is a present and imminent danger for the continuance of the injunction ..... It is necessary to reiterate that the continuance of this injunction would amount to interference with the freedom of press in the form of preventive injunction and it must, therefore, be based on reasonable grounds for the sole purpose of keeping the administration of justice unimpaired... We must remember that the people at large have a right to know in order to be able to take part in a participatory development in the industrial life and democracy. Right to know is a basic right which citizens of a free country aspire in the broaden horizon of the right to live in this age on our land under Art. 21 of the Constitution. That right has reached new dimensions and urgency. That right puts greater responsibility upon those who take upon the responsibility to inform."[40]

The Court thus ordered that there was no longer any need to continue the injunction. "Preventive remedy in the form of an injunction is no longer necessary." Of course, the Court has pointed out that if any article written in the newspaper comes in the way of administration of justice by the Court in the instant case, there would always be available the concept of contempt of Court to take care of such an eventuality.

In *Dainik Sambad v. Tripura*,[41] Gauhati High Court has considered another matter of significance to the freedom of press. Does discriminatory allotment by Government of its advertisements among the various newspapers in the same category impair the freedom of press and the right to equality? The State had argued in the instant case that it was not bound to give advertisements to the petitioner newspaper equally with other newspapers as it had raised communal frenzy through its editorials, refused to publish Government contradictions and had always been critical of the Government.

Rejecting the argument, the High Court pointed out that the fundamental principle involved here was the people's right to know. The Court laid emphasis upon the importance of freedom of press in strengthening an individual's participation in the decision-making process by the Government as the Supreme Court has emphasized in *Indian Express*.[42] In sum, "the fundamental principle involved here is the people's right to know."[43] Freedom of press should receive a generous support from all those who believe in the participation of the people in the administration. Thus, the society has an interest in the freedom of press. In the instant case, the High Court directed the State to distribute its advertisements equally among all newspapers including the petitioner. The Court said: "Such power should not be used on the newspaper establishment so as to make the establishment subservient to the Government."

To the same effect is *Sushil Choudhury v. Tripura*,[44] where the High Court has stated that discriminatory allocation of government advertisements among the

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39. *Ibid*, at 202-3.
40. For discussion on Art. 21, see, *infra*, Ch. XXVI.
For the right to be informed, see, *supra*, 1155.
41. AIR 1989 Gau 30.
42. *Indian Express v. Union of India*, AIR 1986 SC 515 : (1985) 1 SCC 641; *supra.*
43. On the "right to know" see, *supra*, 1066.
44. AIR 1998 Gau 28.

newspapers adversely affects freedom of speech and expression as it may result in reduction of circulation of these newspapers which get less advertisement. A large number of newspaper readers are interested in government advertisements. Such readers may prefer to subscribe to those newspapers which have government advertisements. If a newspaper gains in circulation, it comes to have a great influence on the public mind, and this strikes at the very foundation of the freedom of speech and expression.

In *Rajgopal*[45], the question was how far the press could criticise and comment on the acts and conduct of public officials. The Supreme Court felt that freedom of the press extends to engaging in uninhibited debate about the involvement of public figures in public issues and events. But, as regards their private life, a proper balancing of freedom of the press as well as the right of privacy and defamation has to be done in terms of the democratic way of life laid down in the Constitution.

The Supreme Court has ruled that neither the State nor its officers have any authority in law to impose any prior restraint on publication of any material in the press on the ground that it is defamatory of the State or its officers. Their remedy arises only after publication by way of suit for damages for defamation.

(k) ADVERTISEMENTS

How far are advertisements protected under Art. 19(1)(*a*)? The Supreme Court has considered this question in *Hamdard Dawakhana v. Union of India*.[46]

Parliament enacted an Act with a view to control advertisements of drugs in certain cases. The Act was challenged on the ground that restriction on advertisements was a direct abridgment of the freedom of expression. The Court ruled that the predominant object of the Act was not merely to curb advertisements offending against decency or morality, but also to prevent self-medication by prohibiting instruments which might be used to advocate or spread the evil. The Court stated that an advertisement, no doubt, is a form of speech, but its true character is to be determined by the object which it seeks to promote. It may amount to an expression of ideas and propagation of human thought and, thus, would fall within the scope of Art. 19(1)(*a*). But a commercial advertisement having an element of trade and commerce and promoting business has an element of trade and commerce, and it no longer falls within the concept of freedom of speech for its object is not to propagate any ideas—social, political or economic or to further literature or human thought.

An advertisement promoting drugs and commodities, the sale of which is not in public interest, could not be regarded as propagating any idea and, as such, could not claim the protection of Art. 19(1)(*a*).

An advertisement meant to further business falls within the concept of trade or commerce. A commercial advertisement advertising an individual's business cannot be regarded as a part of freedom of speech.

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45. *R. Rajagopal v. State of Tamil Nadu*, AIR 1995 SC 264 : (1994) 6 SCC 632.
Also see, *infra*, Ch. XXVI, Sec. J(i), under 'Right to Privacy', for further discussion on this case.

46. AIR 1960 SC 554 : (1960) 2 SCR 671.

But the Supreme Court has modified its view expressed in *Hamdard Dawakhana* somewhat in later cases. In *Sakal*[47] and *Bennett Coleman*,[48] the Supreme Court has dilated upon the great significance of advertisement revenue for the economy of newspapers. In *Indian Express Newspapers*,[49] differing from *Hamdard Dawakhana* ruling, the Court has observed: "We are of the view that all commercial advertisements cannot be denied the protection of Art. 19(1)(*a*) of the Constitution merely because they are issued by business men". Advertising pays large portion of the costs of supplying the public with newspapers. "For a democratic press the advertising "subsidy" is crucial". With the curtailment in advertisements, the price of newspaper will be forced up and this will adversely affect its circulation and this will be a direct interference with the right of freedom of speech and expression guaranteed under Art. 19(1)(*a*).

Reading *Hamdard Dawakhana* and *Indian Express* together, the Supreme Court has concluded in *Tata Press*[50] that "commercial speech" cannot be denied the protection of Art. 19(1)(*a*) merely because the same is issued by businessmen. "Commercial speech" is a part of freedom of speech guaranteed under Art. 19(1)(*a*). The public at large has a right to receive the "commercial speech". Art 19(1)(*a*) protects the rights of an individual "to listen, read and receive" the "commercial speech". The protection of Art 19(1)(*a*) is available both to the speaker as well as the recipient of the speech.

Advertising is a 'commercial speech' which has two facets:

(1) Advertising which is no more than a commercial transaction, nonetheless, disseminates information regarding the product advertised. Public at large stands benefited by the information made available through advertisement. In a democratic economy, free flow of commercial information is indispensable. Therefore, any curtailment of advertisement would affect the Fundamental Right under Art 19(1)(*a*) on the aspects of propagation, publication and circulation.

(2) The public at large has a right to receive commercial information. Art 19(1)(*a*) protects the right of an individual to listen, read and receive the said speech. The protection of Art. 19(1)(*a*) is available to the speaker as well as the recipient of the speech.

In *Tata*, the Supreme Court accepted as valid the printing of yellow pages by the Tata Press. Printing of a directory of telephone subscribers is to be done exclusively by the Telephone Department as a part of its service to the telephone subscribers. But yellow pages only contain commercial advertisements and Art. 19(1)(*a*) guarantee freedom to publish the same.

Reference may be made here to a few foreign cases having a bearing on the freedom of the press.

In *New York Times v. Sullivan*,[51] the facts were as follows: In 1960, the New York times carried a full page paid advertisement sponsored by the 'Committee to Defend Martin Luther King and the Struggle for Freedom in the South', which

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47. *Sakal Papers, supra*.
48. *Bennett Coleman, supra*.
49. AIR 1986 SC 515 : (1985) 1 SCC 641.
50. *Tata Press Ltd. v. Mahanagar Telephone Nigam Ltd.*, AIR 1995 SC 2438, 2446 : (1995) 5 SCC 139.
51. (1964) 376 US 254.

asserted or implied that law enforcement officials in Montgomery, Alabama, had improperly arrested and harassed Dr. King and other civil rights demonstrators on various occasions. The respondent, who was the elected Police Commissioner of Montgomery, brought an action for libel against the Times and several of the individual signatories to the advertisement. It was found that some of the assertions contained in the advertisement were inaccurate.

The State Court awarded damages against the newspaper, but the U.S. Supreme Court reversed. BRENNAN, J., stated:

> "Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth—whether administered by judges, juries, or administrative officials—and especially one that puts the burden of proving the truth on the speaker…… *A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to….. "self-censorship"*. Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred…. Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in Court or fear of the expenses of having to do so. They tend to make only statements which "steer far wider of the unlawful zone."…. The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments.
>
> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard to whether it was false or not…"

In *Derbyshire County Council v. Times Newspapers Ltd.*,[52] the House of Lords ruled that a local authority could not sue the press for libel. The Lords held that there is no public interest in allowing government institutions to sue for liable; it is "contrary to the public interest because to admit such actions would place an undesirable fetter on freedom of speech".

In *Leonard Hector v. Att. Gen. of Antiqua and Berbuda*,[53] the Privy Council has observed:

> "In a free democratic society it is almost too obvious to need stating that those who hold office in government and who are responsible for public administration must always be open to criticism. Any attempt to stifle or fetter such criticism amounts to political censorship of the most insidious and objectionable kind. At the same time it is no less obvious that the very purpose of criticism levelled at those who have the conduct of public affairs by their political opponents is to undermine public confidence in their stewardship and to persuade the electorate that the opponents would make a better job of it than those presently holding office. In the light of these considerations their Lordships cannot help viewing a statutory provision which criminalises statements likely to undermine public confidence in the conduct of public affairs with the utmost suspicion."

The question is how far the principles stated in the above cases are applicable in India. The Supreme Court has answered this question as follows:[54]

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52. (1993) 2 WLR 449.
53. (1990) 2 AC 312.

> "So far as the freedom of press is concerned, it flows from the freedom of speech and expression guaranteed by Article 19(1)(a). But the said right is subject to reasonable restrictions placed thereon by an existing law or a law made after the commencement of the Constitution in the interests of or in relation to the several matters set out therein. Decency and defamation are two of the grounds mentioned in clause (2). Law of Torts providing for damages for invasion of the right to privacy and defamation and sections 499/500, I.P.C. are the existing laws saved under clause (2). But what is called for today—in the present times—is a proper balancing of the freedom of press and said laws consistent with the democratic way of life ordained by the Constitution. Over the last few decades, press and electronic media have emerged as major factors in our nation's life. They are still expanding—and in the process becoming more inquisitive. Our system of government demands—as do the systems of Government of the United States of America and United Kingdom—constant vigilance over exercise of governmental power by the press and the media among others. It is essential for a good Government. At the same time, we must remember that our society may not share the degree of public awareness obtaining in United Kingdom or United States. The sweep of the First Amendment to the United States Constitution and the freedom of speech and expression under our Constitution is not identical though similar in their major premises. All this may call for some modification of the principles emerging from the English and United States decisions in their application to our legal system."

One principle which the Court did lay down is that the State or its officers cannot impose any prior restraint or prohibition on any publication because they apprehend that they may be defamed. Their remedy, if any, would arise only after the publication.[55]

(l) PICKETING, DEMONSTRATION AND STRIKE

Within certain limits, picketing or demonstration may be regarded as the manifestation of one's freedom of speech and expression. "Peaceful picketing is free speech. Non violent acts are like words." Picketing or demonstration is a non-violent act of persuasion.[56]

In *V. Vengan*,[57] picketing a North-Indian shop and dissuading intending customers from purchasing in that shop was held to be not warranted by Art. 19(1)(*a*). Art. 15(1) prohibits discrimination on the ground of place of birth,[58] and if the State Legislature were to pass an Act forbidding South Indians to purchase from North Indian shops, such an Act would be unconstitutional. Therefore, the picketing and the propaganda in question contained an unconstitutional germ in support of which the Constitution could not be invoked. The conduct of the petitioner, if carried to its extreme conclusion, would undermine the security of the State by creating disaffection and ultimately strife and hatred between South Indians and North Indians residing and doing business in the South.

As regards government servants, the judicial view appears to be that while banning demonstrations by them is not valid, a strike by them can be validly pro-

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54. *R. Rajagopal v. State of Tamil Nadu*, AIR 1995 SC 264 : (1994) 6 SCC 632.
55. Also see, *infra*, Ch. XXVI, Sec. J(i) under 'Right to Privacy'.
56. *Thornhill v. Alabama*, 310 US 88 (1940).
Also, HARROP A FREEMAN, Needed a Jurisprudential Theory for Liberal Democracy, 2 *JILI*, 49.
57. (1951) 2 M.L.J. 241.
Also, *Damodar v. State of Bombay*, AIR 1951 Bom. 459.
58. *Supra*, Ch. XXII.

hibited. A rule made by the Bihar Government prohibited government servants from participating in any demonstration or strike in connection with any matter pertaining to their conditions of service. The rule was challenged. The Supreme Court said that a government servant does not, by accepting government service, lose his Fundamental Rights under Art. 19. A demonstration, held the Court, is a visible manifestation of the feelings or sentiments of an individual or a group. It is thus a communication of one's ideas to others and is in effect a form of speech or expression, because speech need not be vocal since signs made by a dumb person would also be a form of speech and expression. Accordingly, certain forms of demonstration would fall under Art. 19(1)(*a*).

In the instant case, the government justified the rule as being in the interests of 'public order'. Nevertheless, the Court declared the rule bad as it banned every type of demonstration howsoever innocent, and did not confine itself to those forms of demonstrations only which might lead to a breach of public tranquillity, or would fall under the other limiting criteria specified in Art. 19(2). However, the rule was not held bad in so far as it prohibited a strike, for there was no Fundamental Right to resort to strike.[59]

Again, in *O.K. Ghosh v. E.X. Joseph*,[60] a disciplinary rule prohibited government servants from participating in any demonstration. The Court held the rule to be invalid. The Court emphasized that the rule could be valid if it imposed a reasonable restriction in the interests of public order. The Court did however emphasize that government servants are subject to the rules of discipline which are intended to maintain discipline among them and to lead to an efficient discharge of their duties.

The above-stated principle has been reiterated by the Court in other cases as well. S. 3 of the Essential Services Maintenance Ordinance, 1960, authorised the Central Government to prohibit any strike in any essential service in the public interest. Going on a prohibited strike became illegal and punishable with imprisonment. The provision was declared valid as it did not curtail freedom of speech and there was no Fundamental Right to go on a strike.[61]

(m) BANDH

In a landmark decision in *Bharat Kumar*,[62] a full Bench of the Kerala High Court has declared "Bandhs" organised by political parties from time to time as unconstitutional being violative of the Fundamental Rights of the people. The Court refused to accept it as an exercise of the freedom of speech and expression by the concerned party calling for the *bandh*. When a *bandh* is called, people are expected not to travel, not to carry on their trade, not to attend to their work. A threat is held out either expressly or impliedly that any attempt to go against the call for bandh may result in physical injury.

A call for *bandh* is clearly different from a call for general strike or *hartal.* There is destruction of public property during a *bandh*. Accordingly, the High Court has directed that a call for a *bandh* by any association, organisation or political party and enforcing of that call by it, is illegal and unconstitutional. The

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59. *Kameshwar Pd. v. State of Bihar*, AIR 1962 SC 1166 : 1962 Supp (3) SCR 369.
60. AIR 1963 SC 812 : 1963 Supp (1) SCR 789; also see, *infra.*
61. *Radhey Shyam v. P.M.G., Nagpur*, AIR 1965 SC 311 : (1964) 7 SCR 403.
62. *Bharat Kumar K. Palicha v. State of Kerala*, AIR 1997 Ker 291.

High Court has also directed the State and all its law enforcement agencies to do all that may be necessary to give effect to the Court order.

The Supreme Court has dismissed an appeal against the above-mentioned High Court decision. The Supreme Court refused to interfere with the High Court decision. The Court has accepted the distinction drawn by the High Court between a 'bandh' and a strike. A *bandh* interferes with the exercise of the Fundamental Freedoms of other citizens, in addition to causing national loss in many ways. The Fundamental Rights of the people as a whole cannot be regarded as subservient to a claim of Fundamental Right of an individual, or of a section of the people.[63]

The Supreme Court has now declared the reason why bandh should be banned. In the name of hartal or bandh or strike no person has any right to cause inconvenience to any other person or to cause in any manner a threat or apprehension of risk to life, liberty and property of any citizen or destruction of life and property, and the least to any government or public property. The Supreme Court pointed out that it was high time that the authorities concerned took serious note of this requirement while dealing with those who destroy public property in the name of strike, hartal or bandh. Any soft or lenient approach for such offenders would be an affront to the rule of law and challenge to public order and peace.[64]

In *Ranchi Bar Association v. State of Bihar*,[65] following the Apex Court decision, mentioned above, the Patna High Court has ruled that no party has a right to organise a *bandh* causing/compelling the people by force to stop them from exercising their lawful activities. The government is duty bound to prevent unlawful activities like *bandh* which invades people's life, liberty and property. The government is bound to pay compensation to those who suffer loss of life, liberty or property as a result of a *bandh* because of the failure of the government to discharge its public duty to protect them.

In appropriate cases, even the organisers of the *bandh* may be directed to pay compensation. Any organization interfering with the functioning of the Courts commits contempt of Court and can be punished accordingly. A peaceful strike which does not interfere with the rights and properties of the people is however not illegal. In the instant case, the High Court did award compensation against the State Government for loss of property and death of a person during the *bandh* for failure of the authorities to take appropriate action and provide adequate protection to the people's life, liberty and property. The Government failed to discharge its public duty to protect the people during the *bandh*.

(n) RIGHT TO TRAVEL ABROAD

An interesting question considered in *Maneka* was whether the right to travel abroad could be regarded as a part of Arts. 19(1)(*a*) and (*g*).[66] The right to freedom of speech and expression guaranteed by Art. 19(1)(*a*) is exerciseable not only in India but outside as well. According to BHAGWATI, J., state action taken in India may impair or restrict the exercise of this right elsewhere. For example, a journalist may be prevented from sending his dispatches abroad. The same applies by parity to Art. 19(1)(*g*). But the Court refused to accept the argument, that the right to travel abroad was an 'essential part' of the freedoms guaranteed by

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63. *Communist Party of India v. Bharat Kumar*, AIR 1998 SC 184 : (1998) 1 SCC 201.
64. *James Martin v. State of Kerala*, (2004) 2 SCC 203 : (2003) 10 JT 371.
65. AIR 1999 Pat 169.
66. *Maneka Gandhi v. Union of India, supra.*

Arts. 19(1)(*a*) and (*g*) so that whenever the former was violated, the latter would also be impaired.

The right to travel abroad is not specifically named as a Fundamental Right in Art. 19(1). But a right not named expressly may still be covered by some clause in Art. 19, if it "is an integral part of a named Fundamental Right or partakes of the same basic nature and character as the named Fundamental Right so that the exercise of such right is in reality and substance nothing but an instance of the exercise of the named Fundamental Right".[67] Judged by this test, the right to travel abroad is not an integral part of the rights under Art. 19(1)(*a*) or (*g*), but only a concomitant or peripheral right to these rights. S. 10(3)(*c*) of the Passport Act which authorises imposition of restrictions on the right to go abroad by impounding of passport, could not, therefore, be held void under Art. 19(1)(*a*) or (g).

But this does not mean that an order made under S. 10(3)(*c*), Passport Act, may not violate Art. 19(1)(*a*) or (*g*) under any circumstances. There may be situations when denial of the right to travel abroad may have a direct and inevitable effect to abridge or take away the freedom of speech and expression, or the right to carry on a profession or business. In the words of BHAGWATI, J.:[68]

> "...There may be many such cases where the restriction imposed is apparently only on the right to go abroad but the direct and inevitable consequence is to interfere with the freedom of speech and expression or the right to carry on a profession. A musician may want to go abroad to sing, a dancer to dance, a visiting professor to teach and a scholar to participate in a conference or seminar. If in such a case his passport is denied or impounded, it would directly interfere with his freedom of speech and expression... Examples can be multiplied, but the point of the matter is that though the right to go abroad is not a Fundamental Right, the denial of the right to go abroad may, in truth and in effect, restrict freedom of speech and expression or freedom to carry on a profession..."

When a right under Art. 19(1)(*a*) or (*g*) is infringed, impounding of the passport would have to be justified under Art. 19(2) or (6). In that case, the expression 'in the interests of the general public' in S. 10(3)(*c*) will have to be read down to mean 'public order, decency or morality' [words used in Art. 19(2)],[69] if there is a violation of the right under Art. 19(1)(*a*). Then impounding of a passport for an indefinite length of time would amount to an unreasonable restriction under Arts. 19(2) and (6). BHAGWATI, J., however, cautioned the Passport Authority that the power to refuse or impound a passport should not be exercised lightly as it is a basic human right recognised in Art. 13 of the Universal Declaration of Human Rights; it is a valuable right, a part of personal liberty with which the authority seeks to interfere.

(o) TELEPHONE TAPPING

The freedom of speech and expression means the right to express one's convictions and opinions freely by word of mouth, writing, printing, picture, or in any other manner.

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67. For discussion on the doctrine of Implied Fundamental Rights, see, *supra*, Sec. A. Also see, *infra*, Ch. XXVI, Sec. J.
68. AIR 1978 SC at 644-5.
69. See, *infra*, Sec. D.

When a person is talking on telephone, he is exercising his right to freedom of speech and expression. Telephone tapping, accordingly, infracts Art. 19(1)(*a*) unless it falls within the grounds of restrictions falling under Art. 19(2).[70]

The Court also treated it as an aspect of privacy and invoked Art. 21 against telephone tapping.[71]

(p) SOME MISCELLANEOUS SITUATIONS

When a professor was suspended by the university concerned, and later on an enquiry was set up against him on the allegation that he had made derogatory remarks against the Prime Minister, it was held that Art. 19(1)(*a*) could not protect him against such an inquiry.[72]

Carrying of letters written by others against payment does not fall within Art. 19(1)(*a*).[73]

A condition imposed on cinema exhibitors to show about 2000 ft. of educational films, or films dealing with news and current affairs, or documentary films, has been held to be not inconsistent with Art. 19(1)(*a*) . This is a means of communication and propagation of scientific ideas and the like.[74]

An argument raised against the impugned provision was that just as a restraint on free speech is a violation of Art. 19(1)(*a*) [except as permitted under Art. 19(2)] compelled speech, often known as a "must carry" provision in a statute, is equally an infringement of the right to free speech, except to the extent permitted under Art. 19(2).

The Court countered this argument by stating that whether compelled speech will or will not amount to a violation of the freedom of speech and expression, "will depend on the nature of a 'must carry' provision." If it furthers informed decision-making which is the essence of the right to free speech and expression, it will not amount to any violation of the Fundamental Freedom of speech and expression. If, however, such a provision compels a person to carry out propaganda, or project a partisan or distorted point of view, contrary to his wish, it may amount to a restraint on his freedom of speech and expression. Justifying the provision in question, the Court has observed:

> "The social context of any such legislation cannot be ignored. When a substantially significant population body is illiterate or does not have easy access to ideas or information, it is important that all available means of communication, particularly audio visual communication, are utilised not just for entertainment but also for education, information, propagation of scientific ideas and the like".

The provision in question does not require the cinema exhibitor to show a propaganda film, or a film conveying the views which he objects to.

Levy of an entertainment tax on cable operators has been held to be valid. Their activities have two aspects—business and speech. There is no reason why

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70. *People's Union for Civil Liberties v. Union of India,* AIR 1997 SC 568 at 574-575 : (1997) 1 SCC 301; for discussion on Art. 19(2), see, *infra,* Sec. D.
71. See, *infra*, under Art. 21, Ch. XXVI, Sec. J(i).
72. *A.N. Nigam v. University of Jodhpur*, AIR 1982 Raj 248.
73. *Inland Commercial (TPT) Service v. Union of India*, AIR 1982 Del 393.
74. *Union of India v. The Motion Picture Association,* AIR 1999 SC 2334 : (1999) 6 SCC 150.

the business part cannot be taxed when a similar tax is levied on cinema shows. "Where the freedom of speech gets intertwined with business, it undergoes a fundamental change and its exercise has to be balanced against social interests….while there can be no tax on the right to exercise freedom of expression, tax is leviable on profession, occupation, trade, business and industry".[75]

(q) LIFE INSURANCE CORPORATION

The Consumer Education and Research Centre published a study entitled "A Fraud On Policyholders". It was a scientific research made into the working of the Life Insurance Corporation. This study tried to portray and establish the discriminatory practices which the Corporation was alleged to have adopted and which adversely affected a large number of policy holders, their investment policies, their expense ratio, availability of term insurance and other cognate matters.

The Director of the Corporation wrote a reply to it. His reply was published in The Hindu. In that reply, he tried to challenge the conclusions recorded in the study prepared by the Centre. The Director's reply was also published by the Corporation in '*Yogakshema*', a journal run by the Corporation. On a scientific and studied basis, the Executive Trustee of the Centre (petitioner) rejoined the Director and replied to his reply. Since *Yogakshema* had published the Director's reply, the petitioner requested the Corporation to publish his reply also in *Yogakshema*. The Corporation refused to do so.

In these circumstances, the Gujarat High Court ruled in the case noted below[76] that the action of the Corporation was violative of the petitioner's Fundamental Rights under Art. 19(1)(*a*) and Art. 14. The Corporation is a public body and belongs to no individual. Therefore, the considerations which govern the case of an individual do not apply to a statutory public body. Every citizen has a right to demand of the State to make available to him a particular channel or channels for publishing his studied criticism of the concerned branch of public administration. To make such an opportunity available to an admirer and to deny it to a critic is to deny to him his freedom of speech and expression and to throttle democracy. In a democratic polity, though people may not directly participate in governmental working or public administration, they have a right to demand of those who are in charge of their destiny for the time being how they deal with the problems which they are facing. A Corporation which carries on the business of life insurance in the shape of a statutory monopoly is answerable to the people of India with whose funds it deals and to whose welfare it claims to cater. "The Corporation is a public body and belongs to no individual."

Article 19(1)(*a*) embraces within its sweep both acts of omission and commission which curtail or abridge the freedom of speech and expression, subject to the reasonable restrictions contemplated by Art. 19(2). The Corporation is obligated to publish a studied criticism of its activities and a citizen has a right to express through the medium of such Corporation his studied criticisms of its activities. By spending public funds on publishing only what is appreciative of its activities and by refusing to publish a critical study of its activities, the Corporation will only assume the guardianship of public mind. This cannot be allowed because of

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75. *A. Suresh v. State of Tamil Nadu*, AIR 1997 SC 1889 : (1997) 1 SCC 319.
Also, *Hukum Singh v. State of Uttar Pradesh*, AIR 1998 All 120.
76. *Prof. Manubhai D. Shah v. Life Insurance Coprn.*, AIR 1981 Guj 15.

Art. 19(1)(*a*). If the official Gazette publishes a studied criticism of someone's study without publishing the original article or study, it is under an obligation to publish a studied reply to such a criticism which is the study of a problem. Assuming that All India Radio or Doordarshan publishes something which is a reply to someone's study or is a criticism of someone's studied article by naming that person, it is under an obligation to publish a studied reply to it.

The Court rejected the claim made by the Corporation to the editorial privilege and absolute discretion to publish or not to publish an article as being inconsistent with the Fundamental Rights guaranteed by the Constitution. The Court also rejected as untenable the contention that '*Yogakshema*' was a house magazine and not a mass media. Merely because it is interested in a particular subject-matter and happens to find its circulation amongst officers, employees and agents of the Corporation, it does not attain the character of a house magazine. Under the pretext and guise of publishing a house magazine, the Corporation cannot violate the Fundamental Rights of the petitioner. A house magazine cannot claim any privilege against the Fundamental Rights of a citizen.

The Court also held it against Art. 14 to make available public funds to an admirer and not to a sober critic. Both have an equal place in the social order and both must be treated equally and alike. Thus, refusal to the petitioner to make '*Yogakshema*' available for voicing his studied criticism violated Art. 14.

The matter then came before Supreme Court in *Life Insurance Corporation of India v. Manubhai D. Shah*.[77] The Supreme Court has stated in this case that a liberal interpretation should be given to the right of freedom of speech and expression guaranteed by Art. 19(1)(*a*). The Court has characterised this right as a "basic human right". This right includes "the right to propagate one's views through the print media or through any other communication channel, *e.g.* the radio and television". Thus, every citizen "has the right to air his or her views through the print and/or the electronic media subject, of course, to permissible restrictions imposed under Art. 19(2) of the Constitution".[78]

In the instant case, the Supreme Court has taken cognisance of two situations. One, the respondent circulated a research article suggesting that the LIC was charging unduly high premiums from those who took out life insurance policies. The LIC published a counter reply to this paper in a daily newspaper and also in its own in-house magazine *Yogakshema*. The respondent then prepared a rejoinder and got it printed in the same daily newspaper. He also wanted the LIC to print his rejoinder in *Yogakshema*, but the LIC refused to do so. The Supreme Court was called upon to decide the question whether the LIC was right in refusing to publish the rejoinder by the respondent in *Yogakshema*. Answering in the negative, the Court pointed out that the attitude of the LIC was both "unfair and unreasonable"—unfair because fairness demanded that both view points were placed before the readers and unreasonable because there was no justification for refusing publication. By refusing to print and publish the rejoinder the LIC had violated the respondent's Fundamental Right.

Every free citizen has an undoubted right to lay what sentiments he pleases before the public. Freedom of speech and expression is subject only to the restric-

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77. AIR 1993 SC 171 : (1992) 3 SCC 637.
78. On Art. 19(2), see, *infra.*

tions imposable under Art. 19(2). Efforts by intolerant authorities to curb or suffocate this freedom must be firmly repelled, more so when public authorities betray autocratic, tendencies.

LIC is a 'state' within the meaning of Art. 12.[79] The LIC Act enacted by Parliament requires LIC to function in the best interest of the community. The community is, therefore, entitled to know whether or not, this requirement of the statute is being satisfied in the functioning of the LIC.

(r) TELEVISION

The other situation dealt with by the Supreme Court in the instant case arose out of the *Doordarshan's* refusal to telecast a documentary film on Bhopal gas tragedy prepared by the petitioner. The film in question had won the golden lotus award as the best non-feature film in 1987 and yet the Doordarshan refused to telecast the film on the ground that "the contents being outdated do not have relevance now for the telecast." The Supreme Court has ruled that a film maker has a Fundamental Right under Art. 19(1)(*a*) to exhibit his film and, therefore, the party which claims that it is entitled to refuse enforcement of this right by virtue of law made under Art. 19(2), is under an onus to show that the film does not conform to the requirements of the law.

The Court has emphasized that the words "freedom of speech and expression in Art. 19(1)(*a*) must be broadly interpreted so as to include the freedom to circulate one's views by words of mouth or in writing or through audio-visual instrumentalities, like radio and television, subject, of course, to permissible restrictions imposed under Art. 19(2). "The print media, the radio and the tiny screen play the role of public educators, so vital to the growth of a healthy democracy". Subject to reasonable restrictions placed under Art. 19(2), a citizen has a right to publish, circulate and disseminate his views and any attempt to thwart or deny the same would offend Art. 19(1)(*a*).

Ultimately, the Court has rejected *Doordarshan's* reasons for not showing the film on the Television. The Court has stated concerning the film: "To bring out the inadequacy of the State effort or the indifference of the officers, etc., cannot amount to an attack on any political party if the criticism is genuine and objective and made in good faith." Doordarshan being a state-controlled agency funded by public funds could not have denied access to screen except on valid grounds.

In *Ramesh*,[80] a writ petition was filed to restrain the screening of serial *Tamas* on the television on the ground that it violated Arts. 21 and 25 of the Constitution as well as s. 58 of the Cinematograph Act, 1952. The Court rejected the petition saying that the serial viewed in its entirety "is capable of creating a lasting impression of the message of peace and co-existence..." The Court quoted copiously from its earlier decision in *Abbas*.[81]

Odyssey,[82] another case involving the *Doordarshan*, arose on appeal against a stay order issued by the Bombay High Court restraining telecasting of certain episodes of the serial *Honi Anhonee*. The question before the Supreme Court was

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79. See, *supra*, Ch. XX, Sec. D.
80. *Ramesh v. Union of India,* AIR 1988 SC 775 : (1988) 1 SCC 668.
81. *Khwaja Ahmad Abbas v. Union of India, supra; infra.*
82. *Odyssey Communications Pvt. Ltd. v. Lok Vidyayan Sanghatana,* AIR 1988 SC 1642 : (1988) 3 SCC 410.

whether these episodes should be prohibited from being telecast. Refusing to do so, the Court has pointed out that the right of a citizen to exhibit films on the *Doordarshan,* subject to the terms and conditions imposed by *Doordarshan,* is a part of the Fundamental Right of freedom of expression guaranteed under Art. 19(1)(*a*) which can be curtailed only under circumstances set out in Art. 19(2). A citizen's right to exhibit films on television "is similar to the right of a citizen to publish his views through any other media such as newspapers, magazines, advertisements, hoardings etc., subject to the terms and conditions of the owners of the media." The episodes in question did not violate any law or any right of the petitioners nor was the serial likely to affect prejudicially the well being of the people. The showing of these episodes was not likely to endanger public morality. The Court thus allowed the appeal.

Commenting upon the issue of an interim injunction by the High Court, the Supreme Court stated that "the High Court overlooked that the issue of an order of interim injunction in this case would infringe a Fundamental Right of the producer of the serial." Also, the Court has reserved its opinion on the question whether a citizen has a Fundamental Right to establish a private broadcasting station, or television centre. Underlining the great value which the Court attaches to the of speech and expression, the Court has emphasized:

> "Freedom of expression is a preferred right which is always very zealously guarded by this Court."

The petitioner produced a documentary on violence and terrorism in Punjab. The film received a "U" certificate from the Board of Film Censors. Besides, it also received several international awards. Nevertheless, the *Doordarshan* refused to telecast the film. The Bombay High Court ruled that the refusal of *Doordarshan* to telecast the film was unjustified and amounted to violation of the petitioner's right under Art. 19(1)(*a*). It also amounted to violation of the right of the people under Art. 19(1)(*a*) to be informed and enlightened about the situation in Punjab. The Court emphasized that every person has a Fundamental Right to form his own opinion on any issue of general concern. The State cannot prevent open discussion and open expression of views however hateful to its policies. Restrictions on freedom of speech and expression can be imposed only under Art. 19(2) and not outside that provision. Accordingly, the Court directed the *Doordarshan* to exhibit the film on Channel I or II at a proper time.[83]

As the Supreme Court has emphasized, television plays a very important and significant role in modern life. Many people obtain the bulk of their information on matters of contemporary interest from the broadcasting medium. The combination of picture and voice makes it an irresistibly attractive medium of presentation. It exercises tremendous influence over millions of people. Freedom of speech and expression includes the right to receive information and ideas as well as freedom to impart them.[84]

During the course of recording of the interview of the petitioner for a T.V. programme pertaining to "Laws relating to Women" on the invitation of *Doordarshan* itself, she made critical remarks about a Bill which was then

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83. *Anand Patwardhan v. Union of India,* AIR 1997 Bom 25.
Also see, *C. Gopal Krishnan v. Union of India,* AIR 1996 Ker 333.

84. *Secretary, Ministry of Information and Broadcasting v. Cricket Assn. of Bengal,* AIR 1995 SC 1236 : (1995) 2 SCC 161; see, *infra*.

pending before Parliament as being violative of women's right to equality. When the programme was telecast, her views on the Bill were deleted. The petitioner in a writ petition asserted that this amounted to censorship of her views by the television authorities as her views were against the views of the ruling party. The *Doordarshan* authorities justified deletion on the basis that it only amounted to editing and not censorship. The High Court ruled in *Indira Jai Singh v. Union of India*[85] that the deletion of her views was not by way of editing but by way of censorship.

The interesting aspect of the High Court's decision is the ruling that the right of freedom of speech and expression guaranteed by Art. 19(1)(*a*), protects this freedom on the television as much as it does anywhere else. The Court has observed:

> "A citizen who is interviewed over television by invitation of the television authorities is entitled to express his or her views freely. Censorship or deliberate distortion of these views would violate Art. 19. Any restriction of this right must be within the ambit of Art. 19(2) and by law."

The Court held that the respondents restricted the petitioner's right under Art. 19(1)(*a*) arbitrarily and by an executive fiat. The Court has emphasized that the executive action restraining exercising of a right under Art. 19(1)(*a*) cannot be taken without any legislative authority.

(s) CENSORSHIP OF FILMS

In *K.A. Abbas v. Union of India*,[86] the Supreme Court has upheld censorship of films under Art. 19(1)(*a*) on the ground that films have to be treated separately from other forms of art and expression because a motion picture is able to stir up emotions more deeply than any other product of art. A film can therefore be censored on the grounds mentioned in Art. 19(2).

Another case on film censorship is *Rangarajan*[87] which came before the Supreme Court by way of appeal from the Madras High Court. In this case, the Supreme Court has considered the question of censorship of films *vis-a-vis* Art. 19(1)(*a*).

The Court has justified pre-censorship of a film because it caters for mass audience, it has unique capacity to disturb and arouse feelings and has as much potential for evil as it has for good. A film cannot therefore be allowed to function in a free market place just as the newspapers or magazines do.

Here was a film which criticised the reservation policy of the Tamil Nadu Government. While the Board of Film Censors certified the film as fit for showing, and granted it U certificate, the Madras High Court banned the film from being exhibited and cancelled the certificate as there was some public protest against the film. So, the matter came before the Supreme Court in appeal and the Court reversed the High Court and accepted the appeal. Emphasizing upon the concept of freedom of speech and expression, the Court has stated:

> "Our commitment of freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered. The anticipated danger should not be

85. AIR 1989 Bom 25.
86. AIR 1971 SC 481 : (1970) 2 SCC 780.
87. *Rangarajan v. P. Jagjivan Ram*, (1989) 2 SCC 574 : (1989) 2 SCR 204.

remote, conjectural or far-fetched. It should have proximate and direct nexus with the expression.

A film producer is entitled to project his own message which others may not approve of. Everyone has a Fundamental Right to form his own opinion on any issue of general concern. The State cannot prevent open discussion and open expression of views, however critical of its own views.

At another place in the judgment, the Court has observed:

> "In democracy it is not necessary that every one should sing the same song. Freedom of expression is the rule and it is generally taken for granted. Every one has a Fundamental Right to form his own opinion on any issue of general concern. He can form and inform by any legitimate means. The democracy is a Government by the people via open discussion."

The Court has accepted that movies doubtless enjoy the guarantee under Art. 19(1)(*a*).

The State Government had pleaded for banning the exhibition of the film on the ground that otherwise there might arise a serious law and order situation in the State. To this plea, the Court has given a caustic reply as follows:

> "What good is the protection of freedom of expression if the State does not take care to protect it? If the film is unobjectionable and cannot constitutionally be restricted under Art. 19(2), freedom of expression cannot be suppressed on account of threat of demonstration and processions or threats of violence .... It is the duty of the State to protect the freedom of expression since it is a liberty guaranteed against the State...."

The Court has emphasized that if the film is unobjectionable and cannot constitutionally be restricted under Art. 19(2), freedom of expression cannot be suppressed on account of threat of demonstration or threats of violence. That would tantamount to negation of the rule of law and a surrender to blackmail and intimidation. The State cannot plead its inability to handle the hostile audience problem. Freedom of expression which is legitimate and constitutionally protected cannot be held to ransom by an intolerant group of people.

In the end, the Court has observed:

> "The fundamental freedom under Art. 19(1)(*a*) can be reasonably restricted only for the purposes mentioned in Art. 19(2) and the restriction must be justified on the anvil of necessity and not the quicksand of convenience or expediency. Open criticism of Government policies and operations is not a ground for restricting expression. We must practice tolerance to the views of others. Intolerance is as much dangerous to democracy as to the person himself."

The Delhi High Court directed certain excisions to be made from the film "Bandit queen". On appeal, the Supreme Court set aside the High Court's decision.[88]

(t) TELECASTING

In *Cricket Association*,[89] the Supreme Court has considered the significant question of freedom of telecasting *vis-a-vis* Art. 19(1)(*a*).

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88. *Bobby Art International v. Om Pal Singh Hoon*, JT 1996 (4) SC 533 : AIR 1996 SC 1846.
89. *Secretary, Ministry of Information and Broadcasting v. Cricket Association, Bengal*, AIR 1995 SC 1236 : (1995) 2 SCC 161.

In this case, the right of the Cricket Association to telecast the cricket match came up for consideration before the Supreme Court.

Telecasting is a system of communication either audio or visual or both. Organisation of an event in India is an aspect of the freedom of speech and expression protected by Art. 19(1)(*a*) and reasonable restrictions can be imposed thereon under Art. 19(2). It therefore follows that organisation, production and recording of an event cannot be prevented except by a law permitted by Art. 19(2). Similarly, the publication or communication of the recorded event through the cassettes cannot be restricted or prevented except under a law made under Art. 19(2).

The freedom to receive and communicate information and ideas without interference is an important aspect of the freedom of speech and expression under Art. 19(1)(*a*). Freedom of speech includes the right to propagate one's views through print media or through any other communication channel, *e.g.*, radio and television. The right to impart and receive information is a species of freedom of speech. No monopoly of electronic media is permissible as Art. 19(2) does not permit state monopoly.

Unlike the print media, there are certain built-in limitations on the use of electronic media, *viz.*: (*i*) the airwaves or frequencies are a public property and they have to be used for the benefit of the society at large; (*ii*) the frequencies are limited; (*iii*) the airwaves are owned or controlled by the Government or a central national authority; (*iv*) they are not available on account of the scarcity, costs and competition.

Broadcasting is a means of communication, and, therefore, a medium of speech and expression. Hence, in a democratic society, neither any private body nor any governmental organisation can claim any monopoly over it. The Indian Constitution also forbids monopoly either in the print or electronic media. The Constitution only permits state monopoly in respect of a trade or business.[90] The Government can however claim regulatory powers over broadcasting so as to utilize the public resources in the form of the limited frequencies available for the benefit of the society at large and to prevent concentration of the frequencies in the hands of the rich few who can then monopolise the dissemination of views and information to suit their interests. In democratic countries, this regulatory function is discharged by an independent autonomous broadcasting authority which is representative of all sections of the society and is free from state control. In this case, the Court has laid down the following three propositions:

(1) The airwaves or frequencies are a public property. Their use has to be controlled and regulated by a public authority in the interest of the public and to prevent the invasion of their rights. Since the electronic media involves the use of the airwaves, this factor creates an in-built restriction on its use as in the case of any other public property.

(2) The right to impart and receive information is a species of the right of freedom of speech and expression guaranteed by Art. 19(1)(*a*). A citizen has a Fundamental Right to use the best means of imparting and receiving information and as such to have an access to telecasting for

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90. Art. 19(6).
For discussion on Art. 19(6), see, *infra*, under Sec. I.

the purpose. However, this right to have an access to telecasting has limitations on account of the use of the public property, *viz.*, the airwaves, involved in the exercise of the right and can be controlled and regulated by the public authority. This limitation imposed by the nature of the public property involved in the use of the electronic media is in addition to the restrictions imposed on the right to freedom of speech and expression under Art. 19(2) of the Constitution.[91]

(3) The broadcasting media should be under the control of the public as distinct from the Government. The Central Government shall, therefore, take immediate steps to establish an independent autonomous public authority representative of all sections and interests in the society to control and regulate the use of the airwaves.

The Supreme Court has also emphasized in the instant case that freedom of speech and expression involves not merely freedom to communicate information and ideas without interference but also the freedom to receive the same.

The right to freedom of speech and expression includes the right to educate, to inform and to entertain and also the right to be educated, informed and entertained. The right to telecast a sporting event therefore includes the right to educate and inform the present and the prospective sportsmen interested in the particular game and also to inform and entertain the lovers of the game. The right to information and right to acquire knowledge about the game of cricket through electronic media is a right guaranteed under Art. 19(1)(*a*).

The Board of Cricket Control or the Cricket Association function on the basis of "no profit no loss". Their main aim is to promote the game of cricket. Therefore, telecast by such a body of a cricket match can hardly be regarded as a commercial activity. Because of its educational and entertainment values, this activity falls more appropriately under Art. 19(1)(*a*).

It can thus be seen that the Supreme Court has interpreted Art. 19(1)(*a*) broadly so as to bring broadcasting and telecasting within its coverage. Also, the Court has taken a very significant step by way of freeing these activities from governmental monopolistic control. Also, the function of regulating airwaves will henceforth be performed by an autonomous body rather than the Government itself.

(u) VOTING

Voting at an election is a form of expression.[92] A citizen as a voter is the master of his vote. He must have necessary information so that he can intelligently decide in favour of a candidate who satisfies his criterion of being elected as an MP or MLA.

D. RESTRICTIONS UNDER ART. 19(2)

(a) GROUNDS OF RESTRICTIONS

While it is necessary to maintain and preserve freedom of speech and expression in a democracy, so also it is necessary to place some curbs on this freedom

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91. On the right to receive information, see, *supra*, Sec. C(d), this Chapter.

92. *People's Union for Civil Liberties (PUCL) v. Union of India*, (2003) 4 SCC 399 : AIR 2003 SC 2363.

for the maintenance of social order. No freedom can be absolute or completely unrestricted. Accordingly, under Art. 19(2), the state may make a law imposing 'reasonable restrictions' on the exercise of the right to freedom of speech and expression 'in the interests of' the security of the State, friendly relations with foreign States, public order, decency, morality, sovereignty and integrity of India, or 'in relation to contempt of Court, defamation or incitement to an offence'.

The expression used in Art. 19(2) "*in the interests of*" give a wide amplitude to the permissible law which can be enacted to impose *reasonable* restrictions on the right guaranteed by Art. 19(1)(*a*) under one of the heads mentioned in Art. 19(2). No restriction can be placed on the right to freedom of speech and expression on any ground other than those specified in Art. 19(2).

The burden is on the authority to justify the restrictions imposed.

A look at the grounds contained in Art. 19(2) goes to show that they are all conceived in the national interest or in the interest of the society. The first set of grounds, *viz.*, the sovereignty and integrity of India, the security of the State, friendly relations with foreign States and public order—are all grounds referable to national interest; whereas, the second set of grounds, *viz.*, decency, morality, contempt of Court, defamation and incitement to offence are all conceived in the interest of the society. Some of the grounds for which restrictions can be imposed are explained below.

(b) SECURITY OF STATE AND PUBLIC ORDER

Article 19(2) uses two concepts: 'public order' and 'security of state'. The concept of 'public order' is wider than 'security of state'.[93] As the Supreme Court points out, in Art. 19(2), there exist two expressions 'public order' and 'security of state'. Thus, 'security of state' having been specifically and expressly provided for, "public order cannot include the security of state, though in its widest sense it may be capable of including the said concept. Therefore, in cl. (2), public order is virtually synonymous with public peace, safety and tranquillity."[94]

The term 'public order' covers a small riot, an affray, breaches of peace, or acts disturbing public tranquillity. But 'public order' and 'public tranquillity' may not always be synonymous. For example, a man playing loud music in his home at night may disturb public tranquillity, but not public order. Therefore, such acts as disturb only the serenity of others may not fall within the term 'public order'.[95]

In a foreign case, the Privy Council justified restrictions on the use of loudspeakers at public meetings under 'public order' giving the phrase a meaning wide enough to cover action taken for the avoidance of excessive noise seriously interfering with the comfort or convenience of the people.[96] It will be difficult to give such an extended meaning to 'public order' in India. There should be some

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93. *Romesh Thappar v. State of Madras*, AIR 1950 SC 124 : 1950 SCR 594; *Supdt., Central Prison v. Ram Manohar Lohia*, AIR 1960 SC 633 : (1960) 2 SCR 821; *R.M. Lohia v. State of Bihar*, AIR 1966 SC 740 : (1966) 1 SCR 709.
Also see, *infra*, Ch. XXVII, under Preventive Detention.

94. *O.K. Ghosh v. E.X. Joseph*, AIR 1962 SC 812, at 814.

95. *Madhu Limaye v. S.D.M., Monghyr*, AIR 1971 SC 2486 : (1970) 3 SCC 746.

96. *Francis v. Chief of Police*, (1973) 2 All ER 251.

element of disturbance of peace to bring a matter under 'public order'.[1] But the Indian Courts have been able to place some curb on noise pollution.[2]All grounds on which action can be taken under S. 144, Cr. P.C., fall within the term 'public order' with this rider that 'annoyance' should be of grave proportions.[3]

An aggravated form of disturbance of peace which threatens the foundations of, or threatens to overthrow, the state will fall within the scope of the phrase 'security of state'. The expression 'overthrowing the state' is covered by the term 'security of state'. Therefore, making a speech tending to overthrow the state can be made punishable.[4]

Under Art. 19(2), a restriction can be imposed 'in the interests of' public order, etc. The expression 'in the interests of' gives a greater leeway to the legislature to curtail freedom of speech and expression, for a law penalising activities having a *tendency* to cause, and not *actually* causing public disorder, may be valid as being 'in the interests of' public order. However, the restriction imposed must have a reasonable and rational relation with the public order, security of state, etc. If the nexus between the restriction and public order, etc., is farfetched, then the restriction cannot be sustained as being in the 'interests' of public order, etc.[5] As has been stated earlier, this introduces the concept of proportionality in the area of Fundamental Rights.[6]

The Supreme Court has lucidly explained the effect of the clause "in the interests of" in *O.K. Ghosh v. E.X. Joseph* as follows:[7]

> "This clause again cannot be interpreted to mean that even if the connection between the restriction and the public order is remote and indirect, the restriction can be said to be in the interests of public order. A restriction can be said to be in the interests of public order only if the connection between the restriction and the public order is proximate and direct. Indirect or far-fetched or unreal connection between the restriction and public order would not fall within the purview of the expression 'in the interests of public order.' "

In *Ram Manohar Lohia*,[8] SUBBA RAO, J., speaking for the Court, pointed out that the expression "in the interests of public order" though wider than the phrase "for the maintenance of public order" still could not mean that the existence of any remote or fanciful connection between the impugned act and public order would be sufficient to sustain the validity of the law. The connection between the act prohibited or penalised and public order should be intimate. In other words, there should be a reasonable and rational relation between it and the object sought to be achieved, *viz.*, public order. The nexus should thus be proximate—not far-fetched, problematical or too remote in the chain of its relation with public order.

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1. *D. Anantha Prabhu v. Distt. Collector, Ernakulam,* AIR 1975 Ker 117.
2. *Infra,* (j).
Also see, *Infra,* Ch. XXVI, Sec. J(p), under Art. 21.
3. The *Madhu Limaye* case, *supra* footnote 95.
Also, see, *infra*.
4. *Santokh Singh v. Delhi Administration,* AIR 1973 SC 1091 : (1973) 1 SCC 659.
5. *V.K. Javali v. State of Mysore,* AIR 1966 SC 1387 : (1962) 1 LLJ 134.
6. *Supra,* Sec. B.
7. AIR 1962 SC 814 : 1962 Supp (2) SCR 571.
8. *Supdt. Central Prison v. Ram Manohar Lohia, supra.*

A legal provision making penal speeches or expressions on the part of an individual 'which incite or encourage the commission of violent crimes such as murder' would be valid as these speeches or expressions cannot but undermine the security of the State.[9] Sec. 295A, I.P.C., penalizes a person who 'with deliberate and malicious intention', by words either spoken or written, or by visible representations, insults or attempts to insult the religious beliefs of any class. The constitutional validity of the provision was challenged on the ground that the section was wide enough to cover even trifling forms of religious insults which may not involve any question of public order. It was thus argued that S. 295A, IPC, be declared void.

But the Supreme Court did not do so. The Court ruled that S. 295A makes criminal only graver types of conduct involving insults to religion or religious beliefs. The provision penalizes not every act of, or attempt to, insult the religious beliefs of a class of citizens, but only those aggravated forms of insult to religion which are perpetrated with the deliberate and malicious intention of outraging the religious feelings of a class of citizens. The calculated tendency of such an aggravated form of insult is clearly to disrupt public order and hence the provision is valid.[10]

A provision made penal any instigation not to pay any exaction to government. The Supreme Court ruled that the prohibition imposed was too wide, as it "takes in the innocent and the guilty persons, *bona fide* and *mala fide* advice, individuals and class, abstention from payment and deferment of payment, express or implied instigation, indirect or direct instigation... In short, no person, whether legal adviser or a friend or a well-wisher of a person instigated can escape the tentacles of this section, though in fact the rent due has been collected through coercive process or otherwise".

The section was declared invalid as there was no proximate or even foreseeable connection between such instigation and public order. The Court emphasised that the Fundamental Rights could not be controlled on "hypothetical and imaginary considerations". The Court rejected the argument that any instigation to break the law would in itself be a disturbance of the public order with the remark that "if this argument without obvious limitation be accepted, it would destroy the right to freedom of speech which is the very foundation of democratic way of life".[11]

Section 124A, I.P.C., punishes any person who by words, spoken or written, attempts to bring into hatred or contempt, or excites disaffection towards the government established by law. In the pre-Independence era, this section had been interpreted very broadly, and exciting or attempting to incite bad feelings towards the government was held punishable whether or not it resulted in public disorder.[12] Obviously, the section in such a broad form could not be sustained under Art. 19(2). In *Kedar Nath v. State of Bihar*,[13] the Supreme Court upheld S. 124A by interpreting it restrictively—as rendering penal only such activities as would be intended, or have a tendency, to create disorder.

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9. *State of Bihar v. Shailabala*, AIR 1952 SC 329 : 1952 SCR 654.
10. *Ramji Lal Modi v. State of Uttar Pradesh*, AIR 1957 SC 650.
11. *Superintendent, Central Prison v. Lohia*, AIR 1960 SC 633 : (1960) 2 SCR 821.
12. *Emperor v. Sadashiv Narayan*, AIR 1947 SC 82.
13. AIR 1962 SC 955 : 1962 Supp (2) SCR 769.

In *Kedar Nath*, the Court took the position that when a provision of law is capable of two interpretations, one of which makes it constitutional and the other unconstitutional, the interpretation which makes it constitutional should be preferred. Accordingly, the Court ruled that a mere criticism of government action, however strongly worded, would be consistent with the Fundamental Right of freedom of speech and expression. Only the words having the pernicious tendency, or intended to create disturbance of law and order would be penal in the interests of public order. The gist of the offence, the Supreme Court said, "is incitement to disorder or tendency or likelihood of public disorder or the reasonable apprehension thereof." For determination of criminality, the Court in each case has to determine whether the words in question have "the pernicious tendency" and the uttered has the "intention of creating public disorder or disturbance of law and order." Then only the penal law would take note of the utterance.[14]

On the other hand, considering the constitutional validity of S. 3 of the Pepsu Police (Incitement to Disaffection) Act, the Court has ruled that attempting to cause disaffection amongst the members of a police force towards government established by law, or inducing any member of a police force to commit a breach of discipline may be made penal. Any breach of discipline by members of police force must reasonably be reflected in a threat to public order, for an indisciplined police force could hardly serve as an instrument for maintenance of public order.[15] The Court observed: "Any breach in the discipline by its members must necessarily be reflected in a threat to public order and tranquillity. If the police force itself were indisciplined they could hardly serve as instruments for the maintenance of public order or function properly as the machinery through which order could be maintained among the general public."

Public order is not the same thing as public safety. Hence no restrictions can be imposed on the right to freedom of speech and expression on the ground that public safety is endangered.

(c) SOVEREIGNTY AND INTEGRITY OF INDIA

Section 2 of the Criminal Law Amendment Act, 1961, makes penal the questioning of the "territorial integrity or frontiers of India" in a manner which is, or is likely to be, prejudicial to the interests of the safety or security of India.

(d) FRIENDLY RELATIONS WITH FOREIGN STATES

The idea behind imposing restrictions on the freedom of speech in the interests of friendly relations with a foreign country is that persistent and malicious propaganda against a foreign power having friendly relations with India may cause considerable embarrassment to India, and, accordingly, indulging in such a propaganda may be prohibited. The ground, however, is of broad import and is susceptible of supporting legislation which may even restrict legitimate criticism of the foreign policy of the Government of India.

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14. For a comment on this case see, R.K. MISRA, Freedom of Speech and the Law of Sedition, 8 *JILI*, 117 (1966).
Also see, *I.L.I., THE LAW OF SEDITION IN INDIA*, (1964).

15. *Dalbir Singh v. State of Punjab*, AIR 1962 SC 1106 : 1962 Supp (3) SCR 25.

Under Art. 367(3), a foreign State means any State other than India. The President, however, may, subject to any law made by Parliament, by order declare any State not to be a foreign State for such purposes as may be specified in the order. The Constitution (Declaration as to Foreign State) Order, 1950, directs that a Commonwealth country is not to be a foreign State for the purposes of the Constitution.

The question, therefore, arises whether a restriction can be imposed on the freedom of speech on the ground of its being prejudicial to a Commonwealth country. The Supreme Court has stated in *Jagan Nath v. Union of India*[16] that a country may not be regarded as a foreign State for the purposes of the Constitution, but may be regarded as a foreign power for other purposes. The affairs amongst the Commonwealth countries are foreign affairs and they are foreign powers in relation to each other. Therefore, a Commonwealth country is a foreign country for purposes of Art. 19(2).

(e) INCITEMENT TO AN OFFENCE

According to the general theories of criminal law, incitement and abutment of a crime is punishable. Incitement to serious and aggravated offences, like murder, may be punished as involving the security of the State.[17] Incitement to many other offences may be made punishable as affecting the public order. But there may still be some offences like bribery, forgery, cheating, etc., having no public order aspect, and incitement to which could not be made punishable as an aspect of public order. So. Art. 19(2) has the words 'incitement to an offence'.

The word 'offence' has not been defined in the Constitution but according to the General Clauses Act it means any act or omission made punishable by law. This is a broad concept and so it is possible for the Legislature to create an offence and make incitement thereto punishable. In this way, the freedom of speech can be effectively circumscribed as any subject can be precluded from public discussion by making it an offence.

(f) CONTEMPT OF COURT

In a democratic society, freedom of speech and expression is a prized privilege and a salutary right of the people. But, at the same time, no less important is the maintenance of independence and integrity of the judiciary and public confidence in the administration of justice. It thus becomes necessary to draw a balance between the two values.

Power has been specifically conferred on the Supreme Court [Art. 129] as well as each High Court [Art. 215] to punish its contempt. The freedom of speech and expression guaranteed by Art. 19(1)(*a*) is thus subject to Arts. 19(2), 129 and 215.

The question of contempt of the Supreme Court and of the High Courts has already been discussed earlier.[18] Contempt of other Courts can be punished by the High Courts under the Contempt of Courts Act, 1952. A challenge to the Act as imposing an unreasonable restriction on the right under Art. 19(1)(*a*), because it

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16. AIR 1960 SC 675 : (1960) 2 SCR 942.
17. *Shailabala's* case, *supra*.
18. *Supra*, Chs. IV, Sec. C(i) and VIII, Sec. C(i).

provides no definition of the expression 'contempt of Court', has been rejected on the ground that the expression has a well-recognised judicial interpretation.[19]

The law of contempt of Court as administered by the Supreme Court under Art. 129 has been held to be reasonable under Art. 19(2).[20] S. 228, I.P.C., also makes some cases of contempt of Court punishable.

While the Constitution guarantees freedom of speech and expression, it also lays down that in exercising that right, contempt of Court may not be committed. The underlying idea is that authority of Courts be preserved and obstructions to the due administration of justice removed.

Charging the judiciary as "an instrument of oppression", and the judges as "guided and dominated by class hatred" "instinctively favouring the rich against the poor" has been held to constitute contempt of Court as these words weaken the authority of law and law Courts, and have the effect of lowering the prestige of judges and Courts in the eyes of the people.[21] The Supreme Court has observed recently on the question of contempt of Court:

> "We wish to emphasize that under the cover of freedom of speech and expression no party can be given a licence to misrepresent the proceedings and orders of the Court and deliberately paint an absolutely wrong and incomplete picture which has the tendency to scandalise the Court and bring it into dispute or ridicule….Indeed, freedom of speech and expression is "life blood of democracy" but this freedom is subject to certain qualifications. An offence of scandalising the Court *per se* is one such qualification."[22]

(g) TRIAL BY MEDIA

Interference with administration of justice is not a permissible freedom nor an unreasonable restriction. In a case relating to suicide by wife due to her harassment for dowry, an application for grant of anticipatory bail was rejected by Courts below. When special leave petition from such rejection was pending before Supreme Court, an article appeared in a magazine based on an interview of the family of the deceased, giving their version of the tragedy and extensively quoting the father of the deceased as to his version of the case which could all be materials that may be used in the forthcoming trial. The Supreme Court took the view that such articles appearing in the media would certainly interfere with the administration of justice and deprecated such practice and cautioned the publisher, editor and the journalist who were responsible for the said article against indulging in such trial by media when the issue was sub judice.[23]

Again the Supreme Court has said that before placing criticism of a judgment in public, all concerned in its publication have to see whether any such criticism has crossed limits of fair criticism. Right to freedom of media has to be exercised responsibly and internal mechanism should be devised to prevent publications that would bring judiciary into disrepute and interfere with administration of jus-

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19. *E.T. Sen v. E. Narayanan,* AIR 1969 Del. 201.
20. *C.K. Daphtary v. O.P. Gupta,* AIR 1971 SC 1132 : (1971) 1 SCC 626.
21. *E.M.S. Namboodiripad v. T.N. Nambiar,* AIR 1970 SC 2015 : (1970) 2 SCC 325; In re: *D.C. Saxena,* AIR 1996 SC 2481.
Also see, *supra,* Ch. IV, Sec. C(i).
22. *Narmada Bachao Andolan v. Union of India,* AIR 1999 SC 3345, 3347 : (1999) 8 SCC 308.
Also see, In re: *D.C. Sazena,* AIR 1996 SC 2481 : (1996) 5 SCC 216.
23. *M.P. Lohia v. State of West Bengal,* (2005) 2 SCC 686 : AIR 2005 SC 790.

tice, especially since judiciary has no way of replying thereto by the very nature of its office. Proclivity to sensationalism is to be curbed in every case and it would be no answer to plead that publisher, editor or others concerned did not know of the contemptuous nature of publication or that it was done in haste. For rule of law and orderly society, a free responsible press and independent judiciary are both indispensable. Both have to be, therefore, protected. While the media can, in the public interest, resort to reasonable criticism of a judicial act or the judgment of a Court for public good or report any such statements, it should refrain from casting scurrilous aspersions on, or impute improper motives or personal bias to the judge. Nor should they scandalize the Court or the judiciary as a whole, or make personal allegations of lack of ability or integrity against a judge. The judgments of Courts are public documents and can be commented upon, analysed and criticized, but it has to be in a dignified manner without attributing motives.[24]

(h) DEFAMATION

Defamation is both a crime as well as a tort. According to Winfield: "Defamation is the publication of a statement which reflects on a person's reputation and tends to lower him in the estimation of right-thinking members of society generally or tends to make them shun or avoid him."[25] As a crime, Defamation is defined in S. 49, I.P.C. The law seeks to protect a person in his reputation as in his person or property.

(i) DECENCY OR MORALITY

These are terms of variable content having no fixed meaning for ideas about decency or morality vary from society to society and time to time depending on the standards of morals prevailing in the contemporary society.

The Indian Penal Code in Ss. 292 to 294 lists some of the offences like selling obscene books, selling obscene things to young persons, committing an obscene act, or singing an obscene song in a public place. S. 292, I.P.C., has been held valid because the law against obscenity seeks no more than to promote public decency and morality.[26]

The test of obscenity is whether the tendency of the matter charged as obscene is to deprive and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort is likely to fall.[27]

Again, the Court has observed in *Chandrakant*:[28] "What we have to see is that whether a class, not an isolated case, into whose hands the book, article, or story falls suffer in their moral outlook or become depraved by reading it or might have impure and lecherous thoughts aroused in their minds. The charge of obscenity must, therefore, be judged from this aspect". On the question of obscenity, the Court has laid emphasis on "the importance of art to a value judgment" by the censors. Art should be preserved and promoted in any scheme of censorship for, as the Court observed, "The artistic appeal or presentation of an episode

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24. *Rajendra Sail v. M. P. High Court Bar Assn.*, (2005) 6 SCC 109 : AIR 2005 SC 2473.
25. WINFIELD and JOLOWICZ on *Tort*, 274 (1979).
26. *Ranjit Udeshi v. State of Maharashtra*, AIR 1965 SC 881 : 1965 (1) SCR 65.
27. *R. v. Hicklin*, L.R. 3 Q.B. 360; *Ranjit D. Udeshi v. State of Maharashtra, ibid*.
28. *Chandrakant Kalyandas Kakodkar v. State of Maharashtra*, AIR 1970 SC 1390 : (1969) 2 SCC 687. Also see, *Chandra Rajkumari v. Police Commissioner*, AIR 1998 AP 302.

robs it of its vulgarity and harm...” In short what the Court means is that there is a distinction between artistry and pornography.

In *Ramesh Prabhoo*,[29] the Supreme Court has given somewhat wider meaning to the term ‘decency’ and ‘morality’. The Court has maintained that ‘decency’ or ‘morality’ is not confined to sexual morality alone. The ordinary dictionary meaning of ‘decency’ indicates that the action must be in conformity with the current standards of behaviour or propriety. The Court has cited with approval the following observation from an English case:[30]

> “…… Indecency is not confined to sexual indecency; indeed it is difficult to find any limit short of saying that it includes anything which an ordinary decent man or woman would find to be shocking, disgusting and revolting….”

Accordingly, the Court has ruled that in a secular society, the requirement of correct behaviour or propriety is that a candidate at an election should not make an appeal for votes in the name of his religion. Seeking of votes at an election on the ground of the candidate’s religion in a secular state is against the norms of decency and propriety of the society and a statutory provision declaring this as a corrupt practice is constitutionally valid.

(j) FREEDOM OF SPEECH AND DISCIPLINE IN CIVIL SERVICE

The Supreme Court has ruled in *Devendrappa* that reasonable restrictions may have to be imposed on the freedom of speech and expression in the interest of maintaining discipline in public services, even though it may not have been mentioned as a ground in Art. 19(2).[31]

The appellant, in the instant case, was the general manager of the Karnataka Small Industries Development Corporation. In a statement made to the press he made a direct attack on the head of his organisation. In a letter to the Governor, he made attacks on several officials of the corporation. He was dismissed from service on the ground that his conduct was clearly detrimental to the proper functioning of the organization, or its internal discipline. He challenged the service rules as well as his dismissal, but the Supreme Court upheld both. He challenged his dismissal on the ground of breach of his freedom of speech and expression, but the Court rejected his plea.

The Court expressed the view that a service rule is made to maintain discipline within the service and not to curtail the freedom of speech. Rules of government service designed for proper discharge of duties and obligations by government servants are not invalidated under Art. 19(1)(*a*) although such rules may, to some extent, curtail or impose limitations on the Fundamental Rights of these persons. Although freedom under Art. 19(1)(a) applies to government servants, it does not mean that the responsibility arising from official position of government servants could not impose some limitations on the exercise of their rights as citizens.

The Court justified the service rules under Art. 19(2). These rules cannot be invalidated even if not justified under Art. 19(2). On the question of interrelation

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29. *Dr. Ramesh Yeshwant Prabhoo v. Prabhakar Kashinath Kunte*, AIR 1996 SC 1113 : (1996) 1 SCC 130.

30. *Knuller (Publishing, Printing and Promotions) Ltd. v. Director of Public Prosecutions*, (1972) 2 All ER 898.

31. *M.H. Devendrappa v. Karnataka State Small Industries Development Corpn.*, AIR 1998 SC 1064 : (1998) 3 SCC 732.

of several freedoms guaranteed by Art. 19, the Court has observed that they "are not necessarily and in all circumstances mutually supportive, although taken together they weave a fabric of a free and equal democratic society". Proper exercise of rights may have, implicit in them, certain restrictions. The rights must be harmoniously construed so that they are properly promoted with the minimum of such implied and necessary restrictions. Joining government service has, implicit in it, if not explicitly so laid down, the observance of a certain code of conduct necessary for the proper discharge of functions as a government servant. This code cannot be flouted in the name of other freedoms. Of course, the Courts have to be vigilant to ensure that the code is not so widely framed as to unreasonably restrict fundamental freedoms. "But a reasonable code designed to promote discipline and efficiency can be enforced by the Government organisation in the sense that those who flout it can be subjected to disciplinary action".[32]

In the instant case, the conduct of the petitioner was clearly detrimental to the proper functioning of the organisation, or its internal discipline. "On a proper balancing, therefore, of individual freedom of the appellant and the proper functioning of the government organisation which had employed him, this was a fit case where the employer was entitled to take disciplinary action against him under the service Rules."

But the Supreme Court has refused to apply the *Devendrappa* ruling to an elected member of the corporation who criticised the house tax assessment by the council and asked the tax payers to approach him for sorting out their grievances. He was exercising his democratic right of fair criticism, and it could not be regarded as misconduct on his part, and he could not be removed from the municipal council on that ground.[33] He was an elected member of the municipal council and not its employee. As a representative of the people he owed a duty not merely to the municipal council, but also to the public in his constituency. He held the office in trust for them. As an elected representative of the people, he was expected to safeguard their interest. As such, he would enjoy freedom of speech under Art. 19(1)(a), which includes fair criticism of the law or any executive action. The Supreme Court has observed in this connection:[34]

> "Freedom of speech and expression is guaranteed in our democratic republic both in legislature as well as in local bodies and, therefore, a legislator or a municipal councillor legitimately can express his views in regard to what he thinks to be in public interest. A legitimate exercise of right of speech and expression including a fair criticism is not to be throttled."

(k) NOISE POLLUTION

Lately the Courts have been very conscious of the fact of environmental pollution in India. Accordingly, the Courts have started playing an activist role in the matter of protecting environment.

For this purpose, the Courts have invoked Art. 21 and in a number of cases thereunder, the Courts have tackled a number of problems relating to pollution.[35] The Courts have also interpreted Art. 19 so as to ensure that anti-environmental activities are not protected thereby. On perusal of the relevant case-law, one may

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32. Also see, under *Balakothaiah* case, *infra.*
33. *Baldev Singh Gandhi v. State of Rajasthan,* AIR 2002 SC 1124.
34. *Ibid,* at 1127.
35. See, *Infra,* Ch. XXVI, Sec. J(p).

conclude that the Courts have refused to protect polluting activities under Art. 19. On the other hand, it seems that the various clauses in Art. 19 have been so interpreted as to exclude such activities from their protection.

Coming to Art. 19(1)(*a*), the emerging judicial view is that the freedom of speech can be exercised by a person subject to keeping the level of noise pollution within bearable limits. Although noise pollution has not been mentioned in Art. 19(2) as a ground for which reasonable restrictions can be imposed on the freedom of speech, the Courts have implied this limitation from Art. 19(1)(*a*) itself.

The Courts have argued that freedom of speech includes the freedom to remain silent. The Courts have raised the question: can a person exercise his right under Art. 19(1)(*a*) so as to interfere with the freedom of others? To put it differently, can a citizen say that notwithstanding that he is causing public nuisance and interfering with the right of others, he would be entitled to enjoy his freedom under Art. 19(1)(*a*) in any way he likes, or absolutely without any restriction?

The Courts have answered this question as follows: when a person enjoys his right under Art. 19(1)(*a*), he must do so causing very minimum inconvenience to others. A person cannot claim his freedom of speech so as to interfere with the human rights and Fundamental Rights of others.[36]

The question of noise pollution has arisen in connection with the use of loud speakers. Loud speakers amplify sound manifold and thus create noise pollution. The question has arisen: how far can the use of loud speakers be regulated under Art. 19(1)(*a*)?

In the U.S.A., an uncontrolled discretion vested in the Chief of Police to permit or not to permit the use of loudspeakers at public meetings has been held to be bad for "loudspeakers are today indispensable instruments of effective public speech".[37]

To begin with, the Courts in India also took the same position. It was ruled that the right to use loudspeakers can be regarded as a Fundamental Right in itself being a part of the right of the freedom of speech and expression and, so, a blanket ban on the use of loudspeakers cannot be imposed. A person has a right to propagate, communicate and circulate his views through all means of communication and through all forms of media for reaching a wider audience. Reasonable restriction can, however, be imposed on this right under Art. 19(2).

An uncontrolled discretion cannot be given to executive officers to control the use of loudspeakers, etc. The discretion will have to be controlled as exercisable only when there is an apprehension of a breach of peace. A condition that at a public meeting, loudspeakers should not be used at any time infringes Art. 19(1)(*a*).[38] For example, in an early case, *Indulal v. State of Gujarat*,[39] the Gujarat High Court held that freedom of speech includes freedom to circulate one's views in any manner. The Court drew support for this view from the Privy Council's decision in *Francis v. Chief of Police.*[40]

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36. *New Road Brothers v. Commissioner of Police, Ernakulam*, AIR 1999 Ker 262.
37. *Saia v. New York*, 334 US 558 (1948).
38. *D. Anantha Prabhu v. Dist. Collector*, AIR 1975 Ker 117; *Satya Yug Party v. State of Andhra Pradesh*, AIR 1996 AP 218.
39. AIR 1963 Guj 259.
40. *Supra*.

On the other hand, lately the Courts have started adopting a different stance. For example, in *K. Venu v. Director General of Police*,[41] a single Judge of the Kerala High Court expressed the view that he was not inclined to hold that the right to use loudspeakers was a Fundamental Right in itself on the ground that sound pollution was an accepted danger and indiscriminate use of loudspeakers could not be permitted. In a given situation, it was for the authority concerned to satisfy itself whether a loudspeaker could be used or not.

In *P.A. Jacob v. Supdt. of Police, Kottayam*,[42] the Kerala High Court has taken noise pollution into account saying, "exposure to high noise is a known risk". The Court has observed: "If an absolute right is conceded in this behalf, it will be an unlimited charter for aural aggression." "However wide a right is, it cannot be as wide as to destroy similar or other rights in others". And, further the High Court has said:

> "The right to speech implies the right to silence. It implies freedom, not to listen, and not to be forced to listen".

But the Court has maintained that even though use of loudspeakers does not constitute a Fundamental Right, denial of the use of loudspeakers could validly take place only within the confines of the relevant law. In the instant case, denial of permission by the police authorities was held to be wrongful and arbitrary and for no reason.

The Calcutta High Court has imposed restrictions on the use of loudspeakers at the time of *azan* on the ground of noise pollution. The Court has stated that excessive noise certainly causes pollution in society. In India, there is no effective law made to control the noise creator. But, under Art. 19(1)(*a*), read with Art. 21, the citizens have a right of a decent environment and have a right to live peacefully, right to sleep at night and a right to leisure which are all necessary ingredients of the right to life guaranteed under Art. 21.[43]

In another case,[44] the Calcutta High Court has stated that unfortunately, in India, no restriction has been placed on the user of microphones or loudspeakers. Therefore, it is the duty of the Court to show judicial creativity in the matter. The Court has stated, "….where a law of the past does not fit in the present context, the Court should evolve a new law…"[45]

The Court has emphasized that the citizens are entitled to live in society peacefully, free from mechanical and artificial sounds which create a tremendous health hazards and adverse effect on the citizen. Citizens have a right to live in a society which is free from pollution. If the legislature fails to make an appropriate law for the purpose of controlling noise pollution, the Courts have to fill the gap. In the words of the Court:[46]

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41. AIR 1990 Ker 344.
42. AIR 1993 Ker 1.
43. *Maulana Mufti Syed Md. Noorur Rehman Barkati v. State of West Bengal*, AIR 1999 Cal 15. Also see, *Om Biranjana Religious Society v. State of West Bengal*, (1996) 100 Cal WN 617; *Free Legal Aid Cell v. Delhi*, AIR 2001 Del 455.
44. *Burrabazar Fire Works Dealers Assn. v. Commissioner of Police, Calcutta*, AIR 1998 Cal 121.
45. *Ibid*, at 129.
46. *Ibid*, at 134.

> "If a citizen has a right it is also equally a duty on the part of this Court to see that such rights are preserved and not allowed to be destroyed. Legislature may not rise to the occasion but that does not mean that Court will keep its hand folded in the absence of any legislative mandate. The Courts are the custodian of the rights of the citizens and if the Court is of the view that citizens rights guaranteed under the Constitution of India are violated, the Court is not powerless to end the wrong."

The question of controlling noise pollution has also become embroiled with the question of religious freedom guaranteed by Arts. 25 and 26.[47] Can a church claim the freedom to relay prayers on the loud speakers causing noise pollution and nuisance to the residents?. The Supreme Court has ruled in *Church of God v. K.K.R.M.C.Welfare Ass.*[48] that the question of religious freedom does not arise as no religion requires that prayers be performed through voice amplifiers. The Court directed that the guidelines framed by the Government under the relevant rules framed under the Environment Protection Act, 1986, must be followed by the concerned authorities.[49]

(l) ADMINISTRATIVE DISCRETION

The general principle is that it is unreasonable to leave absolute and arbitrary discretion to an administrative officer to regulate the freedom of speech and expression. The discretion to be valid must be exercisable for purposes specified in Art. 19(2), and subject to legislative policy and procedural safeguards. This judicial approach is illustrated by the following cases.

A provision authorising the district magistrate to prohibit dramatic performances of a scandalous or defamatory nature, corrupting persons or arousing or likely to excite feelings of disaffection to the government has been held to be unconstitutional for it makes a district magistrate the final authority to determine the question whether or not a particular play is offensive under the Act. Further, the district magistrate is not obligated to give reasons for his decision and there is no high authority (judicial or otherwise) to review his decision.[50]

A significant judicial pronouncement in the area is *Virendra v. State of Punjab*.[51] Sec. 2 of a Punjab Act empowered the State Government to prohibit the printing of any matter relating to a particular subject for a maximum period of two months in any issue of a newspaper if the government was satisfied that such action was necessary to prevent any activity prejudicial to the maintenance of communal harmony likely to affect public order. The aggrieved party could make a representation to the government against the order, which, after consideration of the same, could modify, confirm or rescind the order. Sec. 3 authorised the State Government to prohibit the bringing into Punjab of any newspaper if it was satisfied that such action was necessary to prevent any activity prejudicial to the maintenance of communal harmony affecting public order.

These provisions were challenged on the ground of giving arbitrary and uncontrolled discretion to the government to curtail freedom of speech 'on its sub-

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47. *Infra*, Ch. XXIX, Secs. B and C.
48. AIR 2000 SC 2773 : (2000) 7 SCC 282.
49. Also see, *Om Biranguna Religious Society v. State of West Bengal*, (1996) 100 Cal WN 617.
50. *State of U.P. v. Baboolal*, AIR 1956 All. 571; *Harnam v. State of Punjab*, AIR 1958 Punj. 243.
51. AIR 1957 SC 896 : 1958 SCR 409.

jective satisfaction'. The Supreme Court pointed out that there existed in Punjab serious tension amongst the various communities and in such a situation, conferment of wide powers to be exercised in the subjective satisfaction of the government could not be regarded as an unreasonable restriction. The State Government being in possession of all material facts, was the best authority to take anticipatory action for prevention of threatened breach of peace. Therefore, determination of the time when, and the extent to which, restriction should be imposed on the Press must of necessity be left to the judgment and discretion of the government. To make the exercise of those powers justiciable would defeat the very purpose of the Act.

Further, the Court held that a law conferring discretion on the executive could not be invalid if it laid down the policy so that discretion was exercised to effectuate the policy. The law in question satisfied this test for it laid down the purposes for which the power could be exercised. Further, in S. 2, there were two safeguards subject to which the government was to exercise its power, *viz.*, an order could remain in force only for two months, and the aggrieved person could make a representation to the government against the order, and so S. 2, as a whole, was valid. S. 3 was held invalid for it neither laid down any time-limit for the operation of the order, nor did it provide for any representation to the government against the order.[52]

Under S. 144, Cr.P.C., where in the opinion of a district magistrate there is sufficient ground for proceeding under this section and immediate prevention or speedy remedy is desirable, he may, by a written order stating the material facts of the case, direct any person to abstain from a certain act if the district magistrate considers that such direction is likely to prevent danger to human life, health or safety, or a disturbance of the public tranquillity, or a riot, or an affray. The magistrate could, either on his own motion or on the application of any aggrieved person, rescind or alter any order made by him. When an aggrieved person applies, the magistrate is to give him an opportunity of showing cause against the order. If the application is rejected, the magistrate will record his reasons in writing for doing so. No order under S. 144 is to remain in force for longer than two months, but the State Government could direct otherwise in cases of danger to human life, health or safety, or a likelihood of a riot or an affray.

The provision was challenged on the ground that it confers too wide powers on the district magistrate to put restrictions on the freedom of speech and assembly. Rejecting the argument, the Supreme Court has ruled in *Babulal Parate,*[93] that S. 144 is intended to be availed of for preventing disorders, obstructions and annoyances. The magistrate has to act judicially; restraints permissible under S. 144 are of a temporary nature and can only be imposed in an emergency. An opportunity is to be given to the aggrieved person to show cause against the order and the magistrate has to record reasons if he rejects the application of the aggrieved person. The duty to maintain law and order rests on the district magistrate and, therefore, there is nothing unreasonable in making him the initial judge of the emergency.[53]

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52. For further discussion on this topic, see, JAIN, A TREATISE ON ADMN. LAW, 792-794 (1996).

53. *Babulal Parate v. State of Maharashtra,* AIR 1961 SC 884 : (1961) 3 SCR 423; JAIN, CASES AND MATERIALS ON INDIAN ADM. LAW, III, 1809-1813.

But that part of the section [S. 144(6)] which authorises the State Government to extend the life of the order beyond two months has been found to be invalid in *Misra*,[54] because no safeguards were provided in that case. The government exercises its powers in an executive manner; an order passed by it need not be of a temporary duration, and the aggrieved party has been given no opportunity to make representation against government's order.

Under S. 99-A, Cr.P.C., 1898 [presently S. 95, Cr.P.C., 1974) the State Government may, by notification in the Gazette stating the grounds of its opinion, forfeit any book, newspaper or any document containing seditious matter, etc. In *Harnam Das v. State of Uttar Pradesh*,[55] the Court quashed the notification forfeiting certain books because the Government failed to state the grounds for forming its opinion. The ambit of government's power is too large and uncontrolled.

A notable example of administrative regulation of freedom of speech and expression is to be found in the system of film censorship. In *K.A. Abbas v. Union of India*,[56] the Supreme Court has upheld censorship of films under 19(1)(*a*) on the ground that films have to be treated separately from other forms of art and expression because a motion picture is able to stir up emotions more deeply than any other product of art. Films can therefore be censored on the grounds mentioned in Art. 19(2). There exists the Board of Film Censors for the purpose.[57]

Prior to the *Abbas* case, the final appellate powers from the decision of the film censors lay in the Central Government. This was challenged on the ground of its inconsistency with Art. 19(1)(*a*). The Central Government agreed to change this and vest the appellate powers in an independent tribunal. The Court expressed satisfaction that the Central Government would cease to perform curial functions through one of its Secretaries in the sensitive field of freedom of speech and expression. "Experts sitting as a Tribunal and deciding matters *quasi*-judicially inspire more confidence than a Secretary..." The Government also agreed to prescribe reasonable time-limits for the decision of the authorities censoring the film.[58]

A tribunal has now been established to replace the Central Government as the appellate tribunal from the decision of the Board of Film Censors. But a provision was put in the Cinematography Act through which the Central Government could review the decision of the Appellate Tribunal. The Supreme Court held this provision to be unconstitutional being "a travesty of the Rule of law which is one of the basic structure of the Constitution."

The Court disliked the idea of the executive sitting in appeal over the decision of a quasi-judicial body. The Court insisted that the executive must obey judicial orders rather than *vice versa*. The government claimed that the power was necessary because on certain occasions there was public resentment to a film, and this created law and order problem even though the film had been cleared by the Board or the Tribunal. Rejecting the argument, the Court insisted that in such a

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54. *State of Bihar v. K.K. Misra*, AIR 1971 SC 1667; JAIN, CASES, III, 1813-1816.
55. AIR 1961 SC 1662 : (1962) 2 SCR 371.
56. AIR 1971 SC 481 : (1970) 2 SCC 780.
57. See, *supra*, Sec. C(s), under "Censorship of Films".
58. For a description of the working of the film censors see, LEVIN, Hearing Procedures of Three Administrative Agencies, 4 *JILI*, 205 (1962).

situation, "the clear duty of the government is to ensure that law and order is maintained by taking appropriate action against the persons who break the law.[59]

According to a G.O. issued by the Andhra Government, all government advertisements were to be released to the newspapers only by the Director of Information subject to the following guidelines: advertisements were not to be issued to a newspaper or a periodical adopting any of the following tones: (*i*) anti-national; (*ii*) communal; (*iii*) rabid, abusive; (*iv*) provoking tensions between different sections of society; (*v*) distorting news for mischievous purposes; (*vi*) character assassination; black-marketing, mudslinging, etc.; (*vii*) fomenting group rivalries; (*viii*) abusive and slanderous attacks on government and its functionaries.

In *Ushodaya Publications (P) Ltd. v. State of Andhra Pradesh*,[60] the Andhra Pradesh High Court said that the newspapers had no right to demand advertisements from the government. On the other hand, the government did have a right to choose the newspapers in which it would advertise. While the government could give its advertisements to such papers as it pleased, it could not discriminate between one newspaper and another.[61] Government's discretion to grant largess must be structured by rational, relevant and non-discriminatory standards or norms.[62] The government must not use its power to give advertisements to muzzle the press which criticises its policies and actions. The Court held conditions (*i*), (*ii*), (*iv*), (*vi*) and (*viii*) valid but not conditions (*iii*), (*v*) and (*vii*) as it was very difficult to decide the matters mentioned therein.[63]

A notice served on the Indian Express for cancellation of the lease and demolition of its building was quashed by the Supreme Court in *Express Newspapers Pvt. Ltd. v. Union of India*.[64] The company publishing the paper took on perpetual lease a piece of land from the Central Government for construction of its building. On the allegation that the building did not conform with the sanctioned plan, a notice to cancel the lease and for re-entry and demolition of the building was served on the company. The company challenged the same as being violative of the freedom of the press. The allegation was that the Indian Express was a trenchant critic of the Prime Minister Indira Gandhi and as a vindictive measure the notice in question had been given to it. It was also stated that whatever the deviations, they had all been sanctioned by the concerned Central Minister.

The Supreme Court quashed the notice holding it to be *mala fide*. The Court came to the conclusion that the notice of the re-entry and the threatened demolition of the Express buildings were intended and meant to silence the voice of the Indian Express. The impugned notice was held to constitute a direct and immediate threat to the freedom of the press and, thus, violative of Art. 19(1)(*a*) read with Art. 14.

(m) PRESS COUNCIL

The Press Council was first established in 1965 but was abolished in 1976 during the internal emergency declared on June 25, 1975.[65] The Council was re-

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59. *Union of India v. K.M. Shankarappa*, AIR 2000 SC 3678 : (2001) 1 SCC 582.
60. AIR 1981 AP 109.
61. See, *supra*, under Art. 14, Ch. XXI.
62. *Ramana*, *Supra*, 496; *E.E.C. Ltd. v. State of West Bengal*, AIR 1975 SC 266 : (1975) 1 SCC 70.
63. Also see, *supra*, Sec. C(e), on this point.
64. AIR 1986 SC 872 : (1986) 1 SCC 133.
65. *Supra*, Ch. XIII, Sec. B.
Also see, Ch. XXXIII, Sec. F, *infra*.

established in 1978 by the Press Council Act, 1978. The Council is conceived as an agency of self-regulation, and the preservation of the freedom, of the press. It consists primarily of working journalists, managers and owners of newspapers. Its avowed objects are preservation of the freedom of the press and maintenance and improvement of the standards of newspapers in India. If a newspaper offends against standards of journalistic ethics or public taste, or if an editor or working journalist commits professional misconduct, the council may, after giving a hearing and recording the reasons, censure newspaper, editor or the journalist concerned.[66]

The jurisdiction of the council to protect the freedom of the press is every broad. The council can take note of violation of the right to liberty of the press from any agency—be that the State, State functionary, public authority, companies, individual or any person, real or fictional.[67]

E. FREEDOM TO ASSEMBLE: ARTS. 19(1)(*b*) AND 19(3)

ARTICLE 19(1)(*B*)

Article 19(1)(*b*) guarantees to the citizens of India the right to assemble peaceably and without arms. Under Art. 19(3), however, the state can make any law imposing reasonable restrictions on the exercise of this right in the interests of public order, and sovereignty and integrity of India.

To some extent, there is common ground between Arts. 19(1)(*a*) and 19(1)(*b*). For example, demonstrations, processions and meetings considered under Art. 19(1)(*a*) also fall under Art. 19(1)(*b*) for a demonstration also amounts to an assembly and, therefore, the same principles apply under both Articles.[68] The right to strike is not available under either of these Articles.[69]

Article 19(1)(*b*) does not confer on any one a right to hold meetings in government premises. Therefore, Railways can validly prohibit holding of meetings in their premises either within or outside office hours. The right of assembly cannot be exercised on the property of somebody. Railways are entitled to enjoy their properties in the same manner as any private individual subject to such restrictions as may be placed on them by law or usage.[70] But a right to hold public meetings on government property (like a maidan) can be created by usage.[71]

It is not valid to confer uncontrolled discretion on administrative officers to regulate the freedom of assembly. A rule banning holding of public meetings on public streets without police permission has been held bad in *Himmat Lal v. Police Commissioner*.[72] In India, citizens had a right to hold meetings on public streets before the Constitution, subject to the control of appropriate authority regarding the time and place of the meeting and considerations of public order. The rule in question gave no guidance as to the circumstances in which permission to hold a meeting could be refused and, therefore, gave arbitrary powers.[73]

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66. For comments on the Press Council Bill, 1965, see 7 *JILI*, 112 (1965).
67. See, *State of Bihar v. Press Council*, AIR 1975 Del 79.
68. *Supra*, Sec. C(l).
69. *Ibid;* see also *T. K. Rangarajan v. Govt. of T. N.*, (2003) 6 SCC 581 : AIR 2003 SC 3032.
70. *Railway Board v. Niranjan Singh*, AIR 1969 SC 966 : (1969) 1 SCC 502.
71. *D. Anantha Prabhu v. District Collector*, AIR 1975 Ker 117.
72. AIR 1973 SC 87 : (1973) 1 SCC 227.
73. Also see, *Mathai v. State*, AIR 1954 TC 47; *Brahmanand v. State of Bihar*, AIR 1959 Pat. 425; *In re Annadurai*, AIR 1959 Mad 63; *Dasappa v. Dy. Addl. Commr.*, AIR 1960 Mys 57.

F. FREEDOM TO FORM ASSOCIATION : ARTS. (19)(1)(*c*) AND 19(4)

(a) ARTICLE 19(1)(*C*)

Article 19(1)(*c*) guarantees to the citizens of India the right to form associations or unions. Under Art. 19(4), reasonable restrictions in the interests of public order or morality or sovereignty and integrity of India may be imposed on this right by law.

The right to form associations is the very lifeblood of democracy. Without such a right, political parties cannot be formed, and without such parties a democratic form of government, especially that of the parliamentary type, cannot be run properly. Hence the Constitution guarantees the right to form associations subject to such restrictions as can be imposed under Art. 19(4).

Recognising the importance of the right of forming associations in a democratic society, the Courts have not favoured the vesting of absolute discretion in the executive to interfere with this Fundamental Right. A discretion vested in a government official to prohibit formation of an association, without proper safeguards, has been held to be unconstitutional.

A law empowered the State Government to declare an association unlawful on the ground that such association constituted a danger to the public peace, or interfered with the maintenance of public order, or the administration of the law. The government notification had to specify the grounds for making the order and fix a reasonable period to make a representation against the order. The State Government was, however, authorised not to disclose any facts which it regarded as being against public interest. The government had to place the notification and the representation against it before an advisory board. If the board, after considering the material, found that there was no sufficient cause for declaring the association unlawful, the government was bound to cancel the order.

In *State of Madras v. V.G. Row*,[74] the Supreme Court declared the provision to be unconstitutional, for the test to declare an association unlawful was 'subjective' and the factual existence of the grounds was not justiciable. The Court emphasized that curtailing the right to form associations was fraught with serious potential reactions in religious, political and economic fields. Therefore, the vesting of power in the government to impose restrictions on this right without having the grounds therefor tested in a judicial inquiry was a strong element to be taken into consideration in judging the reasonableness of the restrictions. The existence of a summary and largely one-sided review by an advisory board was no substitute for a judicial inquiry.

A requirement that teachers of schools should seek the Board's permission to engage in political activities has been held to be wholesome, for a teacher has got to be under certain terms and discipline of employment and it is detrimental to his calling to get mixed up into rivalries in respect of the union, panchayat or the district board.[75]

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74. AIR 1952 SC 196 : 1952 SCR 597.
Also see, JAIN, *Cases, III,* 1817-1822.

75. *Hazi Mohd. v. District Board, Malda,* AIR 1958 Cal. 401.

At times, recognition of an association by the government may affect the right to form an association, *e.g.*, if the government were to prohibit its servants from becoming members of an unrecognised association, then formation of an association becomes vitally linked up with government recognition, for without recognition, the right to form association becomes illusory. In such a situation, Art. 19(1)(*c*) would control the power of the government to recognise associations. A rule provided that a union could not represent the parties in an industrial dispute unless it had been approved by the Labour Commissioner for this purpose. The application for approval could be made only two years after its formation and the Labour Commissioner had absolute discretion to accept or reject the application. These conditions for recognition were held to contravene Art. 19(1)(*c*).[76]

Similarly, the Supreme Court invalidated a rule which provided that no government servant could join or continue to be a member of any services association which the government did not recognise or in respect of which recognition has been refused or withdrawn by it. The Court held that the rule imposed a restriction on the undoubted right of a government servant under Art. 19(1)(*c*). The rule in question was neither reasonable nor in the interest of "public order" under Art. 19(4). The restriction was such as to make the right guaranteed under Art. 19(1)(*c*) illusory since the government could refuse or withdraw recognition of an association on considerations which might not have any direct or reasonable connection with discipline or efficiency of government servants or public order.[77]

Does the right to form associations also involve a guarantee that an association shall have the concomitant right to achieve its objectives for which it has been formed? Can the law place some restrictions on trade unions in the way of their acting as instruments of agitating and collective bargain to improve the wages of the workmen? Can it be argued that if the concomitant right of an association to achieve its purposes is not guaranteed, then the right to form association becomes an idle right? The right to form associations or unions does not include within its ken as a Fundamental Right a right to form association or unions for achieving a particular object or running a particular institution, the same being a concomitant or concomitant to a concomitant of a Fundamental Right, but not the Fundamental Right itself. A right to form association guaranteed under Article 19(1) (c) does not imply the fulfillment of every object of an association as it would be contradictory to the scheme underlying the text and the frame of the several Fundamental Rights guaranteed by Part III and particularly by the scheme of the guarantees conferred by sub-clauses (a) to (g) of clause (1) of Article 19.[78]

The Supreme Court has, however, not countenanced this extended dimension sought to be given to Art. 19(1)(*c*). The Court has ruled that the right guaranteed by Art. 19(1)(*c*) does not carry with it a concomitant right that unions formed for protecting the interests of labour shall achieve their object such that any interference to such achievement by any law would be unconstitutional unless it could be justified under Art. 19(4) as being in the interests of public order or morality. The right under Art. 19(1)(*c*) extends only to the formation of an association or union and insofar as the activities of the association or union are concerned, or as regards the steps which the union might take to achieve its object, they are sub-

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76. *U.P. Shramik Maha Sangh v. State of Uttar Pradesh*, AIR 1960 All. 45.
Also, *E.R.E. Congress v. General Manager, E. Rly.*, AIR 1965 Cal. 389.
77. *O.K. Ghosh v. E.X. Joseph*, AIR 1963 SC 812 : 1963 Supp (1) SCR 789; *supra*.
78. *Dharam Dutt v. Union of India*, (2004) 1 SCC 712 : AIR 2004 SC 1295.

ject to such laws as may be framed and such laws cannot be tested under Art. 19(4). The Court has held that even a very liberal interpretation of Art. 19(1)(*c*) cannot mean that the trade unions have a guaranteed right to strike. The right to strike may be controlled by appropriate industrial legislation.[79]

The above-mentioned proposition has been reiterated by the Court in the case noted below.[80] Art. 19(1)(*c*) does not extend to, or embrace within it, the objects or purposes or the activities of an association. In other words, Art. 19(1)(*c*) does not carry with it a further guarantee that the objects or purposes or activities of an association so formed shall not be interfered with by law except on grounds as mentioned in Art. 19(4). In the instant case, the State Government took over an educational institution run by a society. The Court ruled that Art. 19(1)(*c*) had not been violated since the institute was taken over and the rights of the society remained unimpaired and uninterfered. It may be that the Institute was the only activity of the society but the Court is concerned with the right of the society to form association. So long as there is no interference with the society, its constitution or composition, merely because of the taking over or acquisition of the Institute, which was the only property or activity of the society, the Fundamental Right of the society to form association is not infringed.

The Court adopted a similar approach in *Raghubar Dayal v. Union of India*.[81] The Forward Contracts (Regulation) Act, 1952, authorises the Central Government to ban forward trading in any commodity by any one except by a recognised association. A recognised association could not amend its rules except with the previous approval of the Central Government. The government could also direct the association to make certain rules. These provisions were challenged as infringing Art. 19(1)(*c*) and not being germane to public order or morality were not warranted by Art. 19(4). It was argued that the freedom to form an association should also include ensuring effective functioning of an association so as to enable it to achieve its lawful objects. The argument in a nutshell was that if a law regulates the recognition of an association under certain conditions subject to which alone recognition could be accorded or continued such conditions would be invalid. Thus, the Court was called upon to consider the question whether the freedom of association implies or involves a guaranteed right of recognition. The contention in the instant case was that if the object of an association was lawful, no restriction could be placed upon it except in the interest of public order and that freedom to form an association carried with it the right to determine its internal arrangements also.

The Court rejected the argument. It ruled that Parliament has power to legislate for regulation of forward trading. It is voluntary, and not compulsory, for an association to seek recognition, and, therefore, conditions of recognition would not affect freedom to form associations. The Supreme Court thus refused to accept the theory that Art. 19(1)(*c*) also confers a Fundamental Right on an association to achieve each of its objectives for which it has been formed and that a law hampering the fulfilment of any of its objects, but not falling under Art.

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79. *All India Bank Employees' Ass. v. The National Industrial Tribunal*, AIR 1962 SC 171 : (1962) 3 SCR 269.
Also, *Radhey Shyam v. P.M.G., Nagpur, supra.*

80. *L.N. Mishra Institute of E.D. & Social Change v. State of Bihar*, AIR 1988 SC 1136 : (1988) 2 SCC 433.

81. AIR 1962 SC 263 : (1962) 3 SCR 547.

19(4), would be unconstitutional. The freedom to associate does not involve freedom to pursue without restriction the objects of the association.[82] Thus, while the right to form association is fundamental, recognition of such an association is not a Fundamental Right and, thus, Parliament can by law regulate the working of such associations by imposing conditions and restrictions on such functions. There can be no objection to statutory interference with the composition or functioning of associations which are created, controlled and governed by statute. Legislative provisions can be validly made for eliminating qualifications for membership based on sex, religion, persuasion or mode of life. However, so long as there is no legislative intervention, it is not open to the Court or authorities purportedly acting under a statute to coin a theory that a particular approved bye-law of a registered cooperative society is not desirable and would be opposed to public policy as indicted by the Constitution. Hence a challenge to the Constitutional validity of a bye law of Zoroastrian Cooperative Society restricting its membership to Parsi community has been repelled.[83]

A Bombay Act provided that only a 'representative union', *i.e.* a union having at least 15 per cent of the total employees in an industry in a local area, could represent the entire body of workers in their relations with the employees. The Court held that the Act imposed no restriction on the right to form unions of textile workers; there was nothing to prevent other unions of other workers from forming a fresh union and enrolling a higher percentage so as to acquire the right of representation.[84]

In *P. Balakotaiah v. Union of India*,[85] certain railway employees who belonged to a Worker's Union sponsored by the Communists carried on agitation for a general strike in order to paralyse communications and movement of essential supplies. They were chargesheeted and their services were terminated. The action was taken against the employees not because they were Communists but because they were engaging themselves in subversive activities. The appellants, however, submitted that their dismissal from service for being communists and trade unionists amounted in substance to a denial to them of the freedom to form association. The Supreme Court rejected the plea saying that the impugned order did not prevent them from continuing to be communists or trade unionists. Their right in that regard remained as before. The appellants, no doubt, enjoyed a Fundamental Right to form associations under Art. 19(1)(*c*), but they had no Fundamental Right to remain in government service, and so when their services were terminated they could not complain of violation of any Fundamental Right.

In *Devendrappa*,[86] the Supreme Court has dissented from the *Balakotaiah* ruling entailing freedom *v.* service. The Court has now said that legitimate action discreetly and properly taken by a government servant with a sense of responsibility and at the proper level to remedy any malfunction in the organisation may

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82. Also see, *D.A.V. College v. State of Punjab*, AIR 1971 SC 1737 : (1971) 2 SCC 269; *Manohar v. State of Maharashtra*, AIR 1984 Bom 47, 53.

83. *Zoroastrian Coop. Housing Society Ltd. v. District Registrar, Coop. Societies (Urban)*, (2005) 5 SCC 632 : AIR 2005 SC 2306. Exclusionist associations based on sex or religion etc. in secular India, history and objects of cooperative movement, theory of "area of operation" of cooperative societies, discussed.

84. *Raja Kulkarni v. State of Bombay*, AIR 1954 SC 73 : 1954 SCR 384.

85. AIR 1958 SC 242.

86. *M.H. Devendrappa v. Karnataka State Small Industries Development Corpn.*, AIR 1998 SC 1064 : (1998) 3 SCC 732; *supra.*

not be barred. A person who legitimately seeks to exercise his rights under Art. 19 cannot be told that you are free to exercise the rights, but the consequences will be so serious and so damaging, that you will not, in effect, be able to exercise your freedom. This means that the *Balakotaiah* approach saying that a government servant is free to exercise his freedom under Art. 19(1)(*a*) or (*b*), but at the cost of his service, clearly amounts to deprivation of freedom of speech. Therefore, what the Court has to consider is the reasonableness of service rules which curtail certain kinds of activities amongst government servants in the interests of efficiency and discipline in order that they may discharge their public duties as government servants in a proper manner without undermining the prestige or efficiency of the organisation. If the rules are directly and primarily meant for this purpose, "they being in furtherance of Art. 19(1)(*g*)",[87] can be upheld although they may indirectly impinge upon some other limbs of Art. 19 *qua* an individual employee. Courts ensure that such impingement is minimal and rules are made in public interest and for proper discharge of public interest. "A proper balancing of interests of an individual as a citizen and the right of the state to frame a code of conduct for its employees in the interest of proper functioning of the state, is required".

Thus, *Devendrappa* reduces somewhat the harshness of the *Balakotaiah* ruling. *Balakotaiah* seemed to suggest that a government servant cannot exercise any freedom under Art. 19 and he can enjoy his freedom only if he gives up government service. But *Devendrappa* ruling permits some space to a government servant to enjoy his freedoms subject to proper functioning of the state. A balance has to be drawn between the interests of a government servant as a citizen and the interests of the state as an employer in promoting the efficiency of public service.

The Hindi Sahitya Sammelan is a society registered under the Societies Registration Act. Because of differences among its management, some litigation started. Parliament intervened by enacting a law creating a statutory body to take over the assets of the old society. All members of the old society were to be members of the new body with some new members added by law without the volition of the original members. The Supreme Court declared the law bad mainly on the ground that it interfered with the composition of the society itself; it interfered with the right of association of the pre-existing members of the old society insofar as new members were added without their consent, and also enrolment of new members was not at the choice of the original members. Imposing new members on the old members against their wishes clearly interfered with their right to continue to function as members of the society which was voluntarily formed by the original founders. "The right to form an association" "necessarily implies that the persons forming the association, have also the right to continue to be associated with only those whom they voluntarily admit in the association. Any law by which members are introduced in the voluntary association without any option being given to the members to keep them out, or any law which takes away the membership of those who have voluntarily joined it, will be a law violating the right to form an association."

Even a very liberal interpretation of Article 19(1) (c) cannot lead to the conclusion that the trade unions have a guaranteed right to an effective collective

87. See, *infra*, Sec. I.

bargaining or to strike, either as part of collective bargaining or otherwise. The right to strike or the right to declare a lockout may be controlled or restricted by appropriate industrial legislation.[88]

This means that any law compulsorily altering the composition of the association amounts to a breach of the right to form the association because it violates the composite right of forming an association and the right to continue it as the original members desired it. The right to form association is not restricted only to the initial stage of forming an association. It also protects the right to continue the association with its own composition as voluntarily agreed upon by the persons forming the association. Otherwise, the right under Art. 19(1)(*c*) would be meaningless because, as soon as an association is formed, a law may be passed interfering with its composition, so that the association formed may not be able to function at all. The right can be effective only if it is held to include within it the right to continue the association with its composition as voluntarily agreed upon by the persons forming the association. The law in question did not merely regulate the affairs of the society; it altered its composition. Any law altering the composition of the association compulsorily will be a breach of the right to form the association of the original members guaranteed under Art. 19(1)(c). Such a law is not protected under Art. 19(4).[89]

(b) THE UNLAWFUL ACTIVITIES (PREVENTION) ACT, 1967

The Act authorises the Central Government to declare by notification in official gazette an association as unlawful on certain grounds mentioned in S. 2(*f*) of the Act. To keep control over the government power, provision has been made for appointment of a tribunal consisting of a sitting High Court Judge. A notification declaring an association unlawful is not to be effective until it is confirmed by the tribunal. The tribunal is to decide whether or not there is sufficient cause for declaring the association as unlawful. Undoubtedly, the mechanism of a tribunal is incorporated into the law as a consequence of what the Supreme Court had stated earlier in *Row*.[90]

In the wake of demolition of the Babri Mosque at Ayodhya, the Government of India issued notifications under the Act on December 10, 1992, declaring the following bodies as unlawful for two years: Vishwa Hindu Parishad (VHP); Rashtriya Swayam Sevak Sangh (RSS); Bajrang Dal; Islamik Sevak Sangh and Jamaat-e-Islami Hind. The tribunal appointed under the Act upheld the ban against the VHP, but quashed the same against RSS and Bajrang Dal. The ban against the Jammat-e-Islami was upheld by the tribunal, but, on appeal, from the tribunal decision, the Supreme Court quashed the order on the ground that "there was no objective determination of the factual basis for the notification to amount to adjudication by the tribunal, contemplated by the Act.[91]

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88. *Dharam Dutt v. Union of India*, (2004) 1 SCC 712 : AIR 2004 SC 1295.

89. *Damyanti Naranga v. Union of India*, AIR 1971 SC 966 : (1971) 1 SCC 678.
Also see, *Asom Rastrabhasa Prachar Samiti v. State of Assam*, AIR 1989 SC 2126 : (1989) 4 SCC 496; *Mani Ram v. State of Haryana*, AIR 1996 P&H 92.

90. *State of Madras v. V.G. Row*, *supra*, footnote 74.

91. *Jamaat-e-Islami Hind v. Union of India*, (1995) SCC 428; see also *Dharam Dutt v. Union of India*, (2004) 1 SCC 712 : AIR 2004 SC 1295; JAIN, *CASES ON INDIAN ADM. LAW.*, Ch. XVI, Sec. D(iii).
Also see, *Rajendra Prasad Agarwal v. Union of India*, AIR 1993 All 258.

The ban against the VHP came to an end on December 9, 1994. Again, on January 14, 1995, the Government of India declared VHP as unlawful. This ban was negatived by the tribunal. It ruled that the notification had been issued on "extraneous considerations" and so it was vitiated. The tribunal ruled that the notification had been for "collateral purposes and not for the purpose of maintaining peace and tranquillity in society", and that the Government had "taken into account matters which it ought not to have taken into consideration".

(c) RIGHT NOT TO FORM ASSOCIATION

A question not yet free from doubt is whether the Fundamental Right to form association also envisages the right to refuse to form an association. In *Tikaramji v. State of Uttar Pradesh*,[1] the Supreme Court observed that assuming that the right to form an association "implies a right not to form an association, it does not follow that the negative right must also be regarded as a Fundamental Right". It has been already seen that while the constitution guarantees a right to form an association or unions the association or union cannot claim as a further Fundamental Right to achieve the particular purpose for which such association has been established and that such a right even if concomitant to the Fundamental Right is not a Fundamental Right in itself unless the same is justified Article 19(4).[2]

A co-operative society of canegrowers was formed to supply sugarcane to the sugar mills. The membership of the co-operative was voluntary. The canegrowers were free to join or not to join the society. The members were free to resign their membership except when indebted to the society. The Court held that the society did not fall foul of Art. 19(1)(*c*).

A High Court has held that the right to form an association necessarily implies that a person is free to refuse to be a member of an association if he so desires, and, therefore, a rule making it compulsory for every teacher to become a member of a government sponsored association at the risk of suffering disciplinary action in case a teacher absents from two consecutive meetings infringes Art. 19(1)(*c*).[3]

(d) GOVERNMENT SERVANTS

The Fundamental Right guaranteed by Art. 19(1)(*c*) can be claimed by government servants as well. A government servant may not lose his right under Art. 19(1)(*c*) by joining government service. But the right guaranteed by Art. 19(1)(*c*) to form association does not involve a guaranteed right to recognition thereof as well.

In *Delhi Police Non-Gazetted Karmchari Sangh v. Union of India*,[4] the Supreme Court has upheld the validity of the Police Forces (Restriction of Rights) Act, 1966, which imposes certain restrictions on the enjoyment of Fundamental Rights on members of the police force. The Act has been enacted under Art. 33 but it is also valid under Art. 19(4).

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1. AIR 1956 SC 676 : 1956 SCR 393.
2. See also *Dharam Dutt v. Union of India*, (2004) 1 SCC 712 : AIR 2004 SC 1295.
3. *Sitharamachary v. Deputy Inspector of Schools*, AIR 1958 AP 78.
Also see on Art. 19(1)(*c*), S.N. DWIVEDI, Right to Group-Life under the Constitution—Its Nature & Scope, 12 *JILI* 237 (1970).
4. AIR 1987 SC 379 : (1987) 1 SCC 115.

A rule compelling a member of the police force to withdraw his membership of an association as soon as recognition accorded to it is withdrawn, or if, no recognition is granted to it, would be protected by Art. 33. [5] It is also protected by Art. 19(4), as it is a reasonable restriction on the right guaranteed by Art. 19(1)(*c*) in the interest of discipline and public order.

(e) MORALITY

The term 'morality' in Art. 19(4) is to be given a broad connotation as meaning not merely 'sexual morality' but 'public morality' as well in the wider sense as understood by the people as a whole.[6]

G. FREEDOM OF MOVEMENT AND RESIDENCE: ARTS. 19(1)(*d*), (19)(1)(*e*) AND 19(5)

(a) ARTICLE 19(1)(*D*)

Article 19(1)(*d*) guarantees to every citizen the right to move freely throughout the territory of India. Art. 19(1)(*e*) guarantees to a citizen the right to reside and settle in any part of India. According to Art. 19(5), however, the State may impose reasonable restrictions on these rights by law in the interests of general public or for the protection of the interests of any Scheduled Tribe.

These constitutional provisions guarantee to the Indian citizens the right to go or to reside wherever they like within the Indian territory. A citizen can move freely from one State to another, or from one place to another within a State. These rights underline the concept that India is one unit so far as the citizens are concerned.

The rights of movement [Art. 19(1)(*d*)] and residence [Art. 19(1)(*e*)] go together in most cases for when a person is asked to quit a particular place, both these rights are simultaneously affected. Therefore, most of the cases fall both under Arts. 19(1)(*d*) and (*e*) simultaneously, and more or less the same principles are followed in the matter of restrictions on any of these two rights, and hence these are being discussed together.

(b) FOREIGNERS

Article 19(1)(*e*) applies only to the citizens and not to foreigners. Accordingly, the Fundamental Right of a foreigner is confined to Art. 21 guaranteeing his life and liberty.[7] He cannot claim the right to reside and settle in the country as guaranteed by Art. 19(1)(*e*). The Government of India thus has power to expel foreigners from India.[8]

(c) RESTRICTING MOVEMENT TO MAINTAIN PUBLIC ORDER

The Punjab Akalis threatened to hold a demonstration in Delhi on the occasion of the inauguration of Asian games. To frustrate such demonstration, the Governments of Haryana and Uttar Pradesh took stringent measures, such as, barri-

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5. For Art. 33, see, *infra*, XXXIII, Sec. E.
6. *Manohar v. State of Maharashtra, supra; Brijgopal Denga v. State of Madhya Pradesh*, AIR 1979 M.P. 173.
7. See, *infra*, Ch. XXVI.
8. *Louis De Raedt*, see, *supra*, Ch. XVIII.

cading highways, resorting to seizure and arrests, intercepting movement of Akalis across the border on to Delhi.

These steps were challenged through a writ petition in the Supreme Court. The Court laid down some general norms as to how the police should behave in such a situation. The police is entitled to impose reasonable restraints on the physical movement of the members of the public in order to protect public property and avoid needless inconvenience to other citizens in their lawful pursuits. But all such restraints on personal liberty have to be commensurate with the object which furnishes their justification. These should be minimal and ought not to exceed the constraints of the particular situation, either in nature or in duration. Above all, these cannot be used as engines of oppression, persecution and harassment. The sanctity of person and privacy has to be maintained at all costs and ought not to be violated in the name of maintenance of law and order. The rule of law requires that no one is to be subjected to harsh, uncivilised or discriminatory treatment even when the objective is the securing of the paramount exigencies of law and order.[9]

(d) WEARING HELMETS

A rule was made under the Motor Vehicles Act requiring compulsory wearing of helmet by a person driving a scooter or a motor cycle. The rule was challenged as infringing the free movement of the driver of a two wheeler guaranteed under Art. 19(1)(*d*), but the Court refused to accept the argument. The Court maintained that the rule has been framed for the benefit and welfare of, and safe journey by, a person driving a two wheeler vehicle. The rule is made to prevent accidents not to curtail freedom of movement. Even if it be assumed that the rule does put some restriction on the freedom of movement, it is justifiable under Art. 19(5) as a reasonable restriction in the interest of the general public.[10]

(e) EXTERNMENT

Articles 19(1)(*d*) and 19(1)(*e*) have been invoked frequently to challenge the validity of an externment order served by the executive on a citizen requiring him to leave a State or a district. Such an order *prima facie* curtails the freedoms guaranteed by these Articles, and, therefore, the Courts are entitled to test whether the order, and the law under which it has been made, are reasonable within Art. 19(5).

An externment order was challenged on the ground that it was not a reasoned order. The Supreme Court rejected the challenge pointing out that there is a certain brand of lawless elements in society whom it is impossible to bring to book by established methods of judicial trial because the legal evidence essential for conviction is impossible to obtain. For fear of reprisals, witnesses are unwilling to depose in public against such characters. So, in the externment order against such a person, and in the disposal of appeal against that order, the concerned authority is not bound to give reasons or to write a reasoned order. The externee is only entitled to be informed of the general nature of the material allegations.[11]

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9. *Rupinder Singh Sodhi v. Union of India,* AIR 1983 SC 65 : (1983) 1 SCC 140.
10. *Ajay Canu v. Union of India,* AIR 1988 SC 2027 : (1988) 4 SCC 156.
11. *State of Maharashtra v. Saleem Hasan Khan,* AIR 1989 SC 1304 : (1989) 2 SCC 316.

The district magistrate of Delhi, empowered by the East Punjab Safety Act, 1949, served an externment order on Khare asking him to immediately remove himself from Delhi and not to return there for three months.

The Act in question empowered the State Government, or the district magistrate, to make an order of externment on being satisfied that such an order was necessary to prevent a person from acting in any manner prejudicial to public safety or maintenance of public order. The satisfaction was 'final' and not open to judicial review. A district magistrate's order could not remain in force for more than three months while that of the government could last for an indefinite period.

In *Khare*,[12] the Supreme Court held the above-mentioned provision valid pointing out the several safeguards subject to which the executive could pass an order of externment, *e.g.*, the district magistrate could not extern a person from his district, and the government could not extern a person from the State and this was a great safeguard; the grounds on which an externment order was made had to be communicated to the externee by the authority making the order, and if the order was to remain in force for more than three months, he had a right to make a representation which was to be referred to an advisory board constituted under the Act. It may be noted however that the opinion of the board was only of a recommendatory nature and not binding on the government.

Under the Bombay Police Act, the Commissioner of Police could direct a person to remove himself from Greater Bombay for a period up to two years if—(*i*) the Commissioner was satisfied that his acts were calculated to cause alarm or danger to person or property, or that he was about to commit an offence involving violence or force; and (*ii*) in his opinion, witnesses were not forthcoming to testify against him in public.

The person concerned had some procedural safeguards: he was to have in writing the main allegations against him: he was to have an opportunity to explain the allegations; he could appear through a lawyer and produce witnesses to clear his character. He could appeal to the State Government against the externment order and could resort to a Court on certain grounds.

The Supreme Court held in *Hari*[13] that the law was valid *vis-à-vis* Art. 19(5) as the restrictions had been imposed to protect the public from dangerous and bad characters; there were many safeguards, and the maximum time-limit for an externment order could only be two years.[5]

An argument was taken against the validity of the law that there was no advisory board to scrutinize the material on which the authority took action against the person concerned. The Supreme Court rejected the argument with the remark that there was no universal rule that the absence of an advisory board would necessarily make such legislation unconstitutional. Another argument advanced against the validity of the law was that the case against the externee was initiated by the police and it was the police itself who was the judge in the case. The Court

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12. *N.B. Khare v. Delhi*, AIR 1950 SC 211 : 1950 SCR 519.

13. *Hari v. Dy. Commr. of Police*, AIR 1959 SC 559 : 1959 Supp (1) SCR 769.
Also, *Bhagubhai v. District Magistrate*, AIR 1956 SC 585 : 1956 SCR 533; *Gurbachan v. State of Bombay*, AIR 1952 SC 221 : 1952 SCR 737; JAIN, *CASES ON ADM. LAW*, Ch. XV, Sec. D(iv); R. DEB, Operation of Special Laws relating to Externment of Bad Characters, 11 *JILI*, 1 (1969).

rejected the contention arguing that whereas the case could be initiated by an inspector of police, the order of externment could be made only by the Commissioner of Police. A safeguard available in the law was that an appeal against the order lay to the State Government and a reference could be made to the Courts on some points.

A State law authorised the district magistrate to require a person to live, or not to live, at a particular place, or to notify his movements, in the interests of security of the State or public order. Although there were adequate procedural safeguards, nevertheless, the Supreme Court declared the law unreasonable mainly on the ground that it required a person to reside at any place, without giving him a hearing before selecting a place for him. A place could be selected for him where he might not have any residential accommodation or means of subsistence. There was no provision for providing him with residence or means of livelihood in the place selected for him for his residence.[14]

Another law authorised the district magistrate, in an area declared by the State Government as disturbed, to direct a 'goonda' not to remain within, or enter into, a specified part of the district, if he was satisfied that his presence was prejudicial to the interests of the general public. Adequate procedural safeguards were provided but the Supreme Court declared the Act invalid on the ground *inter alia* that the definition of a 'goonda' afforded no assistance to deciding who fell in that category. 'Goonda' had been defined as meaning a hooligan, rouge or a vagabond and included a person who was dangerous to public peace or tranquillity. This was an inclusive definition; it did not indicate any tests to be applied to decide whether a person fell in the first part of the definition, and it was left to the unguided discretion of the magistrate to treat any citizen as a goonda which was hardly proper.[15] The Court insisted that the Act must have clearly indicated when and under what circumstances a person could be called a 'goonda'.

In *Prem Chand v. Union of India*,[16] the Court has adopted a very strict approach on the question of externment. The Court has characterised exterment of a person as "economic harakari and psychic distress". The Court has emphasized that externment provisions have to be read strictly and that any "police apprehension is not enough. Some ground or other is not adequate. There must be a clear and present danger based upon creditable material which makes the movements and acts of the person in question alarming or dangerous or fraught with violence". Natural justice must be fairly complied with.

In the instant case, the Supreme Court quashed the externment proceedings by the police against the petitioner (under the Delhi Police Act, 1978) on the ground of misuse of power and laid down the following guidelines for the use of such a power: [17]

> "There must be a clear and present danger based upon credible material which makes the movements and acts of the person in question alarming or dangerous or fraught with violence. Likewise, there must be sufficient reason to believe that the person proceeded against is so desperate and dangerous that

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14. *State of Madhya Pradesh v. Bharat Singh*, AIR 1967 SC 1170 : (1967) 2 SCR 454.
15. *State of Madhya Pradesh v. Baldeo Prasad*, AIR 1961 SC 293 : (1961) 1 SCR 970; JAIN, *CASES III*, 1834-1838.
16. AIR 1981 SC 613 : (1981) 1 SCC 639.
17. *Ibid*., at 616.

> his mere presence in Delhi or any part thereof is hazardous to its community and its safety.... Natural justice must be fairly complied with and vague allegations and secret hearings are gross violations of Articles 14, 19 and 21 of the Constitution..."

It will be appreciated that the Court has shown a tougher attitude in this case than in the Bombay case mentioned above. In the instant case, the restriction could be imposed only in a disturbed area and only on a 'goonda'. There were no such restrictions in the Bombay Act under which any person could be externed and this was much broader than the term 'goonda' howsoever vaguely it might have been defined. The discretion conferred in the Bombay Act was, therefore, much broader than in the instant case but still while the Bombay Act had been held valid, the Act in the instant case was declared invalid.

The above cases appear to establish the proposition that a person can be externed from a local area on the grounds mentioned in Art. 19(5). The power to make such an order may be left to the subjective satisfaction of an administrative officer, subject to some substantive and procedural safeguards. The grounds served on an externee should not be vague, indefinite or incomplete and they should have a direct bearing on the purposes for which an externment order can be made under the relevant law. The externee should be given an opportunity to make a representation or of being heard against the order of externment. This appears to be the minimal procedural safeguard which should be given to the externee.[18]

(f) DEPORTATION

Article 19(1)(*e*) has also been used to challenge deportation of Indian citizens out of the country and, in this area, the Supreme Court has limited the powers of the executive a great deal. This judicial approach is illustrated by the following cases.

When the residence visa permit of a person who entered India on the basis of a valid permit was cancelled, the Supreme Court held that having regard to the fact that he has entered the country legally, the competent authority must inform him of the reasons for his proposed deportation. The reasons must be sufficient to enable the petitioner to make effective representation and only after considering the representation, the competent authority may pass an appropriate order. The Court however observed that the procedure may be departed from for compelling reasons.[19]

A Central law authorised the Central Government to direct the removal from India of any person against whom a reasonable suspicion existed of having entered India without a permit, or on an invalid permit, or committing a breach of a condition of the permit. The Supreme Court held the provision invalid in its relation to the Indian citizens. While an Indian citizen guilty of serious prejudicial acts like espionage or disloyalty to his country, may render himself liable to the gravest penalty, it would be repugnant to all notions of democracy, and inconsistent with his Fundamental Rights, to expel him from the country for any other reason. This amounts to destroying his citizenship which could be done only by taking recourse to Art. 11.[20]

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18. *Raja Sukhnandan v. State of U.P.*, AIR 1972 All. 498.
19. *Hasan Ali Raihani v. Union of India*, (2006) 3 SCC 705 : AIR 2006 SC 1714.
20. *Supra*, Ch. XVIII.

Further, a person could be externed when the government entertained a reasonable suspicion that an offence had been committed under the Act. Thus, the question whether an offence had been committed or not was left entirely to the 'arbitrary and unrestrained discretion' of the government. A person could thus be removed merely on suspicion without giving him a reasonable opportunity to clear his conduct and this was nothing short of a travesty of the right of citizenship. A forfeiture of citizenship on suspicion of committing a breach of permit regulations could hardly be regarded as a reasonable restriction on the Fundamental Right to reside and settle in the country.[21]

According to a Passport rule, no person could enter India without a valid passport. An Indian citizen entered the country without a passport and he was fined for committing the offence. Holding the rule valid, the Supreme Court stated that it is a proper restriction upon entry of an Indian citizen returning from a foreign country to require him to produce a passport.[22] But it will be a different matter to say that if he enters India without a passport he may be deported from India. Such an order will be bad under the *Ebrahim Vazir* ruling.

(g) POLICE SURVEILLANCE

Since the pre-independence days, there have been in operation in some of the States, some police regulations providing for police surveillance of activities of persons suspected of criminal habits or tendencies. This includes secret picketing of the house, domiciliary visits at nights, and shadowing the movements of the suspect. The purpose of police surveillance is prevention of commission of crimes by such persons.

The validity of such regulations with reference to Art. 19(1)(*d*) was first considered by the Supreme Court in *Kharak Singh v. State of Uttar Pradesh*.[23] The Court ruled by a majority that no aspect of police surveillance fell within the scope of Art. 19(1)(*d*). The purpose of secret picketing was only to identify the visitors to the suspect so that police might have some idea of his activities and this did not affect his right of movement in any material form. Against the validity of shadowing of the suspect's movements, it was argued that if a person suspected that his movements were being watched by the police, it would induce in him a psychological inhibition against movement and this would infringe Art. 19(1)(*d*) which should be interpreted as postulating freedom not only from physical, but even psychological, restraints on a person's movement. Rejecting this argument which advocated too broad a view of the scope of the safeguard guaranteed by Art. 19(1)(*d*), the Court ruled that Art. 19(1)(*d*) guarantees freedom from physical, direct and tangible restraints; it has no reference to 'mere personal sensitiveness', or 'the imponderable effect on the mind of a person which might guide his action in the matter of his movement or locomotion'.

On the same view, domiciliary visits were also held to fall outside the scope of Art. 19(1)(*d*) as a knock at the door, or rousing a man from his sleep, does not impede or prejudice his locomotion in any manner.

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21. *Ebrahim Vazir v. State of Bombay*, AIR 1954 SC 229 : 1954 SCR 933. For further discussion on this case see, JAIN, *A TREATISE ON ADM. LAW*, I, 800-801.
22. *Abdul Rahim v. State of Bombay*, AIR 1959 SC 1315 : (1960) 1 SCR 285.
23. AIR 1963 SC 1295 : (1964) 1 SCR 332.

The minority view, on the other hand, was that all acts of surveillance result in a close observation of a suspect's movements which infringes Art. 19(1)(*d*). If a man is shadowed, his movements are constricted. "He can move physically, but it can only be a movement of an automation."

Needless to say, in *Kharak Singh*, the majority took too restrictive a view of Art. 19(1)(*d*) and that the minority view contained a lot of truth. The flaw in the majority view was that if there was no physical restraint on a person's movements, then the reasonableness of police surveillance could not be scrutinised *vis-à-vis* Art. 19(1)(*d*). This flaw has now been removed by the Supreme Court by its pronouncement in *Govind v. State of Madhya Pradesh*.[24] The Court has now held that police surveillance will have to be restricted to such persons only against whom reasonable materials exist to induce the opinion that they show 'a determination to lead a life of crime'—'crime in this context being confined to such as involve public peace or security only and if they are dangerous to security risks.' Similarly domiciliary visits and secret picketing by the police should be restricted to clearest cases of danger to community security and should not be resorted to as routine follow-up at the end of a conviction or release from prison or at the whim of a police officer. The Court administered a warning that these old regulations 'ill-accord with the essence of personal freedom,' verge 'perilously near unconstitutionality' and, therefore, need to be revised.

The Supreme Court has reiterated in *Malak Singh v. State of Punjab*[25] that police can maintain discreet surveillance over reputed bad characters, habitual offenders and other potential offenders in order to maintain public peace and prevent commission of offences. However, intrusive surveillance seriously encroaching on a citizen's privacy is not permissible under Arts. 19(1)(*d*) and 21.

(h) RIGHT TO PRIVACY

An interesting question considered by the Court in these cases is whether there is in India a fundamental Right to privacy.

In the *Kharak Singh* case, [26] the Supreme Court ruled definitively that the 'right to privacy' was not a guaranteed right in India. But in *Govind*,[27] the Court appears to have accepted a limited Fundamental Right to privacy 'as an emanation' from Arts. 19(1)(*a*), (*d*) and 21.

The right to privacy is not, however, absolute, and reasonable restrictions can be placed thereon in public interest under Art. 19(5). The impugned police regulations were characterised as making 'drastic inroads directly into the privacy' and 'indirectly into the Fundamental Rights,' of the suspect and, therefore, they were given a restrictive operation as stated above.

A further discussion is held on the right to privacy later under Art. 21.[28]

(i) ADMINISTRATIVE DISCRETION

A review of the cases concerning Arts. 19(1)(*c*), (*d*) and (*e*) will reveal that there appears to be a difference in judicial attitude towards the permissible limits

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24. AIR 1975 SC 1378 : (1975) 2 SCC 148.
25. AIR 1981 SC 760 : (1981) 1 SCC 420.
26. *Supra*, footnote 23.
27. *Supra*, footnote 24.
28. *Infra*, Ch. XXVI, Sec. J(i) .

of administrative discretion to curtail the Fundamental Rights of 'association', 'movement' or 'residence'. The right of association is better protected for the administrative authority cannot be empowered to restrict the right finally in its discretion; some kind of judicial scrutiny should be provided for.[29] In other cases, judicial review may not be necessary over administrative discretion.

It is also interesting to note the variable judicial attitude to the adequacy of an advisory board (provided for in preventive detention cases),[30] as a control mechanism over administrative discretion. In case of right of association, the Supreme Court has said that since there is an advisory board in preventive detention cases, it does not mean that it will be sufficient in cases of restraint on the right of association as well. On the other hand, in cases of restraint on the right of 'movement or residence', the Court has stated that advisory board is not necessary in such cases just because there is one in preventive detention cases. The dichotomy in judicial attitude may be because of the realisation that in a democracy right of 'association' should be protected effectively as that is the basis of organisation of political parties.

H. RIGHT TO PROPERTY: ARTICLES 19(1)(*F*) AND 19(5)

Article 19(1)(*f*) guaranteed to the Indian citizens a right to acquire, hold and dispose of property. Art. 19(5), however, permitted the state to impose by law reasonable restrictions on this right in the interests of the general public or for the protection of the interests of any Scheduled Tribe. Arts. 19(1)(*f*) and 19(5) have been repealed by the Constitution (Forty-fourth Amendment) Act, 1979.[31]

Some aspects of Art. 19(1)(*f*) have been discussed later under the Right to Property.[32]

I. FREEDOM TO CARRY ON TRADE AND COMMERCE: ARTS. 19(1)(*g*) AND 19(6)

(a) ARTICLE 19(1)(*G*)

Article 19(1)(*g*) guarantees to all citizens the right to practise any profession, or to carry on any occupation, trade or business. Under Art. 19(6), however, the state is not prevented from making a law imposing, in the interests of the general public, reasonable restrictions on the exercise of the above right. Nor is the state prevented from making—

(*i*) a law relating to professional or technical qualifications necessary for practising a profession or carrying on any occupation, trade or business; or

(*ii*) a law relating to the carrying on by the state, or by corporation owned or controlled by it, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise.

For long India has believed in a regulated and planned economy and not in a *laissez faire* economy. A number of constitutional provisions made under the title

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29. *Supra*, Sec. F.
30. *Infra*, Ch. XXVII, Sec. B.
31. See, Chs. XXXI, Sec. B, and XLII, *infra.*
32. *Infra*, Ch. XXXI, Sec. B.

of "Directive Principles of State Policy" bear testimony to this economic philosophy.[33] 'Reasonable restrictions' on trade, commerce or business have to be assessed keeping this factor in mind. Consequently, the right to carry on trade is very much regulated in India and the Courts have upheld, in course of time, a good deal of social control over private enterprise.[34] By and large it is correct to say that despite Art. 19(1)(*g*), the government enjoys power to regulate and order the economy in any way it pleases.

In 1978, by the 44th Amendment of the Constitution, the word 'socialist' has been introduced in the Preamble to the Constitution characterising India as 'sovereign socialist secular democratic Republic'.[35] Does the addition of the word 'socialist' mean that the Courts should sanction a more rigorous social control of trade and commerce? Should the Courts lean more and more in favour of nationalisation and state ownership of industries? Should the concept of socialism and social justice be pushed to such an extreme as to ignore entirely the interests of private enterprise?

The Supreme Court sought to answer these questions in *Excel Wear v. Union of India*.[36] The Court emphasized that while there may be greater emphasis on nationalisation and state ownership of industries, private ownership of industries is recognised; private enterprise forms an overwhelmingly large proportion of India's economic structure. Limited companies having shareholders own a large number of industries. There are creditors and depositors and various other persons having dealings with the undertakings. Socialism cannot go to the extent of ignoring the interests of all such persons. A private sector undertaking differs from a public sector undertaking. When the latter closes down, it can protect the labour even at the cost of the public exchequer. But a private undertaking is run for return to the owner not only to meet his livelihood or expenses but also for the formation of capital for growth of the national economy. The Court has posed the question: Does it stand to reason that by rigorous restrictions all these interests should be completely or substantially ignored? The Court has said: "The questions posed are suggestive of the answers."[37] In the application of the Fundamental Right to carry on business, the Court has permitted the invoking of the principle of "level playing field", subject however, to the doctrine of public interest. The Court has taken note of the fact that "level playing field" is an important factor to be kept in mind and this factor is embodied in Article 19(1)(g) of the Constitution.[38]

For some time now the trend has been undergoing a change. Instead of nationalisation, the trend has shifted to privatisation. Instead of government control over trade and commerce, the emphasis now is to relax government control. The government has come to view its role more as a facilitator, rather than as a controller, of private enterprise. From the case law, one can see that, hitherto, the

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33. See, *infra*, Ch. XXXIV.

34. See, M.P. JAIN, *ADMINISTRATIVE PROCESS UNDER THE ESSENTIAL COMMODITIES ACT, 1955* (ILI, 1964); M.P. JAIN, *COMMODITY CONTROL IN I.L.I., GOVERNMENT REGULATION OF PRIVATE ENTERPRISE* 19-44 (1971); M.P. JAIN, A Survey of Laws Preventing Concentration of Economic Power in I.L.I., *SOME PROBLEMS OF MONOPOLY AND COMPANY LAW*, 43-62 (1972).

35. *Supra*, Ch. I; *infra*, Ch. XXXIV.

36. AIR 1979 SC at 36. Also see, *infra*.

37. For discussion on this aspect, also see, *supra*, Ch. I and, *infra*, Ch. XXXIV.

38. *Reliance Energy Ltd. v. Maharashtra State Road Development Corpn. Ltd.*, (2007) 8 SCC 1 : (2007) 11 JT 1.

orientation of the Courts has been favourable to state control. One can visualise that the present-day liberal trend will manifest itself in the case-law arising in future.

Article 19(1)(*g*) uses four expressions, *viz.*, profession, occupation, trade and business. Their fields may overlap but each of these expressions has a content of its own distinct from the others.

The Fundamental Right to establish educational institution as contained in Article 19(1) (g) of the Constitution of India would, however, be subject only to the reasonable restrictions which may be imposed by any law in terms of clause (6) thereof.[39]

(b) STATE MONOPOLY

Article 19(6)(*ii*) (see above) enables the state to make laws for creating state monoplies either partially or complete in respect of any trade or business or industry or service. The state may enter into any trade like any other person either for administrative reasons, or with the object of mitigating the evils in the trade, or even for the purpose of making profits in order to enrich the exchequer.

The law relating to such trading activities must be presumed to be reasonable and in the interest of general public. This was the view taken by the Supreme Court in *Akadasi*,[40] where the Court observed that the law relating to such state monopoly should be presumed to be reasonable and in the interest of general public within the scope of Art. 19(6)(*ii*). The state is not required to justify its trade monopoly as a 'reasonable' restriction and as being in the 'interests of the general public'.[41] It is presumed to be so. No objection can be taken under Art. 19(1)(*g*) if the state carries on a business either as a monopoly, complete or partial, to the exclusion of all or some citizens only, or in competition with any citizen.[42] Thus, the right of the citizens to carry on a trade has been subordinated to the right of the state to create a monopoly in its favour.[43]

Article 19(6)(*ii*) is a saving provision; its function is not to create a power, but to immunize the exercise of legislative power falling within its ambit from being attacked under Art. 19(1)(*g*).[44] Art. 19(6)(*ii*) does not envisage that a State can carry on a trade only under its own law and not under a law made by Parliament. Parliament has power to create trading monopolies in the States under entry 21 in the Concurrent List.[45]

Reference may also be made in this connection to Art. 298, according to which the Union and each State has power to carry on any trade or commerce.[46]

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39. *Modern School v. Union of India*, (2004) 5 SCC 583 : AIR 2004 SC 2236.
40. *Akadasi Padhan v. State of Orissa*, AIR 1963 SC 1047 : 1963 Supp (2) SCR 691.
41. *New Bihar Biri Leaves Co. v. State of Bihar*, AIR 1981 SC 679 : (1981) 1 SCC 537; *Utkal Contractors & Joinery (P.) Ltd. v. State of Orissa*, AIR 1987 SC 2310 : 1987 Supp SCC 751.
42. *P.T. Society v. R.T.A.*, AIR 1960 SC 801 : 1960 (3) SCR 177.
43. *Ramchandra v. State of Orissa*, AIR 1956 SC 298 : 1956 SCR 28; *J.Y. Kondala Rao v. Andhra Pradesh Road Transport Corp.*, AIR 1961 SC 82 : (1961) 1 SCR 642.
44. *H.C. Narayanappa v. State of Mysore*, AIR 1960 SC 1073 : (1960) 3 SCR 742.
45. *Supra*, Ch. X, Sec. F.
46. Ch. XII, Sec. C.

In *Akadasi*,[47] the Supreme Court upheld the validity of an Orissa Law conferring monopoly rights on the State in the matter of trade in kendu leaves. Nevertheless, the Court restricted the scope of the protection under Art. 19(6)(*ii*). The Court ruled that Art. 19(6)(*ii*) protects *only* those statutory provisions which are "basically and essentially" necessary for creating the State monopoly and not such provisions as are only 'subsidiary, incidental, or helpful' to the operation of the State monopoly. Such subsidiary provisions are not immunized by Art. 19(6)(*ii*) and they would have to satisfy the twin tests of 'reasonableness' and 'public interest' as laid down in Art. 19(6).

In *Akadasi*, the provisions dealing with the fixation of the price at which the kendu leaves were to be purchased from the growers were treated as incidental and, thus, held to be grossly unfair contravening the rights of the growers under Art. 19(1)(*f*). Thus, before a law can get immunity under Art. 19(6)(*ii*), the Court has to apply a kind of value judgment, separate the 'essential' monopolistic provisions from the 'non-essential', and test the validity of the latter under Art. 19(6) like that of any other ordinary law restricting trade and commerce.[48]

Further, under Art. 19(6)(*ii*), a State may create monopoly in its own favour but not in favour of third persons for their benefit.[49] The latter law has to fulfil the normal requirements of Art. 19(1)(*g*) read with Art. 19(6). When monopoly in *kendu* leaves was given to certain agents appointed by the State, but those persons were free from government control and the profit was theirs and not of the State, the Supreme Court held that those persons were not really agents of the concerned State within Art. 19(6)(*ii*).[50]

Reiterating this principle, the Supreme Court emphasized that the monopoly created by the State in favour of third parties is different from a monopoly created by the State in its own favour. "The profit resulting from the sale must be for public benefit and not for private gain." The test thus is whether the entire benefit arising from the monopoly enures to the State. Monopoly in a commodity may be valid if it is only for the benefit of the State. It should not serve the private interests of any one person or class of persons.[51] State monopoly ought not to be used as a cloak for conferring private benefit upon a limited class of persons.[52]

A government policy to purchase certain medicines for government hospitals from public sector manufacturers only was held not to amount to a monopoly. The policy does not prohibit other manufacturers from manufacturing and selling their products to other consumers. The government's requirement for drugs is very limited. There is a lot of public demand for drugs in the open market from other consumers. The Supreme Court has observed in this regard in the undernoted case:[53]

> "Monopoly as contemplated under Art. 19(6) of the Constitution is something to the total exclusion of others. Creation of a small captive market in fa-

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47. *Akadasi Padhan v. State of Orissa*, AIR 1963 SC 1047 : 1963 Supp (2) SCR 691.
Also, *Rasbihari Panda v. State of Orissa*, AIR 1969 SC 1081 : (1969) 1 SCC 414; *New Bihar Biri Leaves Co. v. State of Bihar*, *supra*, note 5.

48. *Cooper v. Union of India*, AIR 1970 SC 564 : (1970) 1 SCC 248; *Vrajlal M. & Co. v. State of Madhya Pradesh*, AIR 1970 SC 129 : (1969) 2 SCC 248.

49. *State of Rajasthan v. Mohanlal*, AIR 1971 SC 2068 : (1971) 3 SCC 705.

50. *Akadasi*, *supra*, footnote 47.

51. *New Bihar Biri Leaves*, *supra*, footnote 41.

52. *Rasbihari*, *supra*, footnote 47.

53. *Indian Drugs & Pharm. Ltd. v. Punjab Drugs Manufacturers Assn.*, AIR 1999 SC 1626 : (1999) 6 SCC 247.

> vour of a State-owned undertaking out of a larger market can hardly be treated as creation of monopoly as contemplated under Art. 19(6) of the Constitution, more so because this captive market consists only of State owned hospitals and dispensaries. Thus, on facts… there is no monopoly created by the impugned policy."

When prohibition is only with respect to the exercise of the right referable only in a particular area of activity or relating to particular matters, there is no total prohibition. Hence, when total prohibition is imposed on the slaughter of cow and her progeny the ban is total with regard to slaughter of one particular class of cattle and is not on total activity of butchers as they are left free to slaughter cattle other than those specified in impugned Act.[54]

Again where a municipality by its resolution prohibited the issue of certain receipts and passes to commission agents on behalf of owners of grain, but not restricting their entry into the market on legitimate business, it was held that the resolution merely prohibited employees of the municipality from issuing such receipts and passes but did not prevent them from carrying on business as an Adatya of a seller of grain which could be considered as a restriction but not a total prohibition.[55]

(c) TRADE: MEANING OF

The guarantee in Art. 19(1)(*g*) extends to practice any *profession* or to carry on any *occupation, trade or business.* Art. 19(1)(*g*) uses four different expressions so as to make the guarantee in Art. 19(1)(*g*) as comprehensive as possible and to include all avenues and modes through which a person earns his livelihood. Nevertheless, Art. 19(1)(*g*) protects only such activities which are of a commercial or a trading nature. Any activity not regarded as trade or business falls outside the purview of this protection. This means that the validity of a law regulating any such activity need not be decided upon by the yardstick of reasonableness and public interest as laid down in Art. 19(6). Thus, a judicial technique to promote rigorous government control of some activities is to refuse to characterise them as trading or commercial activities because of considerations of public morality, public interest, or their harmful and dangerous character.

Plying motor vehicles,[56] or rickshaws[57] on public pathways have been held to be trade and commerce.

(d) LIQUOR TRADE

The judicial opinion on the question whether liquor trade is trade or not for the purposes of Art. 19(1)(*g*) has taken time to stabilize.

An early as 1954, in *Cooverji*,[58] the Supreme Court ruled that no one has an inherent right to sell intoxicating liquors in retail sale. A citizen has no such privilege. As it is a business which is dangerous to the community, the State may

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54. *State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat,* (2005) 8 SCC 534 : AIR 2006 SC 212.
55. *Krishna Kumar v. Municipal Committee,* (2005) 8 SCC 612.
56. *Saghir Ahmad v. State of Uttar Pradesh,* AIR 1954 SC 728 : (1955) SCR 707 ; *Raman & Raman v. State of Madras,* AIR 1959 SC 694 : 1959 Supp (2) SCR 227.
57. *Iqbal v. Municipal Board,* AIR 1959 All. 186.
58. *Cooverjee v. Excise Commissioner, Ajmer,* AIR 1954 SC 220 : 1954 SCR 873.

entirely prohibit it or permit it under conditions. The manner and extent of regulation rest within the discretion of the State.

Again, in *Krishan Kumar v. State of Jammu & Kashmir*,[59] the Supreme Court refused to countenance the argument that dealing in noxious and dangerous goods like liquor was dangerous to the community and subversive of its morals and, therefore, was not trade. The Court stated that the acceptance of such a broad argument "involves the position that the meaning of the expression 'trade or business' depends upon, and varies with, the general acceptance of the standards of morality obtaining at a particular point of time in our country". The Court was of the view that while standards of morality could afford guidance to impose restrictions, they could not limit the scope of the right. The morality or illegality or otherwise of a deal would not affect the quality or character of the activity though it might be a ground for imposing a restriction on the activity.

However, the judicial view underwent a fundamental change in course of time. In *Nashirwar v. State of Madhya Pradesh*,[60] the Supreme Court held that there was no Fundamental Right to carry on trade in liquor because of the reasons of public morality, public interest and harmful and dangerous character of liquor. The Court ruled that "there is the police power of the state to enforce public morality to prohibit trades in noxious or dangerous goods". Reference was also made to Art. 47 a Directive Principle, in support of this view.[61]

In *Har Shankar*,[62] after reviewing the previous case-law, the Court observed: "There is no Fundamental Right to do trade or business in intoxicants. The state under its regulatory powers, has the right to prohibit absolutely every form of activity in relation to intoxicants—its manufacture, storage, export, import, sale and possession."

Again, in *Khoday Distilleries*,[63] the Court observed that a citizen has no Fundamental Right to trade or business in intoxicating liquors and that trade or business in such liquors can be completely prohibited. Because of its pernicious and vicious nature, dealing in intoxicating liquors is considered to be *res extra commercium*. The state can create a monopoly either in itself or in an agency created by it for manufacture, possession, sale and distribution of liquor as a beverage. The state can impose restrictions, limitations and even prohibition on intoxicating liquors.[64]

Alternatively the Court has argued in *McDowell*,[65] that even if it were to be argued that trade in intoxicating liquors falls within the scope of Art. 19(1)(*g*), the State could still impose severe restrictions, or even prohibition, on the trade in intoxicating liquors. Art. 47 expressly speaks of the obligation of the state to endeavour to bring about prohibition of the consumption of intoxicating liquors. Therefore, imposing prohibition is to achieve the directive principle adumbrated in Art. 47. Such a course merits to be treated as a reasonable restric-

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59. AIR 1967 SC 1368 : (1967) 3 SCR 50.
60. AIR 1975 SC 360 : (1975) 1 SCC 29.
61. *Infra*, Ch. XXXIV.
62. *Har Shankar v. Dy. E.T. Commr.*, AIR 1975 SC 1121 : (1975) 1 SCC 737.
63. *Khoday Distilleries v. State of Karnataka*, (1995) 1 SCC 574 : (1994) 6 JT 588.
64. *Ugar Sugar Works Ltd. v. Delhi Administration*, AIR 2001 SC 1447, 1452 : (2001) 3 SCC 635.
65. *State of Andhra Pradesh v. Mcdowell & Co.*, AIR 1996 SC 1627 : (1996) 3 SCC 709.

tion within the meaning of Art. 19(6). Thus, whichever line of thought one adopts, an Act imposing prohibition on manufacture, production, consumption and sale of intoxicating drinks is valid.

Liquor trade may thus be subjected to rigorous control. Restrictions which may not be lawful in case of other trades may be permissible as regards the liquor trade. Even prohibition of the liquor trade may be regarded permissible and lawful. The state has complete right of controlling any aspect of the liquor trade. The state has exclusive right to manufacture and sell liquor. The state can sell its right to raise revenue, and the consideration charged by the state for this purpose is neither tax not fee but is like rental.[66] The state can sell its right by public auction or private negotiation. Whatever has been said here in relation to liquor trade applies with equal force to trade in all intoxicants and nauseous drinks.[67]

A caveat may, however, be added here. Although, regulation of liquor trade may fall outside Art. 19(1)(g), Art. 14 can still be invoked if a restriction imposed on liquor trade is found to be arbitrary, irrational or unreasonable.[68]

(e) BETTING AND GAMBLING

The Supreme Court has refused to characterise many other activities as trade for purposes of Art. 19(1)(*g*). Prize chits serve no social purpose but are prejudicial to public interests as they exploit the poor people and so these can be totally banned.[69] Betting and gambling have been held to be not trade and so fall outside the purview of Art. 19(1)(*g*), as gambling activities from their very nature and in essence "are extra *commercium* although the external forms, formalities and instruments of trade may be employed".[70] Prize competitions involving substantial skill are regarded as business activities. On the other hand, a prize competition which is of a gambling nature would not fall within the protection of Art. 19(1)(*g*).[71]

(f) OTHER TRADES

In *Krishnachandra v. State of Madhya Pradesh*, the Court considered the reasonableness of the Gambling Act under Art. 19(1)(*g*) as if gambling was trade and the Court did not take the stand, as it had done earlier, that gambling was not protected by Art. 19(1)(*g*).[72]

The Calcutta High Court has ruled that Art. 19(1)(*g*) does not guarantee the Fundamental Right to carry on trade or business which generates pollution. No one has a Fundamental Right to manufacture, sell and deal in fireworks which produce sound beyond permissible limits, or which generates pollution which would endanger health and public order.[73]

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66. *Harshankar v. Dy. E. & T. Commr.*, AIR 1975 SC 1121 : (1975) 1 SCC 737; *Sat Pal & Co. v. Lt. Governor of Delhi*, AIR 1979 SC 1550 : (1979) 4 SCC 232.
67. *P.N. Kaushal v. Union of India*, AIR 1978 SC 1457 : (1978) 3 SCC 558; *Southern Pharmaceuticals & Chemicals v. State of Kerala*, AIR 1981 SC 1862 : 1981 LIC 1520.
68. *Ugar Sugar*, *supra*.
69. *Srinivasa Enterprises v. Union of India*, AIR 1981 SC 504 : (1980) 4 SCC 507.
70. *State of Bombay v. R.M.D.Chamarbaugwala.*, AIR 1957 SC 699; *R.M.D.C. v. Union of India*, AIR 1957 SC 628 : 1957 SCR 930.
71. *Supra*, footnote 70.
72. AIR 1965 SC 307 : 1964 (1) SCR 765.
73. *Burrabazar Fire Works Dealers Association v. Commissioner of Police, Calcutta*, AIR 1998 Cal 121.

The Supreme Court has declared that no one can claim a Fundamental Right to carry on business in adulterated foodstuffs thus implying that it is not a trade for purposes of Art. 19(1)(*g*).[74] Money-lending to poor villagers has been held to be not trade and commerce as it is exploitative of the village people. Such an activity has been considered as 'anti-social, usurious, unscrupulous'. On the other hand, money-lending amongst the commercial community is trade as it is integral to trade and commerce.[75]

A contract between an individual and a government is not protected by Art. 19(1)(*g*). If the government infringes the contract, the individual may sue for damages or specific performance, but he cannot argue that he has been deprived of his Fundamental Right to carry on trade and commerce guaranteed by Art. 19(1)(*g*).[76]

The Supreme Court has ruled in *Unni Krishnan*,[77] that establishing educational institutions cannot be regarded as trade or commerce falling under Art. 19(1)(*g*). Imparting education cannot be allowed to become commerce. Trade or business normally connotes an activity carried on for a profit motive. Imparting of education has never been regarded as commerce in India.

Private educational institutions are a necessity of the day as the government alone cannot meet the demand for education particularly in the sector of medical and technical education which calls for huge outlays.

In this case, the Court was faced with the question—how to encourage private educational institutions without allowing them to commercialize education.[78] Establishing and administering an educational institution for imparting knowledge to students is an occupation, protected by Article 19(1) (g) and additionally by Article 26(a), if there is no element of profit generation. Although imparting education has also become a means of livelihood for some professionals and a mission in life for some altruists and is characterized as an occupation, yet it does not cease to be a service to the society and cannot be equated to a trade or a business.

Teaching may however be regarded as a profession falling under art. 19(1)(g).

The law regulating to local administration of an urban or rural area affects the social and economic life of the community. The reasonableness of complete restriction imposed on trade of non vegetarian food items has, therefore, to be viewed from the cultural and religious background of the three municipal towns of Haridwar, Rishikesh and Muni ki Reti. Therefore, the impugned bye-law notified by the Municipal Board, Rishikesh which prohibited the sale and consumption of eggs within the limits of the Municipal Board was not violative of Art. 19(1)(g) cannot be held to be violative of Article 19(1) (g).[79]

(g) ARTS. 19(1)(*G*) AND 301

Article 301 also guarantees freedom of trade. The scope of Art. 301 and its relation with Art. 19(1)(*g*) has been discussed earlier.[80] A provision infringing

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74. *State of Uttar Pradesh v. Kartar Singh*, AIR 1964 SC 1135 : 1964 (6) SCR 679.
75. *Fateh Chand v. State of Maharashtra*, AIR 1977 SC 1825 : (1977) 2 SCC 670; *Supra*.
76. *Achutan v. State of Kerala*, AIR 1959 SC 490 : 1959 Supp (1) SCR 787.
Also see, *infra*, Ch. XXXIX.
77. *Unni Krishnan v. State of Andhra Pradesh*, AIR 1993 SC 2178, at 2244 : (1993) 1 SCC 645.
78. Also see, *infra*, Ch. XXVI, Sec. J(i).
79. *Om Prakash v. State of U.P.*, (2004) 3 SCC 402 : AIR 2004 SC 1896.
80. *Supra*, Ch. XV, Sec. C.

Arts. 301 and 304 may, and ordinarily will, infringe Art. 19(1)(*g*) as well and so it can be challenged under Art. 19(1)(*g*).[81]

J. RESTRICTIONS ON TRADE AND COMMERCE

In several cases, the Courts have upheld measures affecting trade and commerce to some extent, on the ground that they do not constitute restrictions on the Fundamental Right concerned.

Reasonableness of restriction is to be determined in an objective manner and from the standpoint of interest of the general public and not from the standpoint of the interests of persons upon whom the restrictions have been imposed or upon abstract considerations. A restriction cannot be said to be unreasonable merely because in a given case, it operates harshly. In determining whether there is any unfairness involved, the nature of the right alleged to have been infringed, the underlying purpose of the restriction imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing condition at the relevant time enter into judicial verdict. The reasonableness of the legitimate expectation has to be determined with respect to the circumstances relating to the trade or business in question. Canalisation of a particular business in favour of even a specified individual is reasonable where the interest of the country are concerned or where the business affects the economy of the country.[82]

In *Ram Jawaya v. State of Punjab*,[83] the government scheme to nationalise school text books was held valid under Art. 19(1)(*g*) because the private publishers' right to print and publish any book they liked and offer the same for sale, was not curtailed. The choice of text books for the recognised schools lay with the government and the publishers had no Fundamental Right to have any of their books prescribed as a text book by the school authorities.

The Government of Kerala directed that the farmers getting assistance from it for purchase of pumpsets had to purchase them from government approved pump dealers. The private dealers challenged the direction as violation of their right under Art. 19(1)(*g*), but the Supreme Court rejected the contention. The Court ruled that no one has the "Fundamental Right to insist upon the government or any other individual for doing business with him." A government or an individual is free to determine with whom it will do business. The government has every right to select dealers of its choice for delivering of pump sets keeping in view the price and after sale service and this cannot be challenged as an unreasonable restriction under Art. 19(1)(*g*) read with Art. 19(6).[84]

A regulation of trade and commerce becomes challengeable under Art. 19(1)(*g*), if it is shown that it directly and proximately interferes in *praesenti* with the exercise of freedom of trade. If the alleged restriction does not directly or proximately interfere with the exercise of freedom of trade, the freedom guaran-

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81. *S. Ahmad v. State of Mysore*, AIR 1975 SC 1443 : (1975) 2 SCC 131.
82. *Bannari Amman Sugars Ltd. v. CTO*, (2005) 1 SCC 625 : (2004) 10 JT 500.
83. AIR 1955 SC 549; *supra*, Ch. III, Sec. D(iii).
Also, *Naraindas v. State of Madhya Pradesh*, AIR 1974 SC 1232 : (1974) 4 SCC 788.
84. *Krishnan Kakkanth v. Govt. of Kerala*, AIR 1997 SC 128 : (1997) 9 SCC 495.

teed by Art. 19(1)(*g*) is not violated.[85] Once it is assumed that the impugned legislation imposes a restriction on the freedom of trade, the burden is on those who support it to show that the restriction imposed is reasonable and in the interest of general public. The burden is on those who seek the protection of Art. 19(6) and not on the citizen who challenges the restriction as invalid.[86] The Supreme Court has also emphasized that "the greater the restriction, the more the need for strict scrutiny by the Court".[87]

(a) REASONABLE RESTRICTION : WHAT IS?

What is a 'reasonable restriction' under Art. 19(6)?[88] Reasonableness of a restriction has to be tested both from procedural as well as substantive aspects of the law. In order to determine the reasonableness of the restrictions, regard must be had to the nature of the business and the conditions prevailing in the trade. These factors differ from trade to trade and no hard and fast rules concerning all trades can be laid down.[89] Further, a restriction on a trade or business is unreasonable if it is arbitrary or drastic and has no relation to, or goes much in excess of, the objective of the law which seeks to impose it.

As early as 1951, in *Chintaman Rao,*[90] the Supreme Court laid down the test for a "reasonable restriction" as follows:

> "The phrase reasonable restriction cannotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature beyond what is required in the interest of the public. The word reasonable implies intelligent care and deliberation, that is, the choice of a course which reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in article 19(1)(*g*) and the social control permitted by clause (6) of Article 19, it must be held to be wanting in that quality."[91]

The Court has further explained the concept of "reasonableness" as envisaged in Art. 19(6) in *Krishnan*:[92]

> "The reasonableness of restriction is to be determined in an objective manner and from the standpoint of the interests of general public and not from the standpoint of the interests of the persons upon whom the restrictions are imposed or upon abstract consideration. A restriction cannot be said to be unreasonable merely because in a given case, it operates harshly…..In determining the infringement of the right guaranteed under Art. 19(1)(*g*), the nature of right alleged to have been infringed, the underlying purpose of the restriction imposed, the extent and urgency of the evil sought to be remedied thereby, the

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85. *Sukhnandan Saran Dinesh Kumar v. Union of India,* AIR 1982 SC 902 : (1982) 2 SCC 150.
86. *Laxmi Khandsari v. State of Uttar Pradesh,* AIR 1981 SC 860, 873 : (1981) 2 SCC 600.
87. *Narendra Kumar v. Union of India,* AIR 1960 SC 430, 437 : (1960) 2 SCR 375; *Municipal Corp. v. Jan Mohammad,* AIR 1986 SC 1205 : (1986) 3 SCC 20.
88. See, *supra,* Sec. B.
89. *Sreenivasa General Traders v. State of Andhra Pradesh,* AIR 1983 SC 1246 : (1983) 4 SCC 353.
90. *Chintaman Rao v. State of Madhya Pradesh,* AIR 1951 SC 118 : 1950 SCR 759; see, *infra,* note 62.
91. Also see, *Bishambhar Dayal Chandra Mohan v. State of Uttar Pradesh,* AIR 1982 SC 33; *P.P. Enterprises v. Union of India,* AIR 1982 SC 1016 : (1982) 2 SCC 33.
92. *Krishnan Kakkanth v. Govt. of Kerala,* AIR 1997 SC 128, at 135 : (1997) 9 SCC 495.

> disproportion of the imposition, the prevailing conditions at the time, enter into judicial verdict."

Thus, restrictions to be reasonable must not be arbitrary or excessive in nature so as to go beyond the interest of general public. This formulation involves a balancing of private interest *vis-a-vis* public interest. In this process, the Courts have leaned towards the consumers' interests. Thus, while far-reaching restrictions are imposed on trade and commerce, only rarely will a restriction be held as unreasonable.

It has since been held that in judging the reasonableness of the restrictions imposed by Art. 19(6), the Court has to bear in mind the Directive Principles.[1]

In *Sivani*,[2] the Supreme Court has laid down the criteria to evaluate the reasonableness of a restriction under Art. 19(6). The Court must take into account whether the law has struck a proper balance between social control, on the one hand, and the right of the individual on the other. The Court has to take into account such factors as, nature of the right enshrined, underlying purpose of the restriction imposed, evil sought to be remedied by the law, its extent and urgency, how far the restriction is or is not proportionate to the evil and the prevailing conditions at the time. The Court cannot proceed on any abstract or general notion of what is reasonable. The Court cannot judge reasonableness of a restriction from the point of view of one person or a class of persons on whom the restriction may be imposed.

In the context of the Lotteries (Regulation) Act 1988 the Supreme Court has held that if by a statutory action the rights of an agent to carry on business is affected, he may in his own right maintain an action. A quia time application is also maintainable if his right in any manner to carry on business is infringed or is a threatened.[3]

To adjudge the reasonableness of the restriction, regard must be had to the nature of the business, and the conditions prevailing therein which would differ from trade to trade. No hard and fast rules covering all trades can be laid down. The nature of the business and its indelible effect on public interest etc. are important elements in deciding reasonableness of therestriction. No one has inherent right to carry on a business which is injurious to public interest. Trade or business attended with danger to the community may be totally prohibited or be permitted subject to such conditions or restrictions as would prevent the evils to the utmost.

(b) CAN RESTRICTION AMOUNT TO A PROHIBITION?

A question has arisen from time to time whether a restriction can amount to a *prohibition*. The position of the Supreme Court on this question has been that restriction may even amount to prohibition in a given case if the mischief to be remedied warrants total prohibition.[4]

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1. See, *infra*, Ch. XXXIV.
Also see, *infra*, footnotes 40-43 on 1494.

2. *Sivani v. State of Maharashtra*, AIR 1995 SC 1770, at 1774 : (1995) 6 SCC 289.

3. *Tashi Delek Gaming Solutions v. State of Karnataka*, (2006) 1 SCC 442 : AIR 2005 SC 4256.

4. *Peerless General Finance & Investment Co. Ltd. v. Reserve Bank of India*, AIR 1992 SC 1033, 1065 : (1992) 2 SCC 343.

In *Narendra Kumar*,[5] the Supreme Court construed the term 'restriction' to include 'prohibition' and ruled that the reasonableness of such a restruction has to be considered "in the background of the facts and circumstances under which the order was made, taking into account the nature of the evil that was sought to be remedied by such law, the ratio of the harm caused to individual citizens by the proposed remedy, to the beneficial effect reasonably expected to result to the general public", and "whether the restraint caused by the law was more than what was necessary in the interests of the general public." Even though total prohibition upon carrying on one's profession can be imposed by way of regulatory measure but for doing so such prohibition must pass through a stringent test of public interest.[6]

Rent Act, which imposes a limit on the rent which can be charged, would pass the test of reasonable restriction.[7]

The Court has again explained the position as follows in *Mohd. Faruk*:[8]

> "The Court must in considering the validity of the impugned law imposing a prohibition on the carrying on of a business or profession, attempt an evaluation of its direct and immediate impact upon the Fundamental Rights of the citizens affected thereby and the larger public interest sought to be ensured in the light of the object sought to be achieved, the necessity to restrict the citizen's freedom, the inherent pernicious nature of the act prohibited or its capacity or tendency to be harmful to the general public, the possibility of achieving the object by imposing a less drastic restraint and in the absence of exceptional situations such as the prevalence of a state of emergency—national or local—or the necessity to maintain essential supplies, or the necessity to stop activities inherently dangerous, the existence of a machinery to satisfy the administrative authority that no case for imposing the restriction is made out or that a less drastic restriction may ensure the object intended to be achieved."

In *Narendra Kumar*, a total prohibition on copper dealers was held valid.[9] In *Systopic Laboratories*,[10] complete ban on manufacture and sale of certain medical formulations was held to be not an unreasonable restriction on the right to carry on trade under Art. 19(1)(*g*). The Central Government took the said decision on the recommendation of the Drugs Consultative Committee which had thoroughly studied the matter. Implementation of directive principles would be in the interest of the general public and, therefore, trades that are harmful or dangerous to the ecology may be regulated or totally prohibited.[11]

Although regulatory measures for better efficiency, conduct and behaviour in the public interest would be a reasonable restriction, but a total prohibition on a person from carrying on his profession at an age chosen by the Government would not be a reasonable restriction unless special reasons are shown to exist.[12] The Court also expressed the view that the freedom of carrying on a profession should be enjoyed by the citizen to the fullest possible extent without putting "shackles" of avoidable cobweb of rules and regulations putting restrictions in

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5. *Narendra Kumar, supra,* at 436.
6. *B. P. Sharma v. Union of India,* (2003) 7 SCC 309 : AIR 2003 SC 3863.
7. *Municipal Corpn. of Greater Mumbai v. Kamla Mills Ltd.,* (2003) 6 SCC 315.
8. *Md. Faruk v. State of Madhya Pradesh,* AIR 1970 SC 93 : (1969) 1 SCC 853.
9. *Supra,* footnote 5.
10. *Systopic Laboratories (P) Ltd. v. Prem Gupta,* AIR 1994 SC 205 : (1994) Supp (1) SCC 160.
11. *Indian Handicrafts Emporium v. Union of India,* (2003) 7 SCC 589 : AIR 2003 SC 3240.
12. *B. P. Sharma v. Union of India,* (2003) 7 SCC 309 : AIR 2003 SC 3863.

the enjoyment of such freedoms. As such clause 17 of the conditions of licence issued by the Tourism Department of the State restricting the age of tourist guide as 60 years was held to be unconstitutional.

Thus, it is clear from the above discussion that in certain circumstances, a restriction on trade may amount even to prohibition. As stated above, protection of Art. 19(1)(*g*) has already been withdrawn from trade in intoxicants.[13] No person has any Fundamental Right to carry on trade in any noxious or dangerous goods like intoxicating drugs or intoxicating liquors.[14]

(c) MISCELLANEOUS SITUATIONS

A State law prohibited the manufacture of *bidis* in the villages during the agricultural season. No person residing in the villages could employ any other person, nor engage himself, in the manufacture of *bidis* during the agricultural season. The object of the provision was to ensure adequate supply of labour for agricultural purposes. The *bidi* manufacturer could not even import labour from outside, and so had to suspend manufacture of *bidis* during the agricultural season. Even villagers incapable of engaging in agriculture, like old people, women and children, etc., who supplemented their income by making *bidis* in their spare time, were prohibited from engaging themselves in *bidi* manufacture without any reason. The prohibition was held to be unreasonable because it was in excess of the object in view and was drastic in nature.[15]

An order obligating wheat growers to dispose of excess wheat within 15 days was held unreasonable as it did not create any corresponding obligation whatever on any one to purchase wheat at a reasonable price.[16]

In order to curb the increasing menace of vehicle theft the central government devised a system of introducing High Security Registration Plates and accordingly issued the Motor Vehicles (New High Security Registration Plates) Order 2001. The Ministry of Road Transport and Highway left the discretion to the states in the matter of using Notice Inviting Tender (NIT) for supplying such plates. The petitioners challenged the conditions of NIT concerning experience and extent of business of the prospective bidders and the NIT stipulated that the bidders should be operating in at least five countries for licence plates and in atleast three countries having security features worldwide, with minimum annual turnover equivalent to must be from licence place business. The agreement is to subsist for a period of 15 years during which the bidder will be approved except in case of termination of contract. The petitioners challenged these conditions contending that the conditions concerning experience and extent of business are discriminatory and tailor made to suit the interest of a class of manufacturers having foreign collaboration and a cartel of companies. The State was well aware that only one or two companies could satisfy the eligibility conditions in the name of implementing Rule 50 requiring use of such number plates and in the process was taking away the rights of existing manufacturers violating their Fundamental Right under Article 19(1)(g) of the Constitution by eliminating individual manufacturers of plates.

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13. *Supra*, Sec. I(d).
14. *Southern Pharmaceuticals & Chemicals v. State of Kerala*, AIR 1981 SC 1862 : 1981 LIC 1520.
15. *Chintaman Rao v. State of Madhya Pradesh*, AIR 1951 SC 118 : 1950 SCR 759.
16. *Partap Singh v. State of Punjab*, AIR 1975 P&H 324.

Rejecting the petitioner's plea, the Court held that the impugned clauses had been incorporated to ensure that the manufacturers are technically and financially competent to fulfill the contractual obligation. The know how was available outside India and the indigenous manufacturers are mostly those who have foreign collaboration. Keeping in mind the nature and magnitude of the job, the huge infrastructure required for nationwide implementation, the state's attempt to select foreign manufacturers having foreign collaboration and experience in foreign countries cannot be held to be discriminatory and even if one manufacturer is selected through open tender the said selection cannot be held to be creating monopoly or violative of Article 19(g) read with Clause 6.[17]

With a view to stop production of *Khandsari*, a restriction was imposed by way of stopping the crushers for two months. The restriction was held valid in *Laxmi Khandsari v. State of Uttar Pradesh*[18] as it was imposed with a view to stop production of *Khandsari* so as to promote production of white sugar and to make it available to the consumers at reasonable rates. The restriction was held to be in public interest and as bearing a reasonable *nexus* to the objects sought to be achieved, *viz.*, to reduce shortage of sugar and ensure its equitable distribution. The restriction was not more excessive than what the situation demanded.

A law prohibiting advertisements relating to magic remedies was held valid because the underlying purpose of the law was to prevent objectionable and unethical advertisements in order to discourage self-medication and self-treatment.[19]

Whether a particular restriction on trade (prohibiting selling of eggs) to the extent of its complete prohibition is to be considered reasonable within the meaning of clause (b) depends on the nature of trade involved and the public interest to be subserved by such total prohibition. In this respect the Supreme Court has held that the term reasonable restriction as appearing in clause (6) is highly flexible and draws colour from its context. In this case the Court come to the reasoning that a large number of residents are strict vegetarians. A major source of employment and revenue in Rishikesh, Haridwar and Muni Ki Reti is derived from tourism and a floating population of pilgrims. On the other hand as the appellant/petitioners who are running hotels and restaurants form a small section of the population who can also trade in adjoining towns and villages no substantial harm is caused to them.[20]

A law setting up markets for commercial crops and prohibiting any trade in such crops within a reasonable radius of a market has been held to be reasonable. The purpose is to reduce scope for exploitation in dealings. Such markets ensure correct weighing and reasonable prices and provide other facilities to the growers of commercial crops.[21]

Qualitative restrictions imposed on fruit products through a legal provision have been held valid as being reasonable and in public interest.[22]

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17. *Association of Registration Plates v. Union of India*, (2004) 5 SCC 364 : AIR 2005 SC 1354.
18. AIR 1981 SC 860, 873.
19. *Hamdard Dawakhana v. Union of India*, AIR 1960 SC 554 : 1960 (2) SCR 671; *supra.*
20. *Om Prakash v. State of U.P.*, (2004) 3 SCC 402 : AIR 2004 SC 1896.
21. *M.C.V.S. Arunachala Nadar v. State of Madras*, AIR 1959 SC 300 : 1959 Supp (1); *Mohd. Hussain v. State of Bombay*, AIR 1962 SC 97 : 1962 (2) SCR 659; *Jan Mohd. Noor Mohd. v. State of Gujarat*, AIR 1966 SC 385 : 1966 (1) SCR 505.
22. *Hamdard Dawakhana v. Union of India*, AIR 1965 SC 1167 : (1965) 2 SCR 192.

In *Minerva Talkies, Bangalore v. State of Karnataka*,[23] the Supreme Court has upheld a rule made by the State Government to the effect that no licensee shall exhibit more than four cinema shows in a day. The Court has ruled that the rule in question does not impose any unreasonable restriction on the freedom to carry on any occupation, trade or business guaranteed by Art. 19(1)(*g*) in the interest of general public.

The state law prohibited members of the State Medical Education Service from private practice. The Supreme Court held the restriction to be reasonable and hence valid.[24] The Court said that no one compels any one to join the service; one is free to leave it at anytime. The restriction is not on the freedom to practise the medical profession but on such practice while one continues to be a member of the state service. The restriction is in public interest. The state is free to recruit persons to its services on such terms as it thinks desirable to make the services beneficial to the public.

(d) STREET HAWKERS

In *Bombay Hawkers' Union v. Bombay Municipal Corporation*,[25] the Supreme Court ruled, in answer to the claim of the hawkers that under Art. 19(1)(*g*) they have a Fundamental Right to carry on their trade on public streets, that no one has a right to do business so as to cause annoyance or inconvenience to members of the public. Public streets are meant for use by the general public; they are not meant to facilitate the carrying on of private trade or business. But the hawkers ought not to be completely deprived of their right to carry on trade. So, the Court directed that there should be hawking zones in the city where licenses should not be refused to the hawkers except for good reasons.

In *Sodan Singh v. New Delhi Municipality*,[26] (I) the Supreme Court again considered the question: how far the hawkers have a right to ply their trade on pavements meant for pedestrians? In the instant case, the Court has come to the conclusion that the right to carry on trade or business mentioned in Art. 19(1)(*g*) on street pavements, if properly regulated, cannot be denied on the ground that the street pavements are meant exclusively for pedestrians and cannot be put to any other use. Proper regulation is, however, a necessary condition, for otherwise the very object of laying roads would be defeated. The State holds all public roads and streets in the country as a trustee on behalf of the public and the members of the public are entitled as beneficiaries to use them for trading as a matter of right subject to the right of others including pedestrians. The right of hawkers is subject to reasonable restrictions under Art. 19(6). The Court has however negatived the contention of the hawkers that they have a Fundamental Right to occupy a particular place on the pavement where they can squat and do business. "The petitioners do have a Fundamental Right to carry on a trade or business of their choice but not do so at a particular place,[27]" said the Court. The Court has conceded to the hawkers the right to do business while going from place to place subject to proper regulation in the interest of general convenience of the public.

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23. AIR 1988 SC 526 : 1988 Supp SCC 176.
24. *Sukumar Mukherjee v. State of West Bengal*, AIR 1993 SC 2335.
25. AIR 1985 SC 1206 : 1985 (3) SCC 528.
26. AIR 1989 SC 1988 : (1989) 4 SCC 455.
27. *Ibid*, at 1996.

The *Sodan* ruling has been reiterated by the Court in *Sodan Singh v. NDMC (II)*.[28] The Court has said that every citizen has a right to the use of a public street vested in the state as a beneficiary but this right is subject to reasonable restrictions as the state may choose to impose. "Street trading is albeit a Fundamental Right under Art. 19(1)(*g*) of the Constitution but it is subject to reasonable restrictions which the state may choose to impose by virtue of Art. 19(6)." This right includes hawking on the street pavements by moving from one place to another without being stationary on any part of the pavement. This does not include a citizen occupying or squatting on any specific place of his choice on the pavement, regardless of the rights of others, including the pedestrians, to use the pavements. The Court has emphasized in this connection: "Proper regulation is, however a necessary condition, for otherwise the very object of laying roads would be defeated."[29]

The right to hawk cannot be unreasonably restricted The correct approach is to determine where hawking is not to be permitted and thereafter such areas to be non-hawking zones.[30]

In a matter relating to eviction of illegal squatters occupying railway property and also areas around Rabindra Sarobar, the Calcutta High Court directed the railway administration and the State of West Bengal to provide sanitary facilities to the squatters as interim measure. The Union of India went to Supreme Court contending that the High Court ought to have directed police assistance for eviction and rather than providing them with further benefit as such occupation was causing danger to passengers and goods carried by railway and also causing pollution. The Supreme Court directed that the High Court should take necessary steps to give effect to the orders of eviction passed by competent authorities and also the High Court from time to time.[31]

It is clear that in these cases the Supreme Court has sought to reconcile the interests of the pedestrians with those of the hawkers.[32]

(e) WAGES, GRATUITY, LABOUR DISPUTES

There is a close relationship between the right to carry on trade and wages payable to the employees in a trade or industry. Too high wages may affect the economic viability of an industry; but too low wages may amount to exploitation of human labour. A balance has to be drawn between the two conflicting values and the Supreme Court has sought to do so in several cases. The Court has held that the technique of appointing a wage board consisting equally of the representatives of the employers and employees with a few neutral members and a neutral chairman for fixing wages in an industry according to factors laid down and according to natural justice, does not amount to an unreasonable restriction on trade and commerce.[33]

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28. AIR 1992 SC 1153 : (1992) 2 SCC 458. Also see, *Sodan Singh v. NDMC (III),* AIR 1998 SC 1174 : (1998) 2 SCC 727; *Maharashtra Ekta Hawkers Union v. Municipal Corporation Greater Mumbai,* 2004 (1) SCC 625, 640 : AIR 2004 SC 416.

29. *Ibid,* at 1154.

30. *Maharashtra Ekta Hawkers Union v. Municipal Corporation, Greater Mumbai,* (2004) 1 SCC 625 : AIR 2004 SC 416.

31. *Union of India v. Howrah Ganatantrik Nagarik Samity,* (2003) 9 SCC 302 : AIR 2003 SC 3990.

32. Also see, *South Calcutta Hawkers Association v. Government of West Bengal,* AIR 1997 Cal 234; *Bapuji Nagar Khudra Byabsai Ass. v. State of Orissa,* AIR 1997 Ori 189.

33. *Express Newspapers v. Union of India,* AIR 1958 SC 578 : 1959 SCR 12.

Wages are usually classified into 'living wage', 'fair wage' and 'minimum wage'. A 'minimum wage' provides for bare sustenance of life just sufficient to cover the bare physical needs of a worker and his family and such a wage must be paid to a worker irrespective of the industry's capacity to pay. 'A living wage' provides a frugal measure of comfort and other amenities, *e.g.*, education and health in addition to what 'minimum wage' provides for. A 'fair wage' is a mean between 'minimum' and 'living' wages. Arts. 19(1)(*g*) and 19(6) demand that in fixing 'living' or 'fair' wages, industry's capacity to pay is an essential ingredient. Fixing 'living' or 'fair' wages without taking into consideration 'capacity to pay' amounts to an unreasonable restraint on the right to carry on trade.[34]

Gratuity, the Supreme Court has held, is a retirement benefit which may be awarded by an employer when an employee retires or resigns from service voluntarily after completion of 15 years' continuous service. Gratuity being a reward for good, efficient and faithful service rendered for a considerable period, there could be no justification for awarding it when an employee resigns only after three years' service except under exceptional circumstances. Accordingly, a provision of law providing for gratuity in such a case amounts to an unreasonable restriction under Art. 19(6) on the employer's right to carry on business and would be liable to be struck down as unconstitutional.[35]

In *British Paints*,[36] the Supreme Court accepted 10 years' minimum period of service for earning gratuity. In *Straw Board*,[37] the Court again changed its position and upheld the 5 years' minimum qualifying period of service for entitlement to gratuity to workmen who voluntarily retire or resign. This shows that the concept of "gratuity" has undergone a metamorphosis over time. The obligation of the employer to pay gratuity to the employee on his resignation or retirement after a continuous service of five years has been held to be a reasonable restriction in public interest on the employer's right to carry on trade. The Court has justified it as a welfare measure in the interest of the general public to secure social and economic justice to workmen to assist them in their old age and to ensure them a decent standard of life on their retirement.[38]

Provisions made for labour-welfare providing for annual paid leave or one month's notice for dismissal have been held to be reasonable.[39]

In *Jalan Trading Co. v. D.M. Aney*,[40] a statutory obligation to pay the statutory minimum bonus by the employers to the employees even when the employer sustained loss has been held to be reasonable and in public interest, as this is in implementation of the Directive Principles in Arts. 39 and 43.[41] What is sanctioned by the Directive Principles cannot be regarded as unreasonable or contrary to public interest in the context of Art. 19.[42] A state law increasing the number of compulsory

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34. *Ibid*.; *The P.T.I. v. Union of India*, AIR 1974 SC 1044 : (1974) 4 SCC 638.
Also, *U. Unichayi v. State of Kerala*, AIR 1962 SC 12 : (1962) 1 SCR 946.
35. *Express Newspapers (Pr.) Ltd. v. Union of India*, AIR 1958 SC 578 : 1959 SCR 12.
36. *British Paints (India) Ltd. v. Its Workmen*, AIR 1966 SC 732 : 1966 (2) SCR 523.
37. *Straw Board Mfg. Co. Ltd. v. Their Workmen*, AIR 1977 SC 941 : (1977) 2 SCC 329.
38. *Bakshish Singh v. Darshan Engg. Works*, AIR 1994 SC 251.
39. *M.G. Beedi Works v. Union of India*, AIR 1974 SC 1832 : (1974) 4 SCC 43.
40. AIR 1979 SC 233 : (1979) 3 SCC 220.
41. For Directive Principles see, *infra*, Ch. XXXIV.
42. See, *supra*, footnote 1 on 1488.

paid national and paid holidays from 9 to 13 during a year has been held to be valid in view of Art. 43.[43]

(f) ESSENTIAL COMMODITIES

Trades in certain commodities (designated as essential commodities) may be more drastically regulated than trade in other commodities. To assess the reasonableness of a restriction, the nature of the business and conditions prevailing therein are important factors to be considered. As these factors differ from trade to trade, no hard and fast rules concerning all trades can be laid down. The result of this approach is that Courts may hold drastic restrictions on certain trades in certain circumstances as reasonable. As for example, fixation of a ceiling of 200 quintals on wheat stocks possessed by a dealer at any time is valid to obviate black-marketing and hoarding in essential commodities.[44] A similar embargo on sugar stocks has been held valid.[45]

A notification under the Essential Commodities Act imposed a levy on sugar manufacturers. They were required to hand over to the government 50 per cent of their production at a fixed price. They could sell the rest in free market. The notification was challenged on the ground that the price of levy sugar was not sufficient to cover their manufacturing cost. The Court rejected the argument on the following grounds: (1) Interest of the consumers must prevail over that of manufacturers. The dominant object of the price control policy was to ensure equitable distribution and make the commodity available at fair price so as to benefit the consumers. Thus, individual interests must yield to the larger interests of the community. (2) Even if the petitioners had to bear some loss, that would not make the restriction unreasonable.[46] The determining factor was the interest of the consumer and not that of the producer. (3) Since the petitioners could sell 50 per cent of their production in the open market, the loss to them, if any, would be minimal.[47]

An order establishing direct relation, in the field of copper trade, between the importer and the consumer of copper, and completely eliminating the middleman—the dealer, was held valid in *Narendra Kumar*.[48] Copper is an essential commodity; its indigenous production is small; consumers depend on imported copper and there is a tendency of its price to go up. The order was promulgated in an honest effort to protect the interests of the general public.

A rule banning all hedging contracts in cotton except those permitted by the Textile Commissioner, and also authorising him to place such restrictions as he thought fit on such contracts, was held valid. Cotton being an essential commodity, restrictions may reasonably amount to prohibition for a time of all normal trading in the commodity.[49]

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43. *M.R.F. Ltd. v. Inspector, Kerala Govt.*, AIR 1999 SC 188. Also see, *infra*, footnotes 54-59, on 1496-1497.
44. *Suraj Mal Kailash Chand v. Union of India*, AIR 1982 SC 130 : (1981) 4 SCC 554.
45. *P.P. Enterprises v. Union of India*, AIR 1982 SC 1016 : (1982) 2 SCC 33.
46. *Ref. Meenakshi & Prag Ice, infra*.
47. *New India Sugar Works v. State of Uttar Pradesh*, AIR 1981 SC 998 : (1981) 2 SCC 293. Also see, *infra*, Sub-sec. (O) on 1507, under Price Fixing.
48. *Narendra Kumar v. Union of India*, AIR 1960 SC 430 : (1960) 2 SCR 375.
49. *M.B. Association v. Union of India*, AIR 1954 SC 634.

Drastic restrictions placed on the dealers of gold by the Gold (Control) Act have been upheld.[50]

(g) SLAUGHTER OF ANIMALS

To reconcile the right of butchers to carry on their trade, and restrictions imposed on killing of animals through several State laws, the Supreme Court has adopted an economic approach, *viz.*, killing of useful animals could be prohibited but not of those animals who have become economically useless to the society. The Court has emphasized that a prohibition imposed on the Fundamental Right to carry on trade and commerce cannot be regarded as reasonable if it is imposed not in the interest of general public, but merely to respect the susceptibilities and sentiments of a section of the people. Thus, it is reasonable to prohibit slaughter of cows of all ages and male or female calves of cows or buffaloes; prohibition of slaughter of bulls, bullocks and she-buffaloes below the age of twenty-five years is an unreasonable restriction on the butchers' right to carry on their trade as well as not in public interest as these animals cease to be useful after the age of 15 years.[51] The Court observed in this connection in *Quareshi*: "The maintenance of useless cattle involves a wasteful drain on the nation's cattle feed. To maintain them is to deprive the useful cattle of the much needed nourishment. The presence of so many useless animals tends to deteriorate the breed."

An elaborate procedure for certification of animals for slaughter has also been held unreasonable as imposing disproportionate restriction on the butchers' right to carry on their trade.[52] A municipal corporation issued a standing order under a statute directing closure of slaughter houses for seven holidays in a year. The order was challenged as putting an unreasonable restriction on the trade of the butchers. The question before the Court was whether the restriction was reasonable in the interest of the general public. The question before the Court was whether the restriction was reasonable in the interest of the general public. The Supreme Court took the view that the expression "in the interest of general public" found in Art. 19(6) "is of wide import comprehending public order, public health, public security, morals, economic welfare of the community and the objects mentioned in the Directive Principles." The Court ruled that the order in question did not put any unreasonable restrictions on the Fundamental Right of the petitioners under Art. 19(1)(*g*).[53]

A ban was put on the slaughter of bulls and bullocks below the age of 16 years. The Supreme Court found that these animals could be used for breeding, draught and agricultural purposes up to the age of 16 years. Accordingly, the Court ruled that the restriction was not unreasonable, looking to the balance which needs to be struck between public interest, which requires preservation of useful animals, and permitting the different traders in beef, etc. to carry on their trade and profession.[54]

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50. *Manick Chand v. Union of India*, AIR 1984 SC 1249 : (1984) 3 SCC 65.
51. *M.H. Quareshi v. State of Bihar*, AIR 1958 SC 731; *Abdul Hakim v. State of Bihar*, AIR 1961 SC 448 : (1961) 2 SCR 610.
52. *Md. Faruk v. State of Madhya Pradesh*, AIR 1970 SC 93 : (1969) 1 SCC 853.
Also, *supra*, Sec. B and *infra*, Chap. XXXIV, under Directive Principles.
53. *Municipal Corporation, Ahmedabad v. Jan Mohammed*, AIR 1986 SC 1205 : (1986) 3 SCC 20.
54. *Haji Usmanbhai Hasanbhai Qureshi v. State of Gujarat*, AIR 1986 SC 1213 : (1986) 3 SCC 12.

Again, the State of Madhya Pradesh imposed a total ban on the slaughter of bulls and, bullocks and again, the Supreme Court quashed the same.[55]

After referring to all the provisions cases on this question, the Court stuck to its view that these animals were useful only up to the age of 16 years and their slaughter thereafter could not be banned. Referring to Art. 48, a Directive Principle,[56] the Court observed that absolute ban on slaughter of bulls and bullocks is not necessary to comply with Art. 48. The Court has thus sought to strike a balance between the right of the butchers to carry on their trade and public interest.

(h) IMPORT AND EXPORT

Drastic restrictions on the right of trade and commerce have been judicially upheld for the purpose of import and export control. The reason is that import and export policy of a country has to be flexible in modern times as it needs constant adjustments keeping in view the needs of the country, international relations, foreign exchange position, need to protect indigenous industries and a number of other relevant factors. No one can claim an unrestricted right to import or export. The import and export policy forms an integral part of the country's economic policy.[57] Thus, the system of licensing of imports and exports has been held to be reasonable. To regulate imports and exports, there is first the Imports and Exports (Control) Act, 1947, which is a short enactment of eight sections. Issued thereunder are the two orders, the Import Control Order and the Export Control Order. Then, at the third stage, there is the import and export policy announced by the Central Government from time to time. The policy statement is not statutory but only administrative.

The Supreme Court has accepted the right of the Central Government to change, rescind or alter the policy from time to time merely by administrative instructions. Courts do not normally go into such policy decisions. It has also been held that no person can claim a right to the grant of an import or export licence, enforceable at law, merely on the basis of a policy statement.[58] Then, with a view to earn foreign exchange, if under the Import or Export Order, the Government decides to canalise import or export of a commodity through a specialised channel, import or export licences in that commodity could be refused to individuals. Such canalisation is not *per se* an unreasonable restriction and it would be presumed to be in public interest unless the contrary is shown clearly.[59] For example, in *Glass Chatons*,[60] the import of glass chatons was

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55. *Hasmattullah v. State of Madhya Pradesh*, AIR 1996 SC 2076 : (1996) 4 SCC 391.
Also see, *Mirzapur Moti Kureshi Kasab Jamat v. State of Gujarat*, AIR 1998 Guj 220. *Abdul Sattar Yusufbhai Qureshi v. State of Gujarat*, AIR 2001 Guj 179.

56. See, Ch. XXXIV, *infra*.

57. *Bhatnagars & Co. v. Union of India*, AIR 1957 SC 478 : 1957 SCR 701; *Supra*.

58. *Andhra Ind. Works v. C.C. of Imports*, AIR 1974 SC 1539 : (1974) 2 SCC 348, *J. Fernandes & Co. v. Dy. Chief Controller or Imports and Exports*, AIR 1975 SC 1208 : (1975) 1 SCC 716.
But see, *Oswal Woollen Mills Ltd. v. Union of India*, AIR 1983 SC 969 : (1983) 4 SCC 345, where certain administrative decisions not in accordance with certain provisions of the Import Policy were quashed.

59. *Daya v. Jt. Chief Controller, I. & E.*, AIR 1962 SC 1796 : (1963) 2 SCR 73; *Glass Chatons Importers and Users Ass. v. Union of India*, AIR 1961 SC 1514 : (1962) 1 SCR 862; *Daruka & Co. v. Union of India*, AIR 1973 SC 2713; *A.M. Ahmad & Co. v. Union of India*, AIR 1982 Mad. 247.

60. *Supra*, footnote 59.

banned, but import licences were issued to the State Trading Corporation under the import order. This is an example where by administrative policy-making, and by using its power to issue import or export licences, the government was able to create a monopoly for import and export of several commodities in favour of its specialized agencies like the State Trading Corporation, the Mineral and Metal Trade Corporation, etc.

To earn foreign exchange, Parliament enacted a law to impose an obligation on sugar mills to hand over a percentage of their production to a government agency for export. The export price realised was less than the government fixed internal price. The scheme was challenged on the ground that the mills were being forced to sell a part of their production at a loss. The government's contention however was that in fixing the internal price, it had added a margin to cover the loss on export. The Supreme Court upheld the scheme as reasonable because the loss, if any, was comparatively less and there was a very real possibility of its being recouped. The Court also ruled that reasonableness of a restriction imposed under one Act could be assessed by taking into account the countervailing advantage conferred under another Act if both the Acts are enacted as part of a single legislative plan.[61]

(i) TAXING LAWS

At times, taxing statutes have been challenged under Art. 19(1)(*g*), but it is rarely that such a challenge succeeds.[62] A taxing statute is not *per se* regarded as a restriction on the freedom under Art. 19(1)(*g*) even if it imposes some hardship in individual cases. "Then again, the mere excessiveness of a tax or even the circumstance that its imposition might tend towards the diminution of the earnings or profits of the persons of incidence does not *per se*, and without more, constitute violation of the rights under Art. 19(1)(*g*)."[63] Accordingly, the Supreme Court upheld a tax on "chargeable expenditure" in a hotel having room rent of Rs. 400 or more per day.[64]

Sales tax is a tax on the sale of goods. Unless confiscatory, such a tax does not impose an unreasonable restriction on the right of a person to carry on trade whether or not law permits or prohibits the dealers from passing on tax to the purchasers.[65]

Imposition of a tax with retrospective effect is not ordinarily regarded as invalid. To test whether a retrospective imposition of a tax operates so harshly as to violate the Fundamental Right under Art. 19(1)(*g*), the Court considers such factors as relevant as the context in which retroactivity was contemplated, such as, whether the law is one of validation of a taxing statute struck down by the Courts for certain defects, the period of such retroactivity, and the degree and extent of

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61. *Lord Krishna Sugar Mills v. Union of India*, AIR 1959 SC 1124 : (1960) 1 SCR 39. For a comment on the case see, 1 *JILI* 572.

62. *Hoechst Pharmaceuticals Ltd. v. State of Bihar*, AIR 1983 SC 1019 : (1983) 4 SCC 45; *Malwa Bus Service v. State of Punjab*, AIR 1983 SC 634 : (1983) 3 SCC 237; *State of Karnataka v. Hansa Corp.*, AIR 1981 SC 463 : (1980) 4 SCC 697.

63. *Federation of Hotel & Restaurant v. Union of India*, AIR 1990 SC 1637 : 1989 Supp (2) SCC 169, at 1655.

Also see, *Express Hotels (P) Ltd. v. State of Gujarat*, AIR 1989 SC 1949 : (1989) 3 SCC 677.

64. *Federation of Hotel, Ibid*.

65. *S. Kodar v. State of Kerala*, AIR 1974 SC 2272 : (1974) 4 SCC 422.

any unforeseen or unforeseeable financial burden for the past period, etc. A sales tax law voided by the High Court was validated by the State Legislature with retrospective effect by passing an Act. This retrospective law was held valid. Had the law not been validated, dealers who had already collected the tax from customers would have had a windfall as they would not have had any such right had the original law been held valid.[66] A competent legislature can always validate a law declared invalid by the Courts provided the infirmities and vitiating factors noticed by the Court are in its judgment, are removed or cured by the legislature. Such a validating law can be made retrospective.[67]

The Courts do not usually interfere with a tax on the ground of its being excessive, or that it imposes a heavy burden on trade and commerce, or that the profits of the business are greatly reduced thereby.[68] Except in the extreme case when the Court regards an impost as confiscatory,[69] or discriminatory.[70]

An impost on trade, whether a licence-fee or a tax, levied through an invalid or unconstitutional law, infringes Art. 19(1)(*g*) for an illegal impost always amounts to an unreasonable restriction on a citizen's right.[71]

A tax which is 'compensatory' in nature can never operate as an unreasonable restriction on the right to carry on trade or business. The very idea underlying such a tax is service more or less commensurate with the tax levied, and no citizen can claim a right to engage in trade without paying for the special services he receives from the state. This is part of the cost of carrying on business.[72]

(j) INDUSTRIAL DISPUTES

The scale of compensation payable to the employees by the employers who close their undertakings, prescribed by the Industrial Disputes Act, has been held to be not unreasonable,[73] because it is based on social justice.[74]

In *Fertilizer Corporation Kamagar Union v. Union of India*,[75] the workers in the Public undertaking challenged the validity of sale of certain plants and equipment claiming that this would result in the retrenchment of many workers and, thus, depriving them of their right under Art. 19(1)(*g*). The Court rejected

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66. *Krishnamurthi & Co. v. State of Madras*, AIR 1972 SC 2455 : (1973) 1 SCC 75.
67. *Ujagar Prints v. Union of India*, AIR 1989 SC 516 : (1989) 3 SCC 488.
68. *Nazeeria Motor Service v. State of Andhra Pradesh*, AIR 1970 SC 1864 : (1969) 2 SCC 576; *Jagan Nath v. Union of India*, AIR 1962 SC 148 : (1962) 2 SCR 118.
69. For an example of such a tax see *K.T. Moopil Nair v. State of Kerala*, AIR 1961 SC 552 : (1961) 3 SCR 77; *supra*.
70. *Supra*, Ch. XXI, under Art. 14.
Also see, *supra*, Ch. XI, Sec. H, under 'fees'.
A fee can be declared as excessive if it has no relation to the service performed. See, *Chandrakant Krishnarao Pradhan v. Collector of Customs*, AIR 1962 SC 204, where a licence renewal fee for customs agents was held unreasonable as there was no service being rendered at that stage and "under the guise of a fee there must not be an attempt to raise revenue for the general funds of the State".
71. *Yasin v. Town Area Committee*, AIR 1952 SC 115 : 1952 SCR 572; *Himmat Lal v. State of Madhya Pradesh*, AIR 1954 SC 403; *Bengal Immunity Co. v. State of Bihar*, AIR 1955 SC 661 : (1955) 2 SCR 603.
72. *G.K. Krishnan v. State of Tamil Nadu*, AIR 1975 SC 583 : (1975) 1 SCC 375; *Supra*, Ch. XV.
73. *Hathisingh Mfg. Co. Ltd. v. Union of India*, AIR 1960 SC 923.
74. *Infra*, Ch. XXXIV.
75. AIR 1981 SC 344 : (1981) 1 SCC 568.

the challenge saying that Art. 19(1)(*g*) does not protect the right to work in a particular post under a contract of employment. "The right to pursue a calling or to carry on an occupation is not the same thing as the right to work in any particular post under a contract of employment." Art. 19(1)(*g*) cannot be invoked against the loss of a job or retrenchment or removal from service. If workers are retrenched in a factory, they can pursue their rights and remedies under the industrial laws. The closure of an establishment in which a workman is for the time being employed does not by itself infringe his Fundamental Right under Art. 19(1)(*g*). "Art. 19(1)(*g*) confers a broad and general right which is available to all persons to do work of any particular kind and of their choice. It does not confer the right to hold a particular job or to occupy a particular post of one's choice."

(k) ADMINISTRATIVE REGULATION

An administrative order not authorised by law under which it is made, and imposing a restriction on the right to carry on business, is void under Art. 19(1)(*g*).[76] Thus, a condition imposed on the licensee by the licensing authority which is not justified by the Act and the rules under which the licence is issued and which also seriously affects the business of the licensee, would be unreasonable.[77] An order made under a law should impose reasonable restrictions on trade and commerce. Thus, fixing a period of 26 days for disposal of sugar released for free sale in the open market was held unreasonable. Further, refusal by government to extend the period when the petitioners had done every thing they could to remove the sugar from their godowns was also held to be unreasonable as the government acted mechanically in the matter.[78]

The area of trade, commerce and business is progressively coming under rigorous administrative regulation. Licensing, price-fixing, requisitioning of stocks, control on movement of commodities, regulation of industry have been undertaken in the country on a large scale; because of several reasons, *e.g.*, shortage and scarcity of essential commodities, need for economic regeneration of the country under the impact of the five year plans, to discourage some immoral and illegal trades and unfair trade practices, the present day concept of socialist pattern of society, and to reduce concentration of wealth in a few hands.[79] The general principle is that the power conferred on the executive by a law to regulate trade or commerce should not be arbitrary, "unregulated by any rule or principle". A law or order which confers arbitrary power upon the executive in the matter of regulating trade or business is regarded unreasonable.[80]

Generally speaking, administrative discretion is not regarded as arbitrary if the circumstances in, or the grounds on, which it can be exercised are stated, or if the law lays down the policy to achieve which the discretion is to be exercised, or if there are enough procedural safeguards in the law to provide security against

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76. *Tahir Hussain v. District Board,* AIR 1954 SC 630; *Bidi Supply Co. v. Union of India,* AIR 1956 SC 479 : 1956 SCR 267; *Mineral Development Co. v. State of Bihar,* AIR 1960 SC 468; *Bishamber Dayal Chandra Mohan v. State of Uttar Pradesh,* AIR 1982 SC 33 : (1982) 1 SCC 39.

77. *Hamid Raza v. State of Madhya Pradesh,* AIR 1960 SC 994.

78. *Oudh Sugar Mills v. Union of India,* AIR 1970 SC 1907.
Also, *R.H. Hegde v. Market Commission, Sirsa,* AIR 1971 SC 1017 : (1971) 1 SCC 349.

79. *I.L.I., Government Regulation of Private Enterprise,* (1971).

80. *Dwarka Pd. v. State of Uttar Pradesh,* AIR 1954 SC 224 : 1954 SCR 803; *Partap Singh v. State of Punjab,* AIR 1975 P&H 323.

misuse of the discretion. In case of trades which are illegal, dangerous, immoral or injurious to the health, morality and welfare of the public, a greater discretionary power may be left with the Executive than is permissible in case of normal trades. The practical operation of these norms can be illustrated with reference to some judicial pronouncements.

A lot of discretionary power is conferred on the Central/State Governments under several labour laws to regulate labour-management relationship. Several cases have arisen based on these discretionary powers.

In *Bijay Cotton Mills v. Ajmer*,[81] the Minimum Wages Act, 1948, was challenged on the ground that it put unreasonable restrictions on employers (who could not carry on their trade without paying minimum wages), the employees (who could not work on terms mutually agreed upon between them and their employers), and that the procedure to fix minimum wages was arbitrary as it left everything to the unfettered discretion of the government. The Supreme Court held the Act valid. Securing of living wages to labourers is in public interest for it is necessary to ensure not only bare physical subsistence but also health and decency to labourers. It is necessary to curb the freedom of contract to prevent the exploitation of labour. Though the powers enjoyed by the government are wide, yet there are sufficient procedural safeguards, *viz.*, the government is to take into consideration, before fixing the minimum wages, advice of the committee or representations of the people so affected; consultation with advisory bodies is obligatory for revision of minimum wages; there is a Central Advisory Board to advise the Central and State Governments in the matter of fixing and revision of minimum wages and to act as a co-ordinating agency for different advisory bodies: each committee or advisory body is to consist of an equal number of representatives of employers and employees with a few independent persons who could take a fair and impartial view of the matter. There is no provision for review of the government decision, but that does not make the Act unreasonable as it has adequate safeguards against hasty or capricious decision by the government.

A provision in the Industrial Disputes Act [S. 25-O] requires an employer intending to close down his industrial undertaking to give a three months' notice to the government of his intended closure. The government could refuse to permit closure if it was satisfied that the reasons for the intended closure of the undertaking were "not adequate and sufficient" or that "such closure is prejudicial to the public interest". If an employer closed down the undertaking without observing this procedure, he could be punished with imprisonment up to 6 months, or fine up to 5000 rupees or with both. The closure would be illegal and the workmen would be entitled to all the benefits under any law as if no notice had been given to them.

In *Excel Wear v. Union of India*,[82] the Supreme Court declared this provision to be unconstitutional. Commenting on the above provision, the Court said that the reasons given by the employer for closure of the undertaking might be correct yet permission could still be refused if the government thought them to be "not adequate and sufficient". No provision has been made for review of the

81. AIR 1955 SC 33 : 1955 (1) SCR 752. Also see, *supra*.
82. AIR 1979 SC 25 : (1978) 4 SCC 2224.
Also see, JAIN, *CASES ON ADM. LAW*, III, 1887.

order, or for appeal from it. No reasons need be given in the government order granting or refusing the permission. So, the order could be whimsical and capricious. Government is enjoined to pass the order within the 90 days' period. The right to close down a business is "an integral part" of the right to carry it on.[83]

The Court rejected the contention that "an employer has no right to close down a business once he starts it." The right to close is itself a Fundamental Right embedded in the right to carry on any business guaranteed under Art. 19(1)(*g*). But as no right is absolute in scope, this right could also be restricted, regulated or controlled by law in the interest of the general public. The restrictions imposed on this right by the impugned provision in question were held to be unreasonable as there was no higher body to scrutinize the government order negativing employer's request to close down. The Court also rejected the contention of the employers that the right to close down business was at par with the right not to start a business at all. The Court said that while no one can be compelled to start a business, it is different from closing down a business. The two rights cannot be equated.

Thereafter, S. 25-N was enacted. This provision says that an employer cannot retrench any worker who has been in service for a year without the consent of the government. If the government fails to communicate its decision within two months, the permission shall be deemed to have been granted. In *Meenakshi Mills*,[84] the Supreme Court has held that S. 25-N constitutes a reasonable restriction on the employer's right to carry on trade. The discretion of the government is not absolute but subject to proper procedural safeguards. For example, the government is to make an inquiry according to natural justice before coming to a decision; the government is to record reasons for its decision and it has to decide the matter within a time frame of 10 days and, thus, cannot unduly delay matters.

In course of time, S. 25-O was amended the vices pointed out therein in *Excel Wear* were sought to be removed. The constitutional validity of the amended S. 25-O came to be considered by the Supreme Court in the undernoted case.[85] Under the amended section, the government order granting or refusing permission must be in writing and be a reasoned order. The government order was to be passed after giving a reasonable opportunity of being heard to the employer, the workmen and any one else interested in the closure. A review tribunal had also been established the government must pass its order in 60 days failing which the permission would be deemed to have been granted. In the circumstances, the Court upheld the validity of the amended provision.

A similar provision, S. 25-M of the Industrial Disputes Act, requiring government's prior permission to lay off any worker has been held to be valid in *Papnasam*.[86] S. 25-M contains all the procedural safeguards to be found in S. 25-N.

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83. Ref. *Hathisingh Mfg. Co. Ltd. v. Union of India*, AIR 1960 SC 923 : (1960) 3 SCC 528.

84. *Workmen, Meenakshi Mills Ltd. v. Meenakshi Mills Ltd.*, AIR 1994 SC 2696 : (1992) 3 SCC 336.
Also see, JAIN, *CASES*, *III*, 1890-1898.

85. *Orissa Textile & Steel Ltd. v. State of Orissa*, (2002) 2 SCC 578.

86. *Papnasam Labour Union v. Madura Coats Ltd.*, AIR 1995 SC 2200 : (1995) 1 SCC 501.
Also see, JAIN, *CASES*, *III*, 1899-1901.

(l) LICENSING

Regulation of trade through a licensing system is the order of the day,[87] In a number of cases, Courts have considered the permissible scope of the licensing power of the Administration with reference to Arts. 19(1)(*g*) and 19(6). It is now clearly settled that a system of licensing of a trade is not unreasonable provided that the licensing officers are not left with uncontrolled power to grant, revoke or cancel a licence. There should be reasonable norms, policy or principles to guide administrative power as well as some procedural safeguards. The Supreme Court has stated on this point in the following case:[88]

> "Where, however, power is entrusted to an administrative agency to grant or withhold a permit or licence in its uncontrolled discretion the law *ex facie* infringes the Fundamental Right under Art. 19(1)(*g*)."

In *Seshadri v. Dist. Magistrate*,[89] a rule requiring a cinema licensee to show at each performance approved film of such length and for such length of time as the government might direct has been held to be unreasonable because the government is vested with an unregulated discretion to compel an exhibitor to show a film of any length and there is no principle to guide the government in this matter. Similarly, prescribing a minimum length of film to be shown at a performance without fixing a maximum, is also unreasonable for this confers an unfettered discretion on the government to interfere with the cinema licensee's right to carry on trade. No principle is laid down to guide the government. A condition couched in such wide language is bound to operate harshly upon the cinema business and, thus, cannot be regarded as a reasonable restriction.

A provision conferring wide power to grant or cancel a licence on an administrator, without mentioning the grounds on which he could exercise his power was held unreasonable in *Dwarka Pd. v. State of Uttar Pradesh*,[90] as the matter was left to the unrestrained will of a single individual. The only safeguard against improper exercise of power was that the licensing officer would record reasons for the action taken by him. This was not regarded as an effective safeguard as there was no higher authority to examine the propriety of these reasons, and revise or review his decision, and the reasons recorded by him were thus only for his own subjective satisfaction and not for furnishing any remedy to the aggrieved person.

To the same effect is the case noted below.[91] A regulation imposed a licensing system for non-tribal orders. If the licence was refused, the reasons for refusal had to be recorded. The Supreme Court quashed the regulation as it did not provide any principles or standards on which the licensing authority was to act. "There being no principles or standards laid down in the Regulation there are obviously no restraints or limits within which the power of the Executive Committee to refuse to grant or renew a licence is to be exercised". There was no provision for appeal against the decision of the authority refusing to grant the licence. On the other hand, where law gave guidance to the licensing authority in the matter of issuing licences, obligated

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87. LAKSHMI SWAMINATHAN, Right to be heard in Licensing Cases, 12 *JILI* 657 (1970).
88. *Municipal Corporation, Ahmedabad v. Jan Mohammed,* AIR 1986 SC 1205, 1210 : (1986) 3 SCC 20.
89. AIR 1954 SC 747 : (1955) 1 SCR 686.
90. AIR 1954 SC 224 : 1954 SCR 803.
91. *Hari Chand Sarda v. Mizo District Council,* AIR 1967 SC 829 : 1967 (1) SCR 1012. Also see, JAIN, *CASES, III,* 1867-1873.

it to record reasons in case licence was refused, and provided for appeals and revision against his decisions, it was held reasonable.[92]

The provision in the Gold Control Act for licensing of dealers of gold ornaments was held invalid in *Harakchand v. Union of India*,[93] because it conferred unguided power on the executive. The administrator in granting licences was to have regard to such factors as 'suitability of the applicant', 'anticipated demand as estimated by him for ornaments in the region' and 'public interest'. The Supreme Court held that these terms were vague, not capable of objective assessment, provided no objective norm to guide the administrator's discretion and, thus, unfettered power had been given to him to grant or refuse a licence. The Court also held it unreasonable to prescribe the same conditions for renewal as for initial grant of licence as that rendered the entire future of business uncertain and subject to arbitrary administrative will.

A Tamil Nadu Act introduced a system of licensing of private educational institutions. The relevant statutory provision merely said that the State Government "may grant or refuse to grant permission". The only procedural safeguard laid down was that the permission would not be refused "unless the applicant has been given an opportunity of making his representa-tion". Thus, the licensing authority could grant or refuse to grant a license but he could not refuse without giving to the applicant an opportunity to make a representation.

The Supreme Court held the provision unconstitutional under Art. 19(1)(*g*) in *Parasuraman.*[94] There was no criteria laid down for the government to adopt in exercising its licensing power. "The result is that the power to grant or refuse permission is to be exercised according to the whims of the authority and it may differ from person to person holding the office." The government was left with "unrestricted and unguided discretion" which rendered the provision "unfair and discriminatory" *vis-a-vis* Art. 19(1)(*g*). The power to cancel a license on contravention of any direction issued by the competent authority was held to suffer from the vice of arbitrariness.

The criteria laid down in the Railway Tourist Agent Rules for recognition of a person as an authorised railway tourist agent have been held to be not irrelevant or arbitrary.[95] A rule in the Motor Vehicles Rules laying down a scheme for the evaluation of the merits of various applicants for a stage carriage permit, and giving preference to new entrants for short routes, has been held valid under Art. 19(1)(*g*) as it is salutary and avoids monopoly.[96] A provision giving preference to an application from state transport undertaking for operating in any interstate route has been held valid.[97]

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92. *Vishnu Dayal v. State of Uttar Pradesh*, AIR 1974 SC 1489 : (1974) 2 SCC 306; *M.G. Beedi Works v. Union of India*, AIR 1974 SC 1832 : (1974) 4 SCC 43; *S.C. Dogra v. State of Himachal Pradesh*, AIR 1984 HP 29.

93. AIR 1970 SC 1453 : (1969) 2 SCC 166. But see, *Manick Chand v. Union of India*, AIR 1984 SC 1249 : (1984) 3 SCC 65.
Also see, JAIN, *CASES*, Ch. XV, Sec. D(V); *Union of India v. Annam Ramaligam*, AIR 1985 SC 1014.
Also see, JAIN, *CASES*, 1854-1856.

94. *A.N. Parasuraman v. State of Tamil Nadu*, AIR 1990 SC 40 : (1989) 4 SCC 683.

95. *Inder Mal Jain v. Union of India*, AIR 1984 SC 415 : (1984) 1 SCC 361.

96. *P. Venkaiah v. G. Krishna Rao*, AIR 1981 SC 1910 : (1981) 4 SCC 105.

97. *Sher Singh v. Union of India*, AIR 1984 SC 200 : (1984) 1 SCC 107.

In a scheme for distribution of foodstuffs through fair price shops run by government, giving preference to co-operative societies is not violative of Art. 19(1)(*g*).[1] Co-operative societies play positive and progressive role in country's economy and, most surely, in the fair and effective distribution of foodstuffs.

The Customs House Agents Licensing Rules, 1960, restricted the number of such licences to be issued. This was held valid for "a profession or trade has sometimes to be limited in the public interest", *e.g.*, porters at a railway station, taxi cabs, etc. A rule vesting authority in the customs collector to reject an application for licence if the applicant was not considered "suitable" was held invalid as it vested discretion in the collector to reject a candidate for 'trumpery reasons'. The collector was not required to state his reasons for rejecting an application. The rule authorising the collector to cancel a licence for failure to comply with the rules was held valid as rules were made for compliance and not for breach, and there was the safeguard of an appeal to a higher authority.[2]

A provision in the Calcutta Municipal Act required a licence for use of premises for a purpose which in the opinion of the corporation was dangerous to life, health or property. The opinion of the corporation was made conclusive as it could not be challenged in a Court. The provision was declared to be unreasonable under Art. 19(6) as it put carrying on of a business entirely at the mercy of the corporation.[3]

Similarly, a rule conferring an uncontrolled power to cancel a licence, without stipulating that reasons be given and some procedure be followed by the licensing authority for the purpose, is not reasonable.[4] A provision providing for cancellation of licence for specified causes, and after giving reasonable opportunity of hearing to the licensee, is valid.[5] Even under a valid provision, an administrative order cancelling the licence will be quashed if it does not fulfil the condition laid down, or if the concerned administrative officer is biased against the licensee, or if a reasonable opportunity of hearing is not given. The function of cancelling a licence has been characterised as *quasi*-judicial and, therefore, rules of natural justice must be followed.[6]

The Bihar Mica Act, 1948, introduced a licensing system to regulate trading in mica in the State. S. 25 authorised the State Government to cancel the license on the grounds stated therein. Before cancelling a license, it was necessary to furnish the grounds to the licensee and afford him a reasonable opportunity to show cause against cancellation. The Supreme Court in *Mineral Development Ltd. v.*

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1. *Sarkari Sasta Anaj Vikreta Sangh v. State of Madhya Pradesh*, AIR 1981 SC 2030 : (1981) 4 SCC 471; *M.P. Ration Vikreta Sangh Society v. State of Madhya Pradesh*, AIR 1982 SC 2001.
Also, *Krishna Kakkanth v. State of Kerala*, (1997) 9 SCC 495 : AIR 1997 SC 128.

2. *Chandrakant Krishnarao Pradhan v. Collector of Customs*, AIR 1962 SC 204 : 1962 (3) SCR 108; JAIN, *CASES*, *III*, 1859-1867.

3. *Corp. of Calcutta v. Tramways Co. Ltd.*, AIR 1964 SC 1279 : (1964) 5 SCR 25.

4. *Ganpati v. Ajmer*, AIR 1955 SC 188 : (1955) 1 SCR 1065. *Kishan Chand Arora v. Commr. of Police*, AIR 1961 SC 705 : (1961) 3 SCR 135, sustaining power to cancel a licence without any procedure being followed does not now represent good law.

5. *Sukhwinder Pal Bipan Kumar v. State of Punjab*, AIR 1982 SC 65 : (1982) 1 SCC 31; *Fedco v. Bilgrami*, AIR 1960 SC 415 : (1960) 2 SCR 408.

6. *Mahabir Prasad v. State of Uttar Pradesh*, AIR 1970 SC 1302 : (1970) 1 SCC 764; *supra*; *Mohd. Hameed v. Collector, Hyderabad*, AIR 1974 A.P. 119.

State of Bihar[7] held the provisions reasonable. The discretion to cancel the licence was vested in the highest executive authority in the State which ordinarily could be relied upon to discharge the duties honestly and in public interest. The provision provided clearly ascertainable standards for the State Government to apply to the facts of each case and due procedural safeguards had been provided to the licensee.

Video games being games of chance and not of skill, broad discretion may be conferred on the licensing authority to regulate such games. However, a restriction imposed must not be arbitrary. Action of the concerned authority must be informed by reason. An action uninformed by reason may be regarded as arbitrary. The action of the concerned authority must be founded upon relevant grounds of public interest.[8]

S. 4(1) of the Chit Funds Act, 1982, says that no chit is to be commenced without the previous sanction of the State Government. S. 4(3) gives guidance to the State Government for granting and/or refusing to grant previous sanction. The Supreme Court held the provisions to be regulatory in nature and not violative of Art. 19(1)(g) of the Constitution.[9]

Ordinarily a licence may be suspended (pending inquiry for cancellation) without giving any hearing to the licensee, for suspension is a preliminary stage and inquiry must be held before cancellation.[10]

S. 8B of the Imports Control Order empowers the Central Government or the Chief Controller of Imports and Exports to keep in abeyance applications for licences or allotment of imported goods for 6 months in public interest where any investigation is pending into any allegation against a licensee or importer. No reasons need be given.

The Supreme Court has ruled in *Liberty Oil Mills v. Union of India*[11] that such an order cannot be made without due investigation and without giving a reasonable opportunity to the affected party. "Procedural fairness embodying natural justice is to be implied whenever action is taken affecting the rights of parties." The abeyance order must be communicated to the concerned person. Reasons must exist for the decision since "the decision may only be taken if the authority is satisfied that the grant of the licence or allotment of imported goods will not be in the public interest." An outline of the allegations must be given to provide an opportunity to the person affected to make representation. In this case, however, the opportunity of hearing had to be post-decisional.

The trade of money lending was sought to be regulated through a licensing system. The power given to the licensing officer to forfeit security furnished by a licensee on contravention of the licence terms was held to be unreasonable as there were many other adequate provisions for ensuring compliance with the conditions of the licence.[12]

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7. AIR 1960 SC 468 : 1960 (2) SCR 609. Also see, *Chandrakant Saha v. Union of India,* AIR 1979 SC 314 : (1979) 1 SCC 285.
8. *M.J. Sivani v. State of Karnataka,* AIR 1995 SC 1770 : (1995) 6 SCC 289.
9. *Shriram Chits and Investment (P.) Ltd. v. Union of India,* AIR 1993 SC 2063.
10. *Sukhwinder Pal Bipan Kumar v. State of Punjab*, AIR 1982 SC 65 : (1982) 1 SCC 31; JAIN, *CASES, III,* 1856-1867.
11. AIR 1984 SC 1271 : (1984) 3 SCC 465.
12. *Sate of Kerala v. Monarch Investments,* AIR 1992 SC 493 : 1992 Supp (3) SCC 208.

(m) MOVEMENT OF GOODS

Clause 3 of the Cotton Textiles (Control of Movement) Order, 1948, provided that no person should transport by rail, road, sea or inland navigation any cloth or yarn except under a permit issued by the Textile Commissioner. The restriction was held valid for to leave transport of essential commodities uncontrolled would seriously hamper the supply of such commodities to the public. The Textile Commissioner did not have an unregulated and arbitrary power to refuse or grant a permit, because the discretion given to him was to be exercised so as to effectuate the policy underlying the order, *viz.*, to regulate the import of cotton textiles so as to ensure its even distribution in the country and make it available at a fair price to all. The conferment of such discretion could not be regarded as invalid.[13]

A perusal of the Court's opinion leaves the impression that the Court has taken a more relaxed view with respect to movement permits than trading licences. The reason for this may be that whereas without a licence a person could not at all carry on his trade, a restriction on movement affects only one aspect of the total trade leaving the rest free. Therefore, Courts insist on better safeguards in case of administrative discretion relating to trading licences than in the case of issue of movement permits.[14]

(n) REQUISITIONING OF STOCKS

The Rajasthan Foodgrains Control Order authorised administrative authority to freeze any stocks of foodgrains held by a person and also to requisition and dispose of such stocks at the government procurement price. Objection was taken to it on the ground that an absolute discretion had been conferred on the administrative authority. The Court, however, observed that though the specific rule in question did not mention the grounds on which stocks could be frozen, yet the parent Act, *viz.*, the Essential Supplies Act, 1946, did lay down the policy, and the freezing of stocks was reasonably related to that object, and so the clause was valid. The power to requisition stocks at a rate fixed by it and dispose of such stocks at any rate in its discretion vested an unrestrained authority to requisition stocks of foodgrains at an arbitrary price and so was invalid.[15]

(o) PRICE FIXING

A regulatory power over trade and commerce, of great significance in modern times, conceded to the Administration under several legal provisions, is that of price-fixing of commodities. A balance has to be drawn here between the interests of the manufacturers as well as of the consumers. The Courts have in several cases considered the question of scope of such a power and subject to what safeguards it should be conferred on the Administration. The basic norm in this case, as in other cases, is that unlimited discretion to fix prices should not be conferred on administrative authorities.

In the earlier cases, the Supreme Court appeared to insist that the relevant law should lay down the considerations which the price-fixing authority must keep in

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13. *Harishankar Bagla v. State of Madhya Pradesh,* AIR 1954 SC 455 : 1955 (1) SCR 216.
Also, *Chinta Lingam v. Union of India,* AIR 1971 SC 474 : (1970) 3 SCC 768.
14. *Chinta Lingam v. Union of India, ibid.*
15. *State of Rajasthan v. Nathmal,* AIR 1954 SC 307 : 1954 SCR 982.
Also see, *supra,* sub-sec. (f).

mind while fixing prices. Thus, in *Dwarka Prasad*,[16] the very first case on price-fixing, the statutory formula for fixing prices mentioned 8 items, of these, six were fixed but two left some marginal discretion to the executive. The formula was held to be good, the Court stating that "arbitrary power unregulated by any rule or principle" was bad, and that discretion should not be absolute. But, in later cases, the rigours of this judicial stand have been very much diluted.

Clause 11B of the Iron and Steel Order, 1941, issued by the Central Government, authorised the Iron Controller to fix maximum prices to sell iron. Such prices could differ for iron and steel obtainable from different sources, and could include allowances for contribution to, and payment from, an equalisation fund established by the Controller. No more guidance was given to the Controller in the matter of fixing prices, yet the Order was held valid on the ground that since the parent Act, the Essential Supplies Act, laid down the policy, the Order could not be regarded as conferring uncontrolled power on the Controller to fix prices.[17]

This judicial approach does not appear to be satisfactory. The parent Act [The Essential Commodities Act, 1955] applies not only to iron and steel but to a number of commodities, and not only to price-fixing but to regulation of all aspects of trade in essential commodities. Therefore, the policy laid down in the Act is in very general terms, and is hardly of much efficacy to control administrative discretion. The necessary elements going into price-fixing are bound to vary from commodity to commodity, and one general formula applicable to all commodities can hardly be adequate. It is, therefore, necessary that specific considerations applicable to price-fixing of individual commodities be laid down separately. It is only when this is done that Courts can evaluate whether or not relevant considerations have been followed by the administration in fixing the price of the concerned commodity.

An order authorised the controller to fix the price of ice. Four factors were stated in the order which the controller had to take in view while fixing the price. The High Court upheld the formula saying that it gave enough, clear and effective guidelines to the controller to fix prices, and it excluded any chance of capricious or arbitrary fixation of price for the manufacturers.[18]

The Courts do not insist on any procedural safeguards in this area.[19] Price-fixing is regarded more in the nature of a legislative power than an administrative power and, consequently, the rules of natural justice are not required to be followed.[20] The Supreme Court once emphasized that the price fixed should be fair and not arbitrary; that it should not be below the cost of production: that the price should not be fixed on extraneous considerations; and if the price is fixed in such a manner that the producer is enabled to recover his cost of production and secure a reasonable margin of profit, no aspect of Fundamental Right under Art. 19(1)(*g*) is infringed.[21]

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16. *Dwarka Pd. v. State of Uttar Pradesh,* AIR 1954 SC 224 : 1954 SCR 803.
17. *Union of India v. Bhanamal Gulzarimal,* AIR 1960 SC 475 : 1960 (2) SCR 627.
18. *New India Industrial Corp. Ltd. v. Union of India,* AIR 1980 Del 277.
19. *Diwan Sugar Mills v. Union of India,* AIR 1959 SC 626 : 1959 Supp (2) SCR 123.
20. *Saraswati I. Syndicate v. Union of India,* AIR 1975 SC 460 : (1974) 2 SCC 630.
21. *Shree Meenakshi Mills v. Union of India,* AIR 1974 SC 366 : (1974) 1 SCC 468.

In spite of this norm, except in one case, *viz., Premier Automobiles*,[22] the Supreme Court has not interfered with any price-fixing order. In the *Iron price* case,[23] the Court said that in considering the validity of a price fixed, it was not enough to show that a particular stock-holder suffered loss in respect of particular transactions. What was to be proved was the general effect of the price in question on all classes of dealers taken as a whole. If it were shown that in a large majority of cases, the impugned price fixed would adversely affect the Fundamental Right of the dealers guaranteed by Art. 19(1)(*g*), then it might constitute a serious infirmity in the price fixed. In *Meenakshi*,[24] a case dealing with fixation of yarn prices, the Supreme Court refused to intervene stating that even if some producers sustained loss for sometime, it would not be regarded as an unreasonable restriction for the purpose of price fixation was not only to consider the profit of the manufacturer but also to hold the price line. Trade and commerce undergoes periods of prosperity and adversity because of economic, social or political factors. The price fixed had not been shown to be 'arbitrary' or 'so grossly inadequate that it not only results in huge losses but also is a threat to the supply position of yarn'.[84]

In the matter of fixation of sugar price, items of cost have to be standardised on the basis of representative cross-section of reasonably efficient and economic manufacturing units in a region and it is impractical to take into account the costs incurred by each individual unit.[25] In *Saraswati Syndicate*,[26] the Court rejected the writ petition challenging an order fixing ex-factory price of sugar issued under Cl. 7 of the Sugar (Control) Order, 1966. The Court ruled that the price fixed was not shown to be inadequate and there was no breach of any mandatory duty which could justify the issue of *mandamus*. The Court would not interfere if the basis adopted was not shown to be so patently unreasonable as to be in excess of the price-fixing power. In fixing fair price, no doubt, the criteria adopted must be reasonable and reasonable margin of profit judged by average standard of efficiency should be provided for, but in the instant case, however, the price fixed was not shown to be erroneous or unreasonable, and the government had not acted arbitrarily or unreasonably or taken into consideration any extraneous matter.

The Central Government fixed the retention price for each producer of aluminium and its sale price under the Aluminium Control Order, 1970, made under the Essential Commodities Act, 1955. The difference between the two prices was paid into the Aluminimum Regulation Account. Out of this fund, contributions were made to the producer whose retention price was higher than the sale price. The scheme of price fixation was held valid in *Union of India v. Hindustan Aluminium Corp. Ltd*.[27] as it was adopted in the interest of the consumer which was of paramount consideration. "The interest of producers or manufacturers of an

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22. *Premier Automobiles v. Union of India,* AIR 1972 SC 1690 : (1972) 2 SCR 526, see below.
23. *The Bhanamal Gulzarimal* case, *supra*.
24. *Meenakshi Mills'* case, *supra*, footnote 21.
25. *Anakapalle Co-op. Society v. Union of India,* AIR 1973 SC 734 : (1973) 3 SCC 435; *Panipat Co-op. S. Mills v. Union of India*, AIR 1973 SC 537 : (1973) 1 SCC 129.
In these cases, the Supreme Court considered the fixation of ex-mill price of sugar under s. 3(3C) of the Essential Commodities Act, 1955, which lays down the elements for the purpose. On Essential Commodities, also see, *supra*, sub-sec. (f).
26. *Supra*, footnote 20.
27. AIR 1983 Cal. 307.

essential commodity is no doubt a factor to be taken into consideration, but surely it is of much lesser importance and must yield to the interest of the general public who are the consumers." The loss to industry for a temporary period is no ground to set aside the price fixation of an essential commodity. The Court, however, did emphasize that the government should see that the loss was not perpetual and huge resulting in the closure of the industry.

In *Premier Automobiles*, the Court considered the concept of fair price under section 18G of the Industries (Development and Regulation) Act, 1951, in relation to the fixing of car prices. The Court explained that it "takes in all the elements which make it fair for the consumer leaving a reasonable margin of profit to the manufacturer without which no one will engage in any manufacturing activity". In the instant case, the Court asked the government to review car prices every six months. The fact that in *Premier Automobiles*, the Court showed some consideration for the interests of the manufacturers may be because a car is not an essential commodity.

In *Deepak Theatres, Dhuri v. State of Punjab*,[28] the Supreme Court has ruled that the power to fix rates of admission to cinema theatres can be validly conferred on the Administration *vis-a-vis* Art. 19(1)(*g*) as such a power is clothed with public interest.

On the whole, it appears that the Courts have no inclination to police the area of price-fixation. The Courts have conceded a great deal of discretion to the executive in this area. The Courts lean more towards the interests of the consumer rather than that of the manufacturer. As the Supreme Court has said: "No price fixation order need guarantee profit to an establishment in respect of each unit of article served or sold. It is the over-all picture in the trade and commerce that needs to be examined."[29] The Administration enjoys quite a good deal of flexibility and it is extremely difficult to challenge successfully a price-fixing order in a Court. The main reason is that the considerations entering into this area are primarily of an economic nature which the Courts can evaluate only superficially, and most of the time they would defer to the administrative judgment in this regard. In this connection, the Supreme Court has said in *Prag Ice & Oil Mills*.[30] "In the ultimate analysis, the mechanics of price fixation has necessarily to be left to the judgment of the executive and unless it is patent that there is hostile discrimination against a class of operators, the processual basis of price fixation has to be accepted in the generality of cases as valid."

In the area of the regulation of trade and commerce, the judiciary has hitherto laid more stress on social control and has devalued the individual interest of the trader or the manufacturer. So far, the tenor of Court cases by and large has been to expand the area of social control over trade and commerce and correspondingly to reduce the scope of protection and safeguard to individual interest.

In the *Chintaman Rao* case,[31] the Supreme Court had emphasized that a reasonable restriction is one which is not in excess of the requirements of the case. This test involves a drawing of balance between, and a relative evaluation of, the interest of the individual and the exigencies of public control. In the judicial

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28. AIR 1992 SC 1519 : 1992 Supp (1) SCC 684.
29. *Welcome Hotel v. State of Andhra Pradesh*, AIR 1983 SC 1015 : (1983) 4 SCC 575.
30. *Prag Ice & Oil Mills v. Union of India*, AIR 1978 SC 1296 : (1978) 3 SCC 459.
31. *Supra.*

evaluative process of the restrictions under Art. 19(6), however, this approach has by and large been ignored. The consideration whether in a given situation the restriction imposed is in excess of the needs of social control has been rather absent in judicial pronouncements.

In this area, the Courts have shown much deference to the legislative and administrative judgment. Hitherto, the judicial approach appears to have been very much coloured by the prevailing philosophy of a socialist pattern of society in the country. But, it remains to be seen, whether, in course of time, this judicial attitude will undergo a change in view of the toning down of the socialist rhetoric and the contemporary philosophy of liberalisation and privatisation.

CHAPTER XXXV

SAFEGUARDS TO MINORITIES, SCHEDULED CASTES, SCHEDULED TRIBES AND BACKWARD CLASSES

SYNOPSIS

A. GENERAL

India has a composite population, having a number of groups based on religion, language, caste, ethnicity or backwardness, such as, the Scheduled Castes, Scheduled Tribes, Anglo-Indians, Muslims, Parsis, Sikhs, Indian Christians, *etc.*

The minority problem very much influenced and coloured the political life of the country before Independence. The major problem at the time was regarding the Muslim minority and this led to the partition of the country. That diluted, to some extent, the Muslim minority problem, but did not solve completely the minority problem, as such, because a number of other minority groups, as well as a large number of Muslims, are still present in the country.

The framers of the Indian Constitution took care to safeguard the interests of the minorities, to give them a sense of security, to protect them against any discrimination, and to help them to get integrated in the main stream of national life.[1] With this in view, a number of provisions have been incorporated in the Constitution for safeguarding specifically the social, economic and educational interests of minority groups. In addition, certain general constitutional provisions, *e.g.*, Fundamental Rights, protect some of the rights of the minority groups.

The policy of the Constitution is to do away with caste and to strive to create a casteless society. There is thus neither any safeguard to any one specifically based on caste except to the Scheduled Castes, to some extent, nor is there any discrimination against anyone on the basis of caste.

Another policy-objective of the Constitution is to make the government secular. The Constitution does not recognise any religion for any kind of favoured treatment, but treats all religions alike, and protects the cultural or religious practices of all people from state interference.[2] Although under Arts. 15(4) and 16(4),[3] reservations can be made in educational institutions and public services for socially and educationally backward classes, no reservation or special representation has been made for these classes either in the House of the People or in the State Legislative Assemblies.[4]

The Constitution does not define the term 'Minority'. The Constitution uses the term 'minority' only twice. Once in the marginal note to Art. 29, but in the text of the Article the expression used is "Any section of the citizens…. having a distinct language, script or culture of its own…."[5] The emphasis of Art. 29, thus, is on linguistic and cultural minorities. Again, in Art 30, the expression used is

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1. For discussion in the Constituent Assembly, see III *CAD*, 211-314.
Reference may also be made to: MARC GALANTER, Protective Discrimination for Backward Classes in India, 3 *JILI*, 38 (1961), and Competing Equalities: *N. RADHA KRISHNAN*, Reservation to Backward Classes, 13 *Indian Y.B. on Int'l Affairs*, 293 (1964) and Units of Social and Economic Educational Backwardness: Caste and Individual 7 *JILI*, 262 (1965); ILI, *EDUCATIONAL PLANNING* (1967); Imam, Reservation of Seats for Backward Classes in Public Services and Educational Institutions, 8 *JILI* 441 (1966); *ILI*, *MINORITIES AND THE LAW* (1972); *REPORT OF THE COMMITTEE ON UNTOUCHABILITY* (1969).
2. *Supra*, Chs. XXIX and XXX.
3. See, *supra*, Chs. XXII, Sec. C and XXIII, Sec. E.
4. See, *supra*, Chs. II and VI.
5. Ch. XXX, Sec. A, *supra.*

"All minorities, whether based on religion or language…." Art. 30 thus refers to linguistic or religious minorities.[6]

The National Minorities Commission[7] treats Muslims, Christians, Sikhs, Buddhists and Zoroastrians as religious minorities at the national level because their numerical strength as compared with the rest of the Indian citizens is smaller.

(a) FUNDAMENTAL RIGHTS

A wide range of minority rights are covered by the provisions relating to the Fundamental Rights. Arts. 14[8], 15,[9] 16,[10] 25,[11] 26[12] and 29(2)[13] seek to protect them from hostile and discriminatory State action. Arts. 15(2),(4),(5)[14], 16(3),(4),(4A),(4B)[15], 17[16], 23[17] and 25(2)(b)[18] seek to remove social and economic disabilities of the depressed classes of people. Arts. 25 to 30 safeguard religion and culture of minority groups in India.[19]

(b) DIRECTIVE PRINCIPLES

Besides the Fundamental Rights, certain Directive Principles obligate the State to ensure the welfare of certain sections of the people.[20]

Article 46 requires the state to take special care in promoting educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and Scheduled Tribes.[21]

Article 38 requires the state to promote the welfare of the people by securing a social order based on justice.[22]

(c) ELECTIONS

According to Art. 325, there is to be only one general electoral roll and no person is ineligible for being included therein on the ground only of religion, race, caste or sex.[23] Thus, all discrimination is barred in matters of election. Adult suffrage also strengthens the political position of the minorities as the political parties constantly vie with each other to woo them.

The purpose of all the provisions, mentioned above, is to integrate the minorities into one mainstream of national life and thus keep in check the divisive forces which may otherwise be released by the existence of several minority

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6. See, *supra*, Ch. XXX, Sec. B(b).
7. For discussion on the National Minorities Commission, see, Sec. G(e), *infra.*
8. *Supra*, Ch. XXI.
9. *Supra*, Ch. XXII.
10. *Supra*, Ch. XXIII.
11. *Supra*, Ch. XXIX.
12. *Supra*, Ch. XXIX.
13. *Supra*, Ch. XXX.
14. *Supra*, Ch. XXII, Sec. A(b).
15. *Supra*, Ch. XXIII, Sec. D(a).
16. *Supra*, Ch. XXIII, Sec. I.
17. *Supra*, Ch. XXVIII, Sec. A..
18. *Supra*, Chs. XXIX, Sec. B(e).
19. *Supra*, Chs. XXIX and XXX.
20. *Supra*, Ch. XXXIV.
21. *Supra*, Ch. XXXIV, Sec. D.
22. Ch. XXXIV, Sec. D, *supra*.
23. *Supra*, Ch. XIX.

groups. The Constitution while extending safeguards to minorities also seeks to weld and integrate the diverse elements into one political and national life. That is why the system of separate electorates was not adopted and elections to all legislatures are held on the basis of joint electorates.[24]

Besides the above, there are some other constitutional provisions directed towards specific groups of people, and conferring benefits on them.

B. SCHEDULED CASTES

The Constitution treats the Scheduled Castes in India with special favour and affords them with some valuable safeguards. Arts. 14, 15 and 16 of the Constitution confer several benefits of social and economic advancement and empowerment and social equality of status and dignity of person, by providing reservation in government services and in educational institutions for the Scheduled Castes and Schedule Tribes.[25]

The Scheduled Castes are not, strictly speaking, a racial, linguistic or religious minority. They are part and parcel of the Hindu society. They are the depressed sections of the Hindus who have suffered for long under social handicaps and thus need special protection and help for the amelioration of their social, economic and political conditions.

They are known as untouchables or Harijans and constitute nearly 15 per cent of the Indian population. They usually engage themselves in the so-called dirty jobs like tanning and skinning of hides, manufacture of leather goods, sweeping of streets, scavenging, *etc.* Even amongst the Harijans, there are high and low, at the lowest rung of the ladder being the *bhangi*.

The framers of the Constitution were determined to eradicate the scourge of untouchability. With this in view, Art. 17 abolishes untouchability[26] and Art. 25(2)(*b*) provides for opening of Hindu temples to the Harijans.[27] To promote their educational and economic interests, Arts. 15(4) &(5) and 16 provide for reservation of seats for them in educational institutions and in government services.[28]

C. SCHEDULED TRIBES

The Scheduled Tribes [S/T], also known as aborigines, are those backward sections of the Indian population who still observe their tribal ways, their own peculiar customs and cultural norms. The tribal people have remained backward because of the fact that they live in inaccessible forests and hilly regions and have thus been cut off from the main currents of national life.

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24. *Report of the Advisory Committee on Minorities.* Also, ILI, *Minorities*, *supra*, footnote 1, 2004, at 23-25.

25. *S. Nagarajan v. District Collector, Salem,* AIR 1997 SC 935 : (1997) 2 SCC 571.
See, Chs. XXI, XXII and XXIII, *supra.*

26. *Supra*, Ch. XXIII, Sec. I.
The title of the Untouchability (Offences) Act has now been changed to the Protection of Civil Rights Act, 1955.

27. *Supra*, Ch. XXIX, Sec. B(e).

28. *Supra*, Chs. XXII, Sec. C and XXIII Sec. G.

These people are divided into four distinct zones—North, Eastern, Central and Southern. The three main characteristics of these people are their primitive way of living, nomadic habits, love for drink and dance and habitation in remote and inaccessible areas.[29] They constitute nearly 7.5 per cent of the country's total population. The Constitution enjoins to provide facilities and opportunities for development of tribal economic and educational standards.

The Scheduled Tribes also need special provisions for safeguarding their interests. The main problem concerning these people is that their socio-economic conditions be improved at such a pace and in such a way as not to disturb suddenly their social organisation and way of living. The need is to evolve ways and means to gradually adjust the tribal population to changed conditions, and integrate them slowly in the general life of the country without undue and hasty disruption of their way of living.

It has been thought that it may be harmful to the tribal people if they are brought into indiscriminate contact with the outside world. Thus, the Legislatures have been empowered to impose restrictions on the Fundamental Rights guaranteed by Arts. 19(1)(*d*), 19(1)(*e*) and 19(1)(*f*) in the interests of the Scheduled Tribes,[30] in order that movement of people from developed areas to tribal areas may be restricted so that the tribal people are not exploited by outsiders. Laws have, therefore, been enacted prohibiting the entry of non-tribals into the tribal areas without permits, living of non-tribals permanently in tribal areas, and transfer of tribal land to non-tribals. Further, to protect the interests of the tribal people who are simple and less-politically conscious, separate provisions have been made for the administration of the tribal areas.[31] Reservation of seats can also be made for them in educational institutions and government services under Arts. 15(4),(5), 16(4), 41, 46 and 335.[32]

(a) IDENTIFICATION OF S/Cs AND S/Ts

The Constitution does not specify the castes or the tribes which are to be called as the Scheduled Castes or the Scheduled Tribes. It leaves the power to list these castes and tribes to the President, *i.e.*, the Central Executive.

Scheduled Castes, according to Art. 366(24) read with Art. 341, are those castes, races or tribes, or parts thereof, as the President may notify. According to Art. 341(1), the President may by public notification specify what castes, races or tribes, or groups thereof in each State and Union Territory would be regarded as the Scheduled Castes for the purposes of the Constitution in relation to *that* State or Union Territory. Thus, the lists of the Scheduled Castes may vary from State to State and one Union Territory to another.

As regards the States, the President issues the notification after consultation with the Governor of the State concerned.

The purpose of this provision is to avoid disputes as to whether a particular caste, race or tribe should be specified as a Scheduled Caste or not. Only those castes, races or tribes can be characterised as Scheduled Castes which are noti-

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29. *First Report of the Commissioner for Scheduled Castes and Scheduled Tribes*, 3, 11 (1952).
30. *Supra*, Chs. XXIV, Sec. G and XXXI, Sec. B.
31. Art. 244; *supra*, Ch. IX, Sec. C.
32. *Supra*, Chs. XXII, Sec. C; XXIII, Sec. E; XXXIV, Sec. D and *infra*, this Chapter.

fied in the Presidential Order under Art. 341. To determine whether or not a particular caste, race or tribe is a Scheduled Caste or not in a State, one has to look only at the notification issued by the President under Art. 341.[33]

The Supreme Court has expressed in *Milind*[34] that the words "castes" or "tribes" in the expression "Scheduled Castes" and "Scheduled Tribes" have not been used in the ordinary sense of the terms but are used in the sense of the definitions contained in Arts. 366(24) and 366(25). In this view, a caste is a "Scheduled Caste" or a tribe is a "Scheduled Tribe" only if they are included in the President's Orders issued under Arts. 341 and 342.

It has been held that a person belong to S/C in one State cannot be deemed to be so in relation to any other State to which he migrates for the purpose of employment or education. Lists of S/Cs are declared in relation to each State separately.[35]

Under Art. 341(2), however, once the notification is issued by the President under Art. 341(1), any modifications therein, by way either of including or excluding from the list any caste, race or tribe or a part or a group thereof, can be made by Parliament by law and not by a Presidential notification. This means that the entries in the Presidential notification issued under Art. 341(1) have to be taken as final unless altered by Parliament by law.[36] The Constitutional mandate thus is that it is the President who is empowered, in consultation with the Governor of the State, to specify by a public notification the castes, races or tribes or parts or groups within castes, races and tribes which shall, for the purposes of the Constitution, be deemed to be Scheduled Castes in relation to that State.

It is not open to any one to include any caste as coming within the notification on the basis of evidence—oral or documentary—if the caste in question is not specifically mentioned in the notification. It is therefore not possible to give evidence that a particular caste is a Scheduled Caste even though not mentioned in the Presidential Order.[37]

Even the court cannot modify, add or subtract any entry in the Presidential Order. The function of the court is to interpret what an entry in the PO is intended to mean.[37] In *Pankaj*,[38] the Supreme Court has observed :

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33. *K. Adhikanda Patra v. Gandua*, AIR 1983 Ori 89; *E.V. Chinnaiah v. State of A.P.*, (2005) 1 SCC 394, at page 409; *State of Maharashtra v. Mana Adim Jamat Mandal*, (2006) 4 SCC 98.

34. *Maharashtra v. Milind*, AIR 2001 SC 393 : (2001) 1 SCC 4.
Also see, footnote 45, *infra.*

35. *Marri Chandra Shekhar Rao v. Dean, Seth G.S. Medical College*, (1990) 3 SCC 130 : (1990) 2 SCR 843; *MCD v. Veena*, AIR 2001 SC 2749 : (2001) 6 SCC 571 at page 574; *U.P. Public Service Commission v. Sanjay Kumar Singh*, (2003) 7 SCC 657, at page 658 : AIR 2003 SC 3626.

36. *B. Basavalingappa v. D. Munichinappa*, AIR 1965 SC 1269 : (1965) 1 SCR 316. Also, *Parsram v. Shivchand*, AIR 1969 SC 597 : (1969) 1 SCC 20; *Kumari Madhuri Patil v. Addl. Commr., Tribal Development*, AIR 1995 SC 94 : (1994) 6 SCC 241; *K.S. Vijaylakshmi v. Tahsildar, Palakkad*, AIR 2000 Ker. 262; *S. Swvigaradoss v. Zonal Manager, F.C.I.*, AIR 1996 SC 1182 : (1996) 3 SCC 100.

37. *Srish Kumar Choudhury v. State of Tripura*, AIR 1990 SC 991 : 1990 Supp SCC 220. Also see, *Vimal Ghosh v. State of Kerala*, AIR 1997 Ker 237; *State of Maharashtra v. Mana Adim Jamat Mandal*, (2006) 4 SCC 98, at page 102 : AIR 2006 SC 3446.

38. *Pankaj Kumar Saha v. The Sub-Divisional Officer, Islampur*, (1996) AIR SCW 1943 : (1996) 8 SCC 264. Also, *Nityanand Sharma v. State of Bihar*, 1996 AIR SCW 782 : 1996 (3) SCC 576. See also *Raju Ramsing Vasave v. Mahesh Deorao Bhivapurkar*, (2008) 9 SCC 54.

> "It is now settled law that….the Court is devoid of power to include or exclude from or substitute or declare synonyms to be a Scheduled Caste or Scheduled Tribe."

It is for Parliament to amend the list and include therein, or exclude therefrom, any caste, race or tribe.

The purpose of Art. 341(1) is to avoid all disputes as to whether a particular caste is a Scheduled Caste or not for purposes of the Constitution. It is the President's notification issued under Art. 341(1), which determines whether a particular caste is a Scheduled Caste or not.[39] If a particular caste is not mentioned in the Presidential Order, it cannot be characterised as a Scheduled Caste.[40] Only those castes can be regarded as Scheduled Castes which are notified in the PO made under Art. 341. The Supreme Court has observed as regards the President's power under Art. 341:[41]

> "It is obvious that in specifying castes, races or tribes, the President has been expressly authorised to limit the notification to parts of or groups within the castes, races or tribes, and that must mean that after examining the educational and social backwardness of a caste, race or tribe, the President may well come to the conclusion that not the whole caste, race or tribe, but parts of or groups within them would be specified. Similarly, the President can specify castes, races or tribes or parts thereof in relation not only to the entire State, but in relation to parts of the State where he is satisfied that the examination of the social and educational backwardness of the race, caste or tribe justifies such specification. In fact, it is well known that before a notification is issued under Art. 341(1), an elaborate enquiry is made and it is as a result of this inquiry that social justice is sought to be done to the castes, races or tribes as may appear to be necessary, and in doing justice, it would obviously be expedient not only to specify parts or groups of castes, races or tribes, but to make the said specification by reference to different areas in the State. Educational and social backwardness in regard to these castes, races or tribes may not be uniform or of the same intensity in the whole of the State; it may vary in degree or in kind in different areas and may justify the division of the Sate into convenient and suitable areas for the purpose of issuing the public notification in question."

Similarly, Scheduled Tribes, according to Art. 366(25) read with Art. 342, are those tribes or tribal communities, or parts or groups thereof, as the President my notify. The President may specify under Art. 342(1) by public notification what tribes or tribal communities are to be treated as the Scheduled Tribes with respect to each State and Union Territory. A person belonging to a Scheduled Tribe in one State cannot *ipso facto* claim the same status in another State unless his tribe is declared to be a Scheduled Tribe in relation to that State.[42]

In case of the States, the President issues the notification after consulting the Governor of the State concerned. There is no uniform test for classifying the tribes as the Scheduled Tribes and, therefore, there exist difficulties in determining which tribe can rightly be included in, or excluded from, the schedule of tribes.

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39. *Bhaiyalal v. Harikishan,* AIR 1965 SC 1557, 1560 : (1965) 2 SCR 1557.
40. *Parsram v. Shivchand,* AIR 1969 SC 597 : (1969) 1 SCC 20.
41. *Bhaiyalal v. Harikishan, supra,* footnote 39.
42. *Action Committee v. Union of India,* (1994) 5 SCC 244; *U.P. Public Service Commission v. Sanjay Kumar Singh,* (2003) 7 SCC 657 : AIR 2003 SC 3626; *S. Pushpa v. Sivachanmugavelu,* (2005) 3 SCC 1 : AIR 2005 SC 1038.

Once these lists have been issued by the President, any later additions or subtractions can be made therein only by a law of Parliament and not by a Presidential notification [Art. 342(2)]. Clarifying the position in this regard, the Supreme Court has observed in *State of Maharashtra v. Milind*[43] that the Scheduled Tribes Order must be read as it is. It is not even permissible to say that a tribe, sub-tribe, part or group of any tribe or tribal community is synonymous to the one mentioned in the order if they are not so specifically mentioned in it. It is also not at all permissible to hold any enquiry or let in any evidence to decide or declare that any tribe or tribal community or part of or group within any tribe or tribal community is included in the general name even though it is not specifically mentioned in the concerned entry in the said order.[44]

Under the above-mentioned provisions, the President promulgated a number of orders listing the Scheduled Castes and the Scheduled Tribes, *i.e.*, The Constitution (Scheduled Castes) Order, 1950;[45] The Constitution (Scheduled Tribes) Order, 1950;[41] The Constitution (Scheduled Castes—Part C States) Order, 1951, and The Constitution (Scheduled Tribes—Part C States) Order, 1951.

As stated above, once these orders have been issued by the President, no other authority except Parliament, that too by passing a law, can amend these orders.

These orders did not give entire satisfaction to the people and the Central Government received a number of requests for revision and modification of the lists contained in these orders. The Central Government referred all these requests to the Backward Classes Commission.[46] On the recommendation of the Commission, Parliament modified the Presidential Orders by enacting the Scheduled Castes and Scheduled Tribes Order (Amendment) Act, 1956.

After the re-organisation of the States on a linguistic basis in 1957,[47] a new Presidential Order was issued under the States' Re-organisation Act. Besides, various other orders have been issued mainly for the Union Territories. The Scheduled Castes & Tribes Orders of 1950 have been further modified by the Scheduled Castes and Scheduled Tribes Orders (Amendment) Act, 1976.

The Supreme Court has stated in *Ganesh v. State of Maharashtra*[48] : "The notification of the President under Art. 342 of the Constitution, subject to the Scheduled Castes and Scheduled Tribes Act, 1976, is conclusive and final." Similarly "by virtue of Article 341, the Presidential orders made under Clause (1) thereof acquire an overriding status. But for Articles 341 and 342 of the Constitution, it would have been possible for both the Union and the States, to legislate upon, or frame policies, concerning the subject of reservation, vis-`-vis inclusion of Castes/Tribes. The presence of Articles 338, 338A, 341, 342 in the Constitution clearly preclude that".[49]

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43. AIR 2001 SC 393 : (2001) 1 SCC 4.

44. Also see, *B. Basavalingappa v. D. Munichinnappa,* AIR 1965 SC 1269 : (1965) 1 SCR 316; *Sirsh Kumar Choudhury v. State of Tripura,* AIR 1990 SC 991 : 1990 Supp SCC 220; *Nityanand Sharma v. State of Bihar,* AIR 1996 SC 2306 : (1996) 35 SCC 576.

45. *Bhaiya Ram v. Anirudh,* AIR 1971 SC 2533 : (1970) 2 SCC 825; *Dadaji v. Sukdeobabu,* AIR 1980 SC 150 : (1980) 1 SCC 621; *K. Adikanda Patra v. Gandua,* AIR 1983 Ori 89; *Principal, Guntur Medical College v. Y. Panduranga Rao,* AIR 1983 AP 339.

46. See, *infra,* Sec. D.

47. Ch. V, *supra.*

48. AIR 1997 SC 2333 : (1997) 4 SCC 340.

49. *Subhash Chandra v. Delhi Subordinate Services Selection Board,* JT 2009 (10) SC 615, 2009 (11) SCALE 278; *Union of India v. Shantiranjan Sarkar,* (2009) 3 SCC 90.

The Andhra Pradesh Scheduled Castes (Rationalisation of Reservations) Act, 2000 regrouped the 59 castes found in the Presidential List into 4 separate groups and allotted them different percentage out of the total reservation made for Scheduled Castes as a class. Striking down the Act as unconstitutional,[50] the Supreme Court said that the State cannot claim legislative power to make a law dividing the Scheduled Castes List of the State by tracing its legislative competence to Entry 41 of List II or Entry 25 of List III nor could the principles laid down in *Indra Sawhney case*[51] for sub-classification of Other Backward Classes be applied as a precedent for sub-classification or sub-grouping Scheduled Castes in the Presidential List. If they are one class under the Constitution, any division of these classes of persons based on any consideration would, apart from being violative of Article 14 of the Constitution, amount to tinkering with the Presidential List and therefore be unconstitutional.[52]

In *Subhash Chandra v. Delhi Subordinate Services Selection Board*[53] the Supreme Court clarified that there exists a distinction between State Service and State run institutions including Union Territory Services and Union Territory run institutions on the one hand, and the Central Civil Services and the institutions run by the Central Government on the other. In the case of the former, the reservation whether for admission or appointment in an institution and employment or appointment in the services or posts in a State or Union Territory must be confined to the members of the Scheduled Castes and Scheduled Tribes as notified in the Presidential Orders. But in respect of All India Services, Central Civil Services or admission to an institution run and founded by the Central Government, the members of Scheduled Castes and Scheduled Tribes and other reserved category candidates irrespective of their State for which they have been notified are entitled to the benefits thereof.

Clause 3 of the Scheduled Castes Order, 1950, originally declared that "….no person who professes a religion different from Hindusim" would be deemed to be a member of a Scheduled Caste. This para was substituted by the following para of the Scheduled Castes and Scheduled Tribes Orders (Amendment) Act, 1956 : "….no person who professes a religion different from the Hindu or the Sikh religion shall be deemed to be a member of a Scheduled Caste".

This provision has created some difficulty as is illustrated by *Punjabrao v. Meshram,*[54] The Supreme Court held in the instant case that under cl. 3 of the Order, only a person professing the Hindu or Sikh religion could belong to a Scheduled Caste, and a person who became a Buddhist and declared that he had ceased to be a Hindu could not derive any benefit from the Order. He could not thus contest election from a constituency reserved for members of the Scheduled Castes.

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50. *E.V. Chinnaiah v. State of A.P.*, (2005) 1 SCC 394 : AIR 2005 SC 162.
51. 1992 Supp (3) SCC 217.
52. *E.V. Chinnaiah v. State of A.P.*, (2005) 1 SCC 394, at page 414, 418 : (2006) 10 SCALE 472.
53. JT 2009 (10) SC 615, 2009 (11) SCALE 278: *See also Kavita Khorwal v.The Delhi University:* 154 (2008) DLT 755.
54. AIR 1965 SC 1179 : (1965) 1 SCR 849.
Also see, *S. Rajagopal v. C.M. Armugam*, AIR 1969 SC 101; *Soosai v. Union of India*, AIR 1986 SC 733 : 1985 Supp SCC 590, *supra*, footnote 29.

To undo the effect of this ruling, the Scheduled Castes order, 1950, has been amended by the Constitution (Scheduled Castes) Orders (Amendment) Act, 1990 which adds the word "Buddhist" after "the Sikh" in cl. 3. This means that a scheduled caste person professing the Buddhist religion does not cease to be a scheduled caste.[55] This Amendment shows that change of religion does not alter the social and economic conditions of the Scheduled Castes.

In *Soosai v. Union of India*,[56] the Supreme Court has posed the following important question:

> "Whether a Hindu belonging to a Scheduled Caste retains his caste on conversion to Christianity"?

The question becomes relevant to decide whether certain facilities granted to the Scheduled Castes can be denied to a scheduled caste person on changing his religion from Hinduism to another religion. Will this denial amount to discrimination on the ground of 'religion' only and thus be violative of Arts. 14 and 15(1) of the Constitution?

In *Soosai* the constitutional validity of para 3, mentioned above, was challenged under Art. 14 and Art. 15(I) as being discriminatory on the basis of religion.

In its judgment (delivered by PATHAK, J.), the Court has accepted that "caste was retained on conversion from one religion to another",[57] but the Court has also observed that such an oppressed group of people was part of the Hindu society alone. The Court insisted that to sustain discrimination the petitioner must prove that the disabilities and handicaps suffered from such caste membership in the social order of its origin—Hinduism—continue in their oppressive severity in the new environment of a different religious community as well. In the words of the Court :

> "To establish that paragraph 3 of the Constitution (Scheduled Castes) Order, 1950 discriminates against Christian members of the enumerated castes it must be shown that they suffer from a comparable depth of social and economic disabilities and cultural and educational backwardness and similar levels of degradation within the Christian community necessitating intervention by the State under the provisions of the Constitution. It is not sufficient to show that the same caste continues after conversion. It is necessary to establish further that the disabilities and handicaps suffered from such caste membership in the social order of its origin—Hinduism continue in their oppressive severity in the new environment of a different religion community"

In the instant case, no authoritative and detailed dealing with the present conditions of Christian society had been placed before the Court. Accordingly, the Court refused to hold that the President acted arbitrarily in the exercise of his judgment in enacting paragraph 3 of the Constitution (Scheduled Castes) Order, 1950.

The Court asserted that it is well established that when violation of Art. 14 or any of its related provisions, is alleged, the burden rests on the petitioner to es-

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55. *Sandipan Bhagwant Thorat v. Ramdas Bandu Athavale*, AIR 2002 Bom 110.
56. AIR 1986 SC 733.
57. *Ibid.*, 735.

tablish by clear and cogent evidence that the state has been guilty of arbitrary discrimination. In the instant case, the petitioner had failed to establish his case.[58]

The Supreme Court has also considered another interesting question: when a member of a Scheduled Caste is converted to Christianity and, thereafter, is re-converted to Hinduism, what is his status? The Court has held that reconversion would not entitle him to be automatically treaded as belonging to his original caste, before conversion; he would belong to his original caste if the members of the caste accept him as a member. The caste is a "social combination of persons governed by its rules and regulations," and it may admit a new member just as it can expel an existing member.[59] The Constitution Bench of the Supreme Court has observed on this point in *Guntur Medical College*[60]:

> "….on conversion to Hinduism, a person born of Christian converts would not become a member of the caste to which his parents belonged prior to their conversion to Christianity, automatically or as a matter of course, but would become such member if the other members of the caste accept him as a member and admit him within the fold."

The Supreme Court has held that a woman when married to a member of a tribe, after due observance of all formalities and after getting the approval of the elders of the tribe, would be regarded as a member of the tribe to which her husband belongs on the analogy of the wife taking the husband's domicile. In the instant case,[61] the husband belonged to the Munda Tribe. His wife sought to contest for a seat in the Lok Sabha from a reserved tribal constituency. It was argued against her that as she was not a member of the Scheduled Tribe, she was not eligible to contest from the reserved seat. The Supreme Court however ruled that as she was duly married to a person from the Munda Tribe, she acquired membership of that tribe.

However, more recently the Supreme Court has held that[62] a woman belonging to a Forward Class marrying a tribal cannot automatically attain the status of tribal unless she has been accepted by the community as one of them, observed all rituals, customs and traditions which have been practised by the tribals from time immemorial and accepted by the community of the village as a member of tribal society. Such acceptance must be by a resolution of the village community which must be entered in the Village Register kept for the purpose. In any event the off-spring of such a marriage would be tribal. On the other hand if a non-tribal man marries a tribal woman, their off-spring would not be tribal.[63] Further, conversion of the parents does not automatically affect the tribal status of the child.[64]

A member of a Scheduled Tribe in one State, on migration to another State, does not carry with him the tribal status if his Tribe is not recognised as such in

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58. See also *State of Kerala v. Chandramohanan*, (2004) 3 SCC 429, at page 435 : AIR 2004 SC 1672; *Anjan Kumar v. Union of India*, (2006) 3 SCC 257, at page 265 : AIR 2006 SC 1177. See, Ch. XXI, *supra.*

59. *C.M. Arumugam v. S. Rajagopal*, AIR 1976 SC 939 : (1976) 1 SCC 863.

60. *Guntur Medical College v. Mohan Rao*, AIR 1976 SC 1904 : (1976) 3 SCC 411.
Also see, *W.S.V. Satyanarayana v. Director of Tribal Welfare*, AIR 1997 AP 137.

61. *N.E. Horo v. Jahanara Jaipal Singh*, AIR 1972 SC 1840 : (1972) 1 SCC 771.

62. *Anjan Kumar v. Union of India*, (2006) 3 SCC 257, at page 261 : AIR 2006 SC 1177.

63. *Ibid* at page 261.
Ed: The observations appear to be too generalized and requires reconsideration**.**

64. *Lillykutty v. Scrutiny Committee, SC & ST*, (2005) 8 SCC 283 : AIR 2005 SC 4.

the other State. Each State has its own list of Tribes [see Art. 342].[65] In the instant case,[66] the petitioner belonged to a Scheduled Tribe in Andhra Pradesh. He migrated to Maharashtra where his Tribe was not listed as a Scheduled Tribe. The Supreme Court ruled that be could not be treated as a member of the Schedule Tribe in Maharashtra though he would be one in Andhra Pradesh. The Court ruled that under Art. 342, the Scheduled Tribes are specified in relation to each State and Union Territory and, therefore, a member of a Scheduled Tribe in one State does not carry that status to another State. But when an area dominated by members of the same tribe belonging to the same region has been bifurcated between two States, the members would continue to get the same benefit when the said tribe is recognized in both the States.[67] This interpretation of Art. 342 is in line with the interpretation of Art. 341 as mentioned above.[68]

A person belonging to a forward class cannot claim the status of a S/T by obtaining a false certificate to that effect for purposes of admission to an educational institution.[69]

(b) CONSTITUTIONAL SAFEGUARDS

Under Art. 330, seats are to be reserved for the Scheduled Castes and the Scheduled Tribes in Lok Sabha. Originally, this reservation was to operate for ten years from the commencement of the Constitution. But this duration has been extended continuously since then by 10 years each time. Now, under the Amendment of the Constitution, enacted in 1999, this reservation is to last until January 25, 2010 [Art. 334(a)][70]. It is felt that the handicaps and disabilities under which these people live have not yet been removed and that they need this reservation for some time more so that their condition may be ameliorated and they may catch up with the rest of the nation.

The reservation for Lok Sabha seats for the Scheduled Castes and Scheduled Tribes has to be made in each State and Union Territory on population basis. The number of Lok Sabha seats reserved in a State or Union Territory for such Castes and Tribes is to bear, as nearly as possible, the same proportion to the total number of seats allotted to that State or Union Territory in the Lok Sabha as the population of the Scheduled Castes and the Scheduled Tribes (excluding the Scheduled Tribes in the autonomous districts of Assam)[71] in the concerned State or the Union Territory bears to the total population of the State or the Union Territory [Art. 330(2)].

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65. *Supra.* See also *Sau Kusum v. State of Maharashtra*, (2009) 2 SCC 109.
66. *Marri Chandra v. Dean, S.G.S. Medical College*, (1990) 3 SCC 130 : (1990) 2 SCR 843.
67. *Sudhakar Vithal Kumbhare v. State of Maharashtra*, (2004) 9 SCC 481, at page 483 : AIR 2004 SC 1036.
68. Also see, *Kumari Madhuri Patil, infra*, footnote 69; *Dudh Nath Prasad v. Union of India*, AIR 2000 SC 525 : (2000) 2 SCC 20; *State of Uttaranchal v. Sidharth Srivastava*, (2003) 9 SCC 336, at page 352 : AIR 2003 SC 4062.
69. *Kumari Madhuri Patil v. Addl. Commr. Tribal Development*, (1994) 6 SCC 241 : 1994 SCC (125) 1349.
70. The Constitution (One Hundred And Ninth Amendment) Bill, 2009, to amend Article 334 of the Constitution by substituting the words "seventy years" for the words "sixty years" is pending.
71. These Tribal Districts of Assam (Schedule VI) are not under regular administration and the tribes therein are excluded from such representation, *supra*, Ch. IX, Sec. C.

Similarly, under Art. 332(1), seats are to be reserved for the Scheduled Castes and the Scheduled Tribes (excluding the tribes in the autonomous districts of Assam)[72] in the State Legislative Assemblies. Under Art. 334(a), this reservation is to operate until January 25, 2010.[73] The seats reserved for such Castes and Tribes in a State Legislative Assembly are to bear, as nearly as possible, the same proportion to the total number of seats in the Assembly as the population of such Castes and Tribes in the State bears to the total State population.[74]

By the 42nd Amendment of the Constitution, the number of seats for the Scheduled Castes and Scheduled Tribes in Lok Sabha and the State Legislative Assemblies were frozen at the level of the 1971 census population figures and this number will not be varied until the first census held after the year 2000.[75] A new Constitutional Amendment has now been passed to freeze the seats in the Lok Sabha and State Legislature, at the 2001 census level until the year 2026.[76]

Article 243-T of the Constitution provides for reservation of seats for the Scheduled Castes, Scheduled Tribes and women in every municipality and further enables the legislature of a State to make provision for reservation of seats in any municipality or offices of the Chairpersons in the municipalities in favour of Backward Class of citizens. It also mandates that the offices of Chairpersons in the municipalities shall be reserved for the Scheduled Castes, Scheduled Tribes and women as the legislature of a State may, by law, provide.

Elections to the reserved seats are held on the basis of a single electoral roll, and each voter in the reserved constituency is entitled to vote. There is no separate electorate. It is not for the Scheduled Castes and the Scheduled Tribes alone to elect their representatives. Thus, to elect a person belonging to such Castes and Tribes to a reserved seat, all the voters in the constituency have a right to vote. This method has been adopted with a view to discourage the differentiation of the Scheduled Castes and the Scheduled Tribes from other people and to gradually integrate them in the main stream of national life. Also, a member of the Scheduled Castes or the Scheduled Tribes is not debarred from contesting a general non-reserved seat.[77]

The fact that reservation of seats in the Legislatures is not on a permanent basis, but is at present provided for a 10 year period at a time, shows that it is envisaged that the Scheduled Castes and the Scheduled Tribes would ultimately assimilate themselves fully in the political and national life of the country so

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72. *Ibid.*

73. The Constitution (Seventy-ninth Amendment) Act, 1999; see, Ch. XLII, *infra*.

74. Special provisions have been made through Arts. 332(4), (5) and (6) for representation of Autonomous Tribal Districts in the Assam Legislature. Each district has seats in the Legislature in proportion to its population with respect to the total State population; Constituencies in an autonomous district do not comprise any area outside the district; none other than a member of a scheduled tribe of an autonomous district is eligible for election to the Assembly from that district. See *Subrata Acharjee v. Union of India*, (2002) 2 SCC 725 for reservation of seats for Scheduled Tribes in the Tripura Legislative Assembly on a basis other than the proportion of population.

75. In 1980, there were 78 *Harijan* and 39 *Adivasi* members in the Lok Sabha and 546 *Harijan* and 291 *Adivasi* members in the Assemblies.

76. See, *supra*, Chs. II and VI; *infra*, Ch. XLII.

77. *V.V. Giri v. D.S. Dora*, AIR 1959 SC 1318 : (1960) 1 SCR 426.See also *Bihari Lal Rada v. Anil Jain (Tinu) :* (2009) 4 SCC 1.
Also, *supra*, Ch. XIX.

much so that there would be no need for any special safeguards for them and that there would be no need to draw a distinction between one citizen and another. Their condition would improve so much that they would feel that their interests are secure without any kind of reservation.

(c) CONSIDERATIONS OF EFFICIENCY

The general principle adopted as regards government service is merit, but in case of the Scheduled Castes and the Scheduled Tribes, some relaxation is needed because of their backwardness. Art. 335, therefore, provides that the claims of the members of the Scheduled Castes and the Scheduled Tribes are to be taken into consideration, consistently with the maintenance of efficiency of administration, in making appointments to services and posts in connection with the affairs of the Union or of a State. This provision thus imposes a constitutional obligation on the various governments to take steps to ensure that the claims of members of the Scheduled Castes and Scheduled Tribes are duly considered in making appointments to government services.

In this connection, reference may be made to the discussion under Arts. 16(1) and 16(4).[78] Art. 16(4) is an enabling provision conferring power on the State to make reservation of posts in favour of any backward class of citizens who, in the opinion of the State Government, are not adequately represented in the State services. In this connection, reference may also be made to Art. 46, a Directive Principle.[79]

Article 335 runs follows :

> "The claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State."

Article 335 insists on drawing a balance between reservation of posts for the Scheduled Castes and Scheduled Tribes in government posts and maintenance of efficiency in the administration. Art. 335 makes efficiency in administration of paramount importance. Art. 335 makes efficiency in administration an express constitutional limitation upon the discretion vested in the state while making provisions for adequate representation for the Scheduled Castes and Scheduled Tribes.[80]

As the Supreme Court has stated in *Indra Sawhney*,[81] the provisions of the Constitution must be interpreted in such a manner that a sense of competition is cultivated among all service personnel, including the reserved category.

The Supreme Court has observed in this connection:[82]

> "Art. 335 stipulates that the claims of the members of the Scheduled Castes and Scheduled Tribes shall be taken into consideration, consistent with the

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78. *Supra*, Ch. XXIII, Secs. E and G.
79. *Supra*, Ch. XXXIV, Sec. D.
80. *Ajit Singh II v. State of Punjab,* AIR 1999 SC 3471 : (1999) 7 SCC 209.See also *A.P. Public Service Commission v. Baloji Badhavath,* (2009) 5 SCC 1.
81. *Indra Sawhney I v. Union of India,* AIR 1993 SC 477 : 1992 Supp (3) SCC 217; *Indra Sowhney II v. Union of India,* AIR 2000 SC 498.
Also see, Ch. XXIII, Sec. G, *supra;* see, *infra*, Sec. E.
82. *Ashutosh Gupta v. State of Rajasthan,* (2002) 4 SCC 34, 40.

> maintenance of efficiency of administration, in the making of appointment to services and posts in connection with the affairs of the Union or of the State. It is thus, apparent that even in the matter of reservation in favour of Scheduled Castes and Scheduled Tribes the founding fathers of the Constitution did make a provision relating to the maintenance of efficiency of administration. In this view of the matter if any statutory provision provides for recruitment of a candidate without bearing in mind the maintenance of efficiency of administration such a provision cannot be sustained, being against the constitutional mandate".

Whether a particular class is adequately represented in the State services or not is a matter which lies within the subjective satisfaction of the concerned government. Although not stated specifically in the Constitution, the same principle of efficiency of administration[83] is to apply to reservation of posts for Other Backward Classes (OBCs) as well.[84]

(d) ADDITIONAL PROVISIONS FOR SCHEDULED TRIBES

The Constitution provides for the appointment of a Minister for Tribal Welfare in each of the States of Bihar, Madhya Pradesh, and Orissa. This Minister can also be put additionally in charge of the welfare of the Scheduled Castes and Backward Classes, or any other work [proviso to Art. 164(1)].[85]

Under Art. 339(1), the President may appoint a Commission at any time, and must appoint it after ten years of the commencement of the Constitution, to report on the welfare of the Scheduled Tribes in the States and the administration of the Scheduled Areas. The Presidential Order appointing the Commission may define its composition, powers and procedure and may make other incidental or ancillary provisions. No such provision has been made in the Constitution as regards the Scheduled Castes.

Article 339(2) empowers the Centre to issue directives to any State giving directions as to the drawing up and execution of schemes specified in the directives to be essential for the welfare of the Scheduled Tribes in the State. Art. 339(2) is supplementary to Art. 275(1)[86] which provides, *inter alia*, that grants-in-aid shall be payable to a State out of the Consolidated Fund of India for purposes of meeting costs of such schemes of developments as the State may undertake with the approval of the Government of India for promoting the welfare of the Scheduled Tribes in that State. Thus, Art. 275(1) furnishes the *raison d'etre* of Art. 339. The Central Government has been given the power to give directions as respects such schemes because it pays the cost thereof.

There are special provisions made for administration of the areas known as the Scheduled Areas [Schedules V & VI to the Constitution] which have already been discussed earlier in this book.[87]

The main problem with the Scheduled Tribes is to improve their socio-economic condition not at a very quick pace, but in such a way as not to do violence to their social organisation and way of life. The need is to evolve ways and means of gradual adjustment of the tribal population to the changed conditions,

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83. *Indra Sawhney v. Union of India*, AIR 1993 SC 477 : 1992 Supp (3) SCC 217.
84. See further under Art. 16. On "OBCs", see, *infra*, Sec. D.
85. *Supra*, Ch. VII; VII CAD, 521.
86. For Art. 275(1), *supra*, Ch. XI, Sec. M.
Also see, Art. 164, *supra*, Ch. VII, Sec. A(ii)(a); *supra*, footnote 85.
87. *Supra*, Ch. IX, Sec. C.

and their slow integration in the general life of the country without undue and hasty disruption of their way of living.

It has been thought that it may be harmful to the tribal people if they are brought in indiscriminate contact with the outside world. Thus, the legislatures have been empowered to impose restrictions on the Fundamental Rights of other citizens guaranteed by Arts. 19(1)(*d*) and 19(1)(*e*) in the interest of the Scheduled Tribes,[88] so that movement of people from the progressive to the tribal areas, may be restricted. Accordingly, to check exploitation of the tribals, many States have enacted laws prohibiting non-tribals into the tribal areas without permits, living of non-tribals permanently in tribal areas and the transfer of tribal land to non-tribals. Reservations can also be made for them in educational institutions and government services under Arts. 15(4),(5) and 16(4).

(e) THE SCHEDULED CASTES AND THE SCHEDULED TRIBES (PREVENTION OF ATROCITIES) ACT, 1989.

Parliament has enacted the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989. The underlying purpose of the Act is to prevent the commission of offences of atrocities against the Scheduled Castes and Scheduled Tribes, to establish special courts for the trial of such offences and to provide for the relief and rehabilitation of the victims of such offences.

Section 3(1) of the Act contains a list of such acts as fall within the category of atrocity. These acts have been made punishable with imprisonment for a term of six months to five years and with fine.

Section 3(2) lists certain other acts, such as, giving of false evidence against a member of a Scheduled Caste or a Scheduled Tribe to implicate him in a criminal offence, which have also been made punishable.

Provision has been made [s. 14] for designating special courts for the purpose of providing for speedy trial of offences under the Act. Provision has also been made for imposing collective fines [s. 16].

Provisions of this Act override the provisions of any other Act [s. 20].

Every year the Central Government has to lay on the table of each House of Parliament a report on the measures taken by itself and the State Governments in pursuance of this Act [s. 21(4)].

The State Governments are required to make provision for the economic and social rehabilitation of the victims of atrocities, and provide them legal aid [s. 21].

Reference has already been made to the Protection of Civil Rights Act, 1955.[89]

D. ANGLO-INDIANS

The Constitution contains some special provisions safeguarding the interests of the Anglo-Indian community.

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88. *Supra*, Ch. XXIV, Sec. G.
89. *Supra*, Ch. XXIII, Sec. I.
Also see, *infra*, Sec. E.

Anglo-Indians constitute a religious, social, as well as a linguistic minority. An Anglo-Indian, according to Article 366(2), is a person whose father, or any of whose other male progenitors in the male line, is or was of European descent but who is domiciled within the territory of India and is or was born within such territory of parents habitually resident therein and not established there for temporary purposes only.

The President, if he is of opinion that the Anglo-Indian community is not adequately represented in the Lok Sabha, may nominate thereto not more than two members of the community [Art. 331].[90] Similarly, the Governor of a State, if he is of opinion that the Anglo-Indian community needs representation in the State Legislative Assembly, and is not adequately represented there, may nominate one member of the community to the Assembly [Art. 333].[91]

These provisions were necessary, for, otherwise, being numerically an extremely small community, and being interspersed all over India, the Anglo-Indians could not hope to get any seat in any Legislature through election. The concession shown to the Anglo-Indians by way of providing for their representation in the Lok Sabha and the State Legislative Assemblies is to last for the present up to the 25th January, 2010 [Art. 334(*b*)].

Before Independence, Anglo-Indians were enjoying some special privileges in services in railways, customs, posts and telegraph. It was thought necessary that these concessions be continued for some time more and be withdrawn gradually. Accordingly, Art. 336(1) provided that for two years after the Constitution came into force, appointment of Anglo-Indians to these posts would continue on the same basis as it was before August 14, 1947. Thereafter, there was to be a progressive diminution in the number of posts reserved for them in these services at the rate of 10 per cent every two years. All such reservations came to an end by the 25th January, 1960. However, under Art. 336(2), this reservation was not to bar the appointment of qualified Anglo-Indians on merit to other posts.

Further, before Independence, Anglo-Indian educational institutions were getting special grants. Art. 337 protected these grants for the first three years after the beginning of the Constitution. Thereafter, during each succeeding year, these grants could be reduced by ten per cent as compared to the grants in the preceding three years so that ten years after the commencement of the Constitution, such grants, to the extent to which they were a special concession to the Anglo-Indian community, were to cease. Thus, Art. 337 has now exhausted itself.[92]

E. OTHER BACKWARD CLASSES

Besides the Scheduled Castes and the Scheduled Tribes, there are Other Backward Classes. The Constitution extends some protection to the 'Other Backward Classes [OBCs]' as well as these classes have been neglected for long. The Other Backward Classes are to be found amongst all religious groups—Hindus, Muslims, Christians, *etc.*

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90. Also see, *supra*, Ch. II.
91. Also Art. 170, *supra*, Ch. VI.
92. See, *State of Bombay v. Bombay Education Society,* AIR 1954 SC 561 : (1955) 1 SCR 568; *supra*, Ch. XXX, Sec. C.

Under Art. 15(4), the State is empowered to make any special provision for the advancement of any socially and educationally backward class besides the Scheduled Castes and the Scheduled Tribes.[1] The expression 'special provision, for advancement' has a wide connotation. It may include many things, such as, reservation of seats in educational institutions, financial assistance, scholarships, free housing and so on. Article 15 (5) now enables the State to enact a law relating to the admission of Scheduled Castes, Scheduled Tribes or socially and educationally backward classes of citizens in educational institutions other than the minority educational institutions referred to in Art.30(1).[2] The Central Educational Institutions (Reservation in Admission) Act, 2007 provides for reservation of seats in Central Educational Institutions inter alia for the Other Backward Classes. 'Other Backward Classes' has been defined as "the class or classes of citizens who are socially and educationally backward, and are so determined by the Central Government". Presumably having regard to Art. 335, specified institutions of excellence, research institutions and institutions of national and strategic importance have been kept outside the scope of the Act. Under Art. 16(4), the state can make provisions for the reservation of appointments or posts in favour of "any backward class of citizens".[3]

While there exist in the Constitution special provisions for reservation of seats for Scheduled Castes and Scheduled Tribes in the Lok Sabha and the State Legislative Assemblies [Arts. 330 and 332], and for the representation of the Anglo-Indian Community in these various Houses, there exists no such provision for reservation of seats for socially and educationally Backward Classes in the Lok Sabha and the State Legislative Assemblies.

Again, while under Art. 335, there is a constitutional obligation to consider the claims of the members of the Scheduled Castes and Scheduled Tribes in the making of appointments to services and posts in connection with the affairs of the Centre and the States, there exists no corresponding provision for the Other Backward Classes. However, under Art. 16(4), it is permissible to reserve posts in favour of any backward class of citizens which, in the opinion of the concerned Government, is not adequately represented in the services of the State or the Central Government.[4]

It has been ruled by the Supreme Court that Art. 16(4) must be read along with Art. 335. Though on the express terms of Art. 335, the OBCs are not included therein, even the OBCs are also covered by the thrust of Art. 335.[5] This means that when the State proposes to provide reservation for OBCs, "if it is considered by the appropriate authority that such reservation will adversely affect the efficiency of the administration, then exercise under Art. 16(4) is not permissible". This is the constitutional limitation on the exercise of the enabling power of reservation under Art. 16(4).

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1. *Supra*, Ch. XXII, Sec. C.
2. See *supra* under Education.
3. *Supra*, Ch. XXIII, Sec. D(c) and Sec. E.
4. *Supra*, Ch. XXIII, Sec. D(c) and Sec. E. Besides, reference may also be made to Art. 29, *supra*, Ch. XXX, Sec. A.
5. *Indra Sawhney v. Union of India (I)*, AIR 1993 SC 477 : 1992 Supp (3) SCC 217; *Indra Sawhney v. Union of India, (II)*, AIR 2000 SC 498 : (2000) 1 SCC 168; *Ashoka Kumar Thakur v. Union of India*, (2008) 6 SCC 1 : (2008) 5 JT 1; *supra*, footnote 81.

Further, if reservation is to be provided by passing a law by the State Legislature in the subordinate judiciary covered by Arts. 233 and 234,[6] "then the efficiency of the judicial administration will be affected is a matter within the exclusive purview of the High Court which shall have to be consulted". Such consultation is a constitutional obligation before any Act/Rules are made for the purpose.[7] Accordingly, a Bihar Act making reservation in appointment of district and subordinate judge for OBCs was declared unconstitutional by the Supreme Court as the High Court had not been consulted before passing the Act.[8]

A very difficult problem of the day is to identify Other Backward Classes. Generally, socially and educationally backward persons fall within the category of Backward Classes, but even after 50 years of enforcement of the Constitution, it has not been possible to evolve acceptable criteria for the purpose of identifying the OBCs.

It is necessary to state here that the expression "weaker sections" of the people used in Art. 46 is somewhat different from the expression "backward class" of citizens used in Art. 16(4) which is only a part of the weaker sections.[9] The expression "weaker sections" of the people is wider than the expression "backward class" of citizens which is only a part of the "weaker sections".

The expression "weaker sections" connotes all sections of society who are rendered weaker due to various causes. Art. 46 is aimed at promoting their educational and economic interests and protecting them from social injustice and exploitation. This obligation cast on the state is consistent both with the Preamble as well as Art. 38.[10] The term 'backward class" denotes a class which is socially backward and whose educational and economic backwardness is because of its social backwardness. Thus, the expression "backward class" in Art. 16 does not comprise all weaker sections of people but only those which are socially and, therefore, educationally and economically backward.

The Other Backward Classes have not been specified in the Constitution for, at the time of the Constitution-making, not much information was available about them. The Constitution in its various provisions does not even use a single uniform expression, but uses various expressions, to characterise Backward Classes. In Arts. 15(4), 15(5) and 340, the expression used is 'socially and educationally backward classes. In Art. 16(4), the expression used is 'backward' *simpliciter*; in Art. 46, the term used is 'weaker sections of the people'.[11] One of the main criteria for determining socially and educationally backward classes is poverty. Therefore the principle of exclusion of "creamy layer" is necessary.[12]

A person belonging to OBC in one State cannot automatically claim the same status in another State. Each State has its own list of OBCs. The Supreme Court has explained the rationale underlying this rule as follows:[13]

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6. See, *supra*, Ch. VIII, Sec. G(r).
7. *State of Bihar v. BalMukand Sah*, AIR 2000 SC at 1312 : (2000) 4 SCC 640; *supra*, footnote 82.
8. For a detailed discussion on this aspect, see, *supra*, Ch. VIII, Sec. G.
9. *Supra*, for Art. 46, see Ch. XXXIV; for Art. 16(4), see, *supra*, Ch. XXIII.
10. For Art. 38, see, *supra*, Ch. XXXIV.
11. *Supra*, Ch. XXXIV.
12. *Ashoka Kumar Thakur v. Union of India*, (2008) 6 SCC 1 : (2008) 5 JT 1.
13. *Municipal Corp. of Delhi v. Veena*, AIR 2001 SC 2749, at 2750-2751 : (2001) 6 SCC 571.

> "Castes or groups are specified in relation to a given State or Union Territory, which obviously means that such caste would include caste belonging to an OBC group in relation to that State or Union Territory for which it is specified. The matters that are to be taken into consideration for specifying a particular caste in a particular group belonging to OBCs would depend on the nature and extent of disadvantages and social handicaps suffered by that caste or group in that State. However, it may not be so in another State to which a person belongs thereto goes by migration…."

Thus, a person belonging to OBC on migration from the State of his origin in another state where his caste is not in the OBC list was entitled to the benefits or concessions admissible to the OBCs in his State of origin and Union Government, but not in the State to which he has migrated.

In *Valsamma*,[14] the Court considered the following general question which is relevant to S/Cs, S/Ts and OBCs:

> "Whether a lady marrying a S/C, S/T or OBC citizen or one transplanted by adoption or any other voluntary act, *ipso facto*, becomes entitled to claim reservation under Art. 15(4) or 16(4), as the case may be?"

The Court has answered the question in the negative. The Court has argued that S/Cs, S/Ts and OBCs have suffered social disabilities for long and so they have become "socially, culturally and educationally backward". The object of reservation is to remove these handicaps and to bring them in the mainstream of national life. A person belonging to a forward class has an advantageous start in life; when he or she is transplanted in the backward class by adoption or marriage or conversion, he cannot claim the benefits of reservation either under Art. 15(4) or 16(4), as the case may be. "Acquisition of the status of a S/C etc. by voluntary mobility into these categories would play fraud on the Constitution and would frustrate the benign constitutional policy under Articles 15(4) and 16(4) of the Constitution".

(a) BACKWARD CLASSES COMMISSION

To facilitate the task of identifying the backward classes and laying down criteria for the purpose, Art. 340(1) empowers the President to appoint a Commission consisting of such persons as he thinks fit to investigate the conditions of "socially and educationally backward classes" in India and the difficulties under which they labour.

The Commission may recommend the steps that should be taken by the Central and State Governments to remove their difficulties and improve their condition. The Commission may also make recommendations as to the grants which should be made for the purpose by the Centre or any State, and the conditions subject to which such grants should be made. The Presidential Order appointing the Commission is to define the procedure to be followed by the Commission.

The Commission is to investigate the matters referred to it and present its report to the President setting out the facts as found by it and making its recommendations [Art. 340(2)]. The report of the Commission together with a memorandum setting out the action taken thereon by the Central Government is to be laid before each House of Parliament [Art. 340(3)].

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14. *Valsamma Paul v. Cochin University*, AIR 1996 SC 1011, at 1022 : (1996) 3 SCC 545. Also see, *supra*, Ch. XXII, Sec. C, and Ch. XXIII, Sec. D(c).

(b) FIRST BACKWARD CLASSES COMMISSION

As envisaged by the Constitution, the Backward Classes Commission was appointed by the President in January, 1953, under the Chairmanship of Kaka Kalelkar. The Commission was asked, among other things, to determine the criteria to be adopted for classifying socially and educationally backward classes.

The Commission submitted its report in 1955. The report was not unanimous and disclosed a considerable divergence of opinion among its members and failed to specify any easily discernible objective tests to define "backwardness". The majority of the members of the Commission expressed the view that the position of the individual in the social hierarchy based on caste should determine backwardness.

The Central Government could not accept such a criterion because "the caste system is the greatest hindrance in the way of our progress towards an egalitarian society, and the recognition of the specified castes as backward may serve to maintain and even perpetuate the existing distinctions on the basis of caste."

Besides, while some members in some castes may be characterised as backward "educationally and economically," some may not be so classified. Similarly, among the so-called upper and advanced classes, there are large number of persons who are not less backward educationally and economically, and even among the backward classes some castes are more backward than others. Then, conditions differ from State to State and region to region.

The Commission also suggested certain other criteria to identify backwardness, *e.g.*, lack of general educational advancement among the major sections of a caste or community, inadequate representation in the field of trade, commerce and industry, communities consisting of a large percentage of small landowners with uneconomic holdings, *etc.* The Government's reaction to this was that "these are obviously vague tests, more or less of an individual character, and even if they are accepted they would encompass a large majority of the country's population." And, if the entire community, barring a few exceptions, were thus to be regarded as backward, the really needy would be swamped by the multitude and hardly receive attention or adequate assistance, nor would such a dispensation fulfil the conditions laid down in Art. 340 of the Constitution.

The Government of India thus came to the conclusion that further investigation was necessary with a view to devise some positive and workable criteria to specify the socially and educationally backward classes so as to give them adequate assistance and relief in all suitable ways so as to enable them to make up for the leeway of the past and to acquire the normal standards of life prevalent in the country on a systematic and elaborate basis. In the meantime, relief was to be provided to such groups of people to whom disabilities were attached by reasons of environment and occupations considered to be low, and to other classes who, adjudged in the light of reasonable standards, might well be regarded as socially and educationally backward.The task to devise positive and workable critieria to identify backwardness on an all-India basis thus remained incomplete. No indisputable yardstick could be evolved for the purpose. Each State defined backwardness in its own way, and political expediency played some role in this matter. There was thus no uniformity of approach in the country in this respect.

For purposes of Arts. 15(4)[15],(5) and 16(4)[16], it is for the State concerned to list the Backward Classes. The Centre can also list them for purposes of admission into Central educational institutions and Central Services. Even this the Centre was not able to do. The task is an extremely difficult one. Many communities desire to be characterised as backward because of the facilities of admissions and services which are available to such classes, and they thus bring political influence to bear upon the government for being recognised as 'backward'. When a class is designated as backward, then even rich and well educated members of the class claim the privileges available; the more unfortunate members of the class thus get excluded. This is against the best interests of the really backward persons. This frustrates the basic objective of the Constitution, *viz.*, amelioration of the really and factually weak and downtrodden people.

A bulk of case-law has arisen on this point. The courts have been able to instil some rationality in this regard by insisting that for purposes of Arts. 15(4),(5) and 16(4), caste cannot be the sole determinant of backwardness and that other tests like economic, professional, environmental, educational should also be taken into consideration.

The practice to name the castes as 'Backward Classes', without any economic considerations, has two main defects. One, it has a tendency to perpetuate the caste system and, thus, hamper the growth of an egalitarian society. To accept caste as the basis of backwardness, it will lead to legitimisation and perpetuation of the caste system in the country which goes against the secular character of the Indian polity.[17] Also, the traditional caste system is breaking down and is gradually being replaced by contractual relations between individuals.

The future Indian society has undoubtedly to be classless and casteless. It is also not true to assume that all members of a caste are equally socially and educationally backward. Within a backward caste, if no economic considerations are applied, then all the privileges may be utilised by well to do people leaving the poor in the cold. It is, therefore, imperative that the castes as such should not be recognised for purposes of giving assistance. Instead, economic backwardness of classes of people should be the criteria for the purpose.

These considerations have had an impact on the judicial approach concerning characterisation of backward classes so much so that caste cannot be taken as the sole criterion for the purpose and increasing emphasis is being laid on economic factors.[18] Reference may be made here to a few of these judicial pronouncements.

In *Balaji*,[19] the Supreme Court ruled with reference to Art. 15(4), that it may not be irrelevant to take into account 'caste' to determine social backwardness. But it should not be made the "sole dominant test" for the purpose without regard to other relevant factors. It was observed in the instant case that "social backwardness is on the ultimate analysis the result of poverty to a very large extent".

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15. *Supra*, Ch. XXII, Sec. C.
16. *Supra*, Ch. XXIII, Sec. D(c).
17. For discussion on this aspect, see, *supra*, Ch. XXIX, Sec. A.
18. Reference may be made in this connection to the discussion under Arts. 15(4) and 16(4), *supra*, Chs. XXII, Sec. C and XXIII, Sec. D(c).
19. *Balaji v. State of Mysore*, AIR 1963 SC 649 : 1963 Supp (1) SCR 439; *supra*, Ch. XXII, Sec. C(b).

The Court also emphasized that for purposes of Art. 15(4), the backwardness must be social *and* educational and not *either* social or educational.

In *Rajendran*,[20] the Court accepted classification of backward classes based on 'caste' because the social and educational backwardness of the castes was based on their occupations.

In *P. Sagar*,[21] caste-wise classification was rejected because no other factor except caste was taken into consideration: The Court maintained that in determining whether a particular section forms a class, caste could not be excluded altogether. But in case the caste was made a criterion, proper inquiry or investigation should be conducted by the State Government before listing certain castes as socially and educationally backward.

In *K.S. Jayasree v. State of Kerala*,[22] the Supreme Court upheld a government order listing backward classes but exempting therefrom such families as had an aggregate annual income of Rs. 10,000. The order was challenged by a candidate belonging to the backward class but who was denied the privilege of preferential admission to a medical college because her family income exceeded Rs. 10,000 annually. The Court emphasized that poverty or economic standard is a relevant factor in determining backwardness. Neither caste nor poverty alone could be the sole or dominant test, but both are relevant, to determine backwardness. With the improvement in economic position of a family, social backwardness disappears. To permit these persons to take advantage of the privileges meant for backward persons, is to deprive the real backward poor persons of their chance to make progress.

The question has been elaborately considered by the Supreme Court in *Indra Sawhney I.*[23] For example, PANDIAN, J., has stated that before a conclusion is drawn that a caste is backward, "the existence of circumstances relevant to the formation of opinions is a *sine qua non*. If the opinion suffers from the vice of non-application of mind or formulation of collateral grounds or beyond the scope of statute, or irrelevant and extraneous material, then that opinion is challengeable." Similarly, JEEVAN REDDY, J., has emphasized that opinion in regard to backwardness must be based on relevant material. He went on to observe that under Art. 16(4), reservation is not being made in favour of a 'caste' but a backward class. "Once a caste satisfies the criteria of backwardness, it becomes a backward class for the purposes of Art. 16(4)". JEEVAN REDDY, J., further emphasized: "Once backward, always backward is not acceptable." Therefore, if a caste ceases to be backward in course of time, it should be excluded from the list of Backward Classes.

The Supreme Court has observed in *Indra Sawhney II:*[24] "Caste only cannot be the basis for reservation. Reservation can be for a backward class of citizen of a

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20. *P. Rajendran v. State of Madras*, AIR 1968 SC 1012 : (1968) 2 SCR 786; *supra*, Ch. XXII, Sec. C(c).
21. *P. Sagar v. State of Andhra Pradesh*, AIR 1968 SC 1379 : (1968) 3 SCR 595.
22. AIR 1976 SC 2381; *supra*, Ch. XXII, Sec. C(c).
23. *Supra*, Ch. XXIII, Sec. G.
Also see, *Indra Sawhney v. Union of India (II)*, AIR 2000 SC 498, 505 : (2000) 1 SCC 168, *supra*, Ch. XXIII, Sec. G(b).
24. (2000) 1 SCC 168, at 185 : AIR 2000 SC 498; *supra*, Ch. XXIII, *supra*, Ch. XXIII, Sec. G(b).

particular caste. Therefore, from that, the creamy layer and the non-backward class of citizens are to be excluded."

Recently Parliament enacted the Central Educational Institutions (Reservation in Admission) Act, 2006 providing 27 per cent quota to OBCs in institutions for higher education without identifying who could be considered to be an OBC. The Supreme Court in Ashoka Kumar Thakur v. Union of India clarified that if the determination of "Other Backward Classes" by the Central Government is with reference to a caste, it shall exclude the "creamy layer" among such caste.[25]

(c) SECOND BACKWARD CLASSES COMMISSION

The Government of India again appointed the Backward Classes Commission (known as the Mandal Commission after its Chairman B.P. Mandal) under Art. 340 on January 1, 1979, with a view to investigate the conditions of the socially and educationally backward classes within the territory of India. The terms of reference of the Commission were as follows :

(i) to determine the criteria for defining the socially and educationally Backward Classes;

(ii) to recommend steps to be taken for the advancement of the socially and educationally backward classes of citizens so identified;

(iii) to examine the desirability or otherwise of making provision for the reservation of appointments or posts in Central and State Governments in favour of Backward Classes.

(iv) to make such recommendations as the Commission thinks proper.

The Commission submitted its report on 31st December, 1980. The Commission was *inter alia* "entrusted with the task of determining the criteria for defining the socially and educationally backward classes in the country." To determine social and educational backwardness, the Commission evolved eleven indicators or criteria, grouped under three broad heads—social, educational and economic.

The Commission looked at the whole question of reservation of quotas for backward classes in recruitment for government services.[26] The Commission held that (besides the Scheduled Castes and the Scheduled Tribes who amount to 22.56% of the total population), 52% of the total Indian population could be characterised as backward and, therefore, 52% of all posts could be reserved for them. The Commission, however, refrained from making such a drastic recommendation in view of the Supreme Court's ruling that the total quantum of reservations under Art. 16(4) should be below 50%.[27] In view of this legal constraint, the Commission was obliged to recommend reservation of 27% only for the Other Backward Classes so that the total reservation for Scheduled Castes, Scheduled Tribes and the Other Backward Classes would amount to a little less than 50%.

The Commission by and large identified castes with backward classes and more or less entirely ignored the economic tests.[28] The Commission also ignored

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25. (2008) 6 SCC 1.

26. *Report* of the Backward Classes Commission 52 (1980).
Reference has been made earlier to the Commission's Report, *supra*, Ch. XXIII.

27. *Supra*, Ch. XXIII.

28. *REPORT OF THE BACKWARD CLASSES COMMISSION*, Chs. IV, V & VII (1980).
Also see, *supra*, Ch. XXIII, Sec. F.

the fact that even among the so-called higher castes, there may be a number of socially and educationally backward people deserving of help. On the whole, the Commission's recommendations have proved to be very controversial.

Subsequent to the Report of the Backward Commission, the question of characterising backward classes again cropped up before the Supreme Court. In *Vasanth Kumar*.[29] The Judges of the Supreme Court expressed a diversity of views in this regard. The only point on which all the Judges were agreed was that 'caste' cannot be the sole determinant of backwardness, but that it is not an irrelevant test and can be taken into account along with other factors. Some of the Judges were in favour of adopting the means-cum-caste test to determine backwardness.

Then, in 1993, in the famous *Indra Sawhney* case, a nine Judge Bench of the Supreme Court considered in depth the question of backwardness and reservation of posts under Art. 16(4). The highlights of this case have already been taken note of.[30] More recently a Constitution Bench considered the same issue of backwardness and reservation in connection with educational institutions where, as noted earlier, the Court held that there can be no definite determination of the number of Other Backward Classes without including economically backward classes[31].

F. LINGUISTIC MINORITIES

At the time of the framing of the Constitution, practically every State was multi-lingual. Therefore, the problem of linguistic minorities loomed large on the horizon as there were linguistic minorities in practically every State. It therefore became incumbent to make provisions to safeguard some of their rights. Accordingly, a few provisions were incorporated in the Constitution to cope with the problems of linguistic minorities. For example, there is the provision in Art. 14 barring discrimination.[32] Arts. 15(1) and 15(2), noted earlier, do not specifically out-law discrimination on the ground of 'language'.[33] Neither do Arts. 15(4) and 16(4) make any special provisions for linguistee minorities, or provide for reservation in services on the basis of language.[34] Arts. 29 and 30 do confer rights on these minorities to conserve their culture and language.[35]

As has already been pointed out,[36] under Art. 345, a State can prescribe a language for carrying on its official work. However, to protect the interests of a linguistic minority in a State,[37] and to give it a sense of participation in State ad-

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29. *K.C. Vasanth Kumar v. State of Karnataka,* AIR 1985 SC 1495. See, *supra*, Ch. XXII, Sec. C,and Ch. XXIII, Sec. F.

30. *Indra Sawhney v. Union of India,* AIR 1993 SC 477 : 1992 Supp (3) SCC 217; *supra,* Ch. XXIII, Sec. G.

31, (2008) 6 SCC 1, at page 601

32. *Supra*, Ch. XXI.

33. *Supra*, Ch. XXII, Sec. A.

34. For Art. 16(4), see Ch. XXIII, Sec. D(c) *supra.*

35. *Supra*, Ch. XXX.

36. *Supra*, Ch. XVI, Sec. B.

37. The Minorities Commission treats those groups as linguistic minorities which have separate languages and which constitute numerically smaller sections of the people in a State. In other words, linguistic minorities are determined on a Statewise basis. It is not necessary that a language should also have a distinct script to be entitled to protection. For Minorities Commission, see, *infra,* Sec. G(e).

ministration, Art. 347 lays down that, on a demand being made in that behalf, the President may, if he is satisfied that a substantial proportion of the population of a State desires the use of any language spoken by them to be recognised by that State, direct that such language shall also be officially recognized throughout that State, or any part thereof, for such purposes as he may specify.[38] The onus to have a language recognised by the President in a State is thus placed on the people concerned.

Another constitutional provision to safeguard the interests of the linguistic minorities is Art. 350. It makes an interesting provision that every person is entitled to submit a representation for redress of any grievance to any officer or authority of the Union or a State in any of the languages used in the Union or in the State as the case may be.[39]

The States Re-organisation Commission submitting its report in 1956 recommended that the Central Government should adopt, in consultation with the States, a clear code to govern the use of different languages at different levels of the State Administration and that effective steps be taken to see that this code is followed.

In the wake of the re-organisation of the States on a linguistic basis in 1956, a number of unilingual States were formed.[40] But this did not solve the problem of linguistic minorities. Even though new States were formed more or less on linguistic basis, each of these States also came to have linguistic minorities as well. Thus, the reorganisation of the States threw up in an acute form the difficult problem of linguistic minorities in practically every State, because while there was one dominant language group, in a State, several small language groups with languages different from the dominant language also came into being.

A linguistic minority is a group of people having mother-tongue different from that of the majority in a State or a part thereof. The Constitution-makers had anticipated some such problem and had, accordingly, made provisions to meet the situation in Arts. 29,[41] 30,[42] 347 and 350, as noted above. But the dimensions of the problem as it emerged after 1956 were much bigger than what the Constitution-makers had envisaged or what the existing Constitutional provisions could adequately cope with. Consequently, two more Articles, 350A and 350B, were added to the Constitution specifically with a view to protect the interests of the linguistic minorities.

There are three basic problems which a linguistic minority group faces in a State. First, the claim of the linguistic groups that education be imparted to their children in their own mother-tongues. Two, there is the problem of use of minority languages in the administration. Three, there is the problem of representation of the linguistec minorities in the State services.

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38. *Ibid.*

39. M.P. JAIN, Constitutional Aspects of the Language Problem in India, *Yearbook of the South Asia Institute, Heidelberg Univ.*, (1967-68), 116-136; *Report of the States' Reorganisation Comm.*, 211, 212.
For Art. 350, see, Ch. XVI, *supra.*

40. *Supra*, Ch. V.

41. *Supra*, Ch. XXX, Sec. A.

42. *Supra*, Ch. XXX, Sec. B.

(a) ART. 350A

As regards the problem of education in a minority language, Arts. 29 and 30 as noted earlier, do make some provisions for this purpose. The purpose of Art. 29 is to facilitate inter-State migration of people. If, for example, a few people from Madras were to come and settle down in Bombay, they would constitute a cultural, as well as a linguistic, minority group in Maharashtra, and Art. 29 would protect their culture, language and script in Maharashtra.

Article 29 does not impose any positive obligation on the State to take any action to conserve any culture or language. It merely enables a cultural or linguistic minority to preserve its own culture or language, and bars the State from imposing on it any other language or culture.

Similarly, Art. 30 concedes to the minority the right to establish and administer its own educational institutions. It does not impose any positive obligation on a State to provide facilities for education in a minority language.

The States Re-organisation Commission felt that these provisions were not adequate to meet the newly emerging situation after the linguistic re-organisation of the States. The linguistic minorities may not have the resources required to establish and maintain their own educational institutions. The language of instruction in educational institutions touches, in practice, many vital aspects of an individual's life and constitutes, in fact, the core of the problem of linguistic minorities. The Commission, therefore, suggested that the Constitution be amended so as to cast a positive obligation on the States to provide for facilities at the primary stage for education to the children of such minorities in their mother-tongue and, further, to empower the Central Government to issue appropriate directives for enforcing this obligation on the States.[43] Accordingly, Art. 350A was added to the Constitution.

Art 350A supplements Art. 29 as it directs every State, and every local authority within a State, to endeavour to provide adequate facilities for instruction in the mother-tongue at the primary stage of education to the children of linguistic minorities. The Article also empowers the President to issue such directions to any State as he considers necessary or proper for securing the provision of these facilities.

The Commission was of the opinion that the secondary education would have to be treated differently from the primary education. Accordingly, the Commission did not recommend recognition in the Constitution of the right to have instruction in the mother-tongue at the secondary stage. It however suggested that the Government of India should, in consultation with the State Governments, lay down a clear policy in this area and take more effective steps to implement it.

No special provision has been made in the Constitution in regard to the medium of instruction at the University level. Reference may however be made in this connection to the *Guru Nanak University* case.[44] The Supreme Court has ruled that while a university has a right to provide for the education of the majority in the regional medium, it cannot stifle the language and script of any section of the

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43. *REPORT*, 209-10.

44. *D.A.V. College, Jullundar v. State of Punjab*, AIR 1971 SC 1737 : (1971) 2 SCC 269; *supra*, Ch. X, Sec. G(iii)(d).
Also see, Ch. XXX, Sec. C(j) *supra.*

Indian population. It is does so, then the right of such citizens to conserve their language or script through educational institutions of their own is stifled. A university cannot impede the right of the minorities to conserve their language, script and culture.

(b) GOVERNMENT SERVICES

The States Re-organisation Commission also referred to the question of discrimination indulged in the matter of government services in some States against linguistic minorities by invoking residence qualification. The Commission pointed out that the States have confined entry to their services to permanent residents of the State, the term 'permanent residents' being defined in various ways. The Commission pointed out that the domicile tests in force in some States worked to the disadvantage of the minority groups. The Commission, therefore, suggested the passing of a law by Parliament under Art. 16(3) with a view to liberalise residence requirements for services in the States. Accordingly, the Public Employment (Requirement of Residence) Act, 1957, abolishes all laws prescribing residence as a qualification for State services.[45]

(c) EDUCATIONAL INSTITUTIONS

One kind of discrimination still remains and this has even been upheld by the Supreme Court in *Joshi*,[46] *viz*., use of residence qualification for admission to the State-maintained educational institutions. A requirement that for admission to State medical colleges, an applicant should have studied for 10 years in the educational institutions in the State, has been upheld as not infringing Arts. 19(1)(*d*) and (*e*). These articles ensure residence and movement throughout India but not that every citizen should have all the advantages and privileges available to citizens domiciled or residing in a State. A State can accord some preferential treatment to citizens domiciled or residing therein provided that it is not hit by Art. 14.[47] Recently the Supreme Court has laid down that so far as admissions to postgraduate courses such as MS, MD and the like are concerned, it would be imminently desirable not to provide for any reservation based on residence or institutional preference.[48]

G. APPARATUS TO SUPERVISE SAFEGUARDS

In order to ensure that the safeguards provided to the various groups under the Constitution do not just remain mere paper safeguards but are implemented effectively, the Constitution-makers felt it necessary to set up a machinery to keep a continuous watch and vigilance over the working of these safeguards throughout the country, and also to bring to the notice of the government and the legislature concerned any defects existing in the protection of these various groups.

(a) COMMISSIONER FOR SCHEDULED CASTES AND SCHEDULED TRIBES

Article 338(1) provided for the appointment of a Commissioner for the Scheduled Castes and Scheduled Tribes. He was appointed by the President. His duty

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45. *Supra*, Ch. XXIII.
46. *Supra*, Ch. XXII, Sec. A(a).
47. *Arun Narayan v. State of Karnataka,* AIR 1976 Kant 174.
48. *Ashoka Kumar Thakur v. Union of India,* (2008) 6 SCC 1, at page 624 : (2008) 5 JT 1.

was to investigate all matters relating to the safeguards provided to the Scheduled Castes and the Scheduled Tribes under the Constitution and to report to the President upon the working of those safeguards to the President from time to time. These reports were to be laid before each House of Parliament. (Art. 338(2))

The Commissioner used to make annual reports. The Commissioner used to collect materials for these reports from his own personal observations, information received by him from various State Governments, Government of India and non-official agencies. The Commissioner used to receive a large number of complaints from individuals and non-official agencies relating to injustices against, and harassment of, the Scheduled Castes and the Scheduled Tribes. He investigated these complaints in order to ascertain facts.Although he was all the powers of a civil court for the purposes of such investigation, he was not in fact a court and was not empowered to issue orders like a civil court.[49]

His reports usually dealt with such matters as social disabilities, legislative measures adopted by the various governments for the advancement of the Scheduled Castes and the Scheduled Tribes, representation of these communities in Parliament and State legislatures; administrative set up in the governments to look after the interests of these various classes; reservations made for them in government services; educational facilities granted to the students of these classes by the government; welfare schemes of the State Governments for improving the conditions of the Scheduled Castes, Backward Classes, Scheduled Tribes and Scheduled Areas and grants-in-aid by the Central Government to the State governments for these schemes.

The Commissioner in his reports also reviewed the working of the constitutional safeguards in relation to the Anglo-Indians, and the working of the non-official agencies engaged in the task of helping these communities, and made recommendations and suggestions for the amelioration of the condition of these various classes in his charge.

In brief, the reports of the Commissioner contained valuable information and important source material not only on the working of the various safeguards—constitutional, statutory and administrative—for the Scheduled Castes, Scheduled Tribes and other weaker and backward sections of the population, but also on sociological and economic conditions of these people in the various regions of the country.

In addition to the obligations imposed on the Commissioner under the Constitution, he also came to discharge, by convention, certain other functions, such as, representation of the Union Government on the managing committees of the non-official agencies receiving grants from the Centre; examining accounts of these organisations; advising the Central Government regarding the schemes for development of the Scheduled and Tribal Areas,[50] removal of untouchability and welfare of the Scheduled Tribes and other backward classes,[51] submitted by the State Governments and non-official agencies for grants-in-aid.

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49. All *India Indian Overseas Bank SC and ST Employees Welfare Assocn v. Union of India :* (1996) 6 SCC 606.
50. *Supra*, Ch. IX, Sec. C.
51. *Supra.* Sec. E.

On the whole, the Commissioner was concerned with the amelioration and development of the Scheduled Castes and the Scheduled Tribes, Tribal Areas and their administration, removal of untouchability, *etc.* To maintain a live contact with local conditions, a few Regional Assistant Commissioners functioned throughout the country to assist the Commissioner.[52]

In his report for the year 1957-58, the Commissioner made an extremely valuable suggestion. He stated that backwardness has a tendency to perpetuate itself and become a vested interest and that if the ultimate goal of having a classless and casteless society is to be attained, the lists of Scheduled Castes and Scheduled Tribes would have to be reduced from year to year and replaced in due course by a list based on criteria of income-*cum*-merit. This has not, however, happened so far. In fact, the list originally drawn in 1950 has become longer and longer since then. More and more communities constantly pressurize for inclusion in the list. Logically, with the rising tempo of development activities, one would have expected that some of these communities would by now be ready to be excluded from the list of Scheduled Castes, but, what one actually finds is a reverse process in operation, *viz.*, that of enlargement of the lists as more and more communities want to enjoy the rights and privileges available to these classes.

The Advisory Committee for the revision of the lists of Scheduled Castes and Scheduled Tribes, appointed by the Central Government in 1965, suggested that the more advanced communities in the lists concerned be gradually descheduled and a deadline be fixed when these lists would totally be dispensed with in the interest of complete integration of the Indian population. But it is not expected that any such suggestion will be acted upon in the near future because this is an area where political expediency takes precedence over sagacious action.

In 1968, Parliament appointed a Parliamentary Committee on the Welfare of the Scheduled Castes and Scheduled Tribes and, thus, another concrete step was taken towards strengthening the supervisory mechanism over the working of the safeguards for these people.[53]

The committee consists of 20 members elected from the Lok Sabha, and 10 members elected from the Rajya Sabha. It has been invested with powers to criticise, guide and control the Government of India in the matter of Scheduled Castes and Scheduled Tribes. It considered the reports of the Commissioner of Scheduled Castes and Scheduled Tribes. The committee reports to both Houses of Parliament on the action to be taken by the Government for the welfare of these people.

The committee also goes into the question of their employment in services under the Central Government including the public sector undertakings. The committee could thus go deeper into the major recommendations made by the Commissioner and could assess how far these recommendations had been implemented.

Under Art. 338(3), the Commissioner of Scheduled Castes and Scheduled Tribes also discharged similar functions with respect to such other Backward Classes as the President, on receipt of the report of the Backward Classes Com-

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52. *Reports of the Commissioner for Scheduled Castes and Scheduled Tribes.*
53. *Supra*, Ch. II, Sec. J(iv).

mission, specified by order. No such classes were ever specified.[54] Further, the Commissioner was also required to discharge similar functions with regard to the Anglo-Indian community as he did with respect to the Scheduled Castes and the Scheduled Tribes.

(b) COMMISSIONER FOR LINGUISTIC MINORITIES

To investigate all matters relating to the safeguards provided for the linguistic minorities under the Constitution, and to report on these matters to the President at such interval as he may direct, Art. 350B, which was added to the Constitution on the suggestion of the States Re-organization Commission,[55] provides for the appointment by the Central Government of the Commissioner for Linguistic Minorities.[56]

The Commissioner at present submits his report annually; these reports are laid before each House of Parliament where they are discussed, and are also sent to the concerned State Governments.

The Commissioner plays a creative role in implementing safeguards to minorities and protecting their interests. However, his role is more of an investigative nature. He is not directly responsible for implementing, or overseeing the progress of implementation of, the safeguards for minorities. That is a weakness of the present system.

In the XIIth report, the Commissioner for Linguistic Minorities suggested a review whether the implementing machinery of the safeguards at the State, district or any other level was adequate or not. It was also suggested by the Commissioner that there should be some central machinery to supervise the implementation of the safeguards.[57]

(c) ZONAL COUNCILS

The Zonal Councils provide another institutional set-up to safeguard the interests of these minorities.[58] The underlying idea is to enable the States in a zone to evolve a common policy regarding these minorities. The question of treatment of these minorities by the States may affect good neighbourliness amongst them. This can, to a large extent, be avoided by mutual discussions amongst them. The Zonal Council provides the forum for this purpose.

(d) NATIONAL COMMISSION FOR SCHEDULED CASTES AND SCHEDULED TRIBES

In course of time, it began to be felt that instead of a special officer (Commissioner of Scheduled Castes and Scheduled Tribes), a more effective arrangement for the purpose would be to have a high level multi-member Commission to guarantee constitutional safeguards for these people. Accordingly, Art. 338 was

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54. *Supra*, Sec. E.
55. *Supra*, Ch. XVI.
56. *Supra*, Sec. E.
For a discussion on the working of the Safeguards to Linguistic Minorities see, *I.L.I.*, *MINORITIES*, *supra*, footnote 1 on 2004.
57. XII *REPORT*, 78 (1971) The 45th Report was presented to the President on February 15, 2009.
58. *Supra*, Ch. XIV, Sec. D.

amended by the Constitution (65th Amendment) Act, 1990,[59] so as to abolish the office of the Commissioner and to provide for the appointment of the National Commission for the Scheduled Castes and Scheduled Tribes [Art. 338(1)]. By a subsequent amendment[60] the Commission was bifurcated into the National Commission for Scheduled Castes [Art. 338] and the National Commission for Scheduled Tribes [Art. 338A].

Each Commission is to consist of a Chairperson, Vice-Chairperson and three other members to be appointed by the President of India. Subject to any law made by Parliament, the conditions of service and tenure of office of these persons is to be determined by rules made by the President [Art. 338(2) and Art. 338A(2)].

The Commissions investigate and monitor all matters relating to the safeguards provided for the Scheduled Castes and Scheduled Tribes under the Constitution, or under any other law or under any order of the Government. The Commissions are also to evaluate the working of the safeguards. The Commissions are to inquire into specific complaints with respect to deprivation of any rights and safeguards to these people and to participate and advise on the planning process of socio-economic development of the Scheduled Castes and Scheduled Tribes as the case may be and to evaluate the progress of their development under the Union and any State [Art. 338(5)(a), (b), (c) and Art. 338A (5)(a),(b),(c)].

The Commissions are to make recommendations as to the measures to be taken by the various Governments for the effective implementation of these safeguards and other measures for the protection, welfare and socio-economic development of the Scheduled Castes and Scheduled Tribes [Art. 338(5)(e) and Art. 338A(5)(e)].

In addition, the Commissions are to discharge such other functions in relation to the protection, welfare and development and advancement of the Scheduled Castes or Scheduled Tribes as the President may, subject to any law made by Parliament, by rule specify [Art. 338(5)(f) and Art. 338A(5) (f)].

The Central and every State Government are required to consult the Commissions on all major policy matters affecting Scheduled Castes and Scheduled Tribes. The Commissions have power to regulate their own procedure [Art. 338(9) and Art. 338A(9)].

The Commissions are to make annual reports to the President. They can also make reports as and when it is necessary. These reports are to be placed before each House of Parliament along with a memorandum by the Government as to the action taken or proposed to be taken on the recommendations made by the Commissions. Any report of the Commissions pertaining to a State Government is to be forwarded to the State Governor and is to be placed before the State Legislature with a government memorandum explaining the action taken or proposed to be taken on these recommendations or the reasons, if any, for the non-acceptance of any of such recommendations [Arts. 338(d), (6), (7), 338A (5)(d),(6), (7)].

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59. See, *infra*, Ch. XLII.
60. The Constitution (Eighty-ninth Amendment) Act, 2003 w.e.f. 19-2-04.

The Commissions have been given power of a civil court trying a suit and, in particular, in respect of such matters as summoning and examination of witnesses, discovery and production of documents [Arts. 338(8), 338(8)].

The Supreme Court has ruled that the Commission has no power to grant injunctions whether temporary or permanent.[61]

The Commissions have several State offices located in different States and Union Territories. These offices serve as the "eyes and ears" of the Commissions as these offices keep the Commissions informed of all important activities, decisions and orders of the State Governments concerning SCs and STs.

The important constitutional safeguards for the SCs and STs are as follows :

Article 46 refers to developmental and protective safeguards;[62] Art. 17,[63] Art. 23, Art. 24,[64] Art. 25(2)(*b*)[65] confer social safeguards; Art. 244,[66] Art. 275(1),[67] Fifth and Sixth Schedules confer economic safeguards, Art. 15(4),(5)[68] Art. 29(1)[69] and Art. 350A[70] refer to educational and cultural safeguards.

Political safeguards are conferred by Arts. 164(1),[71] 330, 332, 334,[72] 371A, 371B, 371C, 371F.[73]

Arts. 16(4), 16(4A), 335 and 320(4) confer service safeguards.[74]

Arts. 338(5)(c) and 338A(5)(c) of the Constitution refer to socio-economic development of the SCs/STs. This is a very important function of the Commissions, which have to keep track of all the major policy decisions, legislative or executive action by the Government of India or any State Government. The Commissions are required to inquire into specific complaints with respect to the deprivation of rights and safeguards of SCs and STs [Arts. 338(5)(b) and 338A(5)(b)].

A number of statutes have been enacted to provide safeguards to SCs/STs. For example, to give effect to Art. 17[75] the Protection of Civil Rights Act, 1955, has been enacted. This Act makes the practice of untouchability as both congnizable and non-compoundable offence and provides for strict punishment for the offences committed under the Act. Under the Act, responsibility is cast on the State Governments to take such measures as may be necessary for ensuring that the rights arising from abolition of untouchability are made available to the persons subjected to any disability arising out of untouchability.

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61. *All India Indian Overseas Bank v. Union of India,* (1996) 6 SCC 606 : (1996) 10 JT 287.
62. Ch. XXXIV, *supra.*
63. Ch. XXIII, Sec. I.
64. Ch. XXVIII, *supra.*
65. Ch. XXIX, Sec. B, *supra.*
66. Ch. IX, Sec. C, *supra.*
67. Ch. XI, Sec. M, *supra.*
68. Ch. XXII, Sec. C, *supra.*
69. Ch. XXX, Sec. A, *supra.*
70. *Supra,* this Chapter, Sec. F(a).
71. *Supra*, Ch. VII.
72. *Supra*, Chs. II, VI, *supra;* Sec. A(c).
73. Ch. IX, *supra.*
74. Chs. XXIII, *supra*; Ch. XXXVI, *infra.*
75. *Supra*, Ch. XXIII, Sec. I, *supra.*

There is also the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. The Act specifies the atrocities which are made penal under the Act.

The Commissions are concerned with devising ways and means to ensure effective implementation of these Acts. The Commissions collect monthly statistics concerning the offences committed under these Acts.[76] The Commissions make suggestions to the State Governments for effectively dealing with the crimes committed under these Acts. The Commissions are concerned with the education of the children of SCs and STs and make recommendations for strengthening the infrastructure for the purpose.[77]

Another area of interest for the Commissions is economic development of the SCs and STs. For this purpose, the Commissions review the development programmes undertaken by the States for SCs and STs.[78]

(e) NATIONAL COMMISSION FOR MINORITIES

As a further step to safeguard the interests of the religious and linguistic minorities, to preserve the country's secular traditions, to promote national integration and remove any feeling of inequality and discrimination amongst these sections of the people, the Government of India appointed a Minorities' Commission in 1978 under an administrative resolution.[79] The Commission was charged with the function of evaluating the various safeguards provided in the Constitution for the protection of the minorities and in the laws passed by Parliament and the State Legislatures.

The Commission was to make recommendations with a view to ensuring effective implementation and enforcement of all the safeguards and the laws, undertake review of the implementation of the policies pursued by the Central and the State Governments with respect to the minorities and look into specific complaints regarding deprivation of rights and safeguards of the minorities.

The Commission was to conduct studies, research and analysis on the question of avoidance of the discrimination against minorities, suggest appropriate legal and welfare measures in respect of any minority and serve as a national clearing house for information in respect of the conditions of the minorities.

The Commission made periodical reports at prescribed intervals to the Central Government. The Commission submitted an annual report to the President detailing its activities and recommendations. This however did not preclude the Commission from submitting reports to the government at any time it considered necessary on the matters within its scope of its work. The annual report together with a memorandum outlining the action taken on the recommendations, and explaining the reasons for non-acceptance of recommendations, if any, in so far as it related to the Central Government was laid before each House of Parliament. The scope of the Commission's work extended to minorities whether based on religion or language.

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76. See, NATIONAL COMMISSION FOR SCS AND STS, *FOURTH REPORT*, 231-246 (1996-97).
77. *Ibid, 260-264.*
78. *Ibid, 82-117.*
79. Notification issued by the Government of India, dated the 12th January, 1978.

In course of time, the Commission suggested that its position be strengthened by conferring on it statutory powers of enquiry under the Commissions of Inquiry Act, 1952. The Commission also suggested that it be given a constitutional status so that it could function more effectively.[80] Accordingly, Parliament enacted the National Commission for Minorities Act, 1992, to establish the National Commission For Minorities [NCM] on a statutory basis.

An interesting feature of the Act is that it does not define the term 'Minority' but leaves it to the Central Government to notify minorities for the purposes of the Act [s. 2(*c*)].[81]

The Commission consists of a Chairperson, a Vice-Chairperson and five members who are nominated by the Central Government from time to time from amongst persons of eminence, ability and integrity subject to the rider that five members including the chairperson must belong to the minority communities [s. 3]. The Chairperson and every member holds office for three years from the date he assumes office [s. 4]. Under s. 4(2), the Government has power to remove the Chairperson or any member on a few specified grounds, such as, insolvency, moral turpitude, unsoundness of mind, abuse of power, *etc.*

The Central Government also appoints a Secretary to the Commission [s. 5]. The Commission meets as and when necessary [s. 8(1)], has power to regulate its own procedure [s. 8(2)], and enjoys powers of a civil court for purposes of summoning witnesses, receiving evidence on affidavits *etc.* [s. 9(4)].

The Commission discharges the following functions [s. 9] :

(a) evaluate the progress of the development of minorities under the Union and States;

(b) monitor the working of the safeguards provided in the Constitution and in laws enacted by Parliament and the State Legislatures;

(c) make recommendations for the effective implementation of safeguards for the protection of the interests of minorities by the Central government or the State Governments;

(d) look into specific complaints regarding deprivation of rights and safeguards of the minorities and take up such matters with the appropriate authorities;

(e) cause studies to be undertaken into problems arising out of any discrimination against minorities and recommend measures for their removal;

(f) conduct studies, research and analysis on the issues relating to socio-economic and educational development of minorities;

(g) suggest appropriate measures in respect of any minority to be undertaken by the Central Government or the State Governments;

(h) make periodical or special reports to the Central Government on any matter pertaining to minorities and in particular difficulties confronted by them; and

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80. THE MINORITIES' COMM., *FOURTH ANNUAL REPORT*, 87, 395 (1983).
For comments on the Commission and some of its recommendations; see *Bharatiya.* Minorities Commission: Constitutional Metamorphosis, (1979) 21 *JILI* 268.

81. This is Act XIX of 1992. The Act has been amended in 1995 by Act XLI of 1995.

(i) any other matter which may be referred to it by the Central Government.

The Central Government is required to lay the recommendations made by the Commission under head (c) above before each House of Parliament along with a memorandum explaining the action taken or proposed to be taken on the recommendations relating to the Centre. If the Central Government does not accept any of these recommendations, it has to explain the reasons for non-acceptance [s. 9(2)].

If any such recommendation concerns a State Government, the Commission forwards it to that government which follows the same procedure as mentioned above in s. 9(2). The Government lays the recommendation before the State legislature along with an explanatory memorandum [s. 9(3)].

The Central Government makes grants to the Commission for being utilised by it for the purposes of this Act [s. 10]. The salaries and allowances to the Chairperson and members and other staff are paid out of these grants.

The Commission makes an annual report giving an account of its activities [s. 12]. The Central Government lays the report before both Houses of Parliament along with an explanatory memorandum of action taken on the recommendations contained in the annual report and the reasons for the non-acceptance, if any, of such recommendations [s. 12].

Reading ss. 3 and 9 of the Act together, the Supreme Court has observed in *Misbah Alam Shaikh v. State of Maharashtra*:[82]

> "….it is the duty of the Central Government to constitute: a National Commission and it shall be the duty and the responsibility of the National Commission to ensure compliance of the principles and programmes evaluated in section 9 of the Act protecting the interest of the minorities for their development and working of the safeguards provided to them in the Constitution and the law enacted by Parliament as well as the State Legislatures. The object thereby is to integrate them in the national main stream in the united and integrated Bharat providing facilities and opportunities to improve their economic and social status and empowerment."

On the question of minorities, the following observation of Justice H.R. KHANNA in *St. Xavier's*[83] case may be quoted here :

> "India is the most populous country of the world. The people inhabiting this vast land profess different religious and speak different languages. Despite the diversity of religion and language, there runs through the fabric of the Nation the golden thread of a basic innate unity. It is a mosaic of different religions, languages and cultures. Each of them has made a mark on Indian polity and India today represents a synthesis of them all. Our mission is to satisfy every interest and safeguard the interest of all the Minorities to their satisfaction. It is in the context of this background that we should view the provisions of the Constitution contained in Articles 25 to 30. The object of Articles 25 to 30 was to preserve the rights of religious and linguistic minorities so as to place them on a secure pedestal and withdraw them from the vicissitudes of political controversy."

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82. AIR 1997 SC 1409, 1410 : (1997) 4 SCC 528.
83. *Supra*, Ch. XXX, Sec. C(d).

Minorities Commissions have also been established in several States, *e.g.*, Bihar, Andhra Pradesh, Karnataka.

After *T.M.A.Pai*[84] decided that for the purpose of determining the minority the unit will be the state and not the whole of India, an interesting issue was raised before the Supreme Court in *Bal Patil v. Union of India*[85]. The Commission had recommended that Jains should be notified as a minority under section 2(c) of the Act. The question before the court was whether it was for the State Government or the Centre to issue the relevant notification.

The Court said that the power under Section 2(c) of the Act vests in the Central Government which alone, on its own assessment, has to accept or reject the claim of status of minority by a community. The recommendation of the Commission is only advisory and before the Central Government takes decision on claims of Jains as a "minority" under Section 2(c) of the Act, the identification has to be done on a State-wise basis.

However the Court went on to observe that "The power of the Central Government has to be exercised not merely on the advice and recommendation of the Commission but on consideration of the social, cultural and religious conditions of the Jain community in each State. Statistical data produced to show that a community is numerically a minority cannot be the sole criterion. If it is found that a majority of the members of the community belong to the affluent class of industrialists, businessmen, professionals and propertied class, it may not be necessary to notify them under the Act as such and extend any special treatment or protection to them as a minority."[86] The court introduced a concept of the "creamy layer" which is alien to Art. 30 and in direct conflict with the decision in T.M.A.Pai which held that a minority had to be determined only on the basis of their numbers.

More startlingly the Court said "The Commission instead of encouraging claims from different communities for being added to the list of notified minorities under the Act should suggest ways and means to help to create social conditions where the list of notified minorities is gradually reduced and done away with altogether"[87].

The mandate is contrary to the object of the Act which envisages that the Commission should be for the minorities and not for their elimination.

(f) NATIONAL COMMISSION FOR BACKWARD CLASSES

In the *Indra Sawhney* case,[88] the Supreme Court had directed that an expert body consisting of officials and non-officials be established at the level of the Centre and each State to look into the complaints of wrong inclusion or non-inclusion of groups, classes and sections in the lists of Backward Classes other than the Scheduled Castes and Scheduled Tribes. Accordingly, Parliament has enacted the National Commission for Backward Classes Act, 1993, to establish the National Commission for Backward Classes.

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84. (2002) 8 SCC 481.
85. (2005) 6 SCC 690.
86. *Ibid* at page 698.
87. *Ibid* at page 704.
88. *Supra*, Ch. XXIII, Sec. G.

The function of the Commission is to examine requests for inclusion of any class of citizens as a Backward Class in the lists and hear complaints of over-inclusion or under-inclusion ofany Backward Class in such lists and tender such advice to the Central Government as it deems appropriate [s. 9(1)]. The advice of the Commission shall ordinarily be binding upon the Central Government [s. 9(2)]. Lists of Backward Classes are prepared by the Central Government from time to time for purposes of making provision for the reservation of appointments or posts in favour of the Backward Classes of citizens which, in the opinion of that Government, are not adequately represented in the services under that Government or any other authority under the control of that Government [s. 2(*c*)].

The Central Government revises these lists from time to time. At the expiration of three years from the enforcement of this Act, and after every succeeding period of ten years thereafter, the Government is bound to undertake revision of the lists with a view to excluding therefrom those classes who have ceased to be Backward Classes, or for including in such lists new Backward Classes. While undertaking any such revision, the Central Government is to consult the Commission [s. 11].

The Commission consists of the following members nominated by the Central Government:

(a) a Chairperson, who is or has been a Supreme Court or a High Court Judge;

(b) a social scientist;

(c) two persons having special knowledge in matters relating to Backward Classes; and

(d) a member-secretary, who is or has been an officer of the Central Government in the rank of a Secretary to the Government of India [s. 3].

Every member holds office for a term of three years from the date he assumes office [s. 4].

The Commission meets as and when necessary and has power to regulate its own procedure [s. 8].

While performing its functions, the Commission enjoys powers of a civil court trying a civil suit in respect of such matters as summoning witnesses *etc.* [s. 10].

The Commission submits an annual report of its activities during the year to the Central Government [s. 14]. The Central Government lays the report before both Houses of Parliament along with a memorandum of action taken on the advice tendered by the Commission and the reasons for the non-acceptance of any such advice [s. 15].

Several States have set up State Commssions for Backward Classes after the decision in *Indra Sawhney*. Thus the Kerala State Commission for Backward Classes was constituted under the provisions of the Kerala State Commission for Backward Classes Act, 1993. Similarly The Karnataka Backward Classes Commission has been constituted under the Karnataka State Commission for Backward Classes Act, 1995 The Tamilnadu Backward Classes Commission has been constituted as a permanent body under Article 16(4) read with Article 340 of the Constitution of India under a Government Order in 1993.

H. WOMEN

Women as a class neither belong to a minority group nor are they regarded as forming a Backward Class. India has traditionally been a male dominated society and, therefore, presently women suffer from many social and economic disabilities and handicaps. It thus becomes necessary that such conditions be created, and necessary ameliorative steps be taken, so that women as a class may make progress and are able to shed their disabilities as soon as possible.

The Constitution does not contain many provisions specifically favouring women as such. There is Art. 15(3), reference to which has already been made earlier,[89] which is a provision of permissive nature as it merely says that the state is not prevented from making any special provision for women. Then, there are such general provisions as Arts. 14[90] and 15(2)[91] which outlaw any kind of gender discrimination against women. Art. 21 is also there which can be used to spell out some safeguards for women.[92] The Supreme Court has, in course of time, by its interpretative process of these various constitutional provisions extended some safeguards to women. Reference may be made to a few of these judicial pronouncements.

Recognising that women in India need to be liberated from unjust social political and economic suppression, the Supreme Court has declared in *Bodhisattwa*[93], that rape is a heinous crime against a woman and amounts to violation of the Fundamental Right guaranteed to a woman under Art. 21. The Court has gone further and recognised the right of a rape victim to claim compensation from the offender for violation of his constitutional right to live with human dignity which is guaranteed to her by Art. 21.[94]

The Court has reiterated this view in *Chairman, Rly. Board v. Chandrima Das*,[95] where a Bangladeshi woman was gang raped by a few railway employees at Sealdah Railway Station. The Court awarded compensation to her to the tune of Rs. 10 lakhs for violation of her rights under Art. 21.

In *Visakha*,[96] the Supreme Court has come down heavily on sexual harassment of women at work places and has declared the same to be violation of women's right under Art. 21.

A law providing in favour of male succession to property in the male line was challenged on the premise that the provision was discriminatory and unfair against women and, therefore, *ultra vires* the equality clause in the Constitution. But the Court refused to do so as "this would bring about a chaos in the existing state of law." The Court, however, did recognise the right to livelihood of the immediate female relatives of the last male holder to hold the land till they find an alternative source of livelihood for otherwise they would be rendered desti-

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89. *Supra*, Ch. XXII, Sec. B.
90. *Supra*, Ch. XXI.
91. *Supra*, Ch. XXII, Sec. A(a).
92. *Supra*, Ch. XXVI.
93. *Boodhisattwa Gautam v. Subhra Chakraborty*, AIR 1996 SC 922 : (1996) 1 SCC 490; *supra*, Ch. XXVI, Sec. J(l).
94. *Visakha*, AIR 1997 SC 3011 : (1997) 6 SCC 241; *supra*, Chs. XXVI, Sec. J(k), XXXIII, Sec. A(p).
95. AIR 2000 SC 988 : (2000) 2 SCC 465; *supra*, Ch. XXVI, Sec. J(l).
96. *Supra*, footnote 94.

tute. [1] Now by reason of an amendment in 2005 to the Hindu Succession Act, 1956 all female heirs have been conferred equal right in the matter of succession and inheritance with that of male heirs.[2]

In *Githa Hariharan*,[3] the Supreme Court has interpreted s. 6(*a*) of the Hindu Minority and Guardianship Act, 1956, as well as s. 19(*b*) of the Guardians and Wards Act, 1890, to mean that when the father is not in actual charge of the affairs of the minor either because of his indifference, or because of an agreement (oral or written) between him and the minor's mother, and the minor is in the exclusive care and custody of the mother, or the father for any other reason is unable to take care of the minor because of his physical and/or mental incapacity, the mother can act as the natural guardian of the minor and all her actions would be valid even during the life time of the father, who would be deemed to be 'absent' for the purpose of s. 6(*a*) of the HMG Act and s. 19(*b*) of the GW Act.

A woman who is major has the right to go any where and live with anyone she likes without getting married. "This may be regarded immoral by society but it is not illegal. There is a difference between law and morality."[4]

Reference may also be made to *Sarla Mudgal* and *Lily Thomas* discussed earlier.[5]

The Supreme Court has used the Directive Principles contained in Arts. 39(*a*), 39(*d*) and 39(*e*) to confer economic empowerment on women. [6]

NATIONAL COMMISSION FOR WOMEN

To ameliorate the general social condition of the women in the country, Parliament has enacted the National Commission for Women Act, 1990, to establish the National Commission for Women (NCW).

The Commission consists of the following :

(a) a Chairperson, committed to the cause of women;

(b) five members nominated from amongst persons having experience in law, trade unionism, management of an industry, administration, economic development, health, education, social welfare, women's voluntary organisations;

(c) a member-secretary who is either a member of a civil service under the Centre, or an expert in the field of management, sociological movement [s. 3].

All these persons hold office for three years and are appointed by the Central Government [s. 4].

The Commission has power to constitute committees as may be necessary to deal with special issues taken up by the Commission from time to time [s. 8]. The

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1. *Madhu Kishwar v. State of Bihar,* AIR 1996 SC 1864 : (1996) 5 SCC 125; *supra,* Ch. XXXIV, Sec. D(d).
2. See *G. Sekar v. Geetha,* (2009) 6 SCC 99.
3. *Githa Hariharan v. Reserve Bank of India,* AIR 1999 SC 1149 : (1999) 2 SCC 228.
4. *Payal Sharma v. Supdt., Nari Niketan Kalindri Vihar, Agra,* AIR 2001 All 254.
5. Ch. XXXIV, Sec. D(p).
Also see, *Danial Latifi v. Union of India, ibid.*
6. *See John Vallamattom v. Union of India : (2003) 6 SCC 611.Supra,* Ch. XXXIV, Sec. D(t).

Commission has power to regulate its own procedure [s. 9] and has power of a civil court in matters like summoning witnesses [s. 10(4)]. The Commission presents an annual report of its activities [s. 13], which is presented to both Houses of Parliament along with a government memorandum of action taken thereon [s. 14].

The terms of reference of the Commission as laid down in s. 10 of the Act are very comprehensive. The Commission discharges the following functions [s. 10(1)] :

(a) investigate and examine all matters relating to the safeguards provided for women under the Constitution and other laws;

(b) present to the Central Government, annually and at such other times as the Commission may deem fit, reports upon the working of those safeguards;

(c) make in such reports recommendations for the effective implementation of those safeguards for improving the conditions of women by the Union or any State;

(d) review, from time to time, the existing provisions of the Constitution and other laws affecting women and recommend amendments thereto so as to suggest remedial legislative measures to meet any lacunae, inadequacies or shortcomings in such legislation;

(e) take up the cases of violation of the provisions or the Constitution and of other laws relating to women with the appropriate authorities;

(f) look into complaints and take *suo motu* notice of matters relating to—

(i) deprivation of women's rights;

(ii) non-implementation of laws enacted to provide protection to women and also to achieve the objective of equality and development;

(iii) non-compliance of policy decisions, guidelines or instructions aimed at mitigating hardships and ensuring welfare and providing relief to women,

and take up the issues arising out of such matters with appropriate authorities;

(g) call for special studies or investigations into specific problems or situations arising out of discrimination and atrocities against women and identify the constraints so as to recommend strategies for their removal;

(h) undertake promotional and educational research so as to suggest ways of ensuring due representation of women in all spheres and identify factors responsible for impeding their advancement, such as, lack of access to housing and basic services, inadequate support services and technologies for reducing drudgery and occupational health hazards and for increasing their productivity;

(i) participate and advise on the planning process of socio economic development of women;

(j) evaluate the progress of the development of women under the Union and any State;

(k) inspect or cause to be inspected a jail, remand home, women's institution or other place of custody where women are kept as prisoners or otherwise, and take up with the concerned authorities for remedial action, if found necessary;

(l) fund litigation involving issues affecting a large body of women;

(m) make periodical reports to the Government on any matter pertaining to women and in particular various difficulties under which women toil;

(n) any other matter which may be referred to it by the Central Government.

The Central Government is required to lay before the two Houses of Parliament all the reports sent to it by the Commission under (b) above along with a memorandum explaining the action taken or proposed to be taken on the recommendations and the reasons for non-acceptance, if any, of any such recommendations [s. 10(2)].

If a recommendation relates to a State Government, the Commission sends the same to that government which lays the same before the State Legislature along with an explanatory memorandum [s. 10(3)].

The Central Government makes grants to the Commission for being utilised for the purposes of the Act [s. 11].

The salaries and allowances payable to the Chairperson and members of the Commission and its administrative expenses are to be paid out of the grants as mentioned above [s. 6].

While investigating any matter referred to in (a), or sub-cl. (i) of cl. (f), the Commission enjoys all the powers of a civil court trying a suit, such as, summoning of witnesses, receiving evidence on affidavits *etc.*

Section 16 of the Act makes it obligatory on the part of the Central Government to consult the Commission on all major policy matters affecting women.

A reference to the annual report of the Commission for the year 1997-98 throws light on the functioning of the Commission. The Commission has undertaken review of all laws for the protection and empowerment of women. Out of 39 such laws, the Commission has reviewed the following ten laws during the year under review, *viz*., The Commission of Sati (Prevention) Act, 1987; The Medical Termination of Pregnancy Act, 1971; The Child Marriage Restraint Act, 1929; The Family Courts Act, 1984; the Foreign Marriage Act, 1969; The Guardian and Wards Act, 1869; The Indian Succession Act, 1925; The Hindu Marriage Act, 1955; The Indian Penal Code. The Commission has suggested suitable amendments in all these laws with a view to affording better protection to the women. In Chapter III of the Report, the Commission has reviewed cases of violence against women. The Commission has observed in this connection: "Gender-based violence is recognised to-day as a major issue on national human rights agenda."

The Commission views violence against women "as one of the most crucial social mechanisms by which women are forced into a subordinate position."

In Ch. IV, the Commission has surveyed the problem of prostitution and has suggested strict implementation of s. 13 of the Immoral Traffic Prevention Act which provides for appointment of special officers to fight traffickers.

In Ch. V, the Commission has looked into the problems being faced by such groups of women as Scheduled Castes and Scheduled Tribes, mentally ill and handicapped women, widows, minorities. These groups need special attention because "the problems of such women were peculiar to the socio-economic, cultural and situational factors affecting them."

Other issues considered by the Commission in this report are : political participation by women (Ch. VI); women in custody (Ch. VIII); socio-economic development of women (Ch. VII).

The Commission has defined its function as follows:

> "The ultimate objective of the affairs of the Commission is to help enable the women to live a dignified life without distress and with undiscriminated socio-economic status in the society."

More recently, in *Seema v. Ashwani Kumar*, the Commission submitted an affidavit in support of its opinion that non-registration of marriages affects women the most and a law making marriages compulsorily registrable would be of critical importance to various women-related issues such as:

(*a*) Prevention of child marriages and to ensure minimum age of marriage.

(*b*) Prevention of marriages without the consent of the parties.

(*c*) Check illegal bigamy/polygamy.

(*d*) Enabling married women to claim their right to live in the matrimonial house, maintenance, etc.

(*e*) Enabling widows to claim their inheritance rights and other benefits and privileges which they are entitled to after the death of their husband.

(*f*) Deterring men from deserting women after marriage.

(*g*) Deterring parents/guardians from selling daughters/young girls to any person including a foreigner, under the garb of marriage.

The Supreme Court[7] accepted the views expressed by the Commission and directed the States and the Central Government to take the necessary steps to effect such a law.

7. (2006) 2 SCC 578, at page 583 : AIR 2006 SC 1158.

CHAPTER XXXVI

GOVERNMENT SERVICES

SYNOPSIS

A. INTRODUCTORY

Articles 309 to 323 of the Constitution make elaborate provisions for the Central and State services.[1]

The civil servant is indispensable to the governance of the country in the modern administrative age. Ministers frame policies and legislatures enact laws, but the task of efficiently and effectively implementing these policies and laws falls on the civil servants. The bureaucracy thus helps the political executive in the governance of the country. The Constitution, therefore, seeks to inculcate in the civil servant a sense of security and fairplay so that he may work and function efficiently and give his best to the country. Nevertheless, the overriding power of the government to dismiss or demote a servant has been kept intact, even though safeguards have been provided subject to which only such a power can be exercised.

The service jurisprudence in India is rather complex, intertwined as it is with legislation, rules, directions, practices, judicial decisions and with principles of Administrative Law, Constitutional Law, Fundamental Rights and Natural Justice. The role of the Courts in this area is crucial as they seek to draw a balance between the twin needs of the civil service, *viz.*, (1) the need to maintain disci-

1. This Chapter may be read along with Ch. XXIII, *supra*.

pline in the ranks of the civil servants; and (2) the need to ensure that the disciplinary authorities exercise their powers properly and fairly.

B. LEGISLATIVE POWER

According to Art. 309, Parliament or a State Legislature may, *subject to* the provisions of the Constitution, regulate the recruitment and conditions of service of persons appointed to the public services and posts in connection with the affairs of the Union or the State, as the case may be.[2] Pending such legislation, the President, or the Governor, or any person authorised by him, may make rules in this respect [Proviso to Art. 309]. The rules take effect subject to any legislation that may be enacted for the purpose. This rule-making power is thus in the nature of an *interim* power to be exercised by the Executive so long as the Legislature does not act.

The rule-making power is characterised as 'legislative' and not 'executive' power as it is a power which the legislature is competent to exercise but has not in fact exercised.[3]

Rules made by the Government under this power are regarded as legislative in character and so these rules can even be made to take effect retrospectively,[4] but the Supreme Court has said that the President/Governor cannot make such retrospective rules under Art. 309 as contravene Arts. 14, 16 or 311 and "affect vested right of an employee".[5]

The Supreme Court has ruled in *Kapur*[6] that "the benefits acquired under the existing rule cannot be taken away by an amendment with retrospective effect, that is to say, there is no power to make such a rule under the proviso to Art. 309 which affects or impairs vested rights." Upholding the power to frame rules retrospectively, the Court has subjected the power to the following rider in *B.S. Yadav v. State of Haryana*:[7]

> "But the date from which the rules are made to operate must be shown to bear, either from the face of the rules or by extrinsic evidence, reasonable nexus with the provisions contained in the rules, especially when the retrospective effect extends over a long period as in this case."

This means that the "retrospective operation of the rule will be struck down if there exists no reasonable nexus between the concerned rule and its retrospectivity."

Rules were made in 1985 but given operation with effect from 1976. The Supreme Court declared the rules invalid with the following comment:[8]

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2. See entries 70 and 71 in List I, *supra*, Ch. X, and entries 41 and 42 in List II, *supra*, Ch. X.
3. *B.S. Yadav v. State of Haryana*, AIR 1981 SC 561 : 1980 Supp SCC 524.
4. *B.S. Vedera v. Union of India*, AIR 1969 SC 118 : (1968) 3 SCR 575; *S.S. Bola v. B.D. Sardana*, AIR 1977 SC 3127.
Also see, *V.K. Sood v. Secretary, Civil Aviation*, AIR 1993 SC 2285 : 1993 Supp (3) SCC 9.
5. *R.N. Nanjundappa v. T. Thimmaiah*, AIR 1972 SC 1767 : (1972) 1 SCC 409; *Ex. Capt. K.C. Arora v. State of Haryana*, AIR 1987 SC 1858 : (1984) 3 SCC 281; *P.D. Aggarwal v. State of Uttar Pradesh*, AIR 1987 SC 1676 : (1987) 3 SCC 622.
6. *T.R. Kapur v. State of Haryana*, AIR 1987 SC 415 : 1994 Supp (1) SCC 44.
7. *Supra*, footnote 3.
8. *K. Narayanan v. State of Karnataka*, AIR 1994 SC 55, 64 : 1994 Supp (1) SCC 44.

> "As even earlier there is no nexus between framing a rule permitting appointment by transfer and making it retrospective with effect from 1996….The retrospective operation of the impugned rule attempts to disturb a system which has been existing for more than twenty years. And that too without any rationale. Absence of nexus apart no rule can be made retrospectively to operate unjustly and unfairly against other. In our opinion the retrospective operation of the rule with effect from 1976 is discriminatory and violative of Arts. 14 and 16."

The Court also said: "Retrospectivity of the rules is a camouflage for appointment of junior engineers from a back date. In our opinion the rule operates viciously against all those Assistant Engineers who were appointed between 1976 to 1985."

The Court appears to have taken this stand because, at times, State Governments amend service rules with long retrospectivity. The Court has said that the governments change the rules as if they "are a play-thing in the hands of the government".

If there is breach of a statutory rule framed under Art. 309 in relation to the conditions of service, the aggrieved government servant can take recourse to the Court for redress.[9] Questions of interpretation of service rules continually arise before the Courts.[10]

It is not obligatory on the government to frame rules for creating a service, or a post, or to lay down qualifications for a post or service, or to recruit people for the same, as the government can proceed to do so under its executive power.[11] Article 309 does not abridge the power of the Executive to act under Articles 73 and 162 without a law.[12] When a rule has been framed under proviso to Art. 309 of the Constitution laying down the mode and manner of recruitment, no executive order even issued under Art. 162 of the Constitution could be made by way of alteration or amendment of such rules.[13] However, if a rule or a law is in existence then the Executive must abide by it.

The Government cannot amend or supersede statutory rules by administrative instructions, but if the rules are silent on any particular point, then the Government can fill up the gaps and supplement the rules, or the law, by issuing instructions not inconsistent therewith.[14] The Government has power to issue administrative directions governing the service conditions of its employees in the

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9. *State of Mysore v. Bellary*, AIR 1965 SC 868 : (1964) 7 SCR 471 ; *Shea Dayal Sinha v. State of Bihar*, AIR 1981 SC 1543 : (1982) 1 SCC 373.

10. There is a good deal of case-law on the point: see, for example, *Asim Kumar Bose v. Union of India*, AIR 1983 SC 509 : (1983) 1 SCC 345; *Paluru Ramkrishnaiah v. Union of India*, AIR 1990 SC 166 : (1989) 2 SCC 541.

11. *Ramesh Prasad v. State of Bihar*, AIR 1978 SC 327.

12. See, *supra*, Chs. III and VII.

13. *Punjab State Warehousing Corpn, Chandigarh v. Manmohan Singh*, (2007) 9 SCC 337 : (2007) 4 JT 291. See also *State of Uttaranchal v. Alok Sharma*, (2009) 7 SCC 647 : (2009) 6 JT 463, no condition in derogation of rules under Art. 309.

14. *B.N. Nagarajan v. State of Mysore*, AIR 1966 SC 1942; *Sant Ram v. State of Rajasthan*, AIR 1967 SC 1910; *State of Assam v. Premadhar*, AIR 1970 SC 1314 : (1970) 2 SCC 211; *State of Haryana v. Shamsher Jang Bahadur*, AIR 1972 SC 1546; *V.T. Khanzode v. Reserve Bank of India*, AIR 1982 SC 917 : (1982) 2 SCC 7; *Union of India v. Patnakar*, AIR 1984 SC 1587; *Krushna Chandra Sahu v. State of Orissa*, AIR 1996 SC 352 : (1995) 6 SCC 1; *O.P. Lather v. Satish Kumar Kakkar*, AIR 2001 SC 821 : (2001) 3 SCC 110; *Union of India v. Rakesh Kumar*, AIR 2001 SC 1877.

absence of any statutory provisions governing the field.[15] In *Baleshwar Dass v. State of Uttar Pradesh*,[16] an office memorandum regarding seniority in government posts was held binding as the government had been following the same for nearly two decades.

A rule framed under Article 309 cannot be modified by an executive order.[17] An administrative instruction cannot abridge, or run counter to, a statutory provision.[18]

When there is a conflict between a rule made under Art. 309, and an executive instruction, it is the rule which prevails. An executive instruction can make provision only with regard to a matter not covered by the Rules; executive instructions cannot override the rules.[19]

Where a person was appointed inconsistent with the rules but under an administrative instruction, the appointment was quashed by the Supreme Court with the following observation:[20]

> "The settled position of law is that no Government order, Notification or circular can be a substitute of the statutory rules framed under the authority of law. Following any other course would be disastrous inasmuch as it would deprive the security of tenure and right of equality conferred upon the civil servants under the constitutional scheme. It would be negating the so far accepted service jurisprudence."

The legislative or rule-making power under Article 309 is specifically made "subject to the provisions of this Constitution". Therefore, the powers is to be exercised subject to the Fundamental Rights, especially, Article 14,[21] 15,[22] 16[23] and 19(1).[24] Thus, rules have to be reasonable, fair and not grossly unjust, if they are to survive the test of Arts. 14 and 16.[25]

In *Chairman, Railway Board v. C.R. Rangadhamaiah*,[26] the Supreme Court has maintained that a rule made under the proviso to Art. 309 has to be exercised subject to the provisions of the Constitution. This means that the rules can be challenged on the ground of violation of the provisions of the Constitution including the Fundamental Rights. In this case, a rule made on December 5, 1988, reduced the pension of those railway employees who had retired after January 1, 1973, and before December 5, 1988. The Court declared the rule as invalid as being violative not only of Arts. 31(1), 19(1)(*f*), (since repealed),[27] but also of Arts. 14 and 16 on the ground that it was "unreasonable and arbitrary" since it

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15. *M.M. Dolichan v. State of Kerala*, AIR 2001 SC 216 : (2001) 1 SCC 151.
16. AIR 1981 SC 41 : (1980) 4 SCC 226.
17. *State of Maharashtra v. Chandrakant*, AIR 1981 SC 1990 : (1981) 4 SCC 130.
18. *State of Gujarat v. Lal Singh*, AIR 1981 SC 368 : (1981) 2 SCC 75.
19. *Union of India v. Sh. Soma Sundaram Vishwanath*, AIR 1988 SC 2255; *Paluru Ramkrishnaiah v. Union of India*, AIR 1990 SC 166, 171 : (1989) 2 SCC 541.
20. *Rajinder Singh v. State of Punjab*, AIR 2001 SC 1769 : (2001) 5 SCC 482.
21. *Supra*, Ch. XXI.
22. *Supra*, Ch. XXII.
23. *Supra*, Ch. XXIII.
24. *Supra*, Ch. XXIV.
25. *Baleshwar Dass v. State of Uttar Pradesh*, *supra*; *State of Uttar Pradesh v. Ram Gopal*, AIR 1981 SC 1041 : (1981) 3 SCC 1; *B.S. Yadav v. Union of India*, *supra*; *P. Balakotiah v. Union of India*, AIR 1958 SC 232; *State of Mysore v. Krishna Murthy*, AIR 1973 SC 1146.
26. AIR 1997 SC 3828 : (1997) 6 SCC 623.
27. *Supra*, Chs. XXXI and XXXII.

had the effect of reducing the amount of pension that had become payable to the employees (as per the rules then prevalent) who had already retired from service on the date of issuance of the impugned rule.[28]

Similarly, any direction issued by the government in exercise of its administrative power, and any practice followed by it, is subject to these Fundamental Rights and thus arbitrary and unreasonable directions regarding service matters cannot be valid.[29]

An instructive case is *Rattan Lal v. State of Haryana*,[30] The Haryana Government followed the practice of appointing teachers on an *ad hoc* basis at the beginning of the academic year and terminating their services at the end of the year before the beginning of summer vacation, and appointing them again in the beginning of the next academic session and repeating the same process over and over again. The teachers were thus made to lose the benefits of summer vacation, salary and allowances for that period and leave privileges, available to all government servants. Condemning such a practice under Arts. 14 and 16, the Supreme Court said: "These *ad hoc* teachers are unnecessarily subjected to an arbitrary "hiring and firing" policy..... The Government appears to be exploiting this situation. This is not a sound personnel policy.... It is needless to say that the State Government is expected to function as a model employer."

The power conferred by Art. 309 is exercisable subject to the provisions of Arts. 233, 234 and 235.[31] Accordingly, the Supreme Court has ruled in *State of Bihar v. Bal Mukund Sah*[32] that the Bihar Reservation of vacancies in Posts and Services (for Scheduled Castes, Scheduled Tribes and Other Backward classes) Act, 1991, in *ultra vires* the Constitution insofar as the Act seeks to reserve 50% of the posts in subordinate judiciary for these sections. The Act is inconsistent with Arts. 233 and 234.[33] The State Legislature cannot lay down a statutory scheme of reservation in subordinate judiciary without consulting the High Court.

On the question of inter-relationship between Arts. 235 and 309, the Supreme Court has observed in *Sisir* :[34]

> "…the mere fact that Art. 309 gives power to the executive and the legislature to prescribe the service conditions of the judiciary does not mean that the judiciary should have no say in the matter. It would be against the spirit of the Constitution to deny any role to the judiciary in that behalf, for theoretically it would not be impossible for the executive or the legislature to turn and twist the tail of the judiciary by using the said power. Such a consequence would be against one of the seminal mandates of the Constitution, namely, to maintain the independence of the judiciary."

It is thus settled law that the power under Art. 309 can be exercised in relation to subordinate judiciary keeping "in view the opinion of the High Court of the

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28. Also see, *Salabuddin Mohammad Yunus v. State of Andhra Pradesh*, AIR 1984 SC 1905 : 1984 Supp SCC 399.
29. *S.L. Sachdev v. Union of India*, AIR 1981 SC 411 : (1980) 4 SCC 562.
30. (1985) 4 SCC 43 : AIR 1987 SC 478.
31. For these provisions see, *supra*, Ch. VIII, Sec. G..
32. AIR 2000 SC 1296 : (2000) 4 SCC 640.
33. For details, see, *supra*, Ch. VIII, Sec. G(h).
34. *Registrar (Admin.), High Court of Orissa, Cuttack v. Sisir Kanta Satapahty*, AIR 1999 SC 3265 : (1999) 7 SCC 725.

concerned State and the same cannot be whisked away".[35] The framers of the Constitution have separately dealt with the judicial services of the State and have made exclusive provisions [Arts. 233 to 237] for the purpose. These provisions stand on their own and quite independently of the general provisions dealing with State Services, *viz*., Arts. 308 to 323. Thus, Art. 309, which, on its express terms, is made subject to other provisions of the Constitution gets circumscribed "to the extent to which from its general field of operation is carved out a separate and exclusive field for operation" by Arts. 233 to 239 dealing with subordinate judiciary. In laying down this proposition, the Supreme Court is guided by the premise that judicial independence is the very essence and basic structure of the Constitution.[36]

The Courts also lay down norms to deal with service matters when either no norms have been laid down under Article 309, or they are not fair and just.[37]

Besides, independently of general provisions of Art. 309, special provisions exist in the Constitution for some categories of public servants.

For officers of the Supreme Court, rules regarding conditions of service can be made by the Chief Justice subject to a law of Parliament [Art. 146(2)].[38]

For persons in the Audit and Accounts Department, conditions of service may be prescribed by rules made by the President after consultation with the Comptroller and Auditor-General, subject to a law made by Parliament [Art. 148(5)].[39]

Rules regarding conditions of service for officers and servants of a High Court can be made, subject to a law of the State Legislature, by the Chief Justice [Art. 229(2)].[40]

For servants of State Legislatures and Parliament, the relevant provisions in the Constitution are Articles 187[41] and 98.[42]

Article 312 makes provision for the creation of all-India Services common to the Union and the States.[43]

The rule-making or legislative power under Article 309 is *subject to* constitutional provisions[44] and so it is subject to Article 310 laying down the doctrine of pleasure; and Article 311 which controls Article 310.[45]

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35. *State of Bihar v. Bal Mukund Sah,*, AIR 2000 SC at 1319 : (2000) 4 SCC 640.
36. *Ibid*, at 1318.
Also see, *Sisir, supra*, footnote 34*; All Inida Judges' Ass. v. Union of India*, AIR 1993 SC. 2493; *supra*, Ch. VIII, Sec. F and Sec. G.
37. *Krushna Chandra Sahu, supra*, footnote 14.
38. *Supra*, Ch. IV, Secs. I(f) and (g).
39. *Supra*, Ch. II, Sec. J(ii)(s).
40. *Supra*, Ch. VIII, Sec. B(u).
41. *Supra*, Ch. VI, Sec. D(c).
42. *Supra*, Ch. II, Sec. H(c).
43. *Supra*, Ch. XII, Sec. G.
44. *Supra*, Sec. B.
45. Art. 313 was a transitory provision as it kept in force all pre-constitution rules relating to public services, so far as consistent with the Constitution, until fresh rules were made under Art. 309.

C. DOCTRINE OF PLEASURE

In Britain, traditionally, a servant of the Crown holds office during the pleasure of the Crown. This is the common-law doctrine. The tenure of office of a civil servant, except where it is otherwise provided by a statute, can be terminated at any time at will without assigning any cause, without notice. The civil servant has no right at common-law to take recourse to the Courts, or claim any damages for wrongful dismissal. He cannot file a case for arrears of his salary. The Crown is not bound even by any special contract between it and a civil servant, for the theory is that the Crown could not fetter its future executive action by entering into a contract in matters concerning the welfare of the country.

The justification for the rule is that the Crown should not be bound to continue in public service any person whose conduct is not satisfactory.[46] The doctrine is based on public policy, the operation of which can be modified by an Act of Parliament. In practice, however, things are different as many inroads have been made now into the traditional system by legislation relating to employment, social security and labour relations. As De Smith observes: "The remarkably high degree of security enjoyed by established civil servants surpassed only by judiciary, was not recognised by rules applied in the Courts."[47]

A similar rule is embodied in Article 310(1) which lays down that the defence personnel[48] and civil servants[49] of the Union, and the members of an All-India Service, hold office during the 'pleasure of the President'. Similarly, a civil servant in a State holds office 'during the pleasure of the Governor'.

This is the general rule which operates "except as expressly provided by the Constitution". This means that the "doctrine of pleasure" is subject to general constitutional limitations. Therefore, when there is a specific provision in the Constitution giving to a servant a tenure different from that provided in Article 310, then that servant would be excluded from the operation of the doctrine of pleasure. The Supreme Court Judges [Art. 124][50], Auditor-General [Art. 148][51], High Court Judges [Arts. 217, 218][52], a member of a Public Service Commission [Art. 317][53], and the Chief Election Commissioner[54] have been expressly excluded by the Constitution from the rule of pleasure.

(a) IMPLICATIONS OF THE DOCTRINE OF PLEASURE

The Supreme Court has recently justified the pleasure doctrine on the basis of 'public policy', 'public interest' and 'public good' insofar as inefficient, dishon-

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46. *Shenton v. Smith*, (1895) AC 229; *Gould v. Stuart*, (1896) AC 575; *Reilly v. The King*, (1934) AC 176; *Terrell v. Secy. of State*, (1953) 2 QB 482; *Chelliah Kodeeswaran v. Attorney-General of Ceylon*, (1970) AC 1111.

47. S.A. DE SMITH, *CONSTITUTIONAL AND ADMINISTRATIVE LAW*, 189 (1977).
Also see, Wade *ADMINISTRATIVE LAW*, 67-71 (2000).

48. The term 'defence personnel' means a member of a defence service or a person holding any post connected with defence.

49. For meaning of the term 'civil servant' see, *infra*, Sec. D.

50. *Supra*, Ch. IV, Sec. B(m).

51. *Supra*, Ch. II, Sec. J(ii)(s).

52. *Supra*, Ch. VIII, Sec. B(t).

53. *Infra*, Sec. K.

54. Art. 324, *supra*, Ch. XIX, Sec. D.

est or corrupt persons, or those who have become a security risk, should not continue in service.[55]

Under Article 310, the government has power to punish any of its servants for misconduct committed not only in the course of official duties but even for that committed by him in private life. The government has a right to expect that each of its servants will observe certain standards of decency and morality in his private life. For example, government has power to demand that no servant shall remarry during the life-time of his first wife, or that he shall not drink at social functions, or that he shall not lend or borrow or acquire and dispose of property. If the government were not able to do so, there would be a catastrophic fall in the moral prestige of the administration. Thus, disciplinary action can be taken against a police constable for his behaving very rudely and improperly with a member of the public in his private life.[56]

A rule emanating from the doctrine of pleasure in Britain is that no servant of the Crown can maintain an action against the Crown for any arrears of salary. The assumption underlying this rule is that the only claim of the civil servants is on the bounty of the Crown and not for a contractual debt.[57]

The Supreme Court in India refused to follow the abovementioned rule in *State of Bihar v. Abdul Majid*.[58] A sub-inspector of police, dismissed from service on the ground of cowardice, was later reinstated in service, but the government contested his claim for arrears of salary for the period of his dismissal. The Supreme Court upheld his claim for arrears of salary on the ground of contract or *quantum meruit, i.e.*, for the value of the service rendered.

The above ruling was reiterated by the Supreme Court in *Om Parkash v. State of Uttar Pradesh*[59] where it was held that when the dismissal of a civil servant was found to be unlawful, he was entitled to get his salary from the date of dismissal to the date when his dismissal was declared unlawful. In *State of Maharashtra v. Joshi*,[60] a claim for arrears of salary was held to be based on contract.

(b) LEGISLATIVE POWER IS SUBJECT TO THE DOCTRINE OF PLEASURE

The legislative power conferred on Parliament or a State Legislature, or the rule-making power conferred on the President or the Governor, by Article 309 is controlled by the doctrine of pleasure embodied in Article 310 for Article 309 opens with a restrictive clause, *viz.*, 'subject to the provisions of the Constitution.'[61] Therefore, the power of the Legislature or that of the Executive to make

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55. *Union of India v. Tulsiram Patel*, AIR 1985 SC 1416 : (1985) 3 SCC 398.

56. *Madhosingh v. State of Maharashtra*, AIR 1960 Bom 285.
Also see, *Laxmi Narain v. Dist. Magistrate.*, AIR 1960 All. 55.

57. *Mulvenna v. The Admiralty*, 1926 S.C. 842; *Lucas v. Lucas and High Commissioner for India*, (1943) P. 68; *I.M. Lall's* case, 75 I.A. 225; ANSON, *LAW AND CUSTOM OF THE CONST.*, II. 335-36.
See, D.W. LOGAN, A Civil Servant and his Pay, 61 *LQR* 240 (1945). Logan not only criticises the rule but even doubts its correctness.
Also see, *Chelliah Kodeeswaran v. Att. Gen., supra*, footnote 46.

58. AIR 1954 SC 245 : 1954 SCR 786.

59. AIR 1955 SC 600.
Also, *Madhav v. State of Mysore*, AIR 1962 SC 8 : 1962 SCR 886.

60. AIR 1969 SC 1302 : (1969) 1 SCC 1302.

61. *Moti Ram Deka v. N.E.F. Rlys.*, AIR 1964 SC 600 : (1964) 5 SCR 683.

rules, to lay down conditions of service of public servants is subject to 'the tenure at pleasure' doctrine under Article 310.

Article 309 is, therefore, to be read subject to Art. 310. A law or a rule cannot impinge upon the overriding power of the President or the Governor to put an end to the tenure of a civil servant at his pleasure.[62] The inter-relationship between Arts. 309 and 310 has been explained by the Supreme Court as follows in *Tulsiram Patel*:

> "The opening words of Art. 309 make that article expressly subject to the provisions of this Constitution. Rules made under the proviso to Art. 309 or under Acts referable to that Article must, therefore, be made subject to the provisions of the Constitution if they are to be valid. Art. 310(1) which embodies the pleasure doctrine is a provision contained in the Constitution. Therefore, rules made under the proviso to Art. 309 or under Acts referable to that Article are subject to Art. 310(1). By the opening words of Art. 310(1) the pleasure doctrine contained therein operates "except as expressly provided by this Constitution." Art. 311 is an express provision of the Constitution. Therefore, rules made under the proviso to Art. 309 or under Acts referable to Art. 309 would be subject both to Arts. 310(1) and Art. 311."

The result is that the rules made under Art. 309 are not applicable to defence personnel as they remain subject to the President's pleasure.[63]

The position in India differs from that in Britain, because in Britain, the doctrine of pleasure being a common law doctrine, Parliament may by law supersede the doctrine of pleasure in any case it likes. But, the same cannot be done in India. Here the doctrine of pleasure is sanctioned by the Constitution and can, therefore, be excluded only by a constitutional provision, such as, Article 311, but not by any legislation or rules.[64]

(c) DISCIPLINARY ACTION TAKEN UNDER STATUTORY AUTHORITY

Though a law (or the rules) made under Article 309 cannot restrict the pleasure of the President or the Governor, as noted above, yet a law or a rule can prescribe the procedure by which, and the authority by whom, disciplinary powers can be exercised over civil servants. Whatever this authority then does, it does so by virtue of the express power conferred on it by the law (or the rules), and not under the 'pleasure' of the President or the Governor.

The statutory power of the authority to take disciplinary action cannot be equated with the pleasure of the Governor or the President. The disciplinary authority has to act within the compass of its statutory power, and any infringement of this may result in the order being quashed by the Court. For example, in the case noted below,[65] the power to take disciplinary action was conferred under the law on the Inspector-General of Police subject to the approval of the State

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62. *Union of India v. K.S. Subramanian*, AIR 1989 SC 662 : (1989) Supp 1 SCC 331.
Also, *Shamsher Singh v. State of Punjab*, AIR 1974 SC 2192; *Union of India v. Tulsiram Patel*, AIR 1985 SC 1416 : (1985) 3 SCC 398; *Union of India v. S.B. Mishra*, AIR 1996 SC 613 : (1995) 5 SCC 657.

63. *Union of India v. S.B. Mishra*, AIR 1996 SC 613.

64. *Sampuran Singh v. State of Punjab*, AIR 1982 SC 1407 : (1982) 3 SCC 200.
Also, *Ramanatha Pillai v. State of Kerala*, AIR 1973 SC 2641 : (1973) 2 SCC 650.

65. *Supdt. of Police, Manipur v. R.K. Tomalsana Singh*, AIR 1984 SC 535 : 1984 Supp SCC 155.
Also, *Union of India v. Ram Kishan*, AIR 1971 SC 1402 : (1971) 2 SCC 349.

Government. Dismissal of a sub-inspector of police by the I.G. without the approval of the State Government would be invalid.

Conferment of disciplinary powers by statute or rules on a designated authority does not in any way override the pleasure of the Governor or the President, as the case may be. This 'pleasure' remains intact. The Governor or the President can still dismiss, remove or reduce in rank a government servant even though such power has also been conferred on any other authority. But, so far as this authority is concerned, the validity of its action is to be tested with reference to the law under which it functions, and the doctrine of pleasure cannot be invoked to justify a wrongful order made by such an authority. The doctrine of pleasure can be invoked only when an order of termination of service has been made in the name of the Governor or the President.

The pleasure of the President or the Governor is not required to be exercised by either of them personally. Such pleasure can be exercised by the President or the Governor acting with the aid and advice of the Council of Ministers.[66] The Supreme Court has propounded the view in *Shamsher Singh*[67] and *Sripati Ranjan*[68] that the Constitution 'conclusively contemplates' a 'constitutional President' acting with the aid and advice of the Council of Ministers. Appointment, dismissal or removal of civil servants is not a 'personal' but an 'executive' function of the President or the Governor. Wherever the Constitution requires the satisfaction of the President or the Governor for the exercise by him of any power, it is not his personal satisfaction which is required but satisfaction in the constitutional sense. Thus, an officer authorised under the rules of business can take the desired action in the name of the President or the Governor as the case may be.[69]

In *Ranjan*,[70] an appeal in case of dismissal of an employee was disposed of by the Minister when, under the rules, the appeal lay to the President. The Supreme Court ruled that the disposal of the appeal was proper and legal.

D. CIVIL SERVANT

The term civil servant includes members of a civil service of the Centre or a State, or of an all-India service, or all those who hold civil posts under the Centre or a State. A 'civil post' means an appointment or office on the civil side and includes all personnel employed in the civil administration of the Union or a State.

What, however, is necessary to make a civil post 'under the government' is the relation of master and servant between the state and the employee. Whether such a relationship exists is a question of fact to be decided in each case. A host of factors have to be taken into consideration to determine such relationship. None of these factors may be conclusive and no single factor may be considered absolutely essential.

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66. See, Ch. III, Sec. A(iii) and Sec. B; and Ch. VII, Sec. A(ii) and Secs. B and C *supra.*

67. *Shamsher Singh v. State of Punjab*, AIR 1974 SC 2192 overruling *State of Uttar Pradesh v. Babu Ram Upadhya*, AIR 1961 SC 751 : (1961) 2 SCR 679 on this point.
Also, *supra*, Ch. III, Sec. B; Sec. B, Ch. VII.

68. *Union of India v. Sripati Ranjan*, AIR 1975 SC 1755 : (1975) 4 SCC 699.

69. For "Rules of Business", see Chs. III and VII, *supra.*

70. *Supra*, footnote 68.

Some of these factors are:

(i) who selects the employee?

(ii) Who appoints him?

(iii) Who pays him the remuneration or wages?

(iv) Who controls the method of his work?

(v) Who has power to suspend or remove him from employment?

(vi) Who has a right to prescribe the conditions of service?

(vii) Who can issue directions to the employee?

If the answer to all these questions is, the Government then it is a civil post under the Government. Co-existence of all these indicia is not predicated in every case to make the relationship as one of master and servant. In special classes of employment, a contract of service may exist even in the absence of one or more of these indicia. Ordinarily, the right of an employer to control the method of doing work, and the power of superintendence and control are strong indicators of the master and servant relationship.[71]

A civil post outside the regularly constituted services does not have to carry a definite rate of pay; he may be paid on commission basis; the post need not be whole-time, it may be part-time and its holder may even be free to engage himself in other activities. What is important, however, is the existence of the master-servant relationship.[72] Applying the above indicia, the Supreme Court has held the panchayat service in Gujarat created by a State law to be State civil service and its members as servants of the State.[73]

The *kurk-amins* appointed on commission basis by the collectors have been held to be government servants as there exists no difference between them and the *kurk-amins* appointed on salary basis. The former perform the same duties and responsibilities as the latter.[74]

The term 'civil servant' does not include a member of a defence service,[75] or even a civilian employee in defence service who is paid salary out of the estimates of the Ministry of Defence.[76] These persons, therefore, while falling under Articles 309 and 310 do not enjoy the protection of Article 311. A member of the police force, however, is a 'civil servant'.[77]

The statutory public corporations, or government companies registered under the Companies Act, although regarded as instrumentalities of the State and, thus, 'authorities' for the purposes of Art. 12,[78] yet have their own distinctive personality separate from the government. Accordingly, employees of such bodies are

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71. *State of Uttar Pradesh v. Audh Narain Singh*, AIR 1965 SC 360 : (1964) 7 SCR 89.

72. *State of Assam v. Kanak Chandra Dutta*, AIR 1967 SC 884 : (1967) 1 SCR 679.
Also see, *Supdt. of Post Offices v. P.K. Rajamma*, AIR 1977 SC 1677 : (1977) 3 SCC 94.

73. *State of Gujarat v. Ramanlal Keshav Lal*, AIR 1984 SC 161.
Also see, *Mathuradas v. S.D. Munshaw*, AIR 1981 SC 53.

74. *State of Uttar Pradesh v. Chandra Prakash Pandey*, AIR 2001 SC 1298 : (2001) 4 SCC 78.

75. *Inder Sain v. Union of India*, AIR 1969 Del 220. Defence personnel have their own service rules and regulations for maintaining discipline among their ranks.

76. *Lekh Raj v. Union of India*, AIR 1971 SC 2111 : (1971) 1 SCC 780.

77. *Jagannath Prasad v. State of Uttar Pradesh*, AIR 1961 SC 1245.

78. *Supra*, Ch. XX, Sec. D.

not regarded as employees of the government and do not, thus, fall within the term 'civil servants' and do not, therefore, fall under the scope of Arts. 310 and 311.[79]

Appointments made under a scheme and recruitment process being carried out through a committee would not render the incumbents thereof holders of civil post. No rule or regulation has been shown governing the mode of their recruitment. A distinction must be made about a post created by the Central Government or the State Governments in exercise of their power under Articles 77 or 162 of the Constitution of India or under a statute vis-à-vis cases of this nature which are *sui generis*. Terms and conditions of services of an employee may be referable to Acts of appropriate legislature. The matter may also come within the purview of Article 309 of the Constitution.[80] In this case a scheme was floated by the Central Government on a year to year basis and workers known as 'anganwadi workers' were appointed as helpers on honorarium basis. They were also given certain other financial benefits as per the recommendation of a Review Committee constituted by the Central Government. Anganwadi helpers conteded that they were holders of civil posts within the meaning of Article 309 of the Constitution. Distinguishing its earlier decision in *Kanak Chandra Dutta*[81] the Court pointed out that such workers did not carry out any function of the State. They do not hold posts under any statute. Recruitment rules ordinarily applicable to employees of the state were not applicable in their case. No process of selection was involved. In such factual context the Court held that such Anganwadi workers did not hold any civil post under the State and the State was not required to comply with constitutional scheme of equality under Articles 14 and 16 of the Constitution.[82]

In *Ameerbai*[83] after considering a number of its earlier decision the Court held that even though a person may be considered as an employee of an employer to which Art. 12 is attracted, he would not be considered as a government employee holding a 'civil post' under Art. 311. And the fact that such workers were subject to state controlled Integrated Child Development Scheme to which they were attached is not crucial.[84]

Employees of these bodies do remain subject to Fundamental Rights and can also claim natural justice in case of dismissal, reduction in rank, *etc*.[85] Similar is the status of employees of local bodies.[86]

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79. *Bool Chand v. Kurukshetra University*, AIR 1968 SC 292 : (1968) 1 SCR 434; *S.L. Agarwal v. Hindustan Steel*, AIR 1970 SC 1150; *Sabhajit Tewary v. Union of India*, AIR 1975 SC 1329 : (1975) 1 SCC 485; *Sukhdev Singh v. Bhagatram*, AIR 1975 SC 1331; *A.L. Kalra v. Project and Equipment Corp. of India Ltd.*, AIR 1984 SC 1361 : (1984) 3 SCC 316; *K.C. Joshi v. Union of India*, AIR 1985 SC 1046; *Rajasthan SRTC v. Gurudas Singh*, (2004) 13 SCC 418.

Also see, M.P. JAIN, The Legal Status of Public Corporations and Their Employees, 18 *JILI* 1-34 (1976); JAIN and JAIN, *PRINCIPLES OF ADMINISTRATIVE LAW*, Ch XXV (1986).

80. *State of Karnataka v. Ameerbi*, (2007) 11 SCC 681 : (2007) 1 JT 279.

81. *State of Assam v. Kanak Chandra Dutta*, AIR 1967 SC 884.

82. *Ibid.*

83. (2007) 11 SCC 681 : (2007) 1 JT 279.

84. See also *Uttar Haryana Bijli Vitran Nigam Ltd. v. Surji Devi*, (2008) 2 SCC 310 : AIR 2008 SC 1114.

85. For the concept of Natural Justice, see, *supra*, Ch. VIII.

86. *Kumaon Mandal Vikas Nigam Ltd. v. Girija Shankar Pant*, AIR 2001 SC 24 : (2000) 1 SCC 182.

Officers and members of a High Court are civil servants.[87]

Protection under Art. 311 is not available to Members of Autonomous District/Regional Council under Sch. VI.[88]

Employees of an employer who come within the meaning of Article 12 of the Constitution are not necessarily government servants. The State by virtue of a scheme may exercise control over a section of the persons working but merely because of that such persons do not become entitled to protection under Article 311 of the Constitution.[89]

E. RESTRICTIONS ON THE DOCTRINE OF PLEASURE

The Doctrine of Pleasure embodied in Article 310, though not subject to legislative power is not, however, unlimited. On its exercise, the Constitution imposes the following several qualifications:

(1) The 'pleasure' under Art. 310 cannot be exercised in a discriminatory manner and is controlled by the Fundamental Rights, especially, Arts. 14, 15 and 16.

Article 14 can be invoked when a person's services are terminated in a discriminatory manner.[90] Art. 15(1) comes into play if a person's services are terminated on account of religious bigotry, racial prejudice, casteism, provincialism or gender.[91] Art. 16(1) imposes equable treatment and bars arbitrary discrimination.[92]

(2) Under Art. 320(3)(c), the Union or the State Public Services Commission is to be consulted on all disciplinary matters affecting a person serving in a civil capacity under the Central or a State Government.[93]

(3) When a person (not being a member of a defence service or an All-India service or a civil service) is appointed to a civil post on contract for a fixed term, the contract may (if the President or the Governor, as the case may be, deems it necessary in order to secure the services of a person having special qualifications) provide for the payment of compensation to him if, before the agreed period, that post is abolished, or that person is required to vacate that post for reasons not connected with misconduct on his part [Article 310(2)].

The Chief Minister and the Ministers appointed certain persons of their choice in their respective establishments. The order appointing the employees expressly stated not only that their services shall be terminated at any time without giving any notice and without assigning any reason but also that their appointment was for a limited period conterminous with the concerned minister's tenure. These

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87. *Pradyat Kumar v. Chief Justice, Calcutta High Court*, AIR 1956 SC 285 : (1955) 2 SCR 1331; *Akhil Kumar v. State of Uttar Pradesh*, AIR 1960 All 193; *supra*, Ch. VIII, Sec. E(iv)(d).
88. *Pu Myllai Hlychho v. State of Mizoram*, (2005) 2 SCC 92 : AIR 2005 SC 1537.
89. *State of Karnataka v. Ameerbi*, (2007) 11 SCC 681,
90. See, *supra*, Ch. XXI.
91. See, *supra*, Ch. XXII, Sec. A.
92. See, *Supra.* Ch. XXIII, Sec. A.
93. See, *infra*, Sec. G.

employees were also asked to execute an undertaking in the above terms. They did execute such an undertaking.

The Supreme Court ruled that their appointment was purely a contractual appointment conterminous with the tenure of the Minister's establishment, at whose choice and instance they were appointed. The appointees in question could not be treated as temporary government servants. As soon as the tenure of the ministers at whose instance and on whose recommendation they were appointed came to an end, their services also came to an end simultaneously. Neither an order of termination as such, nor any prior notice was necessary for putting an end to their service. "They ought to go out in the manner they have come in."[1]

4. An important limitation on the doctrine of pleasure is imposed by Article 311(1). According to this constitutional provision, no civil servant is to be dismissed or removed by an authority 'subordinate' to the authority by which he was appointed. Dismissal or removal of a civil servant by an authority subordinate to the appointing authority is invalid.[2]

This requirement does not mean that the removal or dismissal must be by the appointing authority itself, or its direct superior. It is enough if the removing authority is of the same or co-ordinate rank or grade as the appointing authority.

The government can confer powers on an officer other than the appointing authority to dismiss a government servant provided he is not subordinate in rank to the appointing authority[3]. This means that a person appointed by Secretary cannot be dismissed by the Deputy Secretary.[4] A person appointed by the Central Government can be dismissed by it but not by the State Government.[5] A rule authorising a junior officer to dismiss employees appointed by a senior authority is invalid as contravening Article 311(1).[6]

The purpose underlying Article 311(1) is to ensure a certain amount of security to civil servants. The Article bars dismissal or removal by subordinate authorities in whose judgment the civil servants may not have much faith.[7] This requirement is not a restriction on the pleasure of the President or the Governor, for he may always dismiss a servant whether appointed by him or by some one subordinate to him. In effect, it constitutes a restriction on subordinate appointing authorities. In their case, the power of dismissal is to be exercised by authorities of the same rank as the appointing authorities.

Article 311(1) does not debar a superior authority from entrusting the function of making an inquiry to a subordinate and then acting on his report.[8]

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1. *State of Gujarat v. P.J. Kampavat*, AIR 1992 SC 1685 : (1992) 2 SCC 226.
2. *Krishna Kumar v. Divl. Asstt., E.E. Central Rly.*, AIR 1979 SC 1912; *Sampuran Singh v. State of Punjab*, AIR 1982 SC 1407 : (1982) 3 SCC 200.
3. *Mahesh v. State of Uttar Pradesh*, AIR 1955 SC 70 : (1955) 1 SCR 965; *State of Uttar Pradesh v. Ram Naresh Lal*, AIR 1970 SC 1263 : (1970) 3 SCC 173; *Sampuran Singh v. State of Punjab*, AIR 1982 SC 1407 : (1982) 3 SCC 200; *Jai Jai Ram v. U.P. State Road Transport Corp.*, AIR 1996 SC 2289 : (1996) 4 SCC 727.
4. *Satish v. West Bengal*, AIR 1960 Cal 278.
5. *Union of India v. Gurbaksh Singh*, AIR 1975 SC 641. Also, *Mysore S.R.T. Corp. v. Mirja Khasim*, AIR 1977 SC 747 : (1977) 2 SCC 747.
6. *Mohd. Ghouse v. Andhra*, AIR 1957 SC 246 : 1957 SCR 414.
7. *Parshotam Lal Dhingra v. Union of India*, AIR 1958 SC 36, 44 : 1958 SCR 828.
8. *Pradyat Kumar v. Chief Justice, Calcutta*, AIR 1956 SC 285 : (1955) 2 SCR 1331.

In *State of Madhya Pradesh v. Shardul Singh*,[9] a departmental enquiry was initiated against a sub-inspector of police by Superintendent of Police. After holding an enquiry, hesent his report to the Inspector General of Police who ultimately dismissed the sub-inspector from service. The order of dismissal was challenged on the ground of its being inconsistent with Art. 311(1). It was argued that the inquiry held by the superintendent of police infringed the mandate of Art. 311(1) as the sub-inspector was appointed by the Inspector General of Police.

The Supreme Court ruled that Art. 311(1) "does not in terms require that the authority empowered under that provision to dismiss or remove an official should itself initiate or conduct the enquiry proceeding the dismissal or removal of the officer, or even that inquiry should be done at his instance". The only right guaranteed to a civil servant under Art. 311(1) is that he shall not be dismissed or removed by an authority subordinate to that by which he was appointed.

The Court has also pointed out that Article 311(1) does not command that the dismissal must be by the very same authority who made the appointment or by its direct superior. The dismissal can be either by the appointing authority or by any other authority to which the appointing authority is subordinate. The dismissal of a civil servant must comply with the procedure laid down in Article 311.[10]

The Supreme Court refused to agree with the proposition that the guarantee given by Art. 311(1) "includes within itself a further guarantee that the disciplinary proceedings resulting in dismissal or removal of a civil servant should also be initiated and conducted by the authorities mentioned in Art. 311(1). Thus, the initiation of a departmental proceeding and conducting an inquiry can be by an authority other than the one competent to impose the proposed penalty.[11]

The legal position is now well settled that it is not necessary that the authority competent to impose the penalty must initiate the disciplinary proceedings and that the proceedings can be initiated by any superior authority who can be held to be controlling authority who may be an officer subordinate to the appointing authority.[12]

The power is concurrently conferred upon the appointing authority and as well as the authority to which the appointing authority is subordinate. There is no dispute that the Engineer-in-Chief being the appointing authority in respect of the post that was held by the respondent delinquent at the time of initiation of disciplinary enquiry is undoubtedly subordinate to the Government. It cannot be said that the Government had no jurisdiction or the authority under the Rules to impose a major penalty on a member of subordinate service.[13]

5. The most important limitation imposed on the doctrine of 'pleasure' is by Art. 311(2). According to this provision, no civil servant can be dismissed,

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9. (1970) 1 SCC 108.

10. *Govt. of Andhra Pradesh v. N. Ramanaiah*, (2009) 7 SCC 165 : (2009) 6 JT 606.

11. *P.V. Srinivasa Sastry v. Comptroller and Auditor General*, (1993) 1 SCC 419 : AIR 1993 SC 1321; *Transport Commissioner, Madras v. A. Radha Krishna Moorthy*, (1995) 1 SCC 332 : 1995 SCC (L&S) 313; *I.G. of Police v. Thavasiappan*, AIR 1996 SC 1318 : 1996 SCC (125) 433.

12. *Director General, ESI v. T. Abdul Razak*, (1996) 4 SCC 708; *Steel Authority of India v. Dr. R.K. Diwakar*, AIR 1998 SC 2210 : (1997) 11 SCC 17.

13. *Govt. of Andhra Pradesh v. N. Ramanaiah*, (2009) 7 SCC 165 : (2009) 6 JT 606.

removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges.[14]

It may be pointed out that there are two kinds of penalties in service jurisprudence—major and minor. Amongst the minor penalties are: censure, withholding promotion, withholding increments. The major penalties are: dismissal, removal from service, compulsory retirement and reduction in rank. Art. 311(2) applies only to three major penalties, *viz.*, dismissal, removal, or reduction in rank.

6. The rule of reasonable opportunity embodied in Art. 311(2) does not however apply in three situations as mentioned in the second proviso to Art. 311(2) in clauses (a) (b) (c).[15] These constitutional provisions are discussed later.[16]

It will be seen from the above that the two main limitations on the doctrine of pleasure are as follows:

(1) A civil servant cannot be dismissed by any disciplinary authority which is subordinate to the authority by which the appointment in question was made.

(2) A civil servant cannot be dismissed, removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him.

These two qualifications on the President's/Governor's pleasure are in reality two safeguards which the Constitution extends to a civil servant.

These two restrictions (mentioned in (1) and (2) above) on the doctrine of pleasure are imperative and mandatory. If any of these restrictions is infringed, the matter is justiciable and the aggrieved party is entitled to suitable relief at the hands of the Courts.

F. DISMISSAL, REMOVAL, REDUCTION IN RANK

(i) DISMISSAL/REMOVAL

These are regarded as major punishments awarded to a civil servant. Art. 311(1) applies to the cases of 'dismissal' or 'removal', while Art. 311(2) covers all these three punishments. Art. 311(1) is thus narrower than that of Art. 311(2) insofar as 'reduction in rank' falls within the ambit of the latter but not the former. Over the years, through judicial exposition, these terms have acquired a somewhat technical significance.

Termination of service of a civil servant when the post held by him is abolished does not involve any punishment and is, thus, neither dismissal nor removal, and so does not attract Art. 311(2). Whether any post is to be retained or abolished is essentially a matter for the government to decide. But a decision to abolish a post should be taken in good faith. It will lose its effective character if it has been made arbitrarily, *mala fide* or as a cloak to take penal action against the

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14. For comments on this provision, see, *infra*, Sec. G.
15. Second Proviso to Art. 311(2), the opening words of which are: Provided further that this clause [Art. 311(2)] shall not apply..."
16. *Infra*, Sec. H.

concerned employee which falls within the meaning of Art. 311(2). In such a case, abolition of the post will suffer from a serious infirmity.[17]

'Dismissal' and 'removal' are practically similar concepts except that in 'dismissal' the person concerned is barred from future employment but not in case of removal.[18]

Both dismissal and removal involve termination of service, but every case of termination of service does not amount to dismissal or removal for purposes of Art. 311(2). This matter can be discussed under the following several heads.

(a) PERMANENT POST

If the employee has the right to hold the post either under the terms of contract of employment, express or implied, or under the rules governing the conditions of service, then the termination of his service attracts Art. 311(2).

A person appointed substantively to a permanent post in government service normally acquires a right to hold the post until he attains the age of superannuation. Termination of service of such a person is regarded *per se* as punishment, for it operates as a forfeiture of his rights and brings about a premature end of his employment. He is therefore entitled to the protection of Art. 311(2).

Removal of a permanent government employee from service for overstaying his leave, or long absence, without observing Art. 311(2), is illegal even when the service rules make a provision to that effect.[19] A rule providing for termination of service of permanent employees merely by notice for a prescribed period, or payment of salary *in lieu of* the notice, is invalid as being inconsistent with Art. 311(2).[20]

When an employee is confirmed in a payscale, the same cannot be reduced without giving him an opportunity of being heard. An employee on confirmation becomes entitled to a right to the post and to the scale of pay fixed.[21]

A constable in the State Armed Police was discharged from service without being given a hearing. The order of discharge cast a stigma on him. The Supreme Court ruled that he should have been given reasonable opportunity of representation.[22]

(b) QUASI-PERMANENT

According to the government service rules, a person appointed to a post temporarily assumes *quasi*-permanent status when he has been in continuous service for more than three years, and has been certified by the appointing authority as fit for employment in a *quasi*-permanent capacity.

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17. *N. Ramanatha Pillai v. State of Kerala*, AIR 1973 SC 2641 : (1973) 2 SCC 650; *State of Haryana v. D.R. Sangar*, AIR 1976 SC 1199 : (1976) 2 SCC 844; *K. Rajendran v. State of Tamil Nadu*, AIR 1982 SC 1107 : (1982) 2 SCC 273.
18. *Mohd. Abdul Salam Khan v. Sarfaraz*, AIR 1975 SC 1064 : (1975) 1 SCC 669.
19. *Jai Shanker v. State of Rajasthan*, AIR 1966 SC 492 : (1966) 1 SCR 825; *Deokinandan Prasad v. State of Bihar*,, AIR 1971 SC 1409 : (1971) 2 SCC 330.
20. *Moti Ram Deka v. N.E. Frontier Rly.*, AIR 1964 SC 600 : (1964) 5 SCR 683.
21. *Div. Supdt., Eastern Rly. v. L.N. Keshri*, AIR 1974 SC 1889 : (1975) 3 SCC 1.
22. *Director General of Police v. Mrityunjoy Sarkar*, AIR 1997 SC 249 : (1996) 8 SCC 280.

A *quasi*-permanent post can be terminated in the same manner as the employment of a permanent government servant, or, when a reduction occurs in the number of posts for such employees. If, therefore, a *quasi*-permanent servant's services are terminated otherwise than in accordance with this rule, he is deprived of his right to that post and it will *prima facie* be a punishment and regarded as dismissal or removal from service so as to attract Art. 311.[23]

(c) FIXED TENURE SERVICE

The service of a person appointed to a post for a fixed term cannot, in the absence of a contract or a service rule permitting its premature termination, be terminated before the expiry of the stipulated period unless he has been guilty of some misconduct, negligence, inefficiency or other disqualifications and appropriate proceedings are taken under Art. 311(2). The premature termination of the service of a servant so appointed will *prima facie* be a dismissal or removal from service by way of punishment and so would fall within the purview of Art. 311(2).

(d) TEMPORARY POST

It is an implied term of a temporary appointment, other than the one for a fixed term, that the service of the appointee may be terminated on a reasonable notice, usually one month's notice.[24]

A temporary government servant has no right to the post he is holding. The character of employment in his case is transitory. His service is liable to be terminated at any time by giving him one month's notice without assigning any reason either under the terms of the contract or under the service rules. This does not *per se* amount to dismissal or removal and, accordingly, Art. 311(2) is not attracted.[25]

An order of termination *simpliciter* without casting any stigma on him or disclosing any penal consequences does not attract the application of Art. 311(2).[26]

It is now well settled that a temporary servant can be discharged if it is found that he is not suitable for the post which he is holding without complying with Art. 311(2). Suitability does not depend on mere proficiency or excellence in work.

The words 'unsuitable' or 'unfit' for the job do not amount to a stigma.[27] Ordinarily, the position is that if an order terminating the service of a temporary servant is an order of termination *simpliciter* without attaching any stigma to the employee, and if the order is not by way of punishment, Art. 311 is not

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23. *K.S. Srinivasan v. Union of India*, AIR 1958 SC 419 : 1958 SCR 1295; *Champaklal v. Union of India*, AIR 1964 SC 1854 : (1964) 5 SCR 190.
24. *Satish Chandra Anand v. Union of India*, AIR 1953 SC 250 : 1953 SCR 655.
25. *Nagaland v. G. Vasantha*, AIR 1970 SC 537.
26. *Triveni Shankar Saxena v. State of Uttar Pradesh*, AIR 1992 SC 496 : 1992 Supp (1) SCC 524; *State of Uttar Pradesh v. Km. Premlata Misra*, (1994) 4 SCC 189 : AIR 1994 SC 2411.
27. *T.C.M. Pillai v. Technology Institute*, AIR 1971 SC 1811 : (1971) 2 SCC 251.
Also, *Hari Singh v. State of Punjab*, AIR 1974 SC 2263; *State of Uttar Pradesh v. Ram Chandra*, AIR 1976 SC 2547; *Commodore Commanding, Southern Naval Area v. V.N. Rajan*, AIR 1981 SC 965 : (1981) 2 SCC 636.

attracted.[28] Even if misconduct, negligence, inefficiency may be the motive or the inducing factor which influences the concerned authority to terminate the service of a temporary employee, such termination cannot be termed as penalty or punishment.[29]

An order of termination of service of a temporary employee *simpliciter* is not invalid. But, if disciplinary grounds or other reasons are set out in the termination order, the same attaches stigma to the employee and, therefore, such an order cannot be made without an enquiry.[30] When the order of termination of service is passed by way of punishment and is *ex facie* punitive in nature, such an order cannot be passed even in respect of a temporary employee, without a regular departmental inquiry.[31]

The Supreme Court has ruled in a recent case that if there are allegations of misconduct against an employee on probation and an enquiry is held to find out the truth of that misconduct and an order terminating the service is passed on the basis of that enquiry, the order would be punitive in nature as the enquiry was held not with a view to assess the general suitability of the employee for the post in question, but to find out the truth of allegations of misconduct against that employee. In such a situation, the order would be founded on misconduct.[32]

If the government dismisses such an employee in a punitive manner, or as a punishment, then termination of his service may amount to 'dismissal' or 'removal' attracting the application of Art. 311.[33] In such a case, it becomes incumbent to hold a formal inquiry by framing charges against him and giving him reasonable opportunity in accordance with Art. 311(2).

From this, it is clear that government can terminate the service of a temporary servant in either of the two ways:

(i) It can discharge him purporting to exercise its power under the terms of contract or the relevant rules simply by giving him notice. In such a case, it is only a case of discharge and nothing more and Art. 311 is not attracted.

(ii) The government may terminate his service by way of punishment in which case Art. 311 is attracted.

Even in the first case, the authority concerned, before exercising its power to discharge a temporary servant, may have to examine the question of the employee's suitability for being continued in service, and it may give him a chance to explain by giving him a show-cause notice enquiring whether he should be continued in service or not. Such an obligation may be imposed on the authority concerned by the relevant service rules.

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28. *Union of India v. P.S. Bhatt*, AIR 1981 SC 957 : (1981) 2 SCC 761; *State of Uttar Pradesh v. Bhoop Singh*, AIR 1979 SC 684 : (1979) 2 SCC 111; *Commodore Commanding, Southern Naval Area, Cochin v. V.N. Rajan*, AIR 1981 SC 965 : (1981) 2 SCC 636.

29. *State of Uttar Pradesh v. Bhoop Singh Verma*, AIR 1979 SC 684 : (1979) 2 SCC 111; *ONGC v. Iskander Ali*, AIR 1980 SC 1242.

30. *Chandreshwar Narain Dubey v. Union of India*, AIR 1998 SC 2671 : (1998) 6 SCC 671.

31. *Nar Singh Pal v. Union of India*, AIR 2000 SC 1401 : (2000) 3 SCC 588.

32. *Chandra Praksh Shahi v. State of Uttar Pradesh*, AIR 2000 SC 1706, at 1715 : (2000) 5 SCC 152.

33. *State of Madhya Pradesh v. Ramashanker Raghuvanshi*, AIR 1983 SC 374 : (1983) 2 SCC 145; *Kanhailal v. Distt. Judge*, AIR 1983 SC 351 : (1983) 3 SCC 32; *Nepal Singh v. State of Uttar Pradesh*, AIR 1980 SC 1459 : (1980) 3 SCC 288.

The Courts have taken the view that Art. 311 does not apply to such an enquiry because it is held only with a view to determine the suitability of the servant concerned to be continued in service or not, and that there is no element of punishment involved therein. Misconduct, negligence, inefficiency or such other disqualification of the servant may have led the authority to terminate his service, but that would not change the character of the inquiry from being one to assess his suitability to one of punishment.[34]

If, on the other hand, a formal inquiry is held against the servant on charges of misconduct, negligence, inefficiency or other disqualification, findings are recorded against him and his service is terminated thereafter then, in substance, it would amount to dismissal.

In *Madan Goptal v. State of Punjab*,[35] a temporary employee was discharged from service after holding an inquiry into charges of bribery against him. He was found guilty of the charges by the enquiry officer. The order of discharge indicated that the punishing authority agreed with the enquiry officer's finding that he had accepted bribes. As the inquiry was held with a view to decide whether or not disciplinary action should be taken against him for his alleged misconduct, Art. 311(2) became applicable. The order of discharge was held to be one for dismissal because it had been preceded by a formal inquiry. The order was quashed as Art. 311(2) had not been observed.

The Courts have, therefore, to examine the facts in each case to determine whether the order of discharge of a temporary servant is one for discharge *simpliciter* or is for dismissal by way of punishment.

A distinction is thus drawn between an inquiry held to assess the suitability of such a servant to be continued in service, and a formal inquiry undertaken with a view to punish him. Art. 311 does not apply in the former case but it does in the latter case. The reason is that otherwise it would lead to this anomalous result that while an authority can discharge a temporary servant without inquiring into his alleged inefficiency or unsuitability, if it chooses to act fairly and make some kind of an inquiry and give the servant involved an opportunity to explain his alleged deficiency, the discharge becomes dismissal and attracts Art. 311.

The Court can lift the veil of an innocuously worded order to find out whether the foundation of the order is misconduct. If it is so, then an enquiry according to Art. 311(2) becomes inevitable. The Supreme Court has observed in this connection: "It is settled law that the order though is innocuous, it is open to the Court to lift the veil and find the cause for terminating the temporary employment. If it is by way of punishment, then necessarily an enquiry has got to be made in accordance with the rules."[36]

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34. *Ranendra Chandra Banerjee v. Union of India*, AIR 1963 SC 1552 : (1968) 3 SCR 234; *Champaklal Chimanlal Shah v. Union of India*, AIR 1964 SC 1854 : (1964) 5 SCR 190; *State of Punjab v. Sukh Raj Bahadur*, AIR 1968 : (1964) 2 SCR 135 SC 1089 : (1968) 3 SCR 234; *Benjamin, A.G. v. Union of India*, (1967) 1 Lab LJ 718; *Ram Gopal v. State of Madhya Pradesh*, AIR 1970 SC 158; *State of Uttar Pradesh v. Kaushal Kishore Shukla*, (1991) 1 SCC 691.

35. AIR 1963 SC 531 : (1963) 3 SCR 716.

36. *G.B. Pant Agricultural and Technology University v. Kesho Ram*, AIR 1995 SC 718 : (1994) 4 SCC 437.

Also see, *Madan Gopal v. State of Punjab*, AIR 1963 SC 531 : (1963) 3 SCR 716; *Samsher Singh v. State of Punjab*, AIR 1974 SC 2192 : (1974) 2 SCC 831.

The Supreme Court has emphasized that the form of the order is not decisive and whether an order is one for punishment or not is a matter of substance which has to be decided on the basis of the entirety of circumstances preceding or attendant on the impugned order.[37]

An order may *ex facie* disclose that a stigma is cast on the servant, or that it visits him with penal consequences. Where an order of dismissal was founded on the ground that the employer had failed in the performance of his duties administratively and technically, it was characterised *ex facie* as "stigmatic as also punitive". The order was quashed as it had been passed without an inquiry according to natural justice.[38]

But it may also be that while termination of service is by way of punishment, the order *ex facie* is innocuous and shows termination *simpliciter*. In such a case, if the government servant can establish by material on record that the order is in fact passed by way of punishment, Art. 311(2) would apply. The Court can even send for the official record where the government servant is able to make out a *prima facie* case that the order is by way of punishment and the government seeks to rebut the same.[39]

If the order is merely a camouflage for an order of dismissal for misconduct, the Court can go behind the form and ascertain the true character of the order. If the order is found in reality to be a cloak for an order of punishment, the Court can give effect to the rights conferred by law upon the employee. On this basis, the order of dismissal was quashed in *Anoop v. Union of India*.[40]

An order of discharge against a temporary employee though couched in innocent terms was really made on the basis of the misconduct as found on inquiry behind her back. She was served with no charge sheet; no explanation was called for from her; she was given no opportunity to cross-examine witnesses and was given no opportunity to show cause against the purported order of dismissal. The order was merely a camouflage for an order of dismissal from service and was made in total contravention of Art. 311(2) and was therefore quashed.[41]

Even when no formal inquiry is held, Art. 311 is attracted if the order of discharge visits the servant concerned with any evil consequences, or casts an aspersion or stigma on his character or integrity. Such an order is characterised as an order to punish. An order of discharge on the ground of "unsatisfactory work and conduct" does not cast a stigma on the servant concerned.[42] But an order

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37. *Samsher Singh v. State of Punjab*, AIR 1974 SC 2192 : (1974) 2 SCC 831; *R.S. Sial v. State of Punjab*, AIR 1974 SC 1317 : (1975) 3 SCC 111; *State of Uttar Pradesh v. Ram Chandra*, AIR 1976 SC 2547.

38. *V.P. Ahuja v. State of Punjab*, (2000) 3 SCC 239 : AIR 2000 SC 1080.

39. *Maharashtra v. Veerappa R. Saboji*, AIR 1980 SC 42 : (1979) 4 SCC 466; *Manager, Government Branch Press v. D.B. Belliappa*, AIR 1979 SC 429 : (1979) 1 SCC 477.

40. AIR 1984 SC 636 : (1984) 2 SCC 369.
Also, *Nepal Singh v. State of Uttar Pradesh*, AIR 1985 SC 84 : (1985) 1 SCC 56; *Gujarat Steel Tubes Ltd. v. Mazdoor Sabha*, (1980) 2 SCC 593 : AIR 1980 SC 1896; *Nar Singh Pal v. Union of India*, (2000) 3 SCC 588 : AIR 2000 SC 1401.

41. *Smt. Rajinder Kaur v. State of Punjab*, AIR 1986 SC 1790 : (1986) 4 SCL 141.
Also see, *Babu Lal v. State of Haryana*, AIR 1991 SC 1310; *Radhey Shyam Gupta v. U.P. State Agro Industries Corpn. Ltd.*, AIR 1999 SC 609 : (1999) 2 SCC 21.

42. See, *Orissa v. Ram Narayan Das*, AIR 1961 SC 177; *Hari Singh v. State of Punjab*, AIR 1974 SC 2263; *State of Uttar Pradesh v. Kaushal Kishore Shukla*, (1991) 1 SCC 691 : 1991 SCC (L&S) 587; *State of Uttar Pradesh v. Prem Lata Misra*, AIR 1994 SC 2411 : (1994) 4 SCC 189.

discharging a temporary servant on the ground that he had been "found undesirable to be retained in government service" amounts to an order of dismissal as it "expressly casts a stigma" on him. Such an order can be passed only after an inquiry under Art. 311.[43]

In *Shesh Narain Awasthy v. State of Uttar Pradesh*,[44] the service of a temporary constable in the U.P. Police was terminated apparently by an innocuous order. On scrutiny, however, the Court found that his service was terminated on account of his alleged participation in the activities on an unrecognised police karamchari parishad. The termination order, therefore, was held to be bad as having been passed without following the procedure prescribed by Art. 311(2).

(e) PERMANENT APPOINTMENT ON PROBATION

The object of appointment on probation is to test the suitability of the appointee; if the appointing authority finds that the candidate is not suitable, it has power to terminate the services of the employee either during or at the end of the period of probation and normally this is not regarded as amounting to imposing the punishment of dismissal attracting the application of Art. 311(2).[45]

In *Krishnamani*,[46] the appellant was first appointed on an *ad hoc* basis. Thereafter, to regularise his services, he was put on probation. During probation, his services having been found to be not satisfactory, were terminated. During the probation, he did not acquire any right to the post; only if he had been regularised on his work being found to be satisfactory, he would have acquired the right to continue in the post.

The words 'unsuitable' or 'unfit' or 'unsatisfactory work and conduct' for the job do not cast any stigma.[47]

In *State of Orissa v. Ram Narayan Das*,[48] a Sub-Inspector of Police, on probation, was discharged from service on the ground of 'unsatisfactory work and conduct.' An inquiry was held against him under Rule 55B of the Civil Services (Classification, Control and Appeal) Rules, 1930. Under the rule, when a probationer's service is proposed to be terminated for any specific fault, or on account of his unsuitability, the probationer is to be apprised of the grounds of such proposal and given an opportunity to show cause against it, and only then an order of termination of service can be passed. The Supreme Court held that the purpose of an inquiry under this rule is not to punish the servant concerned, but is merely to ascertain whether he is fit to be confirmed. Therefore, it was not a case of dismissal and Art. 311(2) would not apply to such an inquiry.

In *Champaklal v. Union of India*,[49] a memorandum containing four charges was served on a temporary government servant, who was asked to explain why

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43. *Jagdish Mitter v. Union of India*, AIR 1964 SC 449 : (1964) 1 LLJ 418.
44. (1988) 2 LLJ 99 (SC).
45. *Hartwell Prescott Singh v. State of Uttar Pradesh*, AIR 1957 SC 886 : 1958 SCR 509; *State of Uttar Pradesh v. Akbar Ali*, AIR 1966 SC 1842 : (1966) 3 SCR 821.
46. *K.V. Krishnamani v. Lalit Kala Academy*, AIR 1996 SC 2444 : (1996) 5 SCC 89.
47. See, *supra*, footnote 27.
Also see, *State of Orissa v. Ram Narayan Das*, AIR 1961 SC 177 : (1961) 1 SCR 606; *Union of India v. R.S. Dhabe*, (1969) 3 SCC 603.
48. AIR 1961 SC 177 : (1961) 1 SCR 606.
49. AIR 1964 SC 1854 : (1964) 5 SCR 190.
Also, *State of Punjab v. Sukh Raj*, AIR 1968 SC 1089 : (1968) 3 SCR 234.

disciplinary action should not be taken against him. No formal departmental inquiry was held against him and after six months his services were terminated without assigning any reason. The Supreme Court ruled that, as no formal inquiry was held against him, the action taken against him was not punitive and, therefore, Art. 311(2) was not attracted. Issue of a memorandum of charges was not material as no formal inquiry was held thereafter. The Court pointed out that, generally, a preliminary inquiry is held to determine whether a *prima facie* case for a formal inquiry is made out or not. The preliminary inquiry and the formal inquiry should not be confused with each other. The preliminary inquiry is only for enabling the authority to decide whether punitive action should be taken against the servant concerned or he should be discharged under the terms of the contract or the relevant service rules. Therefore, Art. 311(2) would apply only to a formal inquiry and not to a preliminary inquiry.

In *State of Punjab v. Sukh Raj Bahadur*,[50] a charge memo was served on the employee on probation for a regular inquiry. The employee replied and thereafter the inquiry was dropped and a simple termination order was issued. The Court held that the order of termination was not founded on any findings as to misconduct. The termination was held valid.

In *Jagdish Prasad v. Sachiv, Zila Gaon Committee*,[51] the termination order stated that the officer had concealed certain facts relating to his removal from an earlier service on charge of corruption and, therefore, he was not suitable for appointment. This was held to amount to stigma.

Usually, the use of the words "unsatisfactory work and conduct" in the termination order are not regarded as stigmatic. In such a case, termination of the service of a probationer without a formal hearing is not regarded as bad.[52]

Termination of service of a probationer without formal hearing would be bad if the termination order is *ex facie* stigmatic.[53]

At times, the employer may hold an inquiry before passing the termination order to satisfy himself about the suitability of the probationer for the job in question. If the language of the order does not cast a stigma on him, the order remains valid.[54]

From the above sundry cases it becomes clear that no hearing need be given to a probationer if the order of termination is not stigmatic. It depends on the facts and circumstances of each case and the language or the words used in the termination order to assess whether the words used amount to stigma or not.

The Supreme Court has now clarified through its decisions in *R.S. Gupta v. U.P. State Agro Industries Corp. Ltd.*[55] and *D.P. Banerjee v. S.N. Bose National Centre for Basic Sciences, Calcutta*,[56] that whether an order of termination of a

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50. AIR 1968 SC 1089 : (1968) 3 SCR 234.
51. AIR 1986 SC 1108 : (1986) 2 SCC 338.
52. *Dipti Banerjee v. Satyendra Nath Bose National Centre for Basic Sciences,* AIR 1999 SC 983; *H.F. Sungati v. Registrar—General High Court of Karnataka,* AIR 2001 SC 1148; *Krishnadevaraya Ed. Trust v. L.A. Balakrishna,* AIR 2001 SC 625.
53. *V.P. Ahuja v. State of Punjab,* AIR 2000 SC 1080 : (2000) 3 SCC 239.
54. *Pavendra Narayan Verma v. Sanjay Gandhi P.G.I. of Medical Sciences,* AIR 2002 SC 23; *Chandra Prakash Shahi v. State of Uttar Pradesh,* AIR 2000 SC 1706.
55. 1999 AIR SCW 207 : AIR 1999 SC 608 : (1999) 2 SCC 21.
56. AIR 1999 SC 983 : (1999) 3 SCC 60.

probationer can be said to be punitive or not depends upon whether certain allegations which are the cause of termination are the motive or the foundation. If findings were arrived at in an inquiry as to misconduct, behind the back of the employee or without a regular departmental inquiry, the simple order of termination is to be treated as 'founded' on the allegations and will be bad. But if the inquiry was not held, no finding were arrived at and the employer was not inclined to conduct an inquiry but, at the same time, he was not willing to continue the employee against whom there were complaints, it would only be a case of motive and the order of termination would not be bad. Similarly, if the employer did not want to inquire into the truth of the allegations because of delay in regular departmental proceedings, or he was doubtful about securing adequate evidence; in such a circumstance, the allegation would be a motive and not the foundation and the simple order of termination would be valid.

In *Banerjee*, the order of termination was held not to be a simple order of termination. The letters written by the employer to the employee contained findings which were arrived at without a full-fledged departmental inquiry. Those findings amounted to stigma and would come in the way of his career. When stigma is cast, it has an adverse effect on the person's future career.

In *State of Bihar v. Gopi Kishore Prasad*,[57] a show cause notice was served seeking a reply to the allegation regarding the officer's bad reputation. The termination order stated that grave doubts had arisen about his integrity which indicated that he was a corrupt officer. It was also stated that confidential inquiries revealed that he was a corrupt officer having bad reputation. The Court quashed the order and ruled that it was a clear case of stigma and it required a full-fledged departmental inquiry under Art. 311(2).

The case-law concerning termination of service of a probationer has been in a state of confusion as each case is based on its own peculiar facts. The Supreme Court has in *Chandra Prakash Shah v. Uttar Pradesh*,[58] has extensively reviewed the previous case-law and sought to rationalize the same on the basis of the concept of "motive" and "foundation".

The Court has stated that an order dismissing a probationer though innocuously worded may be punitive in character. The form of the order is not conclusive and the Court can go behind the order to find out the real foundation of the order. Where misconduct on the part of the employee was the 'foundation' for the order, it is to be regarded as punitive in nature. But where it is only the motive for passing the order of termination, then it is not to be regarded as punitive.

A probationer has no right to hold the post and his services can be terminated at any time on account of general unsuitability for the post in question. To determine his suitability an inquiry may be held and, on the basis of the inquiry, a decision is taken to terminate his services, the order is not punitive and Art. 311(2) is not attracted. But if there are allegations of misconduct, and an inquiry is held to find out the truth, and the order of termination is based on that inquiry, the order is regarded as punitive as it is founded on misconduct and it will not be a mere matter of motive.

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57. AIR 1960 SC 689 : (1960) 1 LLJ 577.
58. (2000) 5 SCC 152 : AIR 2000 SC 1706.

In the instant case, a probationer constable's services were terminated by a simple notice. The Court ruled that the order was punitive in nature. There were allegations of indiscipline and misbehavior against him; a preliminary inquiry was held and on the basis of that inquiry his services were terminated. As the procedure under Art. 311(2) had not been followed, the order of termination was set aside.

The services of a probationer were terminated because of her long absence from duty. The order of termination merely said that she was 'dismissed' from service. Holding the order as having been passed validly, the Supreme Court has pointed out that the services of a probationer can be terminated if his services are unsatisfactory. If the services of a probationer are terminated without any reason whatsoever, it is possible to characterise the order as having been passed arbitrarily. On the other hand, when there is a reason for terminating the services of a probationer and the termination order is worded in an innocuous manner, the order cannot be regarded as having been passed by way of punishment. The use of the word 'dismissed' in the order cannot be regarded as being by way of punishment.[59]

(ii) REDUCTION IN RANK

The expression 'reduction in rank' means reduction of an employee from a higher to a lower rank. The principles discussed above regarding dismissal or removal apply *mutatis mutandis* to reduction in rank as well. When reduction in rank is imposed as a punishment, Art. 311(2) becomes applicable but not otherwise.

When a civil servant has a right to a particular rank, his reduction from that rank operates as a penalty as he loses the emoluments and privileges of that rank. If, however, an employee is appointed temporarily to, or to officiate in, a higher post, his appointment is of transitory nature and he acquires no right to the higher post and, therefore, his reduction to his original substantive post does not *per se* attract Art. 311(2).[60] But even in such a case reduction by way of punishment attracts Art. 311(2), as when the employee is visited with penal consequences, such as, forfeiture of his pay or allowances or loss of seniority in his substantive rank, or stoppage or postponement of his future chances of promotion, or if a stigma is attached to him, or when a full-scale formal inquiry was held before his reversion.[61]

The petitioner appointed to officiate in a higher position was reverted to his original position after two years because of unsatisfactory work. Art. 311(2) was held non-applicable to him because—having been appointed in an officiating capacity he had no right to continue in the post; an officiating appointment can be terminated at any time on reasonable notice; his seniority in his substantive post or his future chance of promotion were not affected as he could be considered for

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59. *Ganganagar Zila Dugdh Utpadak Sahkari Sangh Ltd. v. Priyanka Joshi,* AIR 1999 SC 2363 : (1999) 6 SCC 214.

60. *Hartwell Prescott Singh v. State of Uttar Pradesh,* AIR 1957 SC 186 : 1958 SCR 509.

61. *Div. Personnel Officer, S. Rly. v. S. Raghavendrachar,* AIR 1966 SC 1529; *State of Punjab v. Sukh Raj Bahadur,* AIR 1968 SC 1089 : (1968) 3 SCR 234; *G.S. Gill v. State of Punjab,* AIR 1974 SC 1898 : (1975) 3 SCC 73; *R.S. Sial v. State of Uttar Pradesh,* AIR 1974 SC 1317 : (1975) 3 SCC 111.

promotion in future if his work and conduct justified the same and, hence, his reduction did not operate as a forfeiture of any right or amount to punishment.[62]

As noted above, mere unsuitability or unfitness for the job does not amount to any stigma. When after reduction, the employee loses his seniority in his substantive post, Art. 311(2) becomes applicable.[63] In *Wadhwa*,[64] the appellant was officiating as Additional Superintendent of Police. He was reverted to his substantive post on the ground that he was found to be immature as a Supdt. of Police. The record showed that he was not reverted because of the return of the permanent incumbent from leave, and other officers junior to him continued while he was reverted. The record also revealed that an enquiry was not resorted to for the reason that it would take a long time. His reversion was regarded as reduction in rank.

The Chief Secretary to a State Government, and a member of the Indian Civil Service, was appointed as a Secretary to the Central Government, a tenure post. But before the expiry of the tenure, he was asked to choose between compulsory retirement or reversion to his State post. It was held that the order was a stigma and amounted to reduction in rank and Art. 311(2) became applicable.[65]

When reversion of a probationer to his substantive post appeared to be *mala fide* and really as a punishment for some misconduct, Art. 311(2) became operative.[66] When charges were served on a probationer, but he was reverted without an enquiry, Art. 311(2) did not apply to his case as no formal inquiry had been held against him.[67]

Out of 200 officers appointed on an officiating basis, some of whom were junior to the respondent, only he was reverted to his substantive rank. The order of reversion was *prima facie* innocuous. Nevertheless, the attendant circumstances were such that reversion was by way of punishment attracting Art. 311(2).[68]

In *S.P. Vasudeva v. State of Haryana*,[69] the Supreme Court expressed dissatisfaction with the view taken in some earlier cases that when order of discharge or reversion of a temporary or probationer employee is preceded by an inquiry, then Art. 311(2) must apply. It results in the anomalous position that the Court may not interfere if the order *ex facie* gives no reasons for discharge or reversal, but it may interfere if the superior official makes a *bona fide* inquiry before making up his mind as to the suitability of the employee. The position at present is confusing.

A mere loss of seniority as a result of re-adjustment and re-fixing of seniority *inter se* does not amount to reduction in rank within Art. 311(2).[70]

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62. *Parshotam Lal Dhingra v. Union of India*, AIR 1958 SC 36 : 1958 SCR 828.
63. *Madhav Laxman Vaikunthe v. State of Mysore*, AIR 1962 SC 8 : (1962) 1 SCR 886.
64. *P.C. Wadhwa v. Union of India*, AIR 1964 SC 423 : (1964) 5 SCR 598.
65. *Debesh Chandra Das v. Union of India*, AIR 1970 SC 77 : (1969) 2 SCC 158.
66. *Sukhbans Singh v. State of Punjab*, AIR 1962 SC 1711 : (1963) 1 SCR 416.
67. *State of Punjab v. Sukh Raj*, AIR 1968 SC 1089 : (1968) 3 SCR 234, applying the principle of *Ram Narayan Das, supra*, footnote 42.
68. *State of Uttar Pradesh v. Sughar Singh*, AIR 1974 SC 423.
Also, *Regional Manager v. Pawan Kumar*, AIR 1976 SC 1766 : (1976) 3 SCC 334.
69. AIR 1976 SC 2292 : (1976) 1 SCC 236.
70. *G. Samuel v. State of Kerala*, AIR 1960 Ker 237; *M. Kamalamma v. State of Mysore*, AIR 1960 Mys. 255.

Even when Art. 311(2) is inapplicable to a case of reversion, it may be discriminatory or for a collateral or extraneous purpose attracting challenge under Art. 16.[71]

G. REASONABLE OPPORTUNITY TO SHOW CAUSE

Under Art. 311(2), a civil servant is not to be dismissed, removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges. Art. 311(2) gives a constitutional mandate to the principles of natural justice. [72] The disciplinary proceedings before a domestic tribunal are of *quasi*-judicial character.

A mass of case-law has gathered around the question: what constitutes a 'reasonable opportunity' for purposes of Art. 311(2)? The Courts have laid down a number of norms to define the content of, and elements constituting this concept. A full discussion of these various norms falls appropriately within the realm of Administrative Law and not within the scope of this work, but a few salient principles may be noted here.

The concept of 'reasonable opportunity' being a constitutional limitation on the doctrine of 'tenure at pleasure',[73] Parliament or a State Legislature can make a law defining the content of 'reasonable opportunity', and prescribing procedure for affording the said opportunity to the accused government servant. Pending legislation, rules can be made by the executive for the purpose under Art. 309.[74]

Neither the law nor the rules are, however, decisive of the content of the concept of 'reasonable opportunity'. It is finally for the Courts to ascertain whether or not the law or the rules provide a reasonable opportunity and the Courts can thus test the validity of the law or the rules from this point of view.[75] The reason is that the word 'opportunity' in Art. 311(2) is prefixed by the word 'reasonable'. In each case, therefore, it is for the Courts to see whether, on the facts of the case, a reasonable opportunity was given to the government servant or not.

The concept of "reasonable opportunity to show cause" is synonymous with natural justice. According to the Supreme Court, Art. 311(2) gives a constitutional mandate to the principles of natural justice.[76]

But natural justice does not have a fixed connotation; it cannot be put in a straight-jacket. Natural justice depends on the circumstnaces of each case—the nature of the inquiry, the rules under which the inquiry is being held, the subject-matter which is being dealt with and so forth. The essential point is that the person concerned should have a reasonable opportunity of presenting his case and

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71. *State of Mysore v. Kulkarni*, AIR 1972 SC 2170 : (1973) 3 SCC 597; *supra*, Ch. XXIII, Sec. A.
72. JAIN, *A TREATISE ON ADM. LAW*, Ch. IX; JAIN, CASES & MATERIALS ON INDIAN ADM. LAW, Ch. VIII.
73. *Supra*, Sec. E.
74. *Supra*, Sec. B.
75. *K. S. Hemrajsinhji Pravinsinhji v. Ins. Gen. Police*, AIR 1961 Guj 63.
76. See footnote 66.

that the administrative authority should act fairly, impatially and reasonably. The duty is not so much to act 'judicially' but 'fairly'.[77]

A few general propositions may however be stated here.

The question of requirement of apply the principles of natural justice can be only invoked where there was a jural relationship of employer and employee existed at any point of time. Thus where a person procured in a post meant for a reserved category candidate, on the basis of a false caste certificate has been held not to be a person holding civil post within the meaning of Art. 311. Such appointment, held, is no appointment in the eye of the law and has dismissal will not attract Art. 311.[78]

There must be an inquiry into the charges made against a government servant before any of the three punishments is awarded to him. A statutory departmental inquiry was held into a railway accident. The inquiry committee came to the conclusion that the accident was due to the negligence of the Asst. Station Master. He was later served with a show cause notice as to why he should not be reduced in rank. Thereafter, he was reduced in rank. The Supreme Court held that the inquiry into the accident was not directed against the appellant as such. The findings reached by the statutory inquiry committee could not be said to be findings made against the appellant for the alleged neglect of duty. It was necessary to give him a chance to show his innocence by holding an inquiry in the charge that he was responsible for the accident before imposing any major punishment on him. The order was thus set aside.[79]

The Constitution guarantees to the government servant a fair inquiry into his conduct. The inquiry should therefore be in accordance with the principles of natural justice.[80] When several delinquent officers are involved in a matter, it is salutary to conduct a common inquiry against them all. This avoids multiplicity of proceedings and saves time. Even if one charged officer cites another charged officer as a witness, in his defence, there is no need to split the inquiry. A disciplinary inquiry is not to be equated to a criminal prosecution where defendants are arrayed as co-accused. In a disciplinary proceeding, the concept of co-accused does not arise.[81]

The delinquent officer should be informed of the charges against him. This requirement is specifically laid down in Art. 311(2). The charges must be clear, precise and accurate. If a charge is vague, the inquiry may be vitiated. As for example, a vague accusation that a government servant accepts bribe is not sufficient. He should be given particulars of specific acts of accepting bribes.[82]

Along with the charges, the government servant concerned should also be informed of the evidence by which those charges are sought to be substantiated

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77. *Kumaon Mandal Vikas Nigam Ltd. v. Girja Shankar Pant*, AIR 2001 SC 24 : (2001) 1 SCC 182.
78. *R. Vishwanatha Pillai v. State of Kerala*, (2004) 2 SCC 105 : AIR 2004 SC 1469.
79. *Amalendu v. Dist. Traffic Supdt.*, AIR 1960 SC 992 : (1960) 2 LLJ 61. Also, *Jagdish Pd. Saxena v. Madhya Bharat*, AIR 1961 SC 1070 : (1963) 1 LLJ 325.
80. *Supra*, Ch. VIII; *Nand Kishore v. State of Bihar*,, AIR 1978 SC 1277 : (1978) 3 SCC 366.
81. *Balbir Chand v. Food Corporation of India Ltd.*, AIR 1997 SC 2229 : (1997) 3 SCC 371.
82. *Surath Chandra Chakravarthy v. State of West Bengal*, AIR 1971 SC 752 : (1971) 3 SCR 1; *State of Tamil Nadu v. Thiru K.V. Perumal*, AIR 1996 SC 2474 : (1996) 5 SCC 474.

against him.[83] This is very necessary in order to give him an opportunity to deny his guilt and establish his innocence. At times, prior to the framing of charges, Government may hold a confidential investigation to ascertain what charges should be enquired into. The report of this investigation need not be given to the servant unless it forms part of the evidence at the formal inquiry held into the charges framed against him, and is relied on by the inquiry officer at any stage.[84]

Copies of relevant documents must be supplied to the concerned employee. The inquiry is vitiated if the non-supply of documents has prejudiced the case of the concerned employee.[85] The test to be applied in this behalf has been set out by the Supreme Court in *State Bank of Patiala v. S.K. Sharma*.[86] It was the duty of the employee under enquiry to point out how each and every document was relevant to the charges or to the enquiry being held against him and whether and how their non-supply has prejudiced his case.[87]

The Court has insisted that the opportunity of hearing must be an effective opportunity and not a mere pretence. When charge-sheet is served on a person, documents to prove the charges mentioned therein must be supplied him. But when neither copies of these documents are supplied to him in spite of his request, nor an opportunity given to him to inspect these documents, then there is violation of natural justice.[88]

Not all documents need be supplied to him. If a document has no bearing on the charges, or if it is not relied upon by the enquiry officer to support the charges, or the material was not necessary for the purposes of cross-examination, it need not be supplied.

Many a time, witnesses are examined in the preliminary enquiry in the absence of the person charged, and on the basis of this evidence, charges are framed later. It is, therefore, necessary that copies of these statements be supplied to him. If this is not done, it may vitiate the inquiry.[89]

Where disciplinary proceedings are initiated by issuing a charge sheet, actual service of the charge sheet on the person concerned is essential as the concerned person is required to submit his reply thereto.[90]

After the charges have been intimated to the servant concerned, and his formal reply thereto has been received, the disciplinary authority has to apply his mind to decide whether a further inquiry is called for. If after deliberation and due con-

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83. *Tribhuwan v. State of Bihar*,, AIR 1960 Pat 116; *Altafur Rahman v. Coll., Central Excise*, AIR 1960 All 551; *Khem Chand v. Union of India*, AIR 1958 SC 300 : 1958 SCR 1080; *Ram Prakash v. State of Punjab*, AIR 1960 Punj. 278; *Saghir v. State of Uttar Pradesh*, AIR 1960 All 270.

84. *Krishna Chandra Tandon v. Union of India*, AIR 1974 SC 1589 : (1974) 4 SCC 374.

85. *State of Tamil Nadu v. K.V. Perumal*, AIR 1996 SC 2474 : (1996) 5 SCC 474.

86. 1996 (3) Scale 202 : (1996) 3 SCC 364.

87. Also see, *Secretary to Government v. A.C.J. Britto*, AIR 1997 SC 1393 : (1997) 3 SCC 387.

88. *Chandrama Tewari v. Union of India*, AIR 1988 SC 117 : 1987 Supp SCC 518; *Kashinath Dikshita v. Union of India*, AIR 1986 SC 2118 : (1986) 3 SCC 229; *State of Uttar Pradesh v. Mohd. Sharif*, AIR 1982 SC 937; *Govt. of Tamil Nadu v. K.N. Ratnavelu*, AIR 1998 SC 3037 : (1998) 7 SCC 569.

89. *Govt. of T.N. v. K.N. Ratnavelu*, AIR 1998 SC 3037 : (1998) 7 SCC 569.

90. *Union of India v. Dinanath Shantaram Karekar*, AIR 1998 SC 2722 : (1998) 7 SCC 569.

sideration, the disciplinary authority has come to an affirmative decision, a formal inquiry is to be held into those charges.[91]

Personal hearing is a part of reasonable opportunity, and, if it is demanded by the delinquent servant it cannot be refused.[92]

If the delinquent fails to appear before the inquiry officer in spite of several opportunities having been given to him, then the inquiry officer can proceed *ex parte*.[93]

At the inquiry, the servant concerned must be given full opportunity to answer the charges levelled against him, and to put up his defence by demonstrating that the evidence against him is untrue and unreliable. With this in view, the employee charged must be provided with an opportunity to cross-examine the witnesses produced against him.[94]

Ordinarily speaking, all evidence must be given in his presence. Finding a person guilty on the basis of evidence recorded behind his back is a violation of the principles of natural justice.[95] However, statements of the witnesses taken at the preliminary inquiry can be used at the time of the formal inquiry provided that the statements are made available to the accused employee and he is given opportunity to cross-examine the witnesses in respect of those statements.[96] It is not necessary for making each witness repeat word for word the statement made by him earlier. A mere synopsis of those statements does not satisfy the requirements of Art. 311(2).[97] The Supreme Court has laid down the procedure as follows:[98]

> "Reasonable opportunity contemplated by Art. 311(2) means "hearing" in accordance with the principles of natural justice under which one of the basic requirements is that all the witnesses in the departmental inquiry shall be examined in the presence of the delinquent who shall be given an opportunity to cross-examine them. Where a statement previously made by a witness, either during the course of preliminary enquiry or investigation, is proposed to be brought on record in the departmental proceedings, the law as laid by this Court is that a copy of that statement should first be supplied to the delinquent who should thereafter be given an opportunity to cross-examine that witness".

No material should be relied on against the accused employee without giving him an opportunity to explain it. A sub-inspector of police was dismissed from service. Holding the dismissal order invalid, the Supreme Court pointed out that the officers making confidential reports against him were not summoned for examination at the inquiry and this deprived him of the opportunity of cross-

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91. *State of Punjab v. V.K. Khanna*, AIR 2001 SC 343 : (2001) 2 SCC 330.
92. *State of Punjab v. Karam Chand*, AIR 1959 Punj 402; *C.S. Sharma v. State of U.P.*, AIR 1961 All 45; *Nripendra v. State of West Bengal*, AIR 1961 Cal 1.
93. *State of Tamil Nadu v. M. Natarajan*, AIR 1997 SC 3120 : (1997) 6 SCC 415.
94. *John v. Travancore-Cochin*, AIR 1955 SC 160; *State of Madhya Pradesh v. Chintaman*, AIR 1961 SC 1623; *Bombay v. Nurul Khan*, AIR 1966 SC 269 : (1965) 3 SCR 135; *Bhagat Ram v. State of Himachal Pradesh*, AIR 1983 SC 454 : (1983) 2 SCC 442.
95. *M/s. Kesoram Cotton Mills v. Gangadhar*, AIR 1964 SC 708 : (1964) 2 SCR 809.
96. *State of Mysore v. Shivbasappa*, AIR 1963 SC 375 : (1963) 2 SCR 943; *State of Uttar Pradesh v. O.P. Gupta*, AIR 1970 SC 679; *State Bank of Bikaner and Jaipur v. Srinath Gupta*, AIR 1997 SC 243 : (1996) 6 SCC 486.
97. *State of Punjab v. Bhagat Ram*, AIR 1974 SC 2335.
98. *Kuldeep Singh v. The Commr. of Police*, AIR 1999 SC 677, at 683 : (1999) 2 SCC 10.

examining these persons. Thus, reasonable opportunity of defending himself was denied to him.[1]

Strict rules of evidence as laid down in the Indian Evidence Act do not apply to disciplinary enquiries.[2] Ordinarily, a confession or admission of guilt made by a person accused of an offence before a police officer is not admissible in according to ss. 25 and 26 of the Evidence Act. But as rules of evidence do not apply to departmental enquiries, a confession which is relevant and voluntary can be admitted in a departmental inquiry.[3]

It is however necessary that the inquiry officer bases his findings on some evidence. The Court would quash a dismissal order if it is based on findings recorded by the inquiry officer which are not supported by evidence and were thus wholly perverse.[4]

The inquiry officer should not make private enquiries behind the back of the employee. If it is done, the evidence against him must be disclosed to hi m. An inquiry is vitiated if the findings are based on secret information which the accused officer had no opportunity of meeting.[5] Therefore, the inquiry officer can refer to the past conduct of the accused servant only after giving him an opportunity to explain it.[6]

The accused servant should be given an opportunity to give his testimony. He should have an opportunity of adducing all relevant evidence on which he relies and examines witnesses in his defence.[7]

The inquiry officer should attempt to secure the attendance of defence witnesses. Without so trying, he cannot take shelter behind the plea that he has no legal authority to compel their attendance. Refusal on his part to summon witnesses may vitiate the inquiry.[8] But the right of the servant charged to cross-examine witnesses and produce his own witnesses can be controlled by the inquiry officer so as to see that cross-examination is not done in an irrelevant manner, or that irrelevant evidence is not given. The inquiry officer has to ensure that the inquiry proceedings are not unduly or deliberately prolonged.[9] The Indian Evidence Act as such does not apply to enquiries against Government servants. All materials which are logically probative for a prudent mind are permissible.[10]

The government servant against whom an inquiry is being held has a right to argue his own case, for the right to argue is deemed to be a part of personal

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1. *State of Punjab v. Dewan Chuni Lal,* AIR 1970 SC 2086 : (1970) 1 SCC 479.
2. *State of Mysore v. Shivabasappa,* AIR 1963 SC 375 : (1963) 2 SCR 943; *Assam v. M.K. Das,* AIR 1970 SC 1255; *State Bank of Bikaner & Jaipur v. Srinath Gupta,* AIR 1997 SC 243 : (1996) 6 SCC 486; *Union of India v. A.N. Rao,* AIR 1998 SC 111 : (1998) 1 SCC 700.
3. *Kuldip Singh v. State of Punjab,* AIR 1997 SC 79 : (1996) 10 SCC 659.
4. *S.S. Moghe v. Union of India,* AIR 1981 SC 1495 : (1981) 3 SCC 271. Also see, *infra.*
5. *State of Mysore v. S.S. Makapur,* AIR 1963 SC 375; *Assam v. M.K. Das,* AIR 1970 SC 1255 : (1970) 1 SCC 709; *Krishna Chandra v. Union of India, supra,* footnote 84; *Andhra Pradesh v. S.M. Nizamuddin,* AIR 1976 SC 1964 : (1976) 4 SCC 745.
6. *Nanjudeshwar v. State of Mysore,* AIR 1960 Mys. 159; *Damodar v. Land Reforms Comm.,* AIR 1959 All 437.
7. *Khem Chand v. Union of India,* AIR 1958 SC 300 : 1958 SCR 1080.
8. *Hanif v. Supdt. Police,* AIR 1957 All 634; *Valayya v. A.P.,* AIR 1958 AP 240.
9. *Bombay v. Nurul Khan,* AIR 1966 SC 269 : (1965) 3 SCR 135.
10. *Union of India v. Verma,* AIR 1957 SC 882; *K.L. Shinde v. State of Mysore,* AIR 1976 SC 1080; *Haryana v. Rattan Singh,* AIR 1977 SC 1512 : (1977) 2 SCC 491.

hearing to which he is entitled. A general and absolute right to have legal representation at the inquiry is not recognised. When there is no oral evidence to be recorded, and so no need to cross-examine witnesses, and no legal complexity in a case, absence of a lawyer does not amount to denial of natural justice.[11] But, there may be circumstances when it may be regarded just to permit the help of a lawyer as a part of 'reasonable opportunity' to defend himself, as for example, when the case is complicated and long and a large number of witnesses have to be examined.[12]

When the case against the officer is being handled by a trained prosecutor (though not a lawyer) it is a good ground for allowing him to engage a legal practitioner to defend him lest the scales should be weighed against him.[13] When however the employer appoints a legally trained person as the presenting officer, the delinquent employee must also be allowed to take the assistance of a lawyer.[14]

In the instant case,[15] the presenting officer was a person with legal attainments and experience. The Supreme Court therefore ruled that the refusal of the service of a lawyer to the concerned employee, who had no legal background, resulted in denial of natural justice.

Under Rule 15(5) of the Central Civil Services (Classification, Control and Appeal) Rules, 1967, a government servant may present his case with the assistance of any government servant approved by the disciplinary authority or, with its permission, through a lawyer. This is a mandatory rule. Denial of assistance of a government servant to an accused officer at the inquiry against him amounts to denial of reasonable opportunity to defend himself.

The Supreme Court has gone further and insisted that justice and fairplay demand that when in a disciplinary proceeding, the department is represented by a presenting officer, the delinquent officer should be informed that he has a right to take the help of another government servant from his department to defend him. When at the inquiry against a class IV employee, the Government was represented by a presenting officer but not the employee, and he was not informed of his right to seek assistance of another government servant in the department to represent him, the Supreme Court held the enquiry vitiated and the order of dismissal based on such an inquiry was quashed.[16]

Reasons must be given for their decisions by the inquiry officer as well as the disciplinary authority.[17]

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11. *Krishna Chandra v. Union of India*, *supra*, footnote 84; *H. Sharma v. S.C. Kagti*, AIR 1960 Ass 141; *Hari Pd. v. CIT*, AIR 1972 Cal. 27.

12. *Dr. K. Subbarao v. Hyderabad*, AIR 1957 AP 414; *Nripendra v. State of West Bengal*, AIR 1961 Cal. 1; also see, *Jeevaratnam v. State of Madras*, AIR 1966 SC 951 : (1966) 2 SCR 204, *T. Muniswamy v. State of Mysore*, AIR 1964 Mys. 250.

13. *C.L. Subramanian v. Collector of Customs*, AIR 1972 SC 2178.
Also, LAKSHMI SWAMINATHAN, A Civil Servant's Right to be represented in Disciplinary Proceedings, 16 *JILI* 282 (1974).

14. *Board of Trustees, Bombay Port v. Dilipkumar*, AIR 1983 SC 109 : (1983) 1 SCC 124.

15. *J.K. Aggarwal v. Haryana Seeds Development Corp. Ltd.*, AIR 1991 SC 1221 : (1991) 2 SCC 283.

16. *Bhagat Ram v. State of Himachal Pradesh*, AIR 1983 SC 454 : (1983) 2 SCC 442.

17. *A.L. Kalra v. P & E Corp. of India*, AIR 1984 SC 1361 : (1984) 3 SCC 316.

There is no bar in the disciplinary authority deputing some responsible and competent official to enquire and report into the conduct of the servant against whom action is proposed to be taken. It is open to the disciplinary authority to hold the inquiry itself, or appoint an inquiry officer to conduct the inquiry into the charges against an employee. What cannot be delegated, however, by the disciplinary authority, except when the law specifically so provides, is the ultimate responsibility for the exercise of power of punishment.[18]

The inquiry officer, however, cannot delegate his functions. The inquiry is improper if the inquiry officer delegates the task of hearing witnesses to someone else and then decides the case upon the mere record of evidence.[19] In case an inquiry is held by someone other than the authority, the latter can order a re-inquiry, or a fresh inquiry superseding the earlier inquiry.

If the disciplinary authority exonerates the civil servant finally, no re-inquiry or fresh inquiry on the same facts can then be ordered unless there is a specific provision for reviewing an order of exoneration of this kind in the service rules or any law to that effect.[20] This view is based on the ground of justice, equity and good conscience. Of course, exoneration in a departmental inquiry is no bar to prosecuting the servant concerned in a Court of law.

In the *Kumaon* case, cited above,[21] disciplinary inquiry conducted against an employee was quashed on the ground of denial to him of a reasonable opportunity to defend himself as there were many flaws in the procedure adopted, e.g., no documents were shown to the employee; there was no presenting officer; no defence witness was examined and no cross-examination of the witnesses testifying against him was allowed.

As has already been discussed, even if the servant is found guilty in a departmental inquiry and action is taken against him on that basis, he can still be prosecuted in a Court.[22]

It is well established proposition that the disciplinary authority is the sole judge of the facts.[23] The report of the inquiry officer is not binding on the disciplinary authority. The disciplinary authority is not bound by the findings reached by the inquiry officer. The disciplinary authority has to make its own mind as regards the guilt of the accused servant and the punishment to be meted out to him on the basis of the evidence before him. In this, the inquiry officer's findings can assist, but do not bind, the punishing authority. The report of the enquiry officer is not final or conclusive till the disciplinary authority takes the final decision thereon. The inquiry is not complete till the disciplinary authority comes to its own conclusions whether the charges have been proved or not. Even when the inquiry officer holds that the charges against the concerned employee have not

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18. *Pradyat Kumar v. Chief Justice, Calcutta H.C.*, AIR 1956 SC 285 : (1955) 2 SCR 1331. Also see, *Ramesh Verma v. R.D. Verma*, AIR 1958 All 532; *S. Neelakanta v. State of Kerala*, AIR 1960 Ker 279; *Sreedharaiah v. Dist. Supdt. of Police*, AIR 1960 AP 473.

19. *Amulya Kumar v. L.M. Bakshi*, AIR 1958 Cal 470.

20. *Dwarkachand v. State of Rajasthan*, AIR 1958 Raj 38; *V. Moopan v. State of Kerala*, AIR 1960 Ker 294.

21. *Kumaon Mandal Vikas Nigam Ltd. v. Girja Shankar Pant*, AIR 2001 SC 24 : (2001) 1 SCC 182.

22. *Supra*, Ch. XXV, Sec. B.

23. *Kumaon Mandal Vikas Nigam Ltd. v. Girja Shankar Pant*, AIR 2001 SC 24, at 32 : (2001) 1 SCC 182.

been established, the disciplinary authority may disagree with these findings, and hold that the charges were proved.[24]

The Constitution Bench of the Supreme Court observed in *India v. Goel*,[25] that "the Government may agree with the report or may differ, either wholly or partially, from the conclusions recorded in the report." The Court has stated the legal position in *D'Silva*[26] that neither the findings of the enquiry officer nor his recommendations are binding on the punishing authority.

The Supreme Court has further clarified the position in this regard recently in *Shashikant*:[27]

> "The findings of the Inquiry officer are only his opinion on the materials, but such findings are not binding on the disciplinary authority as the decision making authority is the punishing authority and, therefore, that authority can come to its own conclusion, of course bearing in mind the views expressed by the Inquiry Officer."

When an earlier order of removal from service was quashed because of a technical flaw in the inquiry and the concerned government servant was reinstated, a second inquiry on merits can still be held on the same charges.[28] Even if an employee is acquitted by a criminal Court, departmental inquiry may still continue.[29]

The degree of proof required in a departmental disciplinary proceeding need not be of the same standard as the degree of proof required for establishing the guilt of an accused in a criminal case. However, even then suspicion, however strong, cannot be substituted for proof.

The Courts do not sit in appeal over the findings recorded by the disciplinary authority, or the enquiry officer in a departmental inquiry. But this does not mean that in no circumstance can the Court interfere.

The Supreme Court has emphasized again and again that the enquiry officer should arrive at his conclusions on the basis of some evidence which, with some degree of definiteness, points to the guilt of the delinquent and does not leave the matter in a suspicious state as mere suspicion cannot take the place of proof even in domestic enquiries. If there is no evidence to sustain the charges framed against the delinquent, he cannot be held to be guilty as, in that event, the finding recorded by the enquiry officer would be perverse.[30] As the Supreme Court has observed in *Kuldeep Singh*:[31]

> "Where the findings of misconduct are based on no legal evidence and the conclusion is one to which no reasonable man could come, the findings can be

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24. *Yoginath D. Bagade v. State of Maharashtra*, AIR 1999 SC 3734.
25. *Union of India v. Goel*, AIR 1964 SC 364 : (1964) 4 SCR 718.
Also, *Railway Board v. N. Singh*, AIR 1969 SC 966; *Krishna Chander v. Union of India*, AIR 1974 SC 1589.
26. *A.N. D'Silva v. Union of India*, AIR 1962 SC 1130 : 1962 Supp (1) SCR 968.
27. *High Court of Judicature v. Shashikant S. Patil*, AIR 2000 SC 22, 26 : (2000) 1 SCC 416.
28. *Union of India v. M.B. Patnaik*, AIR 1981 SC 858 : (1981) 2 SCC 159; *Anand Narain Shukla v. State of Madhya Pradesh*, AIR 1979 SC 1923 : (1980) 1 SCC 252.
29. *Corp. of Nagpur v. Ram Chandra Modak*, AIR 1984 SC 636.
30. *Mysore v. Shivbasappa*, AIR 1963 SC 375 : (1963) 2 SCR 943; *Nand Kishore v. State of Bihar*,, AIR 1978 SC 1277 : 1978 (3) SCC 366; *State of Andhra Pradesh v. Sree Rama Rao*, AIR 1963 SC 1723; *Rajinder Kumar Kindra v. Delhi Administration*, AIR 1984 SC 1805 : (1984) 4 SCC 635.
31. *Kuldeep Singh v. Commr. of Police*, AIR 1999 SC 677, 679 : (1999) 2 SCC 10.

> rejected as perverse….Where a *quasi*-judicial Tribunal records findings based on no legal evidence and the findings are his mere *ipse dixit* or based on conjectures and surmises, the enquiry suffers from the additional infirmity of non-application of mind and stands vitiated."

A broad distinction has therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act on it, the decision would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, the decision would not be regarded as perverse and the Court would not interfere with the findings.

In *Kuldeep Singh*, the Court quashed the findings of the enquiry officer as there was absolutely no evidence in support of the charge framed against the concerned employee; the entire findings recorded by the enquiry officer were held vitiated as they were not supported by any evidence on record and were wholly perverse.

In *S.S. Moghe v. Union of India*,[32] an order of dismissal was set aside because the findings recorded by the inquiry officer were not supported by evidence and were wholly perverse.

The Court can also interfere if the findings recorded were such as could not have been reached by an ordinary prudent man or the findings were perverse, or the decision of the disciplinary authority was based on surmises and conjectures rather than the evidence on record.[33]

What is the impact of delay on departmental proceedings? Can delay vitiate these proceedings? The Supreme Court has refused to lay down any predetermined principle applicable to all cases and in all situations where there is delay in concluding the disciplinary proceedings. Whether on the ground of delay, the disciplinary proceedings are to be terminated depends on the facts and circumstances of each case. The Court has to balance all relevant factors to determine whether in the interest of clean and honest administration, the disciplinary proceedings should be terminated because of long delay.

In *State of Andhra Pradesh v. N. Radhakishan*,[34] the Supreme Court quashed the charge memo issued in 1995 because of delay in holding the inquiry. On the other hand, in *Punjab v. Chaman Lal*,[35] the incident occurred in 1987, but the inquiry was initiated in 1993, i.e., nearly 5½ years later. There was no explanation for the delay. The Supreme Court did not quash the disciplinary proceedings. The Court ruled that in the interest of justice as well as administration, the inquiry ought to be completed.

(a) SECOND OPPORTUNITY

Before December, 1976, after the completion of enquiry against a civil servant, if it was proposed to impose on him the punishment of dismissal, removal

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32. AIR 1981 SC 1495 : (1981) 3 SCC 271.
See also, *Syed Rahimuddin v. Director General C.S.I.R.,* AIR 2001 SC 2418 : (2001) 9 SCC 575.

33. *Nand Kishore v. State of Bihar*,, AIR 1978 SC 1277; *State of Andhra Pradesh v. Sree Rama Rao*, AIR 1963 SC 1723; *Yoginath D. Bagade v. State of Maharashtra*, AIR 1999 SC 3734.

34. AIR 1998 SC 1833 : (1998) 4 SCC 154.

35. (1995) 2 SCC 570 : 1995 SCC (L&S) 541.

or reduction in rank, then it was necessary to give him another opportunity of making a representation as to why the proposed punishment should not be awarded to him. It was illegal to impose any of these punishments without this formality.[36] The Courts reached this conclusion by interpreting Art. 311(2).

A mass of case-law gathered around this second opportunity of hearing. At this stage, the punishing authority was not bound to hear the civil servant, and a written representation by him was regarded as sufficient.[37] The second opportunity enabled the servant to plead that no case had been made out against him, or that the conclusions of fact drawn from the evidence were not correct, or that the proposed punishment was excessive.[38]

In course of time, a feeling grew that Art. 311(2), as interpreted by the Courts, had come to impose elaborate procedural formalities before a delinquent civil servant could be punished. Fulfilment of these formalities appeared to consume too much time and cause undue delay in meting out punishment to guilty officials which resulted in lowering the standards of employee discipline in government establishments. The second opportunity, it was thought, protracted disciplinary proceedings without affording any additional safeguard to the guilty officials. It was thus thought desirable to cut down some procedural formalities to expedite disciplinary proceedings against civil servants.[39] With this in view, the Fifteenth Amendment of the Constitution was undertaken.[40]

Originally, the amending bill proposed abolition of the second opportunity as such. But this proposal ran into heavy weather in Parliament. Consequently, the bill was modified and the second opportunity was retained with this restriction that the employee was to make representation on the penalty proposed, but only on the basis of the evidence adduced during the enquiry. This meant that the concerned employee should seek to refer only to the evidence produced at the time of the inquiry and he should not throw in any fresh evidence at that stage.

The XV Constitutional Amendment did not dilute the second opportunity to any significant extent. However, the 42nd Constitutional Amendment abolished the second opportunity.[41] It provides expressly that it is not necessary to give to a delinquent government servant any opportunity of making representation on the proposed penalty.

The position now is that where it is proposed, after inquiry, to impose upon a government servant the punishment of dismissal, removal or reduction in rank, it may be imposed on the basis of the evidence adduced at the inquiry without giving him any opportunity of making representation on the penalty proposed.

It has now been ruled by the Supreme Court that if the inquiry officer holds the charges proved, a copy of the inquiry report must be furnished to the con-

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36. *Union of India v. Jeewan Ram*, AIR 1958 SC 905; *Kapur Singh v. Union of India*, AIR 1960 SC 493 : (1960) 2 SCR 569; *Bachhittar Singh v. State of Punjab*, AIR 1963 SC 395 : 1962 Supp (3) SCR 713; *Maharashtra v. B.A. Joshi*, AIR 1969 SC 1302 : (1969) 1 SCC 804.

37. *U.R. Bhatt v. Union of India*, AIR 1962 SC 1344 : (1962) 1 LLJ 656.

38. *Khem Chand v. Union of India*, AIR 1958 SC 300; *Union of India v. Goel*, *supra*, footnote 25, on 1696.

39. I.L.I, *Disciplinary Proceedings against Government Servants*, 90 (1962); *Report of the Santhanam Committee on Prevention of Corruption* (1964).

40. See, *infra*, Ch. XLII.

41. *Ibid.*

cerned officer against whom disciplinary action is proposed to be taken.[42] This means that after the inquiry officer submits his report containing his findings and recommendations, but before the disciplinary authority takes a final view thereon, a copy of the report of the inquiry officer ought to be sent to the delinquent employee and his comments invited thereon. The Court has explained the position in *Ramzan Khan* thus:

> "….the disciplinary authority is very much influenced by the conclusions of the Inquiry Officer and even by the recommendation relating to the nature of punishment to be inflicted. Even if the second stage of the inquiry has been abolished, the delinquent is still entitled to represent against the conclusion of the Inquiry Officer."

Accordingly, the Court has concluded:

> "….supply of a copy of the inquiry report along with recommendations, if any, in the matter of proposed punishment to be inflicted would be within the rules of natural justice"

The Court has reiterated this proposition in *E.C.I.L.*[43]

The Court has explained that the disciplinary proceedings break into two stages. The first stage ends when the disciplinary authority arrives at its conclusions on the basis of the evidence, inquiry officer's report and the delinquent employee's reply to it. The second stage begins when the disciplinary authority decides to impose penalty on the basis of its conclusions. The 42nd Amendment has taken away the second right, but the right of the charged officer to receive the report of the inquiry officer was an essential part of the first stage itself. The Court has, therefore, observed in *E.C.I.L.*:

> "Both, the dictates of the reasonable opportunity as well as the principles of natural justice, therefore, require that before the disciplinary authority comes to its own conclusions, the delinquent employee should have an opportunity to reply to the enquiry officer's findings. The disciplinary authority is then required to consider the evidence, the report of the enquiry officer and the representation of the employee against it."

The *ECIL* ruling was given in the context of natural justice. But the Court ruled that the position would be the same where statutory rules governed the procedure. The *ECIL* principle would apply even when statutory rules were silent or even prohibited the supply of a copy of the enquiry report to the delinquent.

But the Court has imposed a rider, *viz*., merely because an enquiry report has not been furnished to the delinquent employee, the order of dismissal is not vitiated unless it is shown that the delinquent has been prejudiced thereby. "Whether, in fact, prejudice has been caused to the employee or not on account of the denial to him of the report has to be considered on the facts and circumstances of each case".

A Court/tribunal ought not to interfere with the order of punishment if it concludes that the non-supply of the report would have made no difference to the ultimate result and the punishment given. "The Court/tribunal should not mechanically set aside the order of punishment on the ground that the report was not furnished." Only if the Court/tribunal finds that the furnishing of the report

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42. *Union of India v. Mohd. Ramzan Khan*, AIR 1991 SC 471 : (1991) 1 SCC 588.
43. *Managing Director, E.C.I.L. v. B. Karunakar*, AIR 1994 SC 1074 : (1973) 4 SCC 727.

would have made a difference to the result that the order of punishment should be set aside.

The same principle applies even when a statutory rule requires that a copy of the inquiry report be furnished to the delinquent officer before passing the order of punishment. Under a Civil Service Rule, the report of the inquiry officer has to be furnished to the delinquent officer. The report was not sent to him in the instant case[44] but he was dismissed from service. The Supreme Court ruled that the effect of the non-submission of the inquiry report to the delinquent on the punishment awarded to him would depend on the question whether in fact prejudice had been caused to the concerned employee because of denial of the report to him. If the Court concludes that the non-supply of the report would have made no difference to the ultimate findings and the punishment given by the disciplinary authority, the Court ought not to interfere with the order of punishment. The Court ought not to mechanically set aside the order of punishment on the ground that the report was not furnished to the delinquent employee.[45]

HEARING BY DISCIPLINARY AUTHORITY

In *Punjab National Bank v. Kunj Behari Misra*,[46] the following question was raised: when the inquiry officer, during the course of the disciplinary proceedings, comes to the conclusion that the charges of misconduct against an official are not proved, then can the disciplinary authority differ from that view and give a contrary finding without affording any opportunity to the delinquent officer?

The Court has ruled that natural justice demands that the authority which proposes to hold the delinquent officer guilty must give him a hearing. If the inquiry officer holds the charges to be proved then the report has to be given to the delinquent officer who can make a representation before the disciplinary authority takes further action prejudicial to the delinquent officer.

Further, in case the report of the inquiry officer is favourable to the delinquent officer, but the disciplinary authority takes a different view, and holds the delinquent employee to be guilty, then it must record its tentative findings with reasons and give an opportunity to the concerned officer to represent against these findings. Only, thereafter, the disciplinary authority can record its final findings. The Court has observed:

> "The principles of natural justice….require the authority, which has to take a final decision and can impose a penalty, to give an opportunity to the officer charged of misconduct to file representation before the disciplinary authority records its findings on the charges framed against the officer".[47]

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44. *State of Uttar Pradesh v. Harendra Arora*, AIR 2001 SC 2319 : (2001) 6 SCC 392.
Also see, *Oriental Insurance Co. v. S. Balakrishnan*, AIR 2001 SC 2400 : (2003) 1 SCC 734.

45. Also see, *Oriental Insurance Co. v. S. Balakrishnan*, AIR 2001 SC 2400.
The Supreme Court has adopted this position on pragmatic considerations. As the Court has observed : "where therefore, even after the furnishing of the report, no different consequence would have followed it would be a perversion of justice to permit the employee to resume duty and to get all the consequential benefits."
See, *Managing Director, ECIL, Hyderabad v. B. Karunakar*, AIR 1994 SC 1074 : (1993) 4 SCC 727.

46. AIR 1998 SC 2713 : (1998) 7 SCC 84.

47. Also see, *State Bank of India v. Arvind K. Shukla*, AIR 2001 SC 2398.

To the same effect is the ruling of the Supreme Court in *Yoginath D. Bagde v. State of Maharashtra*.[48] A delinquent officer has a right of hearing not only during the enquiry proceedings conducted by the enquiry officer into the charges levelled against him, but also when those findings are considered by the disciplinary authority and when the disciplinary authority forms a tentative opinion that it does not agree with the findings recorded by the enquiry officer. If the findings of the enquiry officer are favourable to the delinquent employee holding that the charges are not proved against him, it is all the more necessary to give to the delinquent officer an opportunity before reversing the findings of the enquiry officer.

The formation of the opinion by the disciplinary authority should be tentative and not final. It is at this stage that the delinquent officer should be given an opportunity of hearing after he is informed of the reasons on the basis of which the disciplinary authority proposes to disagree with the findings of the inquiry officer. When the disciplinary authority disagrees with the enquiry officer, the disciplinary authority must give reasons as to why it disagrees with the enquiry officer. In the absence of reasons, it will be difficult for the employee charged to satisfactorily give reasons to persuade the disciplinary authority to agree with the conclusions reached by the inquiry officer.[49]

This has been held to be in consonance with Art. 311(2). Till a final decision is taken in the matter, the inquiry does not come to an end. The enquiry ends when the disciplinary authority has taken a final view and held whether the charges are proved or not proved and punishment inflicted on the delinquent. That being so, the right of being heard is available to the delinquent employee upto the final stage. This being a constitutional right of the employee under Art. 311(2) cannot be whittled down by any law or service rules made under Art. 309.[50]

(b) EFFECT OF FAILURE OF NATURAL JUSTICE

What is the impact of failure of natural justice at the inquiry stage on the ultimate order imposing punishment on the delinquent officer. After discussing the matter elaborately in *State Bank of Patiala v. S.K. Sharma*,[51] the Supreme Court has ruled that the Court must distinguish between two situations—

(1) where there is a total violation of natural justice, i.e., where no opportunity of hearing has been given; where there has been no notice/no hearing at all; and

(2) where a facet of natural justice has been violated, *i.e.*, where there has not been adequate opportunity of hearing, or where a fair hearing is lacking.

In situation (1), the order would undoubtedly be void. In such a case, normally, the authority concerned can proceed afresh according to natural justice.

In situation (2), the Court has to see whether in the totality of the circumstances, the delinquent servant did or did not have a fair hearing. While applying the *audi alteram partem* rule, the ultimate and overriding objective must be kept in mind, *viz.*,

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48. AIR 1999 SC 3734 : (1999) 7 SCC 739.
49. Also see, *State Bank of India v. Arvind K. Shukla*, AIR 2001 SC 2398 : (2004) 13 SCC 797.
50. On Art. 309, see, *supra*, Sec. B.
51. AIR 1996 SC 1669 : (1996) 3 SCC 364.

to ensure a fair hearing and to ensure that there is no failure of justice. Whether any prejudice was caused to the person concerned?[52]

Further, there may be situations, where in the interests of the state or public interest, the *audi alteram partem* rule may have to be curtailed. "In such situations, the Court may have to balance public/state interest with the requirement of natural justice and arrive at an appropriate decision."

The application of the above propositions can be illustrated by referring to a few cases.

An order made without giving any notice to the affected person and without giving him any hearing, has been held to be bad in law.[53]

Where a copy of the enquiry officer's report has not been supplied to the delinquent officer, the order of punishment should be set aside only if there has been a failure of justice. It is only if the Court finds that furnishing the report would have made a difference to the result in the case that it should set aside the order.[54]

(c) BIAS

Bias on the part of the inquiry officer vitiates the inquiry. The inquiry officer should be a person with an open mind and he should hold an impartial domestic enquiry. He should not be biased either in favour of the department or against the person against whom the inquiry is to be held, or prejudge the issue, or have a foreclosed mind, or have pre-determined notions.[55] The test is that "there should be a real danger of bias". The conclusion as to bias can be drawn from the surrounding circumstances.[56] A fanciful allegation of bias would not vitiate the proceedings.

An inquiry by a person who is biased against the charged officer is a clear denial of a reasonable opportunity.[57] For example, one and the same person cannot be a judge and a witness in the same case. Therefore, the inquiry officer cannot also be a witness against the servant against whom he is holding the inquiry. Such a procedure denotes a biased state of mind against the person concerned.[58]

An employee was dismissed by his superior officer on charge of misconduct in relation to himself after himself considering the employee's explanation. The order of dismissal was held to be illegal as violative of natural justice since no person can be a judge in his own cause. Any one having a personal stake in the enquiry must keep himself aloof from the enquiry.[59]

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52. *Jankinath Sarangi v. State of Orissa,* (1969) 3 SCC 392; *K.L. Tripathi v. State Bank of India,* (1984) 1 SCC 43 : AIR 1984 SC 273; *State Bank of Patiala v. S.K. Sharma,* AIR 1996 SC 1669 : (1996) 3 SCC 364.

53. *C.B. Gautam v. Union of India,* (1993) 1 SCC 78 : AIR 1994 SC 771; *Chintapalli Agency T.A.S.C.S. Ltd. v. Secretary (F&A) Govt. of A.P.*, AIR 1977 SC 2313 : (1977) 4 SCC 337; *S.L. Kapoor v. Jagmohan,* AIR 1981 SC 136 : (1980) 4 SCC 379.

54. *Managing Director, E.C.I.L. v. B. Karunakar,* (1993) 4 SCC 727; *supra,* footnote 43.

55. *B. Martin v. Union of India,* AIR 1976 Kant. 144.
Also, *Sunil Kumar v. State of West Bengal,* AIR 1980 SC 1170.

56. *Kumaon Mandal Vikas Nigam Ltd. Girja Shankar Pant*, AIR 2001 SC 24 : (2001) 1 SCC 182; *State of Punjab v. V.K. Khanna*, AIR 2001 SC 343 : (2001) 2 SCC 330.

57. *State of Uttar Pradesh v. C.S. Sharma,* AIR 1963 All 94; *Manihar Singh v. Supdt. of Police,* AIR 1969 Ass. 1; *Sreeramulu v. State of Andhra Pradesh*, AIR 1970 AP 114.

58. *State of Uttar Pradesh v. Nooh,* AIR 1958 SC 86 : 1958 SCR 595.

59. *Arjun Chaubey v. Union of India,* AIR 1984 SC 1356 : (1984) 2 SCC 578.

In *Kuldeep Singh*,[60] the Supreme Court held the inquiry officer as biased as he "did not sit with an open mind to hold an impartial domestic inquiry which is an essential component of natural justice as also that of "reasonable opportunity", contemplated by Art. 311(2) of the Constitution." The inquiry officer, said the Court, acted so arbitrarily in the matter and found the employee guilty in such a coarse manner that it became apparent that he was merely carrying out the command from some superior officer who perhaps directed to "fix him up."

Bias on the part of the disciplinary authority may vitiate disciplinary proceedings.[61] In *Kahanna*,[62] the Supreme Court has ruled that the test of bias is whether "there is a real danger of bias.

In the instant case, the Punjab Government issued a charge-sheet against Khanna who was the former Chief Secretary to the Punjab Government. Even before Khanna could reply the Chief Minister announced appointment of an inquiry officer to enquire into the charges against Khanna. This was held to show bias against Khanna. In Service Jurisprudence, the disciplinary authority has to apply its mind upon receipt of the reply to the charge-sheet as to whether a further inquiry is called for or not. Only, thereafter, the inquiry follows and not otherwise. But here the enquiry officer was appointed even before receiving the reply of the delinquest officer. From this fact and the tenor of the charge-sheet, the Court deduced that there was bias in the proceedings.

(d) ENFORCEABILITY OF DISCIPLINARY RULES

Often the rules framed under Art. 309 lay down procedure to be followed at inquiries conducted into charges against civil servants.

In the beginning, some of the High Courts took the view that the rules were merely in the nature of administrative instructions, meant for the guidance of inquiry officers, but were not mandatory and their breach would not create any cause of action in the accused servant. This approach was the result of the doctrine of pleasure which, these Courts held, was controllable not by the rules or law but by constitutional provisions only, and that the procedure at the inquiry was to be tested on the touchstone of Art. 311(2) and not by the rules.[63]

But, the Supreme Court's approach has been to treat the rules as binding and not merely directory in nature, and to insist that statutory disciplinary authorities should act within the rules.[64] For example, the Court held with reference to a service rule in Uttar Pradesh that itgave an option to a gazetted civil servant to request the Governor that his case be tried by an administrative tribunal and not otherwise, and the rule imposed an obligation on the Governor to grant such a request. The proceedings in the instant case were quashed as the servant's request to this effect was not granted and this violated the rule in question.[65]

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60. *Kuldeep Singh v. Commissioner of Police*, AIR 1999 SC 677, 684 : (1999) 2 SCC 10.

61. *State of Punjab v. V.K. Khanna*, AIR 2001 SC 343.
On bias, see, Ch. VIII, Sec. E (iv)(c).

62. AIR 2001 SC 343 : (2001) 2 SCC 330.

63. *Dr. Tribhuvan v. State of Bihar*,, AIR 1960 Pat. 116; *Krishnaswamy v. State of Kerala*, AIR 1960 Ker. 224; *Shankerlingam v. Union of India*, AIR 1960 Bom. 431; *Nripendra v. State of West Bengal*, AIR 1961 Cal. 1.

64. *State of Uttar Pradesh v. Babu Ram Upadhya*, AIR 1961 SC 751 : (1961) 2 SCR 679; *Ranendra Chandra v. Union of India*, AIR 1963 SC 1552 : (1964) 2 SCR 135.

65. *State of Uttar Pradesh v. Jogendra Singh*, AIR 1963 SC 1618 : (1964) 2 SCR 197.

Dismissal of a sub-inspector of police by the superintendent of police without observing the rules pertaining to inquiry made under the Police Act was held bad as mandatory rules had not been observed.[66] In another case, the Court held that Rule 55 of the Civil Services (Classification, Control and Appeal) Rules made it mandatory on the inquiry officer to hold an oral hearing, if the servant charged desired such an inquiry, and the denial of such an inquiry would introduce a fatal infirmity in the inquiry because of the contravention of the mandatory provisions of the rule. This requirement was held to be based plainly upon consideration of natural justice.[67]

Under the concept of 'reasonable opportunity' contained in Art. 311(2), the Courts resort to the concept of 'natural justice' which, in substance means minimal procedural safeguards to the accused person. Therefore, if the service rules provide more safeguards than the minimal, the rules are to be observed. If, however, the rules fall below the minimal safeguards, then the rules have to be supplemented with the natural justice concept.[68] The rules have to be considered in the light of the provisions of Art. 311(2) to find out whether the rules purport to provide reasonable opportunity of hearing to the delinquent employee.[69]

There were two separate rules for civil servants in Tamil Nadu—(i) general disciplinary rules, and (ii) for cases of corruption. The Supreme Court has ruled in the case noted below that the inquiry into corruption cases must be held under the relevant rules, and not under the general disciplinary rules. As both sets of rules have been framed under Art. 309, they both have equal force of law.[70]

In *State Bank of Patiala v. S.K. Sharma*,[71] a statutory regulation provided that copies of the statements of witnesses recorded earlier would be furnished to the delinquent employee. The copies of the statements were not supplied but he was advised to peruse, examine and take notes of the statements half an hour before the commencement of the inquiry. This meant, in substance, three days before the examination of these witnesses. The Supreme Court ruled that the said regulation contained a facet of natural justice and was designed to provide an adequate opportunity to the delinquent officer to cross-examine the witnesses effectively and thereby defend himself properly. However, in the circumstances of the case, the Court concluded that there was a substantial compliance with the regulation in question, though not a full compliance. On account of the said violation, it could not be said that the concerned employee did not receive a fair hearing.

In the instant case, the Court has considered the general question whether each and every violation of rules/regulations governing the inquiry would automatically vitiate the inquiry. The Court has laid down the following propositions concerning the impact of breach of these rules on the validity of the ultimate order:

(1) An order passed imposing punishment on an employee consequent upon a disciplinary inquiry held in violation of the rules/regulations, statutory provisions

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66. *State of Uttar Pradesh v. Babu Ram Upadhya*, AIR 1961 SC 751 : (1961) 2 SCR 679.
67. *Bombay v. Nurul Khan*, AIR 1966 SC 269 : (1965) 3 SCR 135.
68. *Kapur Singh v. Union of India*, AIR 1960 SC 493 : (1960) 2 SCR 569; *State of Uttar Pradesh v. C.S. Sharma*, AIR 1968 SC 158.
69. *Kuldeep Singh v. Commr. of Police*, AIR 1999 SC 677, 683 : (1999) 2 SCC 10.
70. *Secretary to T.N. Govt. v. D. Subramanyan Rajadevan*, AIR 1996 SC 2634 : (1996) 5 SCC 334.
71. AIR 1996 SC 1669 : (1996) 3 SCC 364.

governing such enquiries should not be set aside automatically. The Court should enquire whether—(a) the provision violated is of a substantive character, or (b) whether it is procedural in nature.

(2) A substantive provision has normally to be complied with and the theory of substantial compliance or the test of prejudice would not apply in such a case.

(3) Procedural provisions generally mean to afford a reasonable and adequate opportunity to the delinquent employee. These rules are generally conceived in his interest. Accordingly, violation of any and every procedural provision cannot be said to automatically vitiate the enquiry held or order passed.

(4) Except for the cases falling under the categories of 'no notice', 'no opportunity' and 'no hearing', any complaint of violation of procedural rules should be examined from the point of view of prejudice, *viz*., whether such violation has prejudiced the delinquent employee in defending himself properly and effectively.

(5) If it is found that he has been so prejudiced, appropriate orders will have to be made to repair and remedy the prejudice including setting aside the enquiry and/or the order of punishment. If no prejudice is caused, no interference is called for.

(6) There may be certain procedural provisions which are of a fundamental character, whose violation is by itself proof of prejudice. The Court may not insist on proof of prejudice in any such case.

(7) To repeat, the test is one of prejudice, *i.e*., whether a person has received a fair hearing considering all things. This aspect can also be looked at from the point of view of *mandatory* and *directory* provisions.

(8) In case of violation of a mandatory rule, it has to be ascertained whether the provision is conceived in the interest of the person proceeded against or in public interest. In the former case, he can waive the same either expressly or by his conduct. If he has waived the same, the order imposing punishment cannot be set aside. If he has not waived it, or the provision is such that cannot be waived, then the Court has to give appropriate directions. The ultimate test is always the same, *viz.*, the test of prejudice or the test of fair hearing, as it may be called.

(9) If the breach of a directory rule has occurred, the complaint of violation has to be examined from the standpoint of substantial compliance. The order passed can be set aside only where such violation has caused prejudice to the delinquent employee.

Where the inquiry is not governed by rules but by the general concept of natural justice, the Court has to distinguish between—(i) total violation of natural justice; and (ii) violation of a facet of natural justice. In other words, a distinction has to be made between—(i) no opportunity, and (ii) no adequate opportunity.

The first category comprises: 'no notice', 'no hearing' and 'no fair hearing'. In such a case, the order passed is invalid or a nullity. An example of this is to be found in the case noted below,[72] where the departmental inquiry was quashed as being "totally unsatisfactory" and "without observing the minimum required procedure for proving the charge."

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72. *Ministry of Finance v. S.B. Ramesh,* AIR 1998 SC 853 : (1998) 3 SCC 227.

In the second case, the matter has to be examined from the point of view of prejudice, *i.e.*, the Court has to see whether in the totality of circumstances, the delinquent employee has or has not received a fair hearing.

The Supreme Court has emphasized that the ultimate and overriding aim of *audi alteram partem* rule is to ensure a fair hearing and to ensure that there is no failure of justice.

The above propositions apply to the *audi alteram partem* rule and not to bias which has different tests.

(e) DEPARTMENTAL INQUIRY AND CRIMINAL PROSECUTION

Generally speaking, a criminal prosecution and a departmental inquiry, on the same set of facts, can both run simultaneously. The basis for this proposition is that proceedings in a criminal case and the departmental proceedings operate in distinct and different jurisdictional areas. In departmental proceedings, the charge relates to misconduct, and many factors, such as, enforcement of discipline or investigation into the level of integrity of the delinquent or other staff, operate in the mind of the disciplinary authority. Further, the standard of proof required in disciplinary proceedings is also different from that required in a criminal case. In departmental proceedings, the standard of proof is one of preponderance of the probabilities; in a criminal case, the charge has to be proved by the prosecution beyond reasonable doubt. Another consideration is that criminal cases drag on for long and disciplinary proceedings should not be delayed unduly in the interest of good administration.

In *Meena*,[73] there were charges of misappropriation of public funds by the respondent who was a member of the IAS. Disciplinary proceedings were initiated against him in 1992. In 1993, criminal proceedings were initiated against him. The question arose whether the disciplinary inquiry against the respondent be stayed pending the criminal trial when the charges in the disciplinary proceedings and charges in criminal case were based on the same facts and allegations. The Supreme Court answered in the negative.

In *Nelson*,[74] the Supreme Court rejected the contention that disciplinary proceedings could not be continued in the face of the acquittal in the criminal case and held that the nature and scope of the criminal case are very different from those of a departmental disciplinary proceedings and an order of acquittal, therefore, cannot conclude departmental proceedings. This is so because in a criminal case, the charge has to be proved beyond reasonable doubt while in departmental proceedings the standard of proof for proving the charge is preponderance of probabilities.

The *Nelson* case was followed in *Gopalan*.[75] The respondent who was employed as sub-post master was put on trial for the offences under ss. 407, 467 and 477(A), I.P.C. In the meantime, departmental proceedings were also initiated for these offences as well as for misappropriation. In the departmental proceedings, the charges were held proved and he was ordered to be compulsorily retired. Later, he was acquitted of the criminal charge on benefit of doubt as the offences

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73. *State of Rajasthan v. B.K. Meena*, AIR 1997 SC 13 : (1996) 6 SCC 417.
74. *Nelson Motis v. Union of India*, AIR 1992 SC 1981 : (1992) 4 SCC 711.
75. *Senior Supdt. of Post Offices, Pathamanthitta v. A. Gopalan*, AIR 1999 SC 1514 : (1997) 11 SCC 239.

were not established beyond reasonable doubt. It was argued that in view of his acquittal by the criminal Court, the finding of the inquiry officer holding him guilty of those charges could not be sustained. The Supreme Court rejected the contention, citing *Nelson*, on the ground that the two types of proceedings are different from each other. The disciplinary proceedings were based not only on the offence tried by the criminal Court but on an additional charge also, *viz.*, misappropriation. The second charge was held established in departmental proceedings, and the punishment of compulsory retirement was imposed on him. Therefore, an acquittal in the criminal case, could not conclude the departmental proceedings.

The Courts have however made one exception to the above proposition, *viz.*, where the departmental proceedings and the criminal proceedings are both based on the same set of facts and the evidence in both the proceedings is common without there being a variance, and the criminal charge is of grave nature, in such a situation, the Courts have preferred that the departmental proceedings be suspended pending the final outcome of the criminal prosecution. After taking note of the previous cases,[76] on this point, the Supreme Court has laid down the following propositions in *Anthony*:[77]

(1) Departmental proceedings and proceedings in a criminal case can proceed simultaneously as there is no bar in their being conducted simultaneously, though separately.

(2) If the departmental proceedings and the criminal case are based on identical and similar set of facts and the charge in the criminal case against the delinquent employee is of a grave nature which involves complicated questions of law and fact, it would be desirable to stay the departmental proceedings till the conclusion of the criminal case.

(3) Whether the nature of a charge in a criminal case is grave and whether complicated questions of fact and law are involved in that case, will depend upon the nature of the offence and the nature of the case launched against the employee on the basis of evidence and material collected against him during investigation or as reflected in the charge sheet.

(4) The factors mentioned in (2) and (3) above cannot be considered in isolation to stay the departmental proceedings but due regard has to be given to the fact that the departmental proceedings cannot be unduly delayed.

(5) If the criminal case does not proceed, or its disposal is being unduly delayed, the departmental proceedings, even if they were stayed on account of the pendency of the criminal case, can be resumed and proceeded with so as to conclude them at an early date, so that if the employee is found not guilty his honour may be vindicated and in case he is found guilty, administration may get rid of him at the earliest.

In *Anthony*,[78] the appellant was employed as a security officer at the Kolar Gold Fields. In a raid on his house (according to the police version), some gold

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76. *Jang Bahadur Singh v. Brij Nath Tiwari,* AIR 1969 SC 30 : (1969) 1 SCR 134; *Kusheshwar Dubey v. Bharat Coking Coal Co. Ltd.,* AIR 1988 SC 2118 : (1988) 4 SCC 319; *Depot Manager, APSRTC v. Mohd. Yousuf Khan,* AIR 1997 SC 2232 : (1997) 2 SCC 699.

77. *M. Paul Anthony v. Bharat Gold Mines Ltd.,* AIR 1999 SC 1416 at 1422 : (1999) 3 SCC 679.

78. *Ibid.*

sand was recovered. He was suspended from service and a charge sheet issued to him on June 4, 1985. A criminal prosecution was also launched against him. Simultaneously departmental proceedings were also launched against him and he was held guilty and dismissed from service on 7-6-1986. On 3rd February, 1987, the appellant was acquitted by the criminal Court with the categorical finding that the prosecution had failed to establish its case. Thereafter, the appellant requested for reinstatement but he was informed that as he had already been dismissed from service, the judgment passed by the magistrate did not matter.

The Supreme Court ruled in *Anthony* that the findings recorded by the inquiry officer were based on the evidence of the police officers who had raided his house. The criminal case and the departmental proceedings were based on the same set of facts, *viz.*, "the raid conducted at the appellant's residence and recovery of incriminating articles therefrom. "At the departmental inquiry, the charges framed against *Anthony* were sought to be proved by the evidence of the same police officers who were examined in the criminal Court. On examination of the same evidence, while the inquiry officer upheld the charge, the Court held, on the other hand, that no search was ever made and nothing was recovered from his residence, and the Court thus threw out the entire prosecution case and acquitted the appellant. The Supreme Court thus observed:[79]

> "In this situation, therefore, where the appellant is acquitted by a judicial pronouncement with the finding that the 'raid and recovery' at the residence of the appellant were not proved, it would be unjust, unfair and rather oppressive to allow the findings recorded at the *ex parte* departmental proceedings, to stand."

The Court stated that since the facts and the evidence in both the proceedings were the same without there being any iota of difference, the distinction, which is usually drawn as between the departmental proceedings and the criminal case on the basis of approach and burden of proof, would not apply to the instant case.

The appellant was ordered to be reinstated forthwith and was paid the entire arrears of salary since the date of his suspension.

H. EXCLUSION OF ART. 311(2)

The second proviso to Art. 311(2), in clauses (*a*), (*b*) and (*c*) : lays down three situations where Art. 311(2) does not apply. Holding of inquiry by informing the government servant of the charges and giving reasonable opportunity of being heard is the rule and dispensing therewith is an exception.[80] These clauses are as follows:

(a) Where a civil servant is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge [Art. 311(2)(a)].

The Supreme Court has emphasized that under Art. 311(2)(*a*), the disciplinary authority is to regard the conviction of the concerned civil servant as sufficient proof of misconduct on his part. The authority is to decide whether conviction demands the imposition of any penalty and, if so, what penalty. For this purpose,

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79. *Ibid*, at 1425.
80. *Sudesh Kumar v. State of Hryana*, (2005) 11 SCC 525.

the authority has to take into consideration the judgment of the criminal Court, the entire conduct of the civil servant, the gravity of the offence, the impact of the offence on the administration, whether the offence was of a technical or trivial nature, and the extenuating circumstances, if any. This the disciplinary authority has to do *ex parte* and without giving a hearing to the concerned civil servant.

Action under Art. 311(2)(*a*) is to be taken only when the conduct which has led to his conviction is such that it deserves any of the three major punishments mentioned in Art. 311(2). The power has to be exercised "fairly, justly and reasonably". No hearing need be given while imposing the penalty after conviction on a criminal charge, but "the right to impose a penalty carries with it the duty to act justly".[81] For example, a government servant convicted for parking his scooter in a no-parking area cannot be dismissed from service.

However, if the Court finds that the penalty imposed by the impugned order is arbitrary, or grossly excessive, or out of all proportion to the offence committed, or not warranted by the facts and circumstances of the case, or the requirements of that particular government service, the Court will strike down the order. One such case is *Shankar Dass v. India*[82] where the order imposing the penalty of dismissal was set aside as the Court found that in the fact-situation, the penalty of dismissal from service was whimsical. The Supreme Court emphasized that the power under cl. (a) of the second proviso to Art. 311(2) must be exercised "fairly, justly and reasonably" and that "the right to impose a penalty carries with it the duty to act justly."

A civil servant hit his superior officer with an iron rod leading to his conviction under s. 332, I.P.C., but he was put on probation instead of being sentenced to imprisonment. The disciplinary authority then removed him from service. The Supreme Court ruled that the punishment inflicted on the civil servant cannot be said to be excessive or arbitrary in the fact situation.[83]

A question of importance has been raised in relation to Art. 311(2)(*a*), *viz.*, after conviction by the lower Court, the concerned employee may appeal to a higher Court against his conviction. Can he be dismissed from service after conviction pending his appeal, or can he be dismissed immediately after conviction irrespective of his appeal?

The Supreme Court has answered this question in *Nagoor Meera*.[84] Art. 311(2)(*a*) speaks of "conduct which has led to his conviction on a criminal charge". It does not speak of sentence or punishment awarded. The Court has ruled that the appropriate course in such cases would be to take action as soon as a government servant is convicted of a criminal charge and not to wait for the appeal or revision against conviction. If, however, he is acquitted on appeal or other proceeding, the order can always be revised. If the government servant is reinstated, he will be entitled to all the benefits to which he would have been entitled to had he continued in service.

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81. *Shankar Dass v. Union of India,* AIR 1985 SC 772 : (1985) 2 SCC 358.
82. *Ibid.*
83. *Tulsiram Patel*, *infra*, footnote 87.
84. *Dy. Director of Collegiate Education (Administration), Madras v. S. Nagoor Meera,* AIR 1995 SC 1364 : (1995) 3 SCC 377.

The Court disapproved of the suggestion that the government servant ought not to be dismissed till the appeal, revision or other remedies are over as that would mean continuing in service a person who has been convicted of a serious offence by a criminal Court.

In *Nagoor Meera*,[85] a government servant was convicted on a charge of corruption and was sentenced to undergo rigorous imprisonment for one year in addition to a fine of Rs. 5,000/-. On appeal, the High Court suspended his sentence pending disposal of his appeal. The Supreme Court ruled that merely because the sentence was suspended and he was released on bail, the conviction would not cease to be operative. As he was found guilty of corruption by a criminal Court, he could be dismissed from service; it would not be advisable to retain him in service. If his appeal succeeded, the matter could always be reviewed in such a manner that he suffered no prejudice.

An employee was convicted of an offence under the Prevention of Corruption Act and was sentenced to imprisonment for three years. Accordingly, he was dismissed from service. He then appealed to the High Court which suspended the sentence pending final disposal of the appeal and released him on bail. The Supreme Court ruled in *Union of India v. Ramesh Kumar*,[86] that suspension of the sentence does not wipe out conviction which continues and is not obliterated. Accordingly, his dismissal from service was not affected and so it could not be quashed.

(b) Where an authority empowered to dismiss or remove a civil servant or reduce him in rank is satisfied that, for some reason to be recorded by it in writing, it is not reasonably practicable to hold such inquiry [Art. 311(2)(b)].

The important thing to note is that this clause applies only when the conduct of the government servant is such as he deserves the punishment of dismissal, removal or reduction in rank. Before denying a government servant his constitutional right to an inquiry, the paramount consideration is whether the conduct of the government servant is such as justifies the penalty of dismissal, removal or reduction in rank.

Explaining the scope of the clause, the Supreme Court has said in *Tulsiram Patel*:[87] "... whether it was practicable to hold the inquiry or not must be judged in the context of whether it was reasonably practicable to do so. It is not a total or absolute impracticability which is required by clause (b). What is requisite is that the holding of the inquiry is not practicable in the opinion of a reasonable man taking a reasonable view of the prevailing situation."

The reasonable practicability of holding an inquiry is a matter of assessment to be made by the disciplinary authority. The disciplinary authority is the best judge of the situation.[88]

The Court has explained that it would not be reasonably practicable to hold the inquiry where an atmosphere of violence or of general indiscipline and insubordination prevails. It is immaterial whether the concerned government servant himself is or is not a party to bringing about such an atmosphere. It is the disci-

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85. *Ibid.*
86. AIR 1997 SC 3531 : (1997) 7 SCC 514.
87. *Union of India v. Tulsiram Patel,* AIR 1985 SC 1416 : (1985) 3 SCC 398.
88. *Kuldip Singh v. State of Punjab,* AIR 1997 SC 79 : (1996) 10 SCC 659.

plinary authority which is the best Judge of the "reasonable practicability of holding an inquiry.

The decision of the disciplinary authority is final [Art. 311(3)], provided it records the reasons in writing for denying the inquiry to the concerned civil servant. But a disciplinary authority is not expected to dispense with a disciplinary inquiry lightly or arbitrarily, or out of ulterior motives, or merely in order to avoid the holding of an inquiry, or because the department's case against the government servant is weak and must fail. In such a case, the Court can strike down the order dispensing with the inquiry as also the order imposing penalty.[89]

Principles of Administrative Law regarding discretionary decisions are applicable in this area as well.[90] The Supreme Court has emphasized that the reasons for dispensing with the inquiry must be *germane* to the issue, viz., dispensing with the inquiry. While the Court cannot enquire into the adequacy or sufficiency of the reasons, it can examine the reasons *ex facie*, and if they are not *germane*, it can hold that the pre-requisite for the exercise of power having not been satisfied, the exercise of power was bad or without jurisdiction.[91] The disciplinary authority has to reach this decision *ex parte*.

(c) Where the President or the Governor, as the case may be, is satisfied that, in the interest of the security of the State, it is not expedient to give to a civil servant such an opportunity [Art. 311(2)(c)].

While under clause (b) above, the satisfaction has to be that of the disciplinary authority, under clause (c) it is that of the President or the Governor, as the case may be. The satisfaction of the President or the Governor must be with respect to the expediency or in expediency of holding an inquiry in the interest of the security of the state. Security of state being paramount, all other interests are subordinated to it. Further the satisfaction of the President as provided for in sub-clause (c) of Clause (2) of Art. 311 must be the satisfaction of the President himself and not of any delegated authority by reason of the GOI (Allocation of Business) Rules 1961 made under Art. 77(3) of the Constitution relying on the earlier pronouncement of a Constitution Bench of the Supreme Court in *Jayantilal*.[92]

The satisfaction mentioned here is subjective and is not circumscribed by any objective standards.[93] Whereas under Art. 311(2)(b), as stated above, the competent authority is required to record in writing the reason for its satisfaction that it is not reasonably practicable to hold an inquiry, there is no such requirement for recording the reason in Cl. (c). In this connection, the Supreme Court has observed in *Tulsiram*:

> "The satisfaction so reached by the President or Governor must necessarily be a subjective satisfaction. Expediency involves matters of policy. Satisfaction may be arrived at as a result of secret information received by the Government about the brewing danger to the interest of the security of the State and like

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89. *Arjun Chaubey v. Union of India*, AIR 1984 SC 1356 : (1984) 2 SCC 578; *Tulsiram Patel, supra*, footnote 87.
90. JAIN, *A TREATISE ON ADM. LAW*, I, Ch. XIX.
91. *Workmen, Hindustan Steel Ltd. v. Hindustan Steel Ltd.*, AIR 1985 SC 251 : 1984 Supp SCC 554.
92. AIR 1964 SC 648, 656 : AIR 1971 SC 1547.
93. *Jagdish v. State of Bombay*, AIR 1958 Bom 283; *Mohd. Hyder v. State of Andhra Pradesh*, AIR 1960 AP 479.

> matters. There may be other factors which may be required to be considered, weighed and balanced in order to reach the requisite satisfaction whether holding an inquiry would be expedient or not…."

In *Bk. Sardari Lal v. Union of India*,[1] the Supreme Court ruled that under this constitutional provision, 'satisfaction' must be that of the President or Governor personally and that that function could not be allocated or delegated to any one else. But this view was overruled in *Shamsher Singh*,[2] and *Sripati Ranjan*.[3] Thus, 'personal satisfaction' of the President or the Governor is not necessary to dispense with the inquiry. Such 'satisfaction' may be arrived at by any one authorized under the Rules of Business.[4] It is the satisfaction of the President or the Governor in the constitutional sense.

Under (c), enquiry can be dispensed with only when it is not expedient to hold it 'in the interest of the security of the state.' 'Security of state' may comprise a situation of disobedience and insubordination on the part of members of the police force. As the Supreme Court has clarified in *Tulsiram Patel*,[5] the question is not whether the security of the state has been affected or not, for the expression used in Cl. (c) is "in the interest of the security of the state". The interest of the security of the state may be affected by actual act, or even the likelihood of such acts taking place. So, the Court has observed: "What is required under clause (c) is not the satisfaction of the President or the Governor ....., that the interest of the security of the state is or will be affected but his satisfaction that in the interest of the security of the state, it is not expedient to hold an inquiry as contemplated by Article 311(2)." This means that the satisfaction of the President/Governor must be with respect to the expediency or inexpediency of holding an inquiry "in the interest of the security of the state".

The scope of judicial review under Cl. (c) is much more restrictive than under Cl. (b). The scope of judicial review under (c) has thus been defined by the Supreme Court in these words:[6]

> "….an order passed under Cl. (c) of the second proviso to Art. 311(2) is subject to judicial review and its validity can be examined by the Court on the ground that the satisfaction of the President or the Governor is vitiated by *mala fides* or is based on wholly extraneous or irrelevant grounds…."

The Government must disclose to the Court the nature of the activities of the employee on the basis of which the satisfaction of the President or the Governor was arrived at for the purpose of passing an order under Art. 311(2)(c) "so that the Court or tribunal may be able to determine whether the said activities could be regarded as having a reasonable nexus with the interest of the security of the state." In the absence of any indication about the nature of the activities, it would not be possible for the Court to determine whether the satisfaction was arrived at on the basis of relevant consideration. The government is obliged to place before the Court relevant material on the basis of which the satisfaction was arrived at subject to a claim of privilege under Ss. 123 and 124 of the Evidence Act.

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1. AIR 1971 SC 1547 : (1971) 1 SCC 411.
2. *Supra*, Sec. C(c).
3. *Supra*, Sec. C(c).
4. *Supra*, Chs. III and VII.
5. *Supra*, footnote 87.
6. *A.K. Kaul v. Union of India*, AIR 1995 SC 1403, 1414-1415 : (1995) 4 SCC 73.

The Supreme Court has clarified in *Union of India v. Tulsiram Patel*[7] that in none of the situations described in (a), (b), (c) above, there is to be held any inquiry or hearing as Art. 311(2) does not apply. The second proviso to Art. 311(2) has been inserted in the Constitution "as a matter of public policy and in public interest and for public good." "The second proviso expressly mentions that clause (2) shall not apply where one of the clauses of that proviso becomes applicable. This express mention excludes everything that clause (2) contains and there can be no scope for once again introducing the opportunities provided by clause (2) or any of them into the second proviso."

The Supreme Court has also refused to imply natural justice therein because it is expressly excluded by the opening words of the second proviso. Art. 14 cannot be invoked to imply natural justice in any of these three situations because Art. 311(2) is expressly excluded by the opening words of the second proviso. However, if any of the above three clauses is applied on extraneous grounds or a ground having no relation to the situation envisaged in that clause, the action in so applying it would be *mala fide*, and, therefore, void. "In such a case the invalidating factor may be referable to Art. 14."[8]

The Court has ruled that even the service rules made under Art. 309 cannot liberalize the exclusionary effect of the second proviso. The reason is that the rule-making power under Art. 309 is subject to Art. 311. Any rule contravening Art. 311(1) or 311(2) would be invalid.

To reach the above conclusion, the Court has overruled its earlier decision in *Challappan*[9] from which it could be inferred that under the three above clauses, a limited enquiry ought to be held on the question of nature and extent of the penalty to be imposed. Also, *Challappan* raised the possibility of service rules conferring a right of hearing on a delinquent government servant in the three situations mentioned in (a), (b), (c) above. On both these grounds, the Court has now overruled *Challappan*.

Rules cannot do what the second proviso to Art. 311(2) denies. Rules cannot restrict the exclusionary impact of the second proviso to Art. 311(2) "because that would be to impose a restriction upon the pleasure under Art. 310(1) which has become free of the restrictions placed upon it by clause 2 of Art. 311 by reason of the operation of the second proviso to that clause." Also, the Court has now ruled: "Considerations of fair play and justice requiring a hearing to be given to a government servant with respect to the penalty proposed to be imposed upon him do not enter into the picture when the second proviso to Art. 311(2) comes into play and the same would be the position in the case of a service rule reproducing the second proviso in whole or in part and whether the language used is identical with that used in the second proviso or not."

The *Tulsiram Patel* ruling has been applied in the following fact-situations under Art. 311(2)(b):

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7. *Supra*, footnote 87.

8. On Art. 14 and Administrative Process, see, *supra*, Ch. XXI, Sec. D.
Also see, JAIN, *A TREATISE ON ADM. LAW*, Ch. XVII.

9. *Divisional Personnel Officer, S. Rly. v. T.R. Chellappan*, (1976) 1 SCR 783 : AIR 1975 SC 2216.

(*i*) Certain employees of the Research and Analysis Wing (RAW) were dismissed from service under Art. 311(2), second proviso, clause (b), without holding an inquiry. These orders were challenged as *mala fide*. It was argued that the reasons given therein for dispensing with the inquiry were not true and that an inquiry was reasonably practicable. The facts were that a large number of employees of RAW had been indulging in various acts of misconduct, indiscipline, intimidation and insubordination and had resorted to coercion, intimidation and incitement of other fellow employees.

The said employees were dismissed without an inquiry for the following reasons. Because of coercion and intimidation by them, no witness would co-operate if an inquiry were held against them and, therefore, the concerned disciplinary authority was satisfied that the circumstances were such that it was not reasonably practicable to hold a regular enquiry.

Applying the *Tulsiram Patel* ruling to the facts of the case, the Supreme Court upheld the impugned order of dismissal in *Satyavir Singh v. Union of India*[10] saying that clause (b) of the second proviso to Art. 311 was properly applied in the facts of the case. As held in *Tulsiram Patel*, "it will not be reasonably practicable to hold an inquiry where an atmosphere of violence or of general indiscipline and insubordination prevails." In the situation then prevailing, prompt and urgent action was required to bring the situation under control.

(*ii*) A large number of the members of the Central Industrial Security Force (CISF) stationed at Bokaro Steel Plant staged an agitation which assumed an aggravated form for recognition of their association. They indulged in agitational acts and violent indiscipline so much so that the army had to be called out. There was exchange of fire between the army and the CISF personnel resulting in a number of deaths. A large number of the members of the CISF were dismissed by applying cl. (b) of the second proviso to Art. 311(2). It was believed that any inquiry under Art. 311(2) would be dangerous and counter-productive. The Court held that clause (b) was properly applied in the fact-situation.

(*iii*) Railway employees staged an illegal strike. A number of employees belonging to the all-India loco-running staff were dismissed by applying clause (b) as they were concerned in incidents in furtherance of the strike. Railway services being vital to the country, railway is a public utility service. The Court ruled that clause (b) was properly applied in their case.

(*iv*) Members of the Madhya Pradesh Police Force stationed at the annual mela at Gwalior indulged in violent behaviour and rioting. Some of the active leaders were dismissed by applying clause (c). The orders were issued by the Governor on the advice of the Council of Ministers. Police are the guardians of law and order but they themselves turned into law breakers.

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10. (1985) 4 SCC 252 : AIR 1986 SC 555.

The Court ruled that clause (c) was rightly applied as the situation was such that prompt and urgent action was necessary and holding of an inquiry into the conduct of the dismissed members of the police force would not have been expedient in the interest of the security of the State.

(*v*) A sub-inspector of police was dismissed by the Senior Superintendent of Police after dispensing with the inquiry invoking proviso (b) to clause (2) of Art. 311. The order of dismissal recited that "it is not reasonably practicable to hold an inquiry" against the said sub-inspector "for the reason that the witnesses cannot come forward freely to depose against him in a regular departmental inquiry."

The order was challenged but the same was upheld by the Supreme Court. After looking into the facts of the case, the Court concluded that the Senior Superintendent of Police "cannot be said to be not justified in holding that it is not reasonably practicable to hold an inquiry against the sub-inspector."[11]

(*vi*) A head constable of police in the service of the Punjab Government was dismissed from service without holding an enquiry as contemplated by Art. 311(2). The Senior Superintendent of Police invoked Art. 311(2)(b) dispensing with the inquiry on the ground that it was not reasonably practicable to hold such an inquiry. The constable had links with terrorists, was mixed up with them and was supplying secret information to them. It was impossible to hold an inquiry as nobody would come forward to depose against such "militant police official". He was also preparing to murder senior police officials. In a confession, he had admitted his links with terrorists. The Court found these reasons for dispensing with the enquiry quite acceptable and ruled that the satisfaction not to hold the inquiry was not unjustified or unwarranted.[12]

(*vii*) Insofar as Cl. (b) is concerned, two conditions must be satisfied to sustain action thereunder, *viz.*, (i) there must exist a situation which renders holding of any inquiry "not reasonably practicable"; and (ii) the disciplinary authority must record in writing its reasons in support of its satisfaction and other surrounding circumstances. This means that the question of reasonable practicability must be judged in the light of the circumstances prevailing at the date of the passing of the order.

The decision not to hold the enquiry cannot rest solely on the *ipse dixit* of the concerned authority. It is incumbent on the concerned authority when the decision not to hold the inquiry is questioned in a Court, to show that its 'satisfaction' is based on certain objective facts and is not the outcome of the whim or caprice of the concerned officer. "Clause (b) of the second proviso to Art. 311(2) can be invoked only when the authority is satisfied from the material placed before

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11. *People's Union for Civil Liberties v. Union of India,* AIR 1997 SC 1203 : (1997) 3 SCC 433.
12. *Kuldip Singh v. State of Punjab,* AIR 1997 SC 79 : (1996) 10 SCC 659.

him that it is not reasonably practicable to hold a departmental inquiry."

In *Jaswant Singh*,[13] the Court quashed the order of dismissal as the "subjective satisfaction" dispensing with the inquiry under Art. 311(2)(b) was not fortified by any independent material to justify the dispensing with the inquiry envisaged by Art. 311(2).

(*viii*) An inquiry was dispensed with and the respondent removed from service. The reason for dispensing with the inquiry was that the witnesses appearing against the employee concerned "are likely to suffer personal humiliation and insults thereafter and even they and their family members may become targets of acts of violence".

The Supreme Court considered this reason for dispensing with the inquiry as "totally irrelevant and totally insufficient in law." "There is total absence of sufficient material or good grounds for dispensing with the inquiry."[14]

The interpretation of the Second Proviso to Art. 311(2) now adopted by the Supreme Court in *Tulsiram Patel* no doubt strengthens the hands of the government to take disciplinary action against its servants in cases of grave misconduct. As MADON, J., delivering the majority opinion of the Court said, it could not possibly have been the intention of the Constitution-makers to grant immunity from summary dismissal to dishonest or corrupt government servants so that they may continue in service for months together "at public expense and to public detriment." But, at the same time, care has been taken by the Court to ensure that the power is not misused through a limited judicial review and departmental appeal.

The Supreme Court has upheld the order passed under Art. 311(2)(c) *inter alia* in the following situations.

(i) In *A.K. Kaul v. Union of India*.[15] The appellant was employed as Deputy Central Intelligence Officer in the Intelligence Bureau in the Ministry of Home Affairs, Govt. of India. The employees in the Intelligence Bureau formed an Association and the appellant was elected as its general secretary. He was dismissed from service without holding an enquiry under Art. 311(2)(c). The President was satisfied, said the order, that "in the interest of the security of the State it is not expedient to hold an inquiry" in his case. Having regard to the facts and circumstances of the case, the Court refused to hold that the order was *mala fide* or was based on wholly extraneous or irrelevant grounds.

(ii) In *Union of India v. Balbir Singh*,[16] the respondent who was one of the accused in the assassination of Prime Minister Indira Gandhi wad dismissed from Delhi Police without holding an inquiry. The dismissal was based on the recommendations of a High-Powered Committee of advisors constituted according to the directive of the Central Government. The Committee considered information and documents collected by the Intelligence Bureau having a bearing on the security of the state.

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13. *Jaswant Singh v. State of Punjab*, AIR 1991 SC 385 : (1991) 1 SCC 362.
14. *Chief Security Officer v. Singasan Rabi Das*, AIR 1991 SC 1043 : (1991) 1 SCC 729.
15. AIR 1995 SC 1403 : (1995) 4 SCC 73.
16. AIR 1998 SC 2043 : (1998) 5 SCC 216.

The Court upheld the dismissal observing that this was not a case where there was absolutely no material relating to the activities of the respondent prejudicial to the security of state. Though the respondent was acquitted in criminal trial against him, yet the material placed before the committee was not confined to the assassination only; it related to various other activities of the respondent as well, which the authorities considered as prejudicial to the security of the state and, therefore, acquittal did not make any difference to the order which was passed by the President on the totality of material which was before the authorities long prior to the conclusion of the criminal trial.

Article 311(3) runs as follows:

> "If, in respect of any such person as aforesaid, a question arises whether it is reasonably practicable to hold such inquiry as is referred to in Clause (2), the decision thereon of the authority empowered to discuss or remove such person or to reduce him in rank shall be final."

This finality clause refers mainly to the situation covered by Art. 311(2)(b), proviso II, mentioned above. The Supreme Court has however ruled that Art. 311(3) does not completely bar judicial review of the action taken under Cls. 2(b) of Art. 311, second proviso.

The Supreme Court has commented on this aspect in *Tulsiram* in the following words:

> "The finality given by clause (3) of Art. 311 to the disciplinary authority's decision that it was not reasonably practicable to hold the inquiry is not binding upon the Court. The Court will also examine the charge of *mala fides*, if any, made in the writ petition. In examining the relevancy of the reasons, the Court will consider the situation which according to the disciplinary authority made it come to the conclusion that it was not reasonably practicable to hold the inquiry. If the Court finds that the reasons are irrelevant then the recording of its satisfaction by the disciplinary authority would be an abuse of power conferred upon it by clause (b) and would take the case out of the purview of that clause and the impugned order of penalty would stand invalidated. In considering the relevancy of the reasons given by the disciplinary authority, the Court will not however, sit in judgment over them, like a Court of first appeal."

The Supreme Court has reiterated the proposition in *Jaswant Singh v. State of Punjab*,[17] that in spite of Art. 311(3) the "finality can certainly be tested in a Court of law and interfered with if the action is found to be arbitrary or *mala fide* or motivated by extraneous considerations or merely a ruse to dispense with the inquiry.[18]

Even the President's satisfaction under Cl. (c), mentioned above, can be examined by the Court on such grounds as *mala fides*, or being based wholly on extraneous and/or irrelevant grounds.

Even if some of the material on which the action is taken is found to be irrelevant, the Court would still not interfere so long as there is some relevant material sustaining the action. The Court will not question the truth or correctness of the

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17. AIR 1991 SC 385 : (1991) 1 SCC 362.

18. Also see, *Satyavir Singh v. Union of India*, AIR 1986 SC 555 : (1985) 4 SCC 252; *Shivaji Atmaji Sawant v. State of Maharashtra*, AIR 1986 SC 617 : (1986) 2 SCC 112; *Ikramuddin Ahmad Borah v. Supdt. of Police, Darrang*, AIR 1988 SC 2245 : 1988 Supp SCC 643; *Kuldip Singh v. State of Punjab*, AIR 1997 SC 79, 82 : (1996) 10 SCC 659.

material nor will it go into the question of adequacy of the material; the Court will not substitute its own opinion for that of the President.

The ground of *mala fides* includes *inter alia* situations where the order is found to be a clear case of abuse of power or fraud on power. The Court does not lightly presume abuse or misuse of power as it will make allowance for the fact that the President and the Council of Ministers are the best judge of the situation and that they possess information and material and the Constitution trusts their judgment in the matter, but still they do not become the final arbiter in the matter or that their opinion is conclusive.[19]

The Supreme Court has ruled in *Balbir*,[20] as regards clause (c) that the Court can examine the circumstances on which the satisfaction of the President/Governor is based. If the Court finds that the said circumstances have no bearing whatsoever on the security of the state, the Court can hold that the satisfaction of the President/ Governor which is required for passing such an order has been vitiated by wholly extraneous or irrelevant considerations.

I. OTHER INCIDENTS OF GOVERNMENT SERVICE

Article 311(2) refers to three incidents of government service, *viz.*, dismissal, removal and reduction in rank. But there are many other incidents of government service besides the above mentioned three incidents. An effort is made to throw some light on these other incidents of government service which fall outside the purview of Art. 311(2).[21]

It is the Executive which lays down the conditions of service subject to any law made by the Legislature. The Executive can prescribe the conditions of service subject to any law made by the Legislature and the Executive can do so either by making rules under the proviso to Art. 309[22], or by issuing instructions in exercise of its executive power.

The function of the Courts in the area of Service Law is to ensure rule of law and to ensure that the Executive acts fairly and gives a fair deal to its employees consistent with Arts. 14 and 16. The state ought not to exploit its employees. The Courts ensure that the Executive observes the statutory provisions, rules and instructions, if any, regulating the conditions of service of government employees.[23]

(a) APPOINTMENTS

An authority has freedom to devise procedure for selecting candidates for posts under it, but it does not mean and imply that the employer can do so at the cost of "fairplay, good conscience and equity."[24]

It is the prerogative of the Executive to create and abolish a post. Demarcation of cadres or gradation in the same cadre on higher and lower qualifications is a

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19. *S.R. Bommai v. Union of India,* AIR 1994 SC 1918 : (1994) 3 SCC 1; *A.K. Kaul v. Union of India, supra,* footnote 15.
20. *Union of India v. Balbir Singh,* AIR 1998 SC 2043 : (1998) 5 SCC 216.
21. This portion may be read along with the material in Ch. XXIII, Sec. B, *supra,* under Art. 16.
22. On Art. 309, see, *supra,* Sec. B.
23. *State of Haryana v. Piara Singh,* AIR 1992 SC 2130 : (1992) 4 SCC 118.
24. *Praveen Singh v. State of Punjab,* AIR 2001 SC 152 : (2000) 8 SCC 633.

common phenomenon for fixing hierarchy in service. It is a valid basis of classification.[25]

When the Government proposes to constitute a new service, it is fully within its competence to decide as a matter of policy the sources from which the personnel required for manning the service are to be drawn.[26]

The State indisputably, subject to the constitutional limitations having regard to its power contained in the proviso appended to Article 309 of the Constitution of India, is entitled to frame rules laying down the mode and manner in which vacancies are to be filled up. If the State has the legislative competence to frame rules, indisputably, it can issue governmental orders in exercise of its power under Article 162 of the Constitution of India.[27]

The selection committee functions according to the Service Rules. It has no inherent jurisdiction to lay down the norms for selection nor can such power be assumed by necessary implication.[28]

The Government can create civil posts and fill them up according to executive instructions consistent with Arts. 14 and 16.[29] Existence of statutory rules is not necessary for the purpose. But once the rules for recruitment have been made, the appointments have to be made according to the rules. The executive power can only be used to supplement, and not supplant, the rules.

Under Art. 320, it is not necessary for the Government to make all appointments through the Public Service Commission. [30] But the procedure prescribed for the purpose should be just, fair and reasonable. An opportunity is to be given to eligible persons by inviting applications through public notifications.

Appointments made in violation of the recruitment rules violate Arts. 14 and 16.[31] The Supreme Court has insisted again and again that the recruitment rules made under Art. 309 must be followed strictly. If these rules are disregarded, it will open a back-door for illegal recruitment without limit.[32] Recently, the Supreme Court has observed:[33]

> "The decisions of this Court have recently been requiring strict conformity with the recruitment rules for direct recruits and promotees. The view is that there can be no relaxation of the basic or fundamental rules of recruitment."[34]

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25. *State of Mysore v. P. Narasinga Rao*, AIR 1968 SC 349 : (1968) 1 SCR 407; *Union of India v. Dr. (Mrs.) S.B. Kohli*, AIR 1973 SC 811 : (1973) 3 SCC 592; *State of Jammu & Kashmir v. Triloki Nath Khosa*, AIR 1974 SC 1 : (1974) 1 SCC 19; *K. Narayanan v. State of Karnataka*, AIR 1994 SC 55 : 1994 Supp (1) SCC 44.

26. *S.S. Moghe v. Union of India*, AIR 1981 SC 1495.

27. *Andhra Pradesh Public Service Commission v. Baloji Badhavath*, (2009) 5 SCC 1 : (2009) 5 JT 563.

28. *Ramachandra Iyer v. Union of India*, AIR 1984 SC 541; *Umesh Chandra Shukla v. Union of India*, AIR 1985 SC 1351 : (1985) 3 SCC 721; *Durgacharan Misra v. State of Orissa*, AIR 1987 SC 2267 : (1987) 4 SCC 646.

29. See, *supra*, Chs. XXI and XXIII.

30. For Art. 320, see, *infra*, Sec. K.

31. *State of Orissa v. S. Mohapatra*, (1993) 2 SCC 486; *State of J&K Public Service Comm. v. Narinder Mohan*, AIR 1994 SC 1808 : (1994) 2 SCC 630.

32. *Dr. Arundhati Ajit Pargaonkar v. Maharashtra*, AIR 1995 SC 962 : 1994 Supp (3) SCC 380.

33. *Suraj Parkash Gupta v. State of Jammu & Kashmir*, AIR 2000 SC 2386 : (2000) 7 SCC 561.

34. See, for example, *Keshav Chandra Joshi v. Union of India*, AIR 1991 SC 284 : 1992 Supp (1) SCC 272; *State of Orissa v. Sukanti Mohapatra*, AIR 1993 SC 1650 : (1993) 2 SCC 486; *J&K Public Service Comm. v. Dr. Narinder Mohan*, AIR 1994 SC 1808; *Dr. M. A. Haque v. Union of India*, (1993) 2 SCC 213 : 1993 SCC (L&S) 412.

It is common experience that it is a vicious circle that initially governments impose ban on recruitment, and then make massive *ad hoc* appointments *de hors* the rules giving a go by to making appointments in accordance with the rules. Thereafter the governments resort to regularisation of such appointments exercising the power under Art. 320(3) proviso[35] or Art. 162[36] to make them regular members of the service. The Supreme Court has expressed its unhappiness at such practice in these words:[37]

> "This practice not only violates the mandates of Arts. 14 and 16 but also denies to all eligible candidates their legitimate right to apply for and stand for selection and get selected."

The Court has ruled that regularisation in violation of the statutory rules is not permissible, in exercise of the executive power of the State which has the effect of overriding the rules framed under Art. 309. No regularisation in exercise of executive power under Art. 162, in contravention of the statutory rules is permissible.[38] The Supreme Court has insisted that once the rules are framed under Art. 309, the actions of the government in respect of matters covered by the rules should be regulated by these rules.[39]

The selection by the Commission of a candidate for appointment to a post is only a recommendation and the final authority for appointment is the Government. The Commission's selection is only recommendatory. This means that the Government is free to accept or decline to accept the recommendation made by the Commission. But if the Government chooses not to accept the Commission's recommendation, then the Constitution enjoins the Government under Art. 323 to place on the table of Parliament or State Legislature its reasons for doing so. The Government is made answerable to the Legislature for any departure from the Commission's recommendations, vide Art. 323.[40] The candidates, as such, gets no right to appointment pursuant to the Commission's recommendation.

The Government must make appointments in order of merit fixed by the Commission. The Government cannot disturb the order of merit according to its own sweet will except for other good reasons, *viz.*, bad conduct or character. The Government cannot also appoint any one whose name is not on the recommended list. The Government decides as to how many appointments it will make. The Government decides as to how many appointments it will make.

The Government is not required by Art. 323 to give its reasons to the Commission for departing from its recommendations. All that Art. 323 requires is that along with the report of the Commission, a memorandum containing the reasons for declining to accept the recommendation of the Commission ought to be placed before the Legislature. The Government should place the reasons for not accepting the Commission's recommendations on the file so that it can produce the same in the Court as and when called upon to do so. The Government can

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35. See, *infra*, Sec. K.
36. See, *supra*, Ch. VII, Sec. B.
37. *K.C. Joshi v. Union of India*, AIR 1991 SC 284; *V. Sreenivasa Reddy v. State of Andhra Pradesh*, AIR 1995 SC 586 : 1995 Supp (1) SCC 572.
38. *B.N. Nagarajan v. State of Karnataka*, AIR 1979 SC 1676 : (1979) 4 SCC 507. Also see, *Subedar Singh v. District Judge, Mirzapur*, AIR 2001 SC 201 : (2001) 1 SCC 37.
39. *A.K. Bhatnagar v. Union of India*, (1991) 1 SCC 544.
40. See, *infra*, Sec. K.

take into consideration any developments which may take place after the Commission has made its recommendations.[41]

A candidate on making an application for a post pursuant to an advertisement does not acquire any vested right of selection or appointment to the post in question.[42] A candidate who is eligible and otherwise qualified in accordance with the rules and the terms of the advertisement acquires a vested right of being considered for selection in accordance with the rules as they existed on the date of the advertisement. He cannot be deprived of this limited right during the pendency of selection unless the rules are amended with retrospective effect.[43]

Mere inclusion of the name of a candidate in the list of selected candidates does not confer any right on him to be appointed unless the relevant rules so indicate.[44] He could feel aggrieved at his non-appointment if the Administration does so either arbitrarily or for no *bona fide* or valid reason. The Supreme Court has clarified the position in this regard thus: [45]

> "It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the state is under no legal duty to fill up all or any of the vacancies. However it does not mean that the state has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken *bona fide* for appropriate reasons. And if the vacancies or any of them are filled up, the state is bound to respect the comparative merit of the candidates as reflected at the recruitment test, and no discrimination can be permitted".[46]

The Supreme Court has however ruled that when the list of selected candidates is challenged through a writ petition, it is necessary to make these candidates as parties, or to implead some of them in a representative capacity, if their number is very large. The selected candidates may not have a vested right to be appointed, they surely are interested in defending the select list; setting aside the list will affect them adversely. Natural justice demands that any person who may be adversely affected by a Court order should have an opportunity of being heard.[47]

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41. *Jatinder Kumar v. State of Punjab*, AIR 1984 SC 1850 : (1985) 1 SCC 122; *H. Mukherjee v. Union of India*, AIR 1994 SC 495; *Mrs. Asha Kaul v. State of Jammu & Kashmir*, (1993) 2 JT (SC) 688 : (1993) 2 SCC 573.

42. *Jatinder Kumar v. State of Punjab*, AIR 1984 SC 1850 : (1985) 1 SCC 122.

43. *N.T. Devin Katti v. State of Karnataka PSC*, AIR 1990 SC 1233 : (1990) 3 SCC 157.
Also see, *S.N. Nagarajan v. State of Mysore*, AIR 1966 SC 1942 : (1966) 3 SCR 682; *P. Ganeshwar Rao v. State of Andhra Pradesh*, AIR 1988 SC 2068 : 1988 Supp SCC 740; *P. Mahendra v. State of Karnataka*, AIR 1990 SC 405.

44. *Union Territory of Chandigarh v. Dilbagh Singh*, (1993) 1 SCC 154 : AIR 1993 SC 796.

45. *Shankarasan Dash v. Union of India*, AIR 1991 SC 1612 : (1991) 3 SCC 47.

46. See, *State of Haryana v. Subhash Chander Marwaha*, AIR 1973 SC 2216 : (1974) 3 SCC 220; *Neelima Shangla v. State of Haryana*, AIR 1987 SC 169 : (1986) 4 SCC 268; *Jatinder Kumar v. State of Punjab*, AIR 1984 SC 1850 : (1985) 1 SCC 122; *Union of India v. Ishwar Singh Khatri*, 1992 Supp (3) SCC 84 : 1992 SCC (L&S) 1999; *All India SC and ST Employees Association v. A. Arthur Jeen*, AIR 2001 SC 1851 : (2001) 6 SCC 380.

47. *Prabodh Verma v. State of Uttar Pradesh*, AIR 1985 SC 167; *A.M.S. Sushanth v. M. Sujatha*, (2000) 10 SCC 197; *All India SC and ST Employees Ass. v. A. Arthur Jeen*, AIR 2001 SC 1851 : (2001) 6 SCC 380.

A panel of select candidates can be kept operative for a reasonable time. A long waiting list cannot be kept *in infinitum* in view of the principle "*infinitum injure reprobatur*".[48] The reason for limiting the life of the waiting list is to ensure that other qualified candidates are not deprived of their chance to apply for the posts in succeeding years and be selected for appointment.

In the following case,[49] select list was prepared on the basis of merit in the examination without any qualifying marks. All those who wrote the examination were ranked in the list. These candidates claimed that they had a right to be appointed and that no fresh list be prepared till this list was exhausted. The Supreme Court rejected their contention observing that empanelment is, at best, a condition of eligibility and by itself confers no indefeasible right on the candidates so listed unless the rules do so provide.

For appointment to the posts of presiding officers of the labour Courts, the minimum qualification prescribed was five years' practice. While short-listing the candidates for *viva voce*, the candidates with 7½ years practice were selected. This was held to be valid by the Supreme Court in *M.P. Public Service Commission v. Navnit Kumar Potdar*.[50] This did not amount to changing the statutory criteria. A person with more practice experience is maturer. The fixing of limit at 7½ years instead of five cannot be said to be "irrational, arbitrary having no nexus with the object to select the best among the applicants."

In *Krishn Yadav v. State of Haryana*,[51] the Supreme Court found the process of selection by the subordinate selection board to be arbitrary, vitiated by fraud and motivated by extraneous considerations. The process of selection was quashed with the remark that "it is stinking" and "conceived in fraud."

175 candidates were appointed as assistant teachers, but before they could join, the Deputy Development Commissioner cancelled the orders of appointment on the ground that the appointing authority had no power to make these appointments. Nevertheless, the Supreme Court ruled that these appointees ought to have been given a hearing before their appointments were cancelled.[52]

Where a temporary or *ad hoc* appointment is continued for long, the Court presumes that there is need and warrant for a regular post and may accordingly direct regularization. 50,000 persons were being employed by the State on daily-rated or monthly-rated basis for over 20 years. The Court ordered the regularisation of all workers who had completed 10 years of service.[53]

Normally, as stated above, an appointment made in violation of the Service Rules is regarded as invalid and is quashed by the Courts. As the Supreme Court has observed: "It is well settled that where recruitment to service is regulated by

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48. *Babita Prasad v. State of Bihar*,, 1993 Supp (3) SCC 268 : (1993) 1 SLR 44.

49. *State of Bihar v. Secretariat Assistant Successful Examinees Union*, 1986, (1994) 1 SCC 126 : AIR 1994 SC 736.
Also *N. Mohanan v. State of Kerala*, AIR 1997 SC 1896 : (1997) 2 SCC 556.

50. AIR 1995 SC 77.
Also see, *Haryana v. Subash Chander Marwaha*, AIR 1973 SC 2216 : (1974) 3 SCC 220.

51. AIR 1994 SC 2166 : (1994) 4 SCC 165.

52. *Uttar Pradesh v. Girish Bihari*, AIR 1997 SC 1354 : (1997) 4 SCC 362.

53. *Dharwad District P.W.D. Literate Daily Wage Employees Association v. State of Karnataka*, AIR 1990 SC 883 : (1990) 2 SCC 396.
Also see, *Jacob v. Kerala Water Authority*, AIR 1990 SC 2228; *State of Haryana v. Piara Singh*, AIR 1992 SC 2130 : (1992) 4 SCC 118.

the statutory rules, recruitment must be made in accordance with those rules, any appointment made in breach of rules would be illegal."[54]

In several cases, such appointments have been set aside even if it means uprooting of persons after appointment. But the Supreme Court has taken this unpalatable step because it has felt that "if equality and equal protection before the law have any meaning and if our public institutions are to inspire that confidence which is expected of them we would be failing in our duty if we did not, even at the cost of considerable inconvenience to Government and the selected candidates, do the right thing."[55]

But, on the other hand, there are cases where the Supreme Court has desisted from quashing irregular appointments on humanitarian considerations, such as, the incumbent has been holding the post for a long period.[56] In *Rafiquddin*,[57] appointment of Judges was made against the rules. The appointments were made in 1975. The Supreme Court did not strike down these appointments "having regard to the period of 12 years that have elapsed."

In the following case,[58] even appointments made in contravention of Art. 16 by allotting higher marks than warranted for the *viva voce* test, were not quashed by the Supreme Court, as the selected candidates had already joined the posts long back.

(b) CONFIDENTIAL REPORTS

No statutory rules have been made so far under Art. 309 regulating the award of entries in the character roll of a Central or State Government employees. Accordingly, the entire field is regulated by administrative directions.

Under these directions, the character rolls of government servants are maintained. Every year, entries are made in these rolls by superior competent authorities regarding the work, conduct and character of government servants. These entries are confidential in nature. These entries contain the assessment of the work and conduct of each government servant, reflecting his efficiency or defect in his work and conduct. If any penalty has been imposed on a government servant, it is mentioned in these entries. These entries are important as they constitute the foundation on which the career of an employee is based and is made or marred.

On the basis of these entries, a government servant's suitability to the office is assessed for the purpose of his confirmation, promotion and even for retention in service. The purpose of writing confidential reports is two fold—(1) to give an opportunity to the officer to remove deficiencies and to inculcate discipline; (2) it seeks to serve improvement of quality and excellence and efficiency of public service.

Any adverse entries against a government servant are communicated to him with a view to inform him regarding the deficiencies in his work and conduct and

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54. *State of Uttar Pradesh v. Rafiquddin,* AIR 1988 SC 162, 176 : 1987 Supp SCC 401.
55. *C. Channabasavaiah v. State of Mysore,* AIR 1965 SC 1293.
Also, *Umesh Chandra Shukla v. Union of India,* AIR 1985 SC 1351 : (1985) 3 SCC 721.
56. See, for example, *Shainda Hasan v. State of Uttar Pradesh,* AIR 1990 SC 1381; *H.C. Puttaswamy v. High Court,* AIR 1991 SC 295 : 1991 Supp (2) SCC 421.
57. *Supra,* footnote 54.
58. *Vikram Singh v. Subordinate Services Selection Board,* AIR 1999 SC 1011 : (1991) 1 SCC 686.

afford him an opportunity to make, amend, and improve in his work and, further, if the entries are not justified the communication affords him an opportunity to make representation.

The Supreme Court has observed in this connection:[59]

> "the object of writing the confidential reports or character roll of a Government servant and communication of the adverse remarks is to afford an opportunity to the concerned officer to make amends to his remiss; to reform himself; to amend his conduct and to be disciplined, to do hard work, to bring home his lapse in his integrity and character so that he corrects himself and improves the efficiency in public service. The entries, therefore, require an objective assessment of the work and conduct of a government servant…."

The employee can make a representation against any adverse entry awarded to him. If the competent authority feels that the remarks are justified, he may reject the employer's representation and inform him accordingly. But if he finds the adverse remarks not justified, unfounded or incorrect, he may expunge the same. This means that the adverse remarks ought to be communicated to the employee concerned as soon as possible. If the adverse remarks are communicated to the employee after several years, then the object of communicating the same is lost. In this connection, the Supreme Court has observed in *Baidyanath Mahapatra v. State of Orissa*:[60]

> "It is therefore imperative that the adverse entries awarded to a government servant must be communicated to him within a reasonable period to afford him opportunity to improve his work and conduct and also to make representation in the event of the entry being unjustified."

There is no rule that before an adverse entry is recorded in the character roll, an opportunity of hearing must be given to the concerned employee.[61] There is no rule or principle that the competent authority ought to give reasons for rejecting the employee's representation. The competent authority is obligated to consider the employee's representation in a fair and just manner and if thereafter the representation is rejected, the order of rejection would not be invalid merely because of the absence of reasons. In case the order rejecting the employee's representation is challenged in a Court, the competent authority can always place the reasons before the Court for rejecting the representation.[62]

In view of the importance of the confidential and character rolls on the career of the employee, the Supreme Court has emphasized that these be written by superior officers higher above the cadres. The officer should show objectivity, impartiality, and fair assessment without any prejudices whatsoever with the highest sense of responsibility to inculcate devotion to duty, honestly and integrity to improve excellence of the individual officer.

It is for the employer to prescribe the officer competent to write the confidentials but he should be a superior officer of high rank lest the employees get demoralised which would be deleterious to the efficacy and efficiency of public

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59. *Swatantar Singh v. State of Haryana*, AIR 1997 SC 2105 : (1997) 4 SCC 14.
60. AIR 1989 SC 2218, 2221 : (1989) 4 SCC 664.
61. *R.L. Butail v. Union of India*, (1970) 2 SCC 876 : (1970) 2 LLJ 514; *Maj. Gen. I.P.S. Dewan v. Union of India*, (1995) 3 SCC 383 : (1995) SCC (L&S) 691; *Ramachandra Raju v. State of Orissa*, (1994) Supp (3) SCC 424 : 1995 SCC (L&S) 74; *State of Uttar Pradesh v. Yamuna Shanker Misra*, AIR 1997 SC 3671 : (1997) 4 SCC 7.
62. *Union of India v. E.G. Nambudri*, AIR 1991 SC 1216 : (1991) 3 SCC 38.

service. There should be another higher officer in rank above the one writing the confidential report to review such report. The appointing authority or any equivalent officer would be competent to approve the confidential reports or character rolls.[63]

In a recent case,[64] the Supreme Court has again explained that the confidential reports of an officer "are basically the performance appraisal of the said officer and go to constitute vital service record in relation to his career advancement. Any adverse remark in the CRs could mar the entire career of that officer". The Court has therefore emphasized that:

> "it is necessary that in the event of a remark being called for in the Confidential Records, the authority directing such remark must first come to the conclusion that the fact-situation is such that it is imperative to make such remarks to set right the wrong committed by the officer concerned. A decision in this regard must be taken objectively after careful consideration of all the materials which are before the authority directing the remarks being entered in the C.Rs."

In the instant case, the direction entering adverse remarks against a sessions Court judge by the High Court was quashed by the Supreme Court as having been based on no material. In another case,[65] adverse entries against a subordinate judge were quashed by the High Court as being "unjustified, arbitrary and based on non-existent facts".

(c) CONFIRMATION OF A PROBATIONER

The usual practice is that a person is appointed on probation against a permanent post and is confirmed after the lapse of the period of probation. At times, the employee may not be con-firmed after the lapse of the period of probation. A question then arises as to what is the status of such an employee—is he still to be regarded as being on probation or having been confirmed automatically?

The judicial decisions on this point have been varying depending upon the specific rules/regulations and the scheme underlying them.

A person appointed on probation for a specified period does not *ipso facto* stand confirmed after the lapse of the period of probation unless a specific order of confirmation is made. The period of probation can be extended if the relevant rules so permit, *i.e.,* if the rules do not prescribe any period of probation, or if the rules prescribe only a minimum and not maximum period for the purpose. Allowing a probationer to continue in the post beyond the period of probation, without an order of confirmation, only means that by implication his period of probation has been extended and he acquires no substantive right to hold the post.

There is no right in a government servant to the confirmed merely because he has completed his period of probation. The Supreme Court has ruled out the proposition of automatic confirmation on completion of the period of probation. The permanent status can be acquired only by a specific order confirming the employee on the post held by him on probation. The function of confirmation

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63. *State Bank of India v. Kashinath Kher,* AIR 1996 SC 1328, 1333-34 : (1996) 8 SCC 762.
Also, *High Court of Judicature at Allahabad v. Sarnam Singh,* AIR 2000 SC 2150 : (2000) 2 SCC 339.

64. *P.K. Shastri v. State of Madhya Pradesh,* AIR 1999 SC 3273 : (1959) 7 SCC 329.

65. *High Court of Judicature at Allahabad v. Sarnam Singh,* AIR 2000 SC 2150 : (2000) 2 SCC 339.

implies the exercise of judgment by the confirming authority on the overall suitability of the employee for permanent absorption in service.[66] Therefore, termination after expiry of probation is not invalid. The Supreme Court has observed in this connection:[67]

> "….if in the rule or order of appointment, a period of probation is specified and a power to extend probation is also conferred and the officer is allowed to continue beyond this prescribed period of probation, he cannot be deemed to be confirmed…."

A probationer may, however, automatically stand confirmed and acquire the status of a permanent employee by lapse of probation in one of the two situations:

(1) If the service rules applicable to him expressly provide for such a result; or

(2) If the order of appointment itself stipulates that the appointee will stand confirmed at the end of the period of probation in the absence of any order to the contrary.[68]

(3) When the rule fixes the maximum period of probation, and the probation cannot be extended beyond that period, on the expiry of the prescribed period of probation.[69]

When a service rule prohibited extension of period of probation beyond three years, a probationer in a permanent post was held to have become confirmed after three years without an express order of confirmation having been passed.

In *Dharam Singh*,[70] under the relevant rule, after an initial period of one year's probation, the same could be extended upto a maximum period of three years. The petitioner was on probation for five years, and, thereafter, his services were terminated without an enquiry. The termination was held to be invalid as his probation could not be extended beyond four years. As the maximum period of probation was fixed by the rules, the employee must be held to be confirmed after the lapse of this period.[71] On the other hand, even when a maximum period of probation is fixed, if there is a further provision in the rules for continuation of probation beyond the maximum period, there will be no deemed confirmation in

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66. *G.S. Ramaswamy v. I.G. of State of Mysore*, AIR 1966 SC 175 : (1964) 6 SCR 279; *U.P. v. Akbar Ali Khan*, AIR 1966 SC 1842 : (1966) 3 SCR 821; *State of Punjab v. Dharam Singh*, AIR 1968 SC 1210; *Partap Singh v. U.T. of Chandigarh*, AIR 1980 SC 57; *Dhanjibhai Ramjibhai v. State of Gujarat*, AIR 1985 SC 603 : (1985) 2 SCC 5; *Municipal Corp. Raipur v. Ashok Kumar Misra*, AIR 1991 SC 1402 : (1991) 3 SCC 325; *Chandra Prakash Shahi v. State of Uttar Pradesh*, AIR 2000 SC 1706 : (2000) 5 SCC 152.

67. *Karnataka State Road Transport Coprn. v. S. Manjunath*, (2000) 5 SCC 250 : AIR 2000 SC 2070; *Dayaram Dayal v. State of Madhya Pradesh*, (1997) 7 SCC 443 : AIR 1997 SC 3269; *Wasim Beg. v. State of Uttar Pradesh*, (1998) 3 SCC 321 : 1998 SCC (L&S) 840; *State of Punjab v. Baldev Singh Khosla*, (1996) 9 SCC 190 : AIR 1997 SC 432.

68. *Sukhbans Singh v. State of Punjab*, AIR 1962 SC 1711; *State of Uttar Pradesh v. Akbar Ali*, AIR 1966 SC 1482 : (1966) 3 SCR 284.

69. *Om Prakash Maurya v. U.P. Co-op. Sugar Factories Federation*, AIR 1986 SC 1844; *M.A. Agarwal v. Gurgaon Bank*, AIR 1988 SC 286 : 1987 Supp SCC 343.

70. *State of Punjab v. Dharam Singh*, AIR 1968 SC 1210; *S.M. Mehta*, Legal status of Probationers in Government Service, 16 *JILI*, 104 (1974).

71. Also, *Wasim Beg v. State of Uttar Pradesh*, (1998) 3 SCC 321 : 1998 SCC (L&S) 840.

such a case, and the probation period is deemed extended.[72] This judicial view has been consistently followed in several cases subsequently.[73]

In *Samsher Singh*,[74] the relevant rule provided for an initial period of probation of 2 years which could be further extended for a maximum period of one year. But there was an explanation saying that the period of probation shall be deemed extended if a subordinate judge is not confirmed on the expiry of his period of probation. The Supreme Court ruled that the explanation meant that "the provisions regarding the maximum period of probation for three years is directory and not mandatory unlike in *Dharam Singh*, and that a probationer is not in fact confirmed till an order of confirmation is made."

The Supreme Court has observed in *Patwardhan*,[75] that "confirmation is one of the inglorious uncertainties of government service depending neither on efficiency of the incumbent nor on the availability of substantive vacancies."

(d) SENIORITY

Seniority is an incident of service which cannot be eroded or curtailed by a rule which operates discriminately. A person entering government service should feel secure of equality in continuance, promotion, etc. Any executive action violating it cannot be upheld.[76]

Once an appointment is made to a post according to the service rules, the seniority of the person so appointed is to be counted from the date of his appointment and not with regard to the date of his confirmation. Where the initial appointment is only *ad hoc* and not according to the rules and has been made as a stop gap arrangement, the officiation in such post cannot be taken into account for considering the seniority.[77]

Appointment in accordance with the rules is a condition precedent to count seniority. Temporary, or *ad hoc* or fortuitous appointment, etc. is not an appointment in accordance with the rules and cannot be counted towards the seniority.[78] Therefore, seniority is to be counted from the date on which the appointee is appointed to the post in accordance with the rules, and starts discharging the duty of the post borne on the cadre, and the previous temporary service is

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72. *Samsher Singh v. State of Punjab*, (1974) 2 SCC 831 : AIR 1974 SC 2192; *Satya Narayan Athya v. High Court of M.P.*, (1996) 1 SCC 560 : 1996 SCC (L&S) 338.

73. *Om Prakash Maurya v. U.P. Co-op. Sugar Factories Federation*, AIR 1986 SC 1844 : 1986 Supp SCC 95; *M.K. Agarwal v. Gurgoan Gramin Bank*, AIR 1988 SC 286 : 1987 Supp SCC 643; *Dayaram Dayal v. State of Madhya Pradesh*, AIR 1997 SC 3269 : (1997) 7 SCC 443.

74. AIR 1974 SC 2192 : (1974) 2 SCC 831.
Also see, *Municipal Corp. Raipur v. Ashok Kumar Misra*, (1991) 3 SCC 325 : AIR 1991 SC 1402.

75. *S.B. Patwardhan v. Maharashtra*, AIR 1977 SC 2051 : (1977) 3 SCC 399.

76. *K. Narayanan v. State of Karnataka*, AIR 1994 SC 55 : 1994 Supp (1) SCC 44.

77. *Direct Recruitment Class II Engineering Officers' Association v. State of Maharashtra*, AIR 1990 SC 1607; *West Bengal v. Aghore Nath Dey*, (1993) 3 SCC 371 : 1993 SCC (L&S) 783; *S.K. Saha v.Prem Prakash Agarwal*, AIR 1994 SC 745 : (1994) 1 SCC 431; *O.P. Garg v. State of Uttar Pradesh*, AIR 1991 SC 1202.

78. *Direct Recruits, op cit.; D.N. Agrawal v. State of Madhya Pradesh*, AIR 1990 SC 1311; *Excise Commr., Karnataka v. Sreekanta*, (1993) AIR SCW 1740 : AIR 1993 SC 1564; *V. Sreenivasa Reddy v. State of Andhra Pradesh*, AIR 1995 SC 586.

to be considered as fortuitous.[79] Seniority cannot relate back to the date of temporary appointment.[80]

A temporary appointee appointed *de hors* the rules, or on an *ad hoc* basis, or in a fortuitous vacancy gets seniority from the date of regular appointment.[81]

The quintessence of the proposition is that the appointment to a post must be according to the rules and not by way of *ad hoc* or stop gap arrangement made due to administrative exigencies.

But along with this proposition, the Court has also stated another proposition, *viz.*, if the initial appointment is not made by following the procedure laid down by the rules, but the appointee continues in the post for long uninterruptedly, till the regularisation of his service in accordance with the rules, the period of officiating service will be counted. Since the Government deliberately deviated from the rules and allowed the appointee to be in continuous service for well over 15 to 20 years, the Government must be deemed to have relaxed the rules.[82]

No one has a vested right to seniority but an officer has an interest in seniority acquired by working out the rules. It could be taken away only by operation of a valid law. As has been observed by the Supreme Court:[83]

> "Thus to have a particular position in the seniority list within a cadre can neither be said to be accrued or vested right of a Government servant and losing some places in the seniority list within the cadre does not amount to reduction in rank even though the future chances of promotion gets delayed thereby."

If the circumstances so require, a group of persons, can be treated as a class separate from the rest, for any preferential or beneficial treatment while fixing their seniority. But, whether such group of persons belong to a special class for any special treatment in the matter of seniority, has to be decided on objective consideration and on taking into account relevant factors which can stand the test of Arts. 14 and 16 of the Constitution.[84]

(e) TRANSFER

A government servant has no legal right to insist for being posted at any particular place. A person holding a transferable post has no choice in the matter of posting unless specifically provided in his service conditions. The transfer of a public servant made on administrative grounds or in public interest is not to be interfered with unless there are strong and compelling reasons rendering the

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79. *K.C. Joshi v. Union of India,* AIR 1991 SC 284 : 1992 Supp (1) SCC 272; *Masood Akhtar Khan v. M.P.,* (1990) 4 SCC 24 : 1990 SCC (L&S) 580.

80. *D.N. Agrawal v. State of Madhya Pradesh,* AIR 1990 SC 1311 : (1990) 2 SCC 553; *V. Sreenivasa Reddy v. State of Andhra Pradesh,* AIR 1995 SC 586, 591 : 1995 Supp (1) SCC 572; *Vijay Kumar Jain v. State of Madhya Pradesh,* (1992) Supp. (2) SCC 95 : 1992 SCC (L&S) 627.

81. *Union of India v. S.K. Sharma,* AIR 1992 SC 1188 : 1992 (2) SCC 728.

82. *Direct Recruits, supra,* footnote 77; *Narender Chadha v. Union of India,* AIR 1986 SC 638 : (1986) 2 SCC 157; *Keshav Chandra Joshi v. Union of India,* AIR 1991 SC 284 : 1992 Supp (1) SCC 272.

83. *S.S. Bola v. B.D. Sardana,* AIR 1997 SC 3127 : (1997) 8 SCC 522.

84. *Ram Janam Singh v. State of Uttar Pradesh,* AIR 1994 SC 1722 : (1994) 2 SCC 622.
For Arts. 14 and 16, see, Chs. XXI and XXIII, *supra.*

transfer order improper and unjustifiable.[85] A Court would not interfere with a *bona fide* order of transfer.[86]

Transfer of a government servant in a transferable service is a necessary incident of the service matter. When a government servant is transferred to an equivalent post without any adverse consequence on his service or career prospects, the scope of judicial review is very limited—it is confined only to the grounds of *mala fides* and violation of any specific provision or guidelines regulating such transfers amounting to arbitrariness.

A public servant is bound to comply with an order of transfer. If he has any genuine difficulty, he can make a representation against such an order; but if the initial order stands, he has to comply with it, otherwise he will expose himself to disciplinary action under the relevant service rules.[87]

A transfer of a government servant may be against public interest only if the transfer was avoidable and the successor is not suitable for the post.[88]

(f) PROMOTION

Promotion means appointment of a person of any category or grade of a service or a class of service to a higher category or grade of such service or class. The Supreme Court has observed that promotion means that a person already holding a position would have a promotion if he is appointed to another post which satisfies either of the two conditions, *viz.*: that the new post is in a higher category of the same service, or that the new post carries higher grade in the same service or class.[89]

Eligibility for promotion provided in rules framed under Art. 309 of the Constitution reflect the policy of the State and judicial review in such policy matters will not be entertained unless there is a clear violation of the Constitution or a statutory provision.[90]

No employee has a right to promotion but he has a right to be considered for promotion according to the rules. The right to be considered for promotion is a part of the conditions of service, but chances of promotion are not considered as conditions of service. A rule merely affecting the chances of promotion cannot be regarded as varying the conditions of service.[91] The Supreme Court has observed in *State of Maharashtra v. Chandrakant Anant Kulkarni*:[92]

> "Mere chances of promotion are not conditions of service and the fact that there was reduction in the chances of promotion did not tantamount to a change in the conditions of service. A right to be considered for promotion is a term of service, but mere chances of promotion are not."

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85. *Chief General Manager (Telecom), N.E. Telecom Circle v. Rajendra Chand Bhattacharjee,* AIR 1995 SC 812 : (1995) 2 SCC 532.
86. *Union of India v. S.L. Abbas,* (1993) 4 SCC 357 : AIR 1993 SC 2444.
87. *Gujarat Electricity Board v. Atmaram,* AIR 1989 SC 1433 : (1989) 2 SCC 602.
88. *N.K. Singh v. Union of India,* AIR 1995 SC 423 : (1994) 6 SCC 98.
89. *C.C. Padmanabhan v. Director of Public Instructions,* AIR 1981 SC 64 : 1980 Supp SCC 668.
90. *Dilip Kumar Garg v. State of Uttar Pradesh,* (2009) 4 SCC 753 : (2009) 3 JT 202.
91. *S.S. Bola v. B.D. Sardana,* AIR 1997 SC 3127 : (1997) 8 SCC 522.
Also, *R.S. Dhull v. State of Haryana,* AIR 1998 SC 2090 : (1998) 4 SCC 379.
92. AIR 1981 SC 1990 : (1981) 4 SCC 130. Also see, *K. Jagadeesan v. Union of India,* AIR 1990 SC 1072; *Union of India v. S.L. Dutta,* AIR 1991 SC 363 : (1991) 1 SCC 505.

An employee falling within the zone of consideration cannot be denied promotion merely because some disciplinary criminal proceedings are pending against him.[1] If a charge memo/charge sheet has been issued to him, or if he is suspended, then the sealed cover procedure can be resorted to. But this procedure cannot be resorted to when only preliminary investigation is being made into the charges against him. The reason being that many a time nothing comes out of the preliminary investigation and such an investigation may be initiated at the instance of interested parties.[2]

The above-mentioned proposition is illustrated by the Supreme Court decision in *State of Madhya Pradesh v. R.N. Mishra*.[3] In 1976, a preliminary inquiry was initiated to inquire into allegations of misconduct against the respondent. In 1977, he was promoted to a higher post while the preliminary inquiry was in progress. After a due inquiry, the State Government in 1986 inflicted on him the penalty by way of withholding his two increments. He challenged the order. His argument was that by his promotion in 1977, the allegations of misconduct against him stood condoned by the State Government and, as such, the penalty imposed on him was without jurisdiction. The Supreme Court rejected the contention with the following observation:[4]

> "….an employee/officer who is required to be considered for promotion, despite the pendency of the preliminary inquiry or contemplated inquiry against him is promoted, having been found fit, the promotion so made would not amount to condonation of misconduct which is subject matter of the inquiry."

The Court has gone on to say that the government servant after appointment as such acquires a status, as his conditions of service are regulated by statutory rules or provisions of an Act. Under the law, Government is not justified in excluding an employee from the field of consideration for promotion merely because certain disciplinary proceedings are contemplated, or some preliminary inquiry to inquire into the misconduct attributed to that employee are pending.

In the instant case, under the law, the State Government had no option but to consider the case of the respondent for promotion. The State Government could not have excluded the respondent from the zone of consideration, merely on the ground that a preliminary inquiry to enquire into the allegations of misconduct attributed to him was pending. "In such a situation, the doctrine of condonation of misconduct cannot be applied as to wash off the acts of misconduct which was the subject matter of preliminary enquiry." Accordingly, the Court ruled that in the instant case, promotion of the respondent could not amount to condonation of misconduct alleged against him which was the subject matter of the preliminary inquiry. Consequently, the punishment on the respondent by the State Government was held to be valid and legal.

When an employee substantively holding a lower post is asked to discharge the duties of a higher post, it is not regarded as promotion. In such a case, he does not get the salary of the higher post but gets only a 'charge allowance'. Such a

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1. *New Bank of India v. N.P. Sehgal*, 1991 AIR SCW 565 : (1991) 2 SCC 220.
2. *Union of India v. Janakiraman, K.V.*, AIR 1991 SC 2010 : (1991) 4 SCC 109; *B.C. Chaturvedi v. Union of India*, (1995) 6 SCC 749, 757 : 1996 SCC (L&S) 80.
3. AIR 1997 SC 3548 : (1997) 7 SCC 644.
4. *Ibid*, at 3549.

person continues to hold his substantive lower post and he only discharges the duties of the higher post essentially as a stop gap arrangement.[5]

Ordinarily, the Courts/tribunals do not interfere with assessments made by departmental Promotion Committees in regard to merit or fitness of a candidate for promotion. But there may be a rare case where the Court may interfere with such assessment if it—[6]

> "is either proved to be *mala fide* or is found based on inadmissible or irrelevant or insignificant and trivial material–and if an attitude of ignoring or not giving weight to the positive aspects of one's career is strongly displayed, or if the inferences drawn are such that no reasonable person can reach such conclusions, or if there is illegality attached to the decision…."

Ordinarily, a Court does not interfere with assessment of a candidate made by a departmental promotion committee, but in an exceptional case, the Court can review such an assessment "within the narrow *Wednesbury* principles or on the ground of *mala fides*"[7]

Such a situation occurred in *Badrinath v. Govt. of Tamil Nadu* where assessment by a departmental committee was set aside by the Supreme Court.

(g) SUSPENSION

Suspension of an employee pending disciplinary proceedings against him is not a punishment. Its purpose is to forbid or disable an employee to discharge the duties of the post held by him. The purpose is to refrain him from availing further opportunity to perpetrate the same misconduct, or from scuttling the enquiry, or investigation, or to win over the witnesses. Suspension of a government servant pending an inquiry against him does not amount to dismissal or removal as it does not put an end to his service. He continues to be a member of the service in spite of his suspension, though he is not permitted to work and he draws only a subsistence allowance which is usually less than the salary.[8]

The authority entitled to appoint a public servant is also entitled to suspend him pending a departmental inquiry into his conduct, or pending a criminal proceeding which may eventually result in a departmental inquiry against him.[9] If the service rules so provide, an employee may be suspended and subsistence allowance paid to him during the period of suspension. But if the rules do not so provide, and if an employee is suspended in the absence of such a power, he is entitled to be paid full remuneration for the period of suspension.[10]

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5. *Ramakant Shripad Sinai Advalpalkar v. Union of India,* AIR 1991 SC 1145 : 1991 Supp (2) SCC 733.
Also see, *State of Madhya Pradesh v. Laxmi Shankar,* AIR 1979 SC 979.

6. *Badrinath v. State of Tamil Nadu,* AIR 2000 SC 3243, 3253 : (2000) 8 SCC 395.

7. The Supreme Court has accepted the *Wadnesbury* ruling in *Tata Cellular v. Union of India,* AIR 1996 SC 11.
The Supreme Court has said that the grounds of judicial review of an administrative action are : (i) Illegality; (ii) Irrationality, and (iii) Procedural impropriety.

8. *State of Madhya Pradesh v. State of Maharashtra,* AIR 1977 SC 1466.
Also, *State of Orissa v. Shiva Parshad Das,* AIR 1985 SC 701 : (1985) 2 SCC 65; *O.P. Gupta v. Union of India,* AIR 1987 SC 2257; *M. Paul Anthony v. Bharat Gold Mines, Ltd.,* AIR 1999 SC 1416 : (1999) 3 SCC 679.

9. *R.P. Kapur v. Union of India,* AIR 1964 SC 787; *Balwantrai Ratilal Patel v. State of Maharashtra,* AIR 1968 SC 800 : (1968) 2 SCR 577.

10. *V.P. Gidroniya v. State of Madhya Pradesh,* AIR 1970 SC 1494 : (1970) 1 SCC 362, *P.R.. Nayak v. Union of India,* AIR 1972 SC 554.

It is not an administrative routine or an automatic order to suspend an employee. Each case has to be considered depending on the nature of the allegations, gravity of the situation, etc. The suspension must be a step in aid of the ultimate result of the investigation or inquiry.[11] In the instant case,[12] there were serious allegations of misconduct against the employee and the Court held that the appointing authority was justified in suspending the employee pending an inquiry against him.

In *Punjab v. Khemi Ram*,[13] the Supreme Court has ruled that in case of an order of suspension, the order is communicated as soon as it goes out of office for onward communication and the actual service of the order is not material.

No hearing need be given when an employee is suspended.[14] Art. 311(2) does not protect suspension. An order of suspension is invalid if it is actuated by *mala fides*, or is arbitrary, or has been made for an ulterior purpose.[15] An order of suspension can also be challenged in a Court on the ground that the concerned authority formed his satisfaction to suspend the employee on extraneous or irrelevant considerations, or that there was a total lack of application of mind to the question whether it was necessary or desirable to suspend him.[16]

If a suspended employee is reinstated he goes back to his service. If the order of reinstatement is set aside, the concerned employee reverts to his immediate anterior status of suspension.[17]

On the question of payment of subsistence allowance to the suspended employee, the Supreme Court has taken objection to non-payment thereof, characterising it as an "inhuman act" which has an impropitious effect on the life of the employee. Such an allowance is paid so that the employee can sustain himself during the suspension period.[18]

The Court has linked the payment of subsistence allowance with the right to life under Art. 21 of the Constitution.[19] The provision for payment of subsistence allowance to an employee made in the Service Rules only ensures "non-violation" of the right to life of the employee. On becoming a government servant, a person does not lose his Fundamental Rights including the right to life under Art. 21. Accordingly, in *State of Maharashtra v. Chanderbhan*,[20] the Court struck down a service rule which provided for payment of a nominal amount of Re. 1/- p.m. as subsistence allowance to an employee under suspension.

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11. *V.P. Gidroniya v. State of Madhya Pradesh,* AIR 1970 SC 1494 : (1970) 1 SCC 362; *Govt. of India, Ministry of Home Affairs v. Tarak Nath Ghosh,* AIR 1971 SC 823 : (1971) 1 SCC 734; *U.P. Rajya Krishi Utpadan Mandi Parishad v. Sanjiv Rajan,* (1993) Supp (3) SCC 483 : (1994) SCC (L&S) 67.

12. *State of Orissa v. Bimal Kumar Mohanty,* AIR 1994 SC 2296 : (1994) 4 SCC 126.

13. AIR 1970 SC 214 : (1969) 3 SCC 28.

14. *Furnell v. Whangrei High School Board,* (1973) All ER 400.
Also, *Vasant Vaze,* Natural Justice, Unsavoury Procedure, 16 *J.I.L.I.*, 276 (1974).

15. *State of Orissa v. Bimal Kumar Mohanty, op. cit.*

16. *State of Tamil Nadu v. P.M. Belliappa,* 1985 Lab IC 51 (Mad).

17. *Baldev Raj. v. Punjab Haryana High Court,* AIR 1976 SC 2490, 2499 : (1976) 4 SCC 201.

18. *M. Paul Anthony v. Bharat Gold Mines Ltd.,* AIR 1999 SC 1416 : (1999) 3 SCC 679.
Also see, *O.P. Gupta v. Union of India,* AIR 1987 SC 2257 at 1423 : (1987) 4 SCC 328.

19. *Supra,* Ch. XXVI.
Also see, *State of Maharashtra v. Chanderbhan,* AIR 1983 SC 803 : (1983) 3 SCC 387.

20. AIR 1983 SC 803 : (1983) 3 SCC 387.

It was held in *Fakirbhai*,[21] that if an employee could not attend the departmental proceedings because of financial stringency arising out of non-payment of subsistence allowance to him, and thereby he could not undertake a journey away from his home to attend the departmental proceedings, then the order of punishment, including the whole proceedings, would stand vitiated.[22]

An employee was prosecuted for corruption but was acquitted. He was suspended during prosecution. On acquittal, he was reinstated. The Supreme Court ruled that since he was a man of doubtful integrity and his confidential reports were not good, he was not entitled to get back wages for the period of suspension.[23]

The appellant was suspended while he was being prosecuted for defalcation of funds and fabrication of records. The prosecution culminated in his acquittal. The Supreme Court ruled in *Krishnakant*,[24] that the appellant would not be entitled to reinstatement with grant of all consequential benefits with full back wages as a matter of course, "if the conduct alleged is the foundation for prosecution though it may end in acquittal on appreciation of evidence or lack of sufficient evidence." There are two courses open to the disciplinary authority in such a situation, *viz.*:

(1) It may enquire into the misconduct unless the self-same conduct was subject of charge and on trial the acquittal was recorded on a positive finding that the accused did not commit the offence at all; but acquittal is not on benefit of doubt given. Appropriate action may be taken thereon.

(2) The authority may on reinstatement, after following the principles of natural justice, pass appropriate order including treating suspension period as period of not on duty.

When a government servant is acquitted he would be entitled to be reinstated but may not be entitled to all the consequential benefits treating the suspension period as duty period. In *Krishnakant,* interpreting the Maharashtra Civil Service Rules, the Court ruled that the employee though would be reinstated on acquittal would not be entitled to the consequential benefits. This meant that he would not be entitled to the increments for the period of suspension and he would not be treated, for purposes of pensionary benefits, *etc.*, as being on duty during the period of suspension.

When an employee is completely exonerated and is not visited with any penalty, not even that of censure, indicating that he was completely blameless, he cannot be deprived of any benefits including the salary of the promotional post, from the date he would have been promoted in the ordinary course.[25] But there may be cases where the proceedings are delayed at the instance of the concerned employee himself, or his clearance in the disciplinary proceedings, or acquittal in criminal proceedings against him, is with benefit of doubt, or on account of non-availability of evidence due to the actions of the employee concerned. In such

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21. *Fakirbhai Fulabhai Solanki v. Presiding Officer*, AIR 1986 SC 1168 : (1986) 3 SCC 131.
22. Also see, *Ghanshyam Dass Shrivastava v. State of Madhya Pradesh*, AIR 1973 SC 1183 : (1973) 1 SCC 656; *M. Paul Anthony, supra*, footnote 18.
23. *State of Uttar Pradesh v. Ved Pal Singh*, AIR 1997 SC 608 : (1997) 3 SCC 483.
24. *Krishnakant Raghunath Bishavnekar v. State of Maharashtra*, AIR 1997 SC 1434 : (1997) 3 SCC 636.
25. *M. Paul Anthony v. Bharat Gold Mines Ltd.*, AIR 1999 SC 1416 : (1999) 3 SCC 679.

cases, the concerned authorities have power to decide whether the employee deserves to get any salary for the intervening period, and, if so, how much.[26]

(h) CENSURE

Censure is one of the penalties which may be imposed on a member of the civil service. Ordinarily, natural justice must be afforded to the person concerned which means that he must be given an opportunity to show cause against the proposed imposition of penalty of censure before the penalty is imposed on him.[27]

(i) FORFEITURE OF SERVICE

The Supreme Court has ruled that rules of natural justice must be observed when an order of forfeiture of service on ground of participation in an illegal strike is to be made.[28]

There is a difference between "reduction in rank" and "forfeiture of approved service". The expression 'reduction in rank' within the meaning of Art. 311(2) means reduction from a higher to a lower rank or post. On the other hand, "forfeiture of service" entails merely losing places in the rank or cadre to which the government servant belongs; he may lose his seniority within his cadre; he may lose a higher salary and his chances of promotion may be affected.[29]

Interpreting the Punjab Civil Service Rules, the Supreme Court has ruled that 'forfeiture of service' does not have any effect on the length of qualifying service for purposes of pension or compulsory retirement or premature retirement.[30]

(j) RESIGNATION

The services of a government servant normally stand terminated from the date on which the letter of resignation is accepted by the appropriate authority unless there is some rule to the contrary.[31] However, it is open to a government servant to make his resignation operative from a future date and to withdraw such resignation before it is accepted.[32]

(k) CHANGING THE DATE OF BIRTH

After he enters into service, a government servant acquires the right to continue in service till he reaches the age of retirement as fixed by the Government, unless his services are dispensed with on grounds contained in the service rules following the prescribed procedure. Accordingly, the date of birth entered in the service record assumes great importance for him for it determines his right to remain in service.

Usually, after several years of service, government servants seek to rectify the date of birth recorded earlier claiming to be younger than the recorded date so that they can remain in service somewhat longer. The Supreme Court declared in

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26. *Union of India v. K.V. Janakiraman*, AIR 1991 SC 2010 : (1991) 4 SCC 109.
27. *State of Uttar Pradesh v. Vijay Kumar Tripathi*, AIR 1995 SC 1130 : 1995 Supp (1) SCC 552.
28. *Dayal Saran v. Union of India*, AIR 1980 SC 554 : (1980) 3 SCC 25; *Shiv Shankar v. Union of India*, AIR 1985 SC 514 : (1985) 2 SCC 30.
29. *State of Punjab v. Kishan Chand*, AIR 1971 SC 766.
30. *Chamba Singh v. State of Punjab*, AIR 1997 SC 2455 : (1997) 11 SCC 452.
31. *Raj Kumar v. Union of India*, AIR 1969 SC 180 : (1968) 3 SCR 857.
32. *P. Kasilingam v. P.S.G. College of Technology*, AIR 1981 SC 789 : (1981) 1 SCC 405.

Harnam Singh,[33] that a Government servant who has declared his date of birth at the initial stage of employment would not be debarred from later making a request to correct his age if he has irrefutable proof to support his claim. He should do so within reasonable time if the government has not fixed any period of limitation for the purpose.

But, lately, the Supreme Court has exhibited a more rigid stand on this question. The Court has ruled in *India v. C. Ramaswamy*,[34] that when the date of birth of the employee is entered in the service record on his representation, the principle of estoppel would apply to the employee when he asks for a change in his date of birth, and the authorities concerned would be justified in declining to alter the same.

The Supreme Court has also interdicted the Courts from granting any relief in the matter even if it is shown that the date of birth as originally recorded was incorrect because the candidate concerned had represented a different date of birth to be taken into consideration obviously with a view that that would be to his advantage. Once having secured entry into the service, possibly in preference to other candidates, the principle of estoppel would be clearly applicable to him and relief by way of change in his date of birth can be legitimately denied.[35]

(l) RETIREMENT

Article 311 does not apply to a case of retirement on attaining the age of superannuation as it does not amount to imposing a penalty.[36] The term 'conditions of service' used in Art. 309 includes the power to fix and reduce the age of superannuation.[37]

Termination of service of a civil servant by a change in the age of superannuation does not attract Art. 311(2), and does not amount to removal from service within the meaning of Art. 311(2) which applies only in three situations, *viz.*, dismissal, removal and reduction in rank. When a person joined the State Civil Service, the age of superannuation was fixed at 55 years; it was then raised to 58 years by the Government which lowered it again to 55 years. Consequently, he had to retire. Art. 311(2) was held inapplicable to such a situation. In the instant case, the Court also rejected the contention that the rule in question was retrospective. The Court held that there was no retrospectivity in the rule whatsoever as it applied to all uniformly notwithstanding whether they entered in service prior or subsequent to the date of the order.[38]

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33. *Union of India v. Harnam Singh*, 1993 AIR SCW 1241, 1246 : (1993) 2 SCC 162.
Also see, *Union of India v. Kantilal Hematram Pandya*, AIR 1995 SC 1349 : (1995) 3 SCC 17; *Burn Standard Co. Ltd. v. Dinabandhu Majumdar*, AIR 1995 SC 1499 : (1995) 4 SCC 172.

34. AIR 1997 SC 2055 : (1997) 4 SCC 647.

35. *Ibid*, at 2062.
Also see, *Secretary and Commissioner, Home Dept. v. R. Kirubakaran*, AIR 1993 SC 2647 : 1994 Supp (1) SCC 155; *Burn Standard Co. Ltd. v. Dinabandhu Majumdar*, AIR 1995 SC 1499 : (1995) 4 SCC 172; *G.M. Bharat Coking Coal Ltd., W.B. v. Shib Kumar Dushad*, AIR 2001 SC 72 : (2000) 8 SCC 696.

36. *Union of India v. S.A. Razak*, AIR 1981 SC 360 : (1981) 2 SCC 74.

37. *Bishun Narain v. State of Uttar Pradesh*, AIR 1965 SC 1567 : (1965) 1 SCR 693.
Also see, *State of Andhra Pradesh v. S.K. Mohinuddin*, AIR 1994 SC 1474.

38. *Bishun Narain, op. cit.*

In 1979, the A.P. Government increased the age of superannuation from 55 to 58 years. In 1983, the age was reduced from 58 to 55 years. The order was challenged but, in *Nagaraj,*[39] the Supreme Court rejected the challenge. The Court ruled that it was open to the Government to reduce the age of superannuation and the reduction in age was not unreasonable. In reducing the age of retirement, the Government did not act "arbitrarily or irrationally". The impugned decision was actuated and influenced predominantly by the consideration of creating new avenues of employment for the youth. The reduction in age of retirement is not therefore hit by Art. 14 or 16 as it was not "arbitrary or unreasonable."

A member of the Indian Police Service was due to retire on 31st March, 1996. On 20th March, he was granted extension of service for six months, but, on 23rd March, the extension was cancelled. The Supreme Court ruled that it was not necessary to give a hearing to the concerned employee. Till the order came into force, no vested right could have arisen. If the order of the extension created no right, its cancellation could not have withdrawn any right and hence the right to hearing did not arise and there was no violation of the rules of natural justice.[40]

(m) COMPULSORY RETIREMENT

When the Service Rules so provide, compulsory retirement of civil servants, earlier than their normal superannuation is regarded as different from dismissal or removal. While dismissal or removal is a punishment as it results in the government servant concerned losing his pensionary rights which would otherwise have accrued to him in respect of the service already put in by him, compulsory retirement is not regarded as penal in nature. It does not cast any stigma or implication of misbehaviour or incapacity, nor does the employee concerned lose his retrial benefits. The government servant thus retired is entitled to pension proportionate to the period of service already put in by him.[41]

Compulsory retirement takes place, earlier than the normal age of retirement, when the Service Rules so provide. Under Art. 465-A of the Civil Service Regulations, the Government can retire an employee, who has put in 25 years' service, in public interest. Compulsory retirement arises only when the Service Rules fix one age for superannuation, and another age of compulsory retirement, and the services of a civil servant are terminated between these two points of time.

The Supreme Court has laid down the principle that the rule provising for compulsory retirement "must not only contain the outside limit of superannuation but there must also be a provision for a reasonably long period of qualified service."[42] The termination of service of a civil servant under a rule which does not prescribe a reasonably long period of qualified service in substance amounts to removal under Art. 311(2).[43] When the rules do not fix the age of compulsory retirement, retiring a person before the age of superannuation amounts to dis-

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39. *K. Nagaraj v. State of Andhra Pradesh,* AIR 1985 SC 551 : (1985) 1 SCC 523.
40. *State of U.P. v. Girish Behari,* AIR 1997 SC 1354 : (1997) 4 SCC 362.
41. *Shaymlal v. State of Uttar Pradesh,* AIR 1954 SC 369 : (1955) 1 SCR 26.
42. *Takhatray Shivdattrai Mankad v. State of Gujarat,* AIR 1970 SC 143 : (1969) 2 SCC 120. Also, *Bombay v. Subhagchand M. Doshi,*AIR 1957 SC 892 : 1958 SCR 571.
43. *Gurdev v. State of Punjab,* AIR 1964 SC 1585.

missal. Similarly, retiring a person earlier than the age fixed for compulsory retirement would amount to dismissal or removal.[44]

The rationale underlying compulsory retirement is that in all organizations, and more so in government organizations, there is good deal of dead wood, and it is in public interest to chop off the same. The power to compulsorily retire a government servant is one of the facets of the doctrine of pleasure embodied in Art. 310. A balance is sought to be drawn between the rights of the individual government servant and the interest of the public. While a minimum service is assured to the government servant, the Government is given power to energize its machinery and make it more efficient by compulsorily retiring those who in its opinion should not be there in public interest. Compulsory retirement is therefore resorted to in public interest.[45]

As the Supreme Court has observed in *Kandaswamy*:[46] "The Government is given power to energise its machinery by weeding out deadwood, inefficient, corrupt and people of doubtful integrity by compulsorily retiring them from service." Emphasizing upon the need to compulsorily retire government servants, the Supreme Court has observed in *State of Orissa v. Ram Chandra Das*:[47]

> "….the settled legal proposition is that the Government is empowered and would be entitled to compulsorily retire a government servant in public interest with a view to improve efficiency of the administration or to weed out the people of doubtful integrity or corrupt but sufficient evidence was not available to take disciplinary action in accordance with the rules so as to inculcate a sense of discipline in the service."

It is for the Government to decide whether or not an employee's retirement is in public interest. The exercise of power must be *bona fide* and in public interest. If the authority concerned *bona fide* forms the opinion that it is so, then its correctness is not liable to challenge in a Court of law.[48] But the same may be challenged on the ground that the requisite opinion is based on no evidence, or has not been formed, or the decision is based on collateral grounds, or that it is an arbitrary decision.

As compulsory retirement is not considered to be dismissal or removal, and is not considered as a punishment, it does not attract the procedural safeguard contained in Art. 311(2).[49] Therefore, no opportunity of hearing need be given to the concerned government servant before exercising the power of compulsory retirement.[50]

But compulsory retirement may amount to dismissal or removal in certain situations, e.g. if the order casts a stigma on the employee retired. This happen

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44. *Moti Ram Deka v. N.E.F. Rly.*, AIR 1964 SC 600 : (1964) 5 SCR 683; *Ram Parshad v. State of Punjab*, AIR 1966 SC 1607; *Takhatray, op. cit.; Murari Mohan v. Union of India*, AIR 1985 SC 931 : (1985) 3 SCC 120.
45. *Union of India v. J.N. Sinha*, AIR 1971 SC 40 : (1970) 2 SCC 458.
46. *K. Kandaswamy v. Union of India*, AIR 1996 SC 277 : (1995) 6 SCC 162.
47. AIR 1996 SC 2436 : (1996) 5 SCC 331.
48. *Union of India v. J.N. Sinha, op. cit.*; *T.G. Shivacharana Singh v. State of Mysore*, AIR 1965 SC 280; *N.V. Puttabhatta v. State of Mysore*, AIR 1972 SC 2185 : (1972) 3 SCC 739; *Tara Singh v. State of Rajasthan*, AIR 1975 SC 1487; *Union of India v. M.E. Reddy*, AIR 1980 SC 563; *Baldev Raj v. Union of India*, AIR 1981 SC 70; *S. Ramachandra Raju v. State of Orissa*, (1994) 3 SCC 424; *Bishwanath Prasad Singh v. State of Bihar*, (2001) 2 SCC 305.
49. *Dinesh Chandra v. State of Assam*, AIR 1978 SC 17 : (1977) 4 SCC 441.
50. *Union of India v. J.N. Sinha*, AIR 1971 SC 40 : (1970) 2 SCC 458.

when the order of retirement contains words from which a stigma, misbehaviour or incapacity may be inferred against the officer retired, or, if he is being made to lose the benefit already earned by him.[51] For example, a civil servant was retired after 28 years' service on the ground that he had outlived his utility. The Supreme Court ruled that as the order on its face stated that he was incapable of holding the post and, as this was a stigma against the employee, it amounted to dismissal and attracted Art. 311(2).[52]

An order of compulsory retirement may be couched in innocuous language without making any imputations against the concerned government servant. But, if challenged, the Court can lift the veil, look into his service record and consider whether the order was based on any misconduct of the employee, or was made *bona fide* and not with any oblique or extraneous purpose. If the Court finds that the order of compulsory retirement was by way of casting stigma on the reputation or career of the employee concerned, then the order would be regarded as being in contravention of Art. 311(2).[53] The Supreme Court has observed in the instant case: "Mere form of the order in such cases cannot deter the Court from delving into the basis of the order if the order in question is challenged by the concerned government servant."

In *Anoop*,[54] the Court has stated: "If the Court holds that the order though in the form is merely a determination of employment is in reality a cloak for an order of punishment, the Court would not be debarred, merely because of the form of the order, in giving effect to the rights conferred by law upon the employee."

An employee can be compulsorily retired if there is material to doubt his integrity.[55]

The Supreme Court has laid down the following propositions concerning compulsory retirement in Baikuntha Nath Das v. Chief District Medical Officer, Baripada[56] and Posts and Telegraphs Board v. C.S.N. Murthy:[57]

(1) An order of compulsory retirement is not a punishment as it implies no stigma nor any suggestion of misbehaviour.

(2) Principles of natural justice do not apply to an order of compulsory retirement.

These two propositions have already been discussed above.

(3) The order is passed in its subjective satisfaction by the Government on forming the opinion that it is in public interest to retire a government servant compulsorily.

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51. *State of Uttar Pradesh v. Shyam Lal Sharma*, AIR 1971 SC 2151 : (1971) 2 SCC 514.

52. *State of Uttar Pradesh v. Madan Mohan*, AIR 1967 SC 1260 : (1967) 2 SCR 333; *I.N. Saxena v. State of Madhya Pradesh*, AIR 1967 SC 1264.

53. *Ram Ekbal Sharma v. State of Bihar*,, AIR 1990 SC 1368 : (1990) 3 SCC 504;

54. *Anoop Jaiswal v. Government of India*, AIR 1984 SC 636 : (1984) 2 SCC 369.
Also, *State of Uttar Pradesh v. Abhai Kishore Masta*, (1995) 1 SCC 336 : 1995 SCC (L&S) 317.

55. *S. Govinda Menon v. Union of India*, AIR 1967 SC 1274 : (1967) 2 SCR 566; *Periyar and Pareekanni Rubber Ltd. v. State of Kerala*, AIR 1990 SC 2192 : (1991) 4 SCC 195; *Union of India v. A.K. Patnaik*, AIR 1996 SC 280 : (1995) 6 SCC 442.

56. AIR 1992 SC 1020 : (1992) 2 SCC 299.

57. (1992) 2 SCC 317 : AIR 1992 SC 1368.
Also see, *Gujarat v. Umedbhai M. Patel*, AIR 2001 SC 1109 : (2001) 3 SCC 314.

(4) The Government has to consider the entire record of service before taking a decision in the matter. The record to be considered would include the entries in the confidential records/character rolls, both favourable and adverse.

(5) An order of compulsory retirement is not challengable merely on the ground that while passing the same, uncommunicated adverse remarks were also taken into consideration.[58]

(6) As regards the judicial scrutiny of an order of compulsory retirement, the High Court or the Supreme Court does not act as a Court of appeal; the Court can interfere if the order is passed on any of the following grounds, *viz.*:

(a) *mala fides*; or

(b) extraneous reasons;[59] or

(c) based on no evidence;

(d) it is arbitrary which means that no reasonable person would form the requisite opinion on the given material; in short, if it is found to be a perverse order. In this connection, the Supreme Court has stated in *India v. V.P. Seth*:[60]

> "….an order of compulsory retirement can be made subject to judicial review only on grounds of *mala fides*, arbitrariness or perversity and that the rule of *audi alteram partem* has no application since the order of compulsory retirement in such a situation is not penal in nature."

A few words need be said concerning proposition (5), stated above. There has been some shift in the judicial opinion on the question whether the uncommunicated adverse entries in the service record can be considered for the purposes of compulsory retirement. In *Union of India v. M.E. Reddy*,[61] the Court had laid down that uncommunicated adverse remarks can be relied upon while passing an order of compulsory retirement. But, then, the Court took a different view in *Brij Mohan Singh Chopra v. State of Punjab*[62] and *Baidyanath*.[63] The Court ruled therein that uncommunicated entries could not legally be relied upon while making an order of compulsory retirement. It was also held in *Baidyanath* that if a representation was pending against the adverse remarks, then these remarks could not be taken into consideration unless the representation itself was considered and disposed of. But in *Baikuntha Nath*,[64] as stated above, the *Reddy* view has been adopted and reiterated and the view expressed in *Baidyanath* and *Brij Mohan* was overruled. The *Baikuntha Nath* ruling is now the prevailing norm and has been followed in a number of cases.[65] The position, therefore, is that uncom-

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58. *State of Uttar Pradesh v. Lalsa Ram,* AIR 2001 SC 1137 : (2001) 3 SCC 389.
59. *State of Gujarat v. Umedbhai M. Patel, supra.*
60. AIR 1994 SC 1261.
61. AIR 1980 SC 563 : (1980) 2 SCC 15.
62. AIR 1987 SC 948.
63. *Baidyanath Mahapatra v. State of Orissa,* AIR 1989 SC 2218 : (1989) 4 SCC 664.
64. AIR 1992 SC 1020 : (1992) 2 SCC 299.
65. *Posts and Telegraphs Board v. C.S.N. Murthy,* AIR 1992 SC 1368 : (1992) 2 SCC 317; *Secretary to the Govt., Harijan & Tribal Welfare Dept. v. Nityananda Pati,* AIR 1993 SC 383 : 1993 Supp (2) SCC 391; *Union of India v. V.P. Seth,* AIR 1994 SC 1261 : 1994 SCC (L&S) 1052; *M.S. Bindra v. Union of India,* (1998) 7 SCC 310 : AIR 1998 SC 3058; *Gujarat v. Suryakant Chunilal Shah,* (1998) 8 JT (SC) 326; *Madan Mohan Choudhary v. State of Bihar,* AIR 1999 SC 1018 : (1999) 3 SCC 396.

municated adverse remarks may also be considered for the purpose of compulsory retirement of an employee.

The Supreme Court has emphasized in *State of Uttar Pradesh v. Bihari Lal*[66] that the entire service record should be considered before taking a decision to compulsorily retire a government servant including any adverse remarks whether communicated to him or not. "It is on an overall assessment of the record that the authority would reach a decision whether the government servant should be compulsorily retired in public interest."

While considering the entire record of the employee concerned, before taking a decision as regards his compulsory retirement, more importance is to be attached to the record of performance during the later years which would include entries in his character roll both favourable and unfavourable. If a government servant is promoted to a higher post, notwithstanding the adverse remarks, then such remarks lose their sting, more so, if the promotion is based upon selection and not upon seniority.[67]

In *Baldev*,[68] the order of compulsory retirement was held to be arbitrary when it was based on old confidential entries made 20 years earlier. The Court emphasized that such stale entries could not be taken into consideration for retiring an employee compulsorily, particularly when he had been promoted subsequent to these entries. The Court observed that on promotion to a higher post, any prior adverse entries in his service record lost all significance and such entries remained on record as part of the past history.

There was one solitary adverse entry and after this entry the employee concerned was promoted to a higher post. The order of compulsory retirement was quashed. The Court observed that his entire service record had not been taken into consideration objectively.[69]

In *State of Orissa v. Ram Chandra Das*,[70] the Supreme Court has observed that if the Government on consideration of the entire service record comes to the conclusion "as a reasonable prudentman" that the employee should be compulsorily retired, then the Court would not interfere with such a decision. The Court went on to say that merely because a promotion was given to the concerned employee after adverse entries had been made against him, it would be no ground to hold that the compulsory retirement of the employee could not be ordered. This ruling seems to modify the *Baldev Raj* and *Baikuntha Nath*,[71] rulings to some extent.

In *State of Punjab v. Gurdas Singh*,[72] the Court has reiterated the view expressed by it in *Ram Chandra Das*, and it has observed:

> "Before the decision to retire a government servant prematurely is taken the authorities are required to consider the whole record of service. Any adverse entry prior to earning of promotion or crossing of efficiency bar or picking up

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66. AIR 1995 SC 1161, 1162 : 1994 Supp (3) SCC 594.
67. *Baikunith Nath Das, supra; Posts and Telegraphs Board, supra.*
68. *Baldev Raj v. State of Punjab*, AIR 1984 SC 986 : 1984 Supp SCC 221.
69. *S. Ramachandra Raju v. State of Orissa*, AIR 1995 SC 111 : 1994 Supp (3) SCC 424.
70. AIR 1996 SC 2436 : (1996) 5 SCC 331.
Also see, *K. Kandaswamy v. Union of India*, AIR 1996 SC 277 : (1995) 6 SCC 162; *Union of India v. V.P. Sethi*, AIR 1994 SC 1261 : (1994) 2 LLJ 411.
71. *Supra*, footnotes 67 and 68.
72. AIR 1998 SC 1661, 1666 : (1998) 4 SCC 92.

> higher rank is not wiped out and can be taken into consideration while considering the overall performance of the employee during whole of his tenure of service whether it is in public interest to retain him in the service. The whole record of service of the employee will include any uncommunicated adverse entries as well."

As regards proposition (6), stated above, over time, the Courts have quashed a number of orders of compulsory retirement. A few examples may be cited here. Such an order was quashed in *Madan Mohan Choudhary v. State of Bihar*,[73] on the ground that it was arbitrary in the sense that no reasonable person could have come to the conclusion, on the material available, that the concerned employee had outlived his utility and become a dead wood which had to be chopped off. An order of compulsory retirement of an employee would be unjustified when there is nothing adverse against him in the service record.[74]

In *Ramaswami*,[75] charges were framed against a civil servant but were dropped and he was promoted to a very responsible post. Thereafter, he was compulsorily retired. The Supreme Court held that there was nothing even mildly suggestive of inaptitude or inefficiency after promotion, and there was no entry in the service record to his discredit, or even hinting even remotely that he had outlived his utility as a government servant, and, therefore, the order of retirement was held to be invalid.

A judge after having been allowed to cross the second efficiency bar was compulsorily retired by the High Court. The Supreme Court quashed the order of retirement as there was nothing to show that suddenly there was deterioration in the quality of his work or integrity so as to deserve compulsory retirement.[76]

The Supreme Court quashed an order of compulsory retirement in *S.R. Venkataraman v. Union of India*,[77] on the ground of abuse of power by the concerned authority. In *Sonam Lama*,[78] the reason given for issuing an order of compulsory retirement was that "the better talent which is available in the department can be used and entrusted with the functions of these officers who can be compulsorily retired….the functions of these officers can be better done by more qualified persons." The Supreme Court quashed the order as being "wholly erroneous" which could not be sustained in law. The Court observed:

> "Apparently the above reasoning cannot be the basis for compulsorily retiring any official. The report does not state that in the public interest the officers cannot be continued. The assessment of performance of the officers is only to the effect that there are better talented persons available in the department and the work performed by the officials could be better done by more qualified persons. This is wholly extraneous consideration for compulsorily retiring any official. 'The better talent' is a relative term. That does not mean that the incumbent in the office has become a dead wood."

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73. AIR 1999 SC 1018 : (1999) 3 SCC 396.
74. *High Court of Judicature at Allahabad v. Sarnam Singh,* (2000) 2 SCC 339 : AIR 2000 SC 2150.
75. *D. Ramaswami v. State of Tamil Nadu,* AIR 1982 SC 793 : (1982) 1 SCC 510.
76. *Swami Saran v. State of Uttar Pradesh,* AIR 1980 SC 269 : (1980) 1 SCC 12.
77. AIR 1979 SC 49 : (1979) 2 SCC 491.
78. *Sikkim v. Sonam Lama,* AIR 1991 SC 534 : 1991 Supp (1) SCC 179.

On the question of compulsory retirement of a government servant, the Supreme Court has warned:[79]

> "To dunk an officer into the puddle of "doubtful integrity", it is not enough that the doubt fringes on a mere hunch. That doubt should be of such a nature as would reasonably and consciously be entertainable by a reasonable man on the given material. Mere possibility is hardly sufficient to assume that it would have happened. There must be preponderance of probability for the reasonable man to entertain doubt regarding that possibility. Only then there is justification to ram an officer with the label 'doubtful integrity'"

In the following case,[80] the respondent was suspended from service on charges of misconduct and an inquiry was ordered against him. Pending completion of the inquiry, he was retired from service. The Supreme Court concluded that the order of compulsory retirement though innocuously worded was in fact an order of his removal from service and could not thus be sustained.

In the case noted below,[81] an order of compulsory retirement was quashed as having been passed for extraneous grounds for the following reasons :

(1) There was no adverse entry in the respondent's confidential record;

(2) He has crossed the efficiency bar at the ages of 50 and 55;

(3) He had less than two years to retire;

(4) A disciplinary inquiry initiated against him was not completed within a reasonable time. The authorities did not wait for the conclusion of the inquiry and decided to dispense with his services on the basis of unproved allegations.

An employee appointed for a fixed term of five years does not superannuate; he only goes out of office on completion of his tenure. Therefore, the question of prematurely retiring him does not arise.[82]

(n) VOLUNTARY RETIREMENT

A government servant can seek voluntary retirement from service before the age of normal superannuation if he has put in the specified numbers of years of service as required by the Service Rules applicable to him.

It is a matter of interpretation of the relevant Service Rules whether an employee has a right to seek voluntary retirement—(i) without the employer having any say in the matter; or (ii) subject to the permission of the employer.

Interpreting fundamental Rule 56(c), the Supreme Court held in *Dinesh*,[83] that "there is no question of acceptance of the request for voluntary retirement by the Government, when the government servant exercises his right under FR56(c)." Under Rule 56(c), a government servant enjoys an option in absolute terms to voluntary retire with three months' previous notice, after he reaches 50 years of age, or has completed 25 years of service, and the consent of the Government is not nec-

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79. *M.S. Bindra v. Union of India*, (1998) 7 SCC 310 : (1988) 7 SCC 310.
80. *High Court of Punjab and Haryana v. Ishwarchand Jain*, AIR 1999 SC 1677 : (1999) 4 SCC 579.
81. *State of Gujarat v. Umedbhai M. Patel*, AIR 2001 SC 1109 : (2001) 3 SCC 314.
82. *L.P. Agarwal v. Union of India*, AIR 1992 SC 1872 : (1992) 3 SCC 526.
83. *Dinesh Chandra Sangma v. State of Assam*, AIR 1978 SC 17 : (1977) 4 SCC 441.
Also, *B.J. Shelat v. State of Gujarat*, AIR 1978 SC 1109.

essary to give legal effect to the voluntary retirement of the government servant under that rule.

In *B.J. Shelat v. Gujarat*,[84] the rule in question gave a right to say 'no' to the Government to the employee's request to voluntary retire if any departmental proceedings were pending or contemplated against him. The right of the employee to seek voluntary retirement under this rule is conditional, but the government has to pass an order withholding permission to retire on one of the conditions mentioned in the rule. If no such order is made and communicated to the concerned employee, he retires at the end of the notice period.

Interpreting the Service Rules of a corporation, the Supreme Court concluded that after completion of 25 years' service, or on attaining the age of 50 years, whichever is earlier, the employee has a right to make a request for voluntary retirement, but his request becomes effective only if he is "permitted" to retire. The employee has a right to make a request to permit him to retire, but if his request is not accepted and permission is not granted, the employee cannot retire. There cannot be automatic retirement under the rules.[85]

In *Syed Muzaffar Mir*,[86] the respondent, a railway employee, was under suspension. He sought premature retirement by giving three months' notice. No order withholding retirement was passed. The notice period expired on 21-10-1985 and thereafter an order of removal was passed against him on 4-11-1985. The question arose whether the order of removal was validly passed. Interpreting the relevant Railway Service Rules, the Supreme Court ruled that the order of removal was *non-est*. Under the Rules, permission to retire could be withhled in case the employee was under suspension. In the instant case, no such order was passed.

But, then, the Court changed its position in this matter. A government employee expressed his intention for voluntary retirement and gave a three months' notice for the purpose on Sept. 20, 1993. He handed over charge on February 11, 94, even without acceptance of voluntary retirement. On February 25, 1994, the concerned authority declined to accept his request to retire.

The matter fell under Rule 5.32(B) of the Punjab Civil Services Rules. Prosecution against the petitioner for certain offences were pending trial. The Court distinguished the fact-situation in this case from that in *Muzaffar* where the respondent was under suspension and not facing criminal trial. Upholding this order in *Baljit*,[87] the Court pointed out that "when serious offences are pending trial it is open to the appropriate Government to decide whether or not the delinquent should be permitted to retire voluntarily or such disciplinary action as is available should be taken under the law. Therefore, mere expiry of three months' period of notice given, does not automatically put an end to the jural relationship of employer and employee between Government and the delinquent official. Only on acceptance by the employer of resignation or request for voluntary retirement their jural relationship ceases. It would, therefore, be of necessity that the Government takes appropriate decision, whether the delinquent would be permitted to retire voluntarily from service pending the action against him." In the instant

84. AIR 1978 SC 1109 : (1978) 2 SCC 202.
85. *HPMC v. Shri Suman Behari Sharma*, AIR 1996 SC 1353 : (1996) 4 SCC 584.
86. *Union of India v. Sayed Muzaffar Mir*, AIR 1995 SC 176 : (1994) 6 JT 288.
87. *Baljit Singh v. State of Haryana*, AIR 1997 SC 2150 : (1997) 1 SCC 754.

case, serious offences were pending trial against the employee. The Government, therefore, rightly refused to permit him to retire voluntarily from service. "Each case should be considered in its own backdrop of facts. Until the jural relations of employer and employee comes to a close according to law, the employer always has power to decide and pass appropriate order."

But the Court overruled *Baljit* in *Singhal*[88] interpreting the same Rule. The Court ruled that under the Rule, a government employee can seek voluntary retirement after 20 years of service by giving a three months' notice for the purpose. If the appointing authority does not refuse to grant permission for retirement *within* the notice period the retirement becomes effective from the date of expiry of the notice period. Under this Rule, the Government could say 'no' to the request of retirement within the notice period but it was not necessary for the Government to say 'yes'.

The Court held that the *Baljit* ruling went against the rulings in *Dinesh and Shelat* where the Court had taken the view under similar rules that "a positive order had to be passed within the notice period withholding permission to retire and that the said order was also to be communicated to the employee during the said period."

(o) PENSION

Right to receive pension is a valuable right vesting in a civil servant. Payment of pension to a government servant depends not on government's discretion but on rules. A government servant falling within the rules is entitled to receive pension. It may be that an order is needed for quantification of the pension, but the right to receive the same flows not from the order but from the rules.

Pensionary benefits as well as any other terminal benefits constitute conditions of service. Therefore, the employer can revise these benefits and fix a date from which the revised benefits shall take effect. Such a date may be set prospectively or retrospectively so long as it is set in a reasonable manner. If questioned, the only question will be whether the prescription of the date is unreasonable or discriminatory.[89]

Pension is not a bounty depending on the sweet will and pleasure of the government, but is right to property.[90] Therefore, an order imposing a cut in the pension of a retiring civil servant cannot be passed without giving the affected employee a reasonable opportunity of being heard against the proposed reduction in the amount of his pension as the order adversely affects him.[91]

A government servant can be deprived of the whole or part of his pensionary rights only in accordance with the rules. Under R. 9(1) of the Civil Service Pension Rules, 1972, the President can withhold the whole or part of the pension of a

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88. *State of Haryana v. S.K. Singhal*, AIR 1999 SC 1829 : (1999) 4 SCC 293.
Also see, *Tek Chand v. Dile Ram*, AIR 2001 SC 905 : (2001) 3 SCC 290.

89. *West Bengal v. Ratan Behari Dey*, (1993) 4 SCC 62 : 1993 SCC (L&S) 1123.

90. *Deokinandan Prasad v. State of Bihar*, AIR 1971 SC 1409 : (1971) 2 SCC 330; *Kerala v. Padmabhan Nair*, AIR 1985 SC 356 : (1985) 1 SCC 429; *D.S. Nakara v. Union of India*, AIR 1983 SC 130 : (1983) 1 SCC 305.
Also see, *supra*, Ch. XXXIV, under Art. 41.

91. *Punjab v. Iqbal Singh*, AIR 1976 SC 667 : (1976) 2 SCC 1; *State of Punjab v. K.R. Erry*, AIR 1973 SC 834.
Also see, *Union of India v. P.D. Yadav*, (2002) 1 SCC 405.

government employee if he is found guilty of "grave misconduct or negligence" during the period of his service. In the absence of a finding of "grave misconduct or negligence" either in a judicial proceeding, or a departmental inquiry, the President is "without authority of law to impose penalty of withholding pension as a measure of punishment." As the employee's right to pension is a statutory right, the measure of deprivation must, therefore, be correlative to or commensurate with the gravity of the misconduct.[92]

In *Union of India v. B. Dev*,[93] absence from duty by the employee concerned was found to be wilful and pre-meditated amounting to misconduct. Therefore, an order withholding from him full pensionary benefit was upheld by the Supreme Court. Divesting pensionary rights of a pensioner is not valid.[94]

The Service Rules may require "future good conduct" on the part of a pensioner. Pension may be withheld if the pensioner is convicted of any serious crime or is guilty of misconduct.[95]

A few persons were granted pensionary benefits by erroneous interpretation of the rules. The Court refused to perpetuate the same mistake. The Court could not direct something being done which was contrary to rules. "In such cases, there is no question of application of Article 14 of the Constitution. No person can claim any right on the basis of decision which is *de hors* the statutory rules nor can there be any estoppel."[96]

(p) GRATUITY

Gratuity is a statutory retiral benefit earned by an employee.

The Supreme Court has ruled that the word 'pension' in R. 9(1) of the Pension Rules, stated above, covers gratuity also. Therefore, gratuity can also be withdrawn or reduced along with pension under that Rule.[97] Also, like pension, gratuity also cannot be reduced without giving the employee a reasonable opportunity of hearing.

(q) TRANSFER OF A GOVERNMENT DEPARTMENT TO A CORPORATION

Where all the functions of a government department along with posts are transferred to some government corporation, the question arises as to how to transfer the services of the government employees because of Art. 311. While Art. 311 applies to a government department it does not apply to a corporation and, therefore, government servants may not prefer the change of a department into a corporation, as their services become less secure because of the absence of Art. 311.

In *State of Mysore v. H. Papanna Gowde*,[98] it has been held that because of Art. 311, it is not open to the Government to declare even by a statutory rule that

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92. *Jarnail Singh v. Secretary, Ministry of Home Affairs*, (1993) 1 SCC 47 : AIR 1994 SC 1484; *Union of India v. G. Gangayuthan*, AIR 1997 SC 3387 : (1997) 7 SCC 463.
93. AIR 1998 SC 2709 : (1998) 7 SCC 691.
94. *Salabuddin Mohammad Yunus v. State of Andhra Pradesh*, AIR 1984 SC 1905 : 1984 Supp SCL 399; *supra.*
95. *State of Haryana v. S.K. Singhal*, AIR 1999 SC 1829, 1832 : (1999) 4 SCC 293.
96. *Union of India v. Rakesh Kumar*, AIR 2001 SC 1877, at 1885 : (2001) 4 SCC 309
97. See, footnote 72, *supra.*
98. AIR 1971 SC 191 : (1970) 3 SCC 545.

after transfer of the department along with posts to a corporation, the holders of these posts under the Government in the department shall cease to be in the service of the Government because that will be violative of Art. 311, as civil servants cannot be dismissed or removed from service. Art. 311, as such, is not applicable to a corporation. Therefore, the procedure suggested by the Supreme Court in *S.K. Saha v. Prem Prakash Agarwal*,[1] is that the Government can give an option to the holders of such posts either to be absorbed in some other government department, or to leave the government service and opt for the service of the proposed corporation. Once he opts for service in the corporation, the government servant ceases to be in the government service. He cannot then be treated as having been deputed to the corporation holding his lien with the Government.

J. DISCIPLINARY PROCEEDINGS

(a) DISCRETION OF DISCIPLINARY AUTHORITIES

A disciplinary authority may hold an inquiry into the charges against a civil servant either by itself or may depute an inquiry officer for the purpose. The inquiry officer after holding the inquiry submits his report to the disciplinary authority. The disciplinary authority has discretion to accept the findings of the inquiry officer. But, the authority can disagree with those findings and come to its own conclusions on the basis of the evidence tendered at the enquiry.

The disciplinary authority is regarded as the final fact finding authority. This point has been emphasized again and again by the Supreme Court. In *B.C. Chaturvedi v. Union of India*,[2] the Supreme Court has observed:

> "The disciplinary authority is the sole judge of facts where appeal is presented; the appellate authority has co-extensive power to re-appreciate the evidence or the nature of punishment."

In the case mentioned below,[3] in an enquiry against the respondent, the enquiry officer came to the conclusion that the respondent molested a female employee and that he acted against moral sanctions and his acts did not withstand the test of decency and modesty. The disciplinary authority, agreeing with the report of the enquiry officer, imposed the penalty of removing him from service.

The respondent challenged his removal through a writ petition in the High Court. The High Court ruled that on the basis of evidence produced before the enquiry officer, it was not possible to come to the conclusion that the respondent attempted to molest.

On appeal, the Supreme Court reversed the High Court saying that the High Court over-looked the settled position that in departmental proceedings, "the disciplinary authority is the sole Judge of facts". The High Court cannot, normally speaking, substitute its own conclusion, with regard to the guilt of the delinquent, for that of the departmental authorities. With these remarks, the Supreme Court set aside the order of the High Court and restored the punishment imposed by the disciplinary authority on the respondent.

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1. AIR 1994 SC 745 : (1994) 1 SCC 431.
2. (1995) 6 SCC 749 : AIR 1996 SC 484.
3. *Apparel Export Promotion Council v. A.K. Chopra*, (1999) 1 SCC 759 : (1999) 1 SCC 759.

After finding the facts, if the concerned officer is held to be guilty and the charges against him are held to have been established, then the disciplinary authority can impose the punishment on the delinquent officer. In the matter of punishment, the disciplinary authority has the final say.

Nevertheless, it needs to be emphasized that the disciplinary authority exercises its discretion subject to Arts. 14 and 16.[4] The Supreme Court has emphasized in *Nepal Singh v. State of Uttar Pradesh*:[5] "In dealing with a government servant the state must conform to the constitutional requirements of Arts. 14 and 16 of the Constitution. An arbitrary exercise of power by the state violates those constitutional guarantees." Arts. 14 and 16 guarantee fair and just treatment. "When a government servant satisfies the Court *prima facie* that an order terminating his services violates Arts. 14 and 16, the competent authority must discharge the burden of showing that the power to terminate the services was exercised honestly and in good faith, on valid considerations, fairly and without discrimination."

As a sequel to the police agitation, the State Government dismissed 1100 members of the police force for participation in the agitation. Later, 1000 of these persons were reinstated. The Government was not able to explain the criteria which were applied to distinguish between those who were reinstated and those who were not. The Court ruled that the petitioners had been arbitrarily weeded out for discriminatory treatment as compared to others who were similarly situated. The treatment meted out to the appellants was held to be arbitrary which amounted to denial of equal treatment under Art. 14.[6]

Further, the disciplinary authority has to exercise its discretion subject to the principles of Administrative Law governing the exercise of discretionary powers.[7] Thus, *mala fides* on the part of the disciplinary authority vitiates the inquiry, but there must be positive evidence of *mala fides* on record. For example, in *Partap Singh v. State of Punjab*,[8] the Supreme Court quashed the government's order suspending the appellant civil servant and ordering an inquiry against him on the ground that the order was vitiated by *mala fides* insofar as it was motivated by an improper purpose which was outside the purpose for which the discretion to punish had been conferred on the Government.

In *State of Punjab v. V.K. Khanna*,[9] the Supreme Court quashed the charge sheet issued by the Government against a senior civil servant with the following observation:[10]

> "….in the event there is an element of malice or *mala fide* motive involved in the matter of issue of a charge-sheet or the concerned authority is so biased that the inquiry would be a mere farcical show and the conclusions are well known then and in that event law Courts are otherwise justified in interfering at the earliest stage so as to avoid the harassment and humiliation of a public official".

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4. *Supra*, Chs. XXI and XXIII.
5. AIR 1985 SC 84 : (1985) 1 SCC 56.
6. *Senghara Singh v. State of Punjab*, (1983) 4 SCC 225.
7. JAIN, *A TREATISE ON ADM. LAW*, I, Ch. XIX; JAIN *CASES & MATERIALS ON INDIAN ADM. LAW, II*. Ch. XVI.
8. AIR 1964 SC 72.
9. AIR 2001 SC 343 : (2001) 2 SCC 330.
10. *Ibid*, at 357.

In *Kalra,*[11] the Supreme Court held the order of dismissal to be arbitrary as the facts established did not amount to misconduct warranting dismissal.

(b) COURTS AND DISCIPLINARY PROCEEDINGS

There is an immense amount of case-law in this area. An analysis of these cases show that under Art. 226, roles of the High Courts and of the Supreme Court under Art. 32 are rather limited in disciplinary proceedings. The Court does not act as a Court of appeal against the order of the disciplinary authority. The disciplinary authority is regarded as the sole judge of the facts if the inquiry is properly conducted.

The Courts have really three principal functions to discharge in this area:

(1) to decide whether a civil servant is entitled to the protection of Art. 311 or not;

(2) to ensure that enquiries against civil servants are held according to the principles of natural justice, or according to the statutory rules, if any, framed for the purpose; and

(3) to ensure that the inquiry officer and the disciplinary authority function according to the principles of Administrative Law.

The Courts are extremely reluctant to intervene beyond these points.[12]

A disciplinary proceeding is not a criminal trial. The standard of proof required is that of preponderance of probability and not proof beyond reasonable doubt.[13]

The Courts do not go into the adequacy or reliability of evidence in support of a particular finding by the inquiry officer. The only question which the Courts consider is whether or not the findings of fact by the inquiry officer are supported by any probative evidence. The Courts thus apply the 'no evidence' rule and quash a finding of fact if there is no evidence at all to support it.[14] The Courts do not re-appreciate the evidence tendered at the inquiry and arrive at their own findings, or assume the position of a Court of appeal from the inquiry officer.[15] If there is some legal evidence on which the findings can be based then adequacy or even reliability of that evidence is not a matter for judicial interference.

The Supreme Court has observed in *Goel,*[16] in this connection:

> "If the conclusion, upon consideration of the evidence, reached by the disciplinary authority, is perverse or suffers from patent error on the face of the record or based on no evidence at all, a writ of *certiorari* could be issued."[17]

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11. *A.L. Kalra v. P & E. Corporation of Union of India,* AIR 1984 SC 1361 : (1984) 3 SCC 316.
12. See below.
13. *Union of India v. Sardar Bahadur,* 1972 Lab IC 627 : (1972) 4 SCC 618.
14. *State of West Bengal v. B.K. Barman,* AIR 1971 SC 156 : (1970) 3 SCC 612; *Nand Kishore v. State of Bihar,* AIR 1978 SC 1277 : (1978) 3 SCC 366; *supra.*
15. *State of Madras v. G. Sundaram,* AIR 1965 SC 1103; *Union of India v. H.C. Goel,* AIR 1964 SC 364 : 1964 (4) SCR 718; *High Court of Judicature v. Shashikant S. Patil,* (2000) 1 SCC 416 : AIR 2000 SC 22.
16. *Union of India v. H.C. Goel,* AIR 1964 SC 364; *Union of India v. S.L. Abbas,* (1993) 4 SCC 357 : AIR 1993 SC 2444.
17. *Supra,* Ch. VIII, Sec. E (iv), for discussion on *Certiorari.*

Thus, the Court will interfere with the findings of fact by the disciplinary authority if there is a finding which shocks the judicial conscience of the Court.[18]

A Court, however, interferes if the departmental authorities have taken into account some considerations extraneous to the evidence and the merits of the case, or have been influenced by extraneous or irrelevant considerations, or where the conclusions appear to be arbitrary or perverse.[19]

The inquiry officer should arrive at his conclusions on the basis of some evidence. Suspicion cannot be allowed to take the place of proof even in disciplinary enquiries. The Court does not interfere with disciplinary proceedings merely on the ground that it was based on evidence which would be insufficient for conviction of the delinquent on the same charge at a criminal trial. If the enquiry is properly held, then the disciplinary authorities are the sole judge of facts and the Courts do not substitute their own opinion on the merits or the facts even if they differ from those of the inquiry or the punishing authorities.

Whether the evidence is sufficient for the authority to impose the punishment, or whether the evidence is such as is legally admissible in terms of the Evidence Act, are not the questions into which the Courts would go.[20] The review Court is not concerned with the correctness of the findings of fact so long as those findings are reasonably supported by evidence. Judicial review is directed not against the decision, but is confined to the examination of the decision-making process.

The Supreme Court has stated in this connection in *State of Andhra Pradesh v. S. Sree Rama Rao*:[21]

> "The High Court is not constituted in a proceeding under Art. 226 of the Constitution as a Court of appeal over the decision of the authorities holding a departmental inquiry against a public servant: it is concerned to determine whether the inquiry is held by an authority competent in that behalf, and whether the rules of natural justice are not violated. Whether there is some evidence, which the authority entrusted with the duty to hold the enquiry has accepted and which evidence may reasonably support the conclusion that the delinquent officer is guilty of the charge, it is not the function of the High Court in a petition for a writ under Art. 226 to review the evidence and to arrive at an independent finding on the evidence."

The Supreme Court has observed in this connection in *B.C. Chaturvedi v. India*:[22]

> "When an inquiry is conducted on charges of misconduct by a public servant, the Court/Tribunal is concerned to determine whether the enquiry was held by a competent officer or whether the rules of natural justice are complied with. Whether the findings or conclusions are based on some evidence, the authority entrusted with the power to hold inquiry has jurisdiction, power and authority to reach a finding of fact or conclusion. But that finding must be based on some evidence. Neither the technical rules of Evidence Act nor of proof of fact or evidence as defined therein, apply to disciplinary proceedings."

Similarly, the Supreme Court has emphasized recently in *Kuldeep Singh*,[23] that while in exercise of its power of judicial review, the Court would not interfere

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18. *Apparel Export Promotion Council v. A.K. Chopra,* AIR 1999 SC 625.
19. *Bhagat Ram v. State of Himachal Pradesh,* AIR 1983 SC 454 : (1983) 2 SCC 442.
20. *State of Orissa v. Murlidhar,* AIR 1963 SC 404; also, *supra*, footnote 14.
21. AIR 1963 SC 1723 : 1964 (3) SCR 25.
22. AIR 1996 SC 484 : (1995) 6 SCC 749.
23. *Kuldeep Singh v. Commissioner of Police,* AIR 1999 SC 677, at 679 : (1999) 2 SCC 10.

with the findings recorded at the departmental enquiry by the disciplinary authority or the enquiry officer "as a matter of course," yet the Court can interfere with the conclusions reached therein "if there was no evidence to support the findings or the findings recorded were such as could not have been reached by an ordinary prudent man or the findings were perverse or made at the dictate of the superior authority."[24]

In *Shashikant*,[25] the Supreme Court has emphasized that the disciplinary authority is the sole judge of the facts "if the inquiry has been properly conducted". The Court has observed further:

> "The settled legal position is that if there is some legal evidence on which the findings can be based then adequacy or even reliability of that evidence is not a matter for canvassing before the High Court in a writ petition filed under Art. 226 of the Constitution."

Head (3), mentioned above, would include such grounds as: the decision of the disciplinary authority is vitiated by extraneous considerations, or is wholly arbitrary or capricious that no reasonable person could have arrived at such a conclusion.

In *V.S. Menon v. Union of India*,[26] the disciplinary proceedings were quashed as the charges levied were such as could not be sustained under the Civil Services (Safeguarding of National Security) Rules, 1949, under which the disciplinary action was sought to be taken. This was a case of *ultra vires*, *i.e.*, going outside the purview of the law. When a tribunal of enquiry functions beyond its jurisdiction (as laid down in the rules), then the enquiry by it could not be regarded as falling under Art. 311(2) and no order of dismissal could be founded on it. Lack of jurisdiction in the tribunal vitiates the entire proceedings.[27]

While, ordinarily, a Court does not interfere with the charge sheet at the initial stage of a disciplinary proceeding, yet:

> "in the event there is an element of malice or *mala fide*, motive involved in the matter of issue of a charge-sheet or the concerned authority is so biased that the inquiry would be a mere farcical show and the conclusions are well known then and in that event law Courts are otherwise justified in interfering at the earliest stage so as to avoid the harassment and humiliation of a public official."

This is with a view of not shielding any misdeed, but to maintain due of process of law in the society.[28]

Article 311(2) imposes only procedural safeguards and no substantive restrictions. Therefore, the quantum of punishment awarded to a delinquent employee lies within the discretion of the disciplinary authority. The Constitution merely guarantees reasonable opportunity of showing cause against the proposed punishment, but does not say that the punishment should not exceed any prescribed

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24. See, *Apparel Export Promotion Council v. A.K. Chopra*, (1999) 1 SCC 759: AIR 1999 SC 625.
25. *High Court of Judicature at Bombay v. Shashikant S. Patil*, AIR 2000 SC 22, at 26 : 2000 (1) SCC 416.
26. AIR 1963 SC 1160 : 1963 Supp (2) SCR 404.
27. *B.N. Singh v. State of Uttar Pradesh*, AIR 1960 All 754.
28. *State of Punjab v. V.K. Khanna*, AIR 2001 SC 343 : (2001) 2 SCC 330.

standard.[29] The disciplinary authority is invested with the discretion to impose appropriate punishment keeping in view the magnitude or gravity of the misconduct. The reviewing Court does not normally substitute its own judgment on penalty for that of the disciplinary authority. The Court would not normally interfere with, and change, the punishment imposed by the disciplinary authority.

In the following case,[30] the Governor passed a dismissal order on the basis of five charges which were held to have been substantiated by the enquiry tribunal. Later, the Supreme Court held that the tribunal's findings on two charges were vitiated because of failure of natural justice, but other findings of the tribunal were not so vitiated. Nevertheless the Court refused to interfere with the order of dismissal or direct the Governor to reconsider the matter.

The Supreme Court pointed out that had the Governor's order been based solely on the two vitiated findings, then the order would have been illegal. But when the rest of the findings of the tribunal stood, and these findings established that the servant was *prima facie* guilty of grave delinquency, the Court could not then direct the Governor to reconsider the order of dismissal. The reasons which induce the punishing authority to impose the punishment if there has been a proper inquiry, or the penalty imposed, are not justiciable. If some of the findings of the tribunal were unassailable, then the Governor's order, on whose powers no restrictions were attached to determine appropriate punishment, would be final.

The same view has been reiterated in another case[31] in which punishment was imposed on the basis of two charges, of which one was held unsustainable by the Court. The Supreme Court ruled that it could not quash the punishment imposed and stated the principle that if the order could be supported on the basis of any finding of substantial misdemeanour for which the punishment could lawfully be imposed, then it was not for the Court to consider whether that ground alone would have weighed with the authority in imposing the punishment in question.

An order removing a government servant from service should be a speaking order.[32]

Normally the Supreme Court does not interfere with the punishment imposed by the disciplinary authority on the delinquent employee as the matter falls within the ambit of the discretion of the authority. The Supreme Court does however maintain that the punishment imposed should be consonant with the gravity of the offence, and if the punishment was disproportionate to the misconduct proved, then the Supreme Court ruled that it would interfere.

The Supreme Court has emphasized in *Tulsiram Patel*:[33]

> "The disciplinary authorities are expected to act justly and fairly after taking into account all the facts and circumstances of the case and if they act arbitrarily and impose a penalty which is unduly excessive, capricious or vindictive, it can be set aside in a departmental appeal. In any event, the remedy by way of judicial review is always open to a government servant."

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29. *A.N. D'Silva v. Union of India*, AIR 1962 SC 1130 : 1962 Supp (1) SCR 968; *U.R. Bhatt v. Union of India*, AIR 1962 SC 1344 : 1962 (1) LLJ 656.
30. *Orissa v. Bidyabhushan*, AIR 1963 SC 779 : 1963 Supp (1) SCR 648.
31. *Railway Board v. N. Singh*, AIR 1969 SC 966 : (1969) 1 SCC 502.
32. *Nand Kishore v. State of Bihar*,, AIR 1978 SC 1277 : (1978) 3 SCC 366.
33. *Supra*, footnote 87, at 2094.

At another place, the Court has said: "Where the Court finds that the penalty imposed by the impugned order is arbitrary or grossly excessive or out of all proportion to the offence committed or not warranted by the facts and circumstances of the case or the requirements of that particular government service the Court will also strike down the impugned order."

There are cases where the Supreme Court has reduced the punishment imposed by the disciplinary authority. In *Shankar Das v. Union of India*,[34] the order of dismissal was set aside on the ground that the penalty was whimsical and the concerned government servant was ordered to be reinstated with full back wages.

The Court may not however always order reinstatement. It may substitute a penalty which in its opinion would be just and proper in the circumstances of the case.

In *Dasayan*,[35] the Supreme Court reduced the punishment of dismissal to compulsory retirement as the co-accused had also been given the same punishment.

In *Dr. Anil Kapoor v. Union of India*,[36] the Supreme Court refused to interfere with the punishment of removal from service although the Court did say that "it is possible to take another view in this matter", but that "that will not be a ground for interfering with the orders passed by the disciplinary proceedings."

In *Ram Kishan v. Union of India*,[37] an employee was dismissed after inquiry for using abusive language towards his superior authority. The Supreme Court set aside the dismissal order holding it to be "harsh and disproportionate to the gravity of the charge…."

In *Ram Avtar Singh v. State Public Service Tribunal*,[38] the punishment of dismissal of a police constable who remained absent for one day on hunger strike for opposing his transfer was held to be disproportionate by the Supreme Court. The Court set aside his dismissal and ordered his reinstatement in service on only 50% of backwages as he remained jobless since 1991 when he was dismissed and on tendering a written apology for what he had done.[39]

In *Kartar Singh Grewal v. State of Punjab*,[40] the concerned employee had put in unblemished service for 29 years. Three days before retirement, the disciplinary authority imposed on him the punishment of dismissal after a departmental enquiry. The Public Service Commission did not agree with the punishment; the evidence in support of the charges against him was not very strong; the employee had died leaving behind him his widow who was in bad health. In these circumstances, the Supreme Court reduced the punishment to compulsory retirement. The Court thought that this will meet the ends of justice in the instant case.[41]

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34. AIR 1989 SC 1137 : 1989 Supp (1) SCC 686.
35. *Director-General of Police v. G. Dasayan*, AIR 1998 SC 2265.
36. AIR 1999 SC 1528 : (1998) 9 SCC 47.
37. AIR 1996 SC 255 : (1995) 6 SCC 157.
Also see, *Union of India v. Iqbal Singh Cheema*, AIR 1996 SC 426 : 1995 Supp (4) SCC 84.
38. AIR 1999 SC 1542 : (1998) 9 SCC 666.
39. Also see, *V.R. Kartaki v. State of Karnataka*, AIR 1991 SC 1241 : 1991 Supp (1) SCC 267.
40. AIR 1991 SC 1067 : (1991) 2 SCC 635.
41. Also see, *Laxmi Shankar Pandey v. Union of India*, AIR 1991 SC 1070 : (1991) 2 SCC 488.

In *Mohal*,[42] the Court reduced the punishment from removal from service to compulsory retirement in the interest of justice. The inquiry against the employee was *ex parte* as he could not attend the inquiry because of financial stringency arising due to non-payment of subsistence allowance to him owing to a technicality.

In this connection, an interesting fact may be noted. Until 1996, there existed a dichotomy between the powers of the Supreme Court and the High Courts to interfere with the punishment imposed on a civil servant by the disciplinary authority. As stated above, the Supreme Court ruled that while it was empowered to interfere with the punishment imposed, the High Courts were not so authorised.

As early as 1963, in *State of Orissa v. Bidyabhushan Mohapatra*,[43] the Supreme Court ruled that having regard to the gravity of the established misconduct, the punishing authority had the power and jurisdiction to impose punishment. The penalty was not open to review by the High Court under Art. 226. If the High Court reached a finding that there was some evidence to reach the conclusion, it became unassailable. The order of the Governor who had jurisdiction and unrestricted power to determine the appropriate punishment was final.[44]

This situation continued till 1996 when in *B.C. Chaturvedi v. Union of India*,[45] the Supreme Court ruled that normally, in exercise of its power of judicial review, the High Court does not substitute its own conclusion on penalty and impose some other penalty. But, observed the Court:

> "If the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the High Court/Tribunal, it would appropriately mould the relief, either directing the disciplinary appellate authority to reconsider the penalty imposed, or to shorten the litigation, it may itself, in exceptional and rare cases, impose appropriate punishment with cogent reasons in support thereof."

Thus, if the penalty imposed shocks the conscience of the High Court, it can appropriately mould the relief. If the punishment imposed on the delinquent servant is shockingly disproportionate to the charges held proved against the employee, it will be open to the High Court to interfere.[46]

In *Chaturvedi*,[47] after an inquiry, an ITO was found to have assets disproportionate to his known sources of income. The disciplinary authority imposed on him the penalty of dismissal. The tribunal changed it into compulsory retirement on the ground that he was "no longer fit to continue in government service" as he had reached the age of 50 years. But the Supreme Court quashed the tribunal order saying that the reasoning was wholly unsupportable, "not relevant nor germane to modify the punishment". The Court observed:

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42. *A.V. Mohal v. Senior Supdt. of Post Office,* AIR 1991 SC 328 : 1991 Supp (2) SCC 503.
43. AIR 1963 SC 779 : 1963 Supp (1) SCR 648.
44. In *Krishna Chandra v. Union of India,* AIR 1992 Ori 261, HANSARIA, C.J., raised the question as to why the power to do complete justice had been denied to the High Courts.
45. AIR 1996 SC 484 : (1995) 6 SCC 749.
46. *B.C. Chaturvedi v. Union of India,* (1995) 6 SCC 749 : AIR 1996 SC 484; *Colour-Chem Ltd. v. A.L. Alaspurkar,* (1998) 3 SCC 192 : AIR 1998 SC 948; *U.P. State Road Transport Corpn. v. Mahesh Kumar Mishra,* (2000) 3 SCC 450 : AIR 2000 SC 1151.
47. *Ibid.*

> "In view of the gravity of the misconduct, namely, the appellant having been found to be in possession of assets disproportionate to the known source of his income, the interference with the imposition of punishments was wholly unwarranted."

Again, it has been emphasized by the Supreme Court in *State of Uttar Pradesh v. Nand Kishore Shukla*,[48] that a High Court not being a Court of appeal from the disciplinary authority, cannot go into the question of imposition of punishment. It is for the disciplinary authority to consider what would be the nature of the punishment to be imposed on a government servant based on his proved misconduct.

In the case mentioned below,[49] the disciplinary authority imposed the punishment of removal from service on the respondent for seeking to molest a subordinate female employee in the work place. A writ petition was filed in the High Court challenging this decision, the Court reduced the punishment. The Supreme Court, on appeal, objected to the High Court ruling with the following observation:

> "The High Court should not have substituted its own discretion for that of the authority: what punishment was required to be imposed, in the facts and circumstances of the case, was a matter which fell exclusively within the jurisdiction of the competent authority and did not warrant any interference by the High Court".

On the whole, it would seem that under Art. 136 (read with Art. 142), the Supreme Court enjoys far more discretion to interfere with the punishment imposed by the disciplinary authority on the delinquent employee than does either High Court under Art. 226, or the Administrative Tribunal.

When the disciplinary action against an employee is held to be vitiated, it is quashed, and, usually, *status quo ante* is restored, but it may not always be so because the High Court/Supreme Court has power to mould relief according to the specific facts and circumstances of each case.

In *Banerjee*,[50] termination of the service of a probationer was quashed because no regular departmental inquiry was held. The Court ordered his reinstatement with back wages as there was no material to show that he had been gainfully employed after termination. On the other hand, in *Haryana v. Jagdish Chander*,[51] although the inquiry was quashed yet the employee was not reinstated in service.

The difference between *Jagdish* and *Bannerjee* was this: In *Bannerjee*, no inquiry was held at all, whereas in *Jagdish*¸ an inquiry was held but was found deficient in one respect, *viz.*, theinquiry report had not been given to him as required by the Supreme Court decision in *Karunakar*.[52] Accordingly, in *Jagdish* the Court directed the report to be given to the concerned employee, and the proceedings from that stage were set aside and the Court stated that no order for reinstatement or backwages, needed to be passed at that stage because the rest of the inquiry proceedings were yet to go on and had not finally concluded.

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48. AIR 1996 SC 1561 : (1996) 3 SCC 750.
49. *Apparel Export Promotion Council v. A.K. Chopra,* (1999) 1 SCC 759 at 773 : AIR 1999 SC 625.
50. *D.P. Bannerjee v. S.N. Bose National Centre for Basic Sciences, Calcutta,* AIR 1999 SC 983, 993 : (1999) 3 SCC 60.
51. (1995) 2 SCC 567 : AIR 1995 SC 984.
52. *Managing Director, ECIL v. B. Karunakar,* (1993) 4 SCC 727 : 1993 SCC (L&S) 1184.

(c) SERVICE TRIBUNALS

The 42nd Constitutional Amendment introduces an innovation in the Constitution in the form of a new Article 323A.[53] It provides that Parliament may establish tribunals for adjudication of disputes concerning recruitment and conditions of service of persons appointed to public service under Central, State or any local or other authority, or a corporation owned or controlled by Government. The law made by Parliament for the purpose may specify the jurisdiction and procedure of these tribunals and exclude the jurisdiction of all Courts, except that of the Supreme Court under Art. 136, with respect to the service matters falling within the purview of these tribunals.

The justification for Art. 323A lay in the fact that massive case-law was being generated in the country in relation to service matters and too much time of the Courts, especially of the High Courts, was being consumed on this type of litigation. Art. 323A seeks to relieve the High Courts which used to take cognizance of service matters under Art. 226.

Article 323A is an enabling provision. Its scope is very wide, and is synonymous with Art. 309.[54] The expression 'conditions of service' used in Art. 323A also occurs in Art. 309 and means all those conditions which regulate the holding of a post by a person right from the time of his appointment till his retirement and even beyond it in such matters as pension etc., and includes matters of dismissal or termination of the service of government servants. Therefore, the tribunals can be endowed with comprehensive jurisdiction in relation to service matters.

An interesting question which arises is whether the setting up of these tribunals will be merely for purposes of holding inquiries against government servants or also for imposing punishment. The use of the expression 'adjudication of disputes' indicates that wider frame of reference is envisaged. It will be for Parliament to settle all the intricate questions in the law to be enacted.

Another interesting aspect of Art. 323A is that Parliament has been given power to establish service tribunals not only for the Central employees, but also for the employees of the States, local governments and of the government corporations. This will effect quite a drastic change in the present system where each of these units has control over the disciplinary proceedings relating to its servants.

While the States are subject to Art. 311(2), the local governments are not, and in their case only principles of natural justice are applicable. Similarly, in case of government undertakings, natural justice may apply.[55]

The Indian Parliament has enacted the Administrative Tribunals Act, 1985, establishing administrative tribunals for adjudication of service disputes in civil services under the Centre as well as the States. The Central Government is to establish the Central Administrative Tribunal (CAT) for central services. An appeal

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53. *Supra*, Ch. VIII, Sec. I..
54. *Supra*, Sec. B.
55. JAIN, THE LEGAL STATUS, etc., see *supra*.
Also, JAIN and JAIN, PRINCIPLES OF ADM. LAW, Ch. XXV (1986).

from CAT lies to the Supreme Court under the Act. A detailed discussion of these tribunals falls legitimately under Administrative Law.[56]

CAT exercises jurisdiction equivalent to that of the High Courts under Art. 226. It is thus more of a supervisory, rather than, an appellate body. It has therefore been held that—

(1) CAT cannot interfere with an order of transfer made *bona fide* by the concerned authority;[57]

(2) the tribunal is not an appellate authority and cannot thus substitute the role of authorities to clear the efficiency bar of a public servant;[58]

(3) The tribunal could not appreciate the evidence before the inquiry officers and substitute its own conclusion for that of the disciplinary authority.[59]

The Supreme Court has laid emphasis upon this aspect in several cases. For example, in *State of Tamil Nadu v. S. Subramaniam*,[60] the Court has observed:

> "In Judicial review, it is settled law that the Court or the tribunal has no power to trench on the jurisdiction to appreciate the evidence and to arrive at its own conclusion….When the conclusion reached by the authority is based on evidence, Tribunal is devoid of power to re-appreciate the evidence….The only consideration the Court/Tribunal has in its judicial review is to consider whether the conclusion is based on evidence on record and supports the finding or whether the conclusion is based on no evidence."[61]

In the instant case, the Court quashed the order of the Tribunal with the remark: "The Tribunal has committed serious error of law in appreciation of the evidence and in coming to its own conclusion that the charge had not been proved. Thus we hold that the view of the Tribunal is *ex facie* illegal."

But if the findings are perverse and based on no evidence, the reviewing Court or tribunal can quash the same.[62]

(4) It is not the province of the Tribunal to go into the truth or otherwise of the charges; the tribunal is not an appellate authority over the departmental authorities. Therefore, the tribunal exceeds its jurisdiction when it enters upon a discussion whether the charges are established on the materials available.[63]

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56. JAIN, *A TREATISE ON ADM. LAW*, I, Ch. XIII; JAIN, *CASES & MATERIALS ON INDIAN ADM. LAW*, II, Ch. XII

57. *Union of India v. S.L. Abbas*, (1993) 4 SCC 357 : AIR 1993 SC 2444.

58. *Administrator of Dadra & Nagar Haveli v. H.P. Vora*, AIR 1992 SC 2303 : 1993 Supp (1) SCC 551.

59. *State Bank of India v. Samarendra Kishore Endow*, (1994) 1 JT (SC) 217 : (1994) 2 SCC 537; *Union of India v. A.N. Rao*, AIR 1998 SC 111 : (1958) 1 SCC 700.

60. (1996) 7 SCC 506.

61. Also see, *B.C. Chaturvedi v. Union of India*, (1995) 6 SCC 749 : AIR 1996 SC 484; *State of Tamil Nadu v. T.V. Venugopalan*, (1994) 6 SCC 302; *Union of India v. Upendra Singh*, (1994) 3 SCC 357 : 1994 (1) LLJ 808; *State of Tamil Nadu v. Rajapandian*, (1995) 1 SCC 216 : AIR 1995 SC 561; *High Court of Judicature at Bombay v. Uday Singh*, AIR 1997 SC 2286 : (1997) 5 SCC 129.

62. See, *supra*, Ch. VIII, Sec. E(iv)(c).

63. *State of Tamil Nadu v. Thiru K.V. Perumal*, AIR 1996 SC 2474 : (1996) 5 SCC 474.

In *Government of Tamil Nadu v. A. Rajapandian*,[64] the Supreme Court has ruled that the Tribunal cannot sit as a Court of appeal over a decision based on the findings of the enquiring authority in disciplinary proceedings. The Court has stated:

> "Where there is some relevant material which the disciplinary authority has accepted and which material *reasonably supports the conclusion* reached by the *disciplinary authority*, it is not the function of the Administrative Tribunal to review the same and reach different finding than, that of the disciplinary authority."

In *Union of India v. S.L. Abbas*,[65] the tribunal interfered with the order of transfer. The Supreme Court ruled that the tribunal was not an appellate body and, therefore, it could not substitute its own judgment for that of a *bona fide* order of transfer.

The power of the tribunal to interfere with the quantum of punishment imposed by the disciplinary authority on the delinquent employee is *pari passu* with that of the High Court under Art. 226. Normally, the Tribunal does not substitute its own conclusion on penalty for that of the disciplinary authority and impose some other punishment. The Supreme Court has emphasized that the tribunal cannot, while exercising the power of judicial review, normally speaking, substitute its own conclusion on penalty and impose some other penalty. But if the punishment imposed "*shocks* the conscience" of the Tribunal, it could appropriately interfere with it by moulding relief either by referring the matter to the disciplinary authority to reconsider the penalty imposed, or, in an exceptional and rare case, with a view to shorten litigation, it may itself impose appropriate punishment giving cogent reasons in support thereof.[66]

In *Ganayutham*,[67] the disciplinary authority, after inquiry, imposed the punishment of withdrawal of 50% pension and gratuity on the employee on the ground that the government suffered substantial loss of revenue due to the misconduct of the employee. The Tribunal held that the punishment was too severe and reduced the punishment to withholding of 50% pension for ten years instead of on a permanent basis. On appeal, the Supreme Court restored the punishment imposed by the disciplinary authority saying that the Tribunal could interfere with the punishment awarded to the employee by the disciplinary authority only if it is irrational which means that it is in outrageous defiance of logic or moral standards. The Tribunal would not interfere if the authority has reasonably arrived at its decision as to punishment.

In *Om Kumar v. Union of India*,[68] the Supreme Court has elaborately considered the question of scope of judicial review of the punishment imposed on an employee by the concerned disciplinary authority. The Court has now ruled that where an administrative decision relating to punishment in disciplinary cases is questioned as 'arbitrary' under Art. 14, the Court is confined to the *Wednesbury*

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64. (1995) 1 SCC 216 : AIR 1995 SC 561.
65. AIR 1993 SC 2444.
66. *State Bank of India v. Samarendra Kishore Endow*, (1994) 2 SCC 537 : 1994 SCC (L&S) 687; *B.C. Chaturvedi v. Union of India*, AIR 1996 SC 484 : (1995) 6 SCC 749.
Also, *Indian Oil Corp. v. Ashok Kumar Arora*, (1997) 3 SCC 72 : AIR 1997 SC 1030.
67. *Union of India v. G. Ganayutham*, AIR 1997 SC 3387, 3390 : (1997) 7 SCC 463.
68. AIR 2000 SC 3689.

principles.[69] This means that the discretion of the punishing authority can be challenged on such grounds as—the order was contrary to law; relevant factors were not considered, irrelevant factors were considered, the decision was one which no reasonable person could have taken.[70] But when administrative action is challenged under Art. 14 as being discriminatory, the question to consider is whether it is excessive.

(d) INQUIRY AGAINST JUDGES OF SUBORDINATE COURTS

Article 235 provides that the control over district Courts and Courts subordinate thereto is vested in the High Courts.[71] The word 'control' in this provision includes disciplinary control as well.[72] Besides Art. 235, superintendence vested in a High Court by Art. 227 over all subordinate Courts in the State also imports control, as there can be no superintendence without control.[73]

The vesting of disciplinary control over members of the subordinate judiciary in a State in the High Court ensures maintenance of the independence and integrity of the judiciary and protection from executive interference. As the Supreme Court has observed in *Shamsher*,[74] the members of the subordinate judiciary are not only under the control but also under the care and custody of the High Court.

Article 235 means that it is for the High Courts to hold inquiries into the conduct of judicial officers who are entitled to the protection of Art. 311(2). The Supreme Court has laid emphasis on the protective role of the High Courts in these words:[75]

> "….the High Court while exercising its power of control over the subordinate judiciary is under a constitutional obligation to guide and protect judicial officers from being harassed or annoyed by trifling complaints relating to judicial orders so that the Officers may discharge their duties honestly and independently unconcerned by the ill-conceived or motivated complaints, made by unscrupulous lawyers and litigants".

Article 235 vests in the High Court the power to hold inquiries, impose punishments, initiate disciplinary proceedings, suspend any member of subordinate judiciary. The Supreme Court has observed in this regard:[76]

> "Article 235, therefore, relates to the power of taking a decision by the High Court against a member of the subordinate judiciary. Such a decision either to hold enquiry into conduct of a judicial officer, subordinate or higher judiciary, or to have the inquiry conducted….and to consider the report of the enquiry officer for taking further action is of the High Court. Equally, the decision to consider the report of the enquiry officer and to take follow up action and to make

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69. *Associated provincial Picture Houses v. Wednesbury Corporation*, (1948) 1 KB 223.
70. For a detailed discussion on this topic, see, JAIN, *A TREATISE ON ADM., LAW*, I, Ch. XIX (1996); JAIN, *CASES & MATERIALS ON INDIAN ADM. LAW*, Ch. XVI.
71. *Supra*, Ch. VIII, Sec. G.
72. *Mohd. Ghouse v. Madras*, AIR 1957 SC 246 : 1957 SCR 414; *Chief Justice of A.P. v. L.V.A. Dikshitulu*, AIR 1979 SC 193 : (1979) 2 SCC 34.
73. *Supra*, Ch. VIII, Sec. C(iv).
74. *Shamsher Singh v. State of Punjab*, AIR 1974 SC 2192 : (1974) 2 SCC 831.
75. *Registrar, High Court of Madras v. R. Rajiah*, AIR 1988 SC 1388 : (1988) 3 SCC 211.
76. *High Court of Judicature at Bombay v. Shirish Kumar R. Patil*, AIR 1997 SC 2631, 2636 : (1997) 6 SCC 339; *Madan Mohan Choudhary v. State of Bihar*, AIR 1999 SC 1018 : (1999) 3 SCC 396.

appropriate recommendation to the Disciplinary Committee or the Governor, is entirely of the High Court."

The appointing authority in respect of the State judicial service is the Governor. He is, therefore, the actual authority to impose a major punishment of dismissal, removal or reduction in rank under Art. 311(1). The High Court itself cannot pass such an order.[77] But in view of Art. 235, the Governor is not entitled to conduct disciplinary proceedings, or set up an enquiry or disciplinary tribunal, apart from the High Court. It is the High Court alone which has to conduct an inquiry into the charges against a judicial officer and send its report with its recommendations to the Governor. In imposing punishment, the Governor is to have regard to this report. In such a case, the High Court is only a recommendatory authority and cannot itself pass the order; such an order is passed by the State Government on the recommendation of the High Court.

On this point, the Supreme Court has emphasized that, in such cases, the Constitution contemplates that the Governor will act in harmony with the recommendations of the High Court. The recommendation of the High Court is binding on the Government. The Supreme Court has emphasized that the Governor cannot take any action against a member of Subordinate judicial service without, and contrary to, the recommendations of the High Court.[78] If the High Court's recommendations were not to be binding on the State, then unfortunate consequences will follow. It is in public interest that the State accepts the High Court's recommendations. Thus, the State could not pass an order of compulsory retirement on a judicial officer when the High Court had made no such recommendation.[79]

This point has been emphasized again by the Supreme Court in *Baldev Raj v. Punjab and Haryana High Court.*[80] The High Court after enquiry recommended removal of a sub-judge. The Government referred the matter to the State Public Service Commission for advice and, on its advice, the Sub-Judge was reinstated. The Supreme Court quashed this order saying that the sole and exclusive disciplinary control over subordinate judiciary is vested in the High Court and its recommendation is binding on the Government. The Government does not have to consult any other body except the High Court in this area, not even the Public Service Commission.

Unfortunately, there have been cases where the Supreme Court has had to quash the enquiries made by the High Courts against the subordinate judges for one reason or another, such as, lack of *bona fides* on the part of the High Court in instituting disciplinary proceedings against a member of the Higher Judicial Service in the State,[81] or the High Court's advice is arbitrary and is not supported by any material,[82] failure of natural justice.[83]

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77. *Baradakanta Mishra v. High Court of State of Orissa,* AIR 1976 SC 1899 : (1976) 3 SCC 327.

78. *The Registrar, High Court of Madras v. R. Rajiah,* AIR 1988 SC 1388; *High Court of M.P. v. Mahesh Prakash,* AIR 1994 SC 2595 : (1995) 1 SCC 203; *Registrar (Administration) High Court of State of Orissa, Cuttack v. Sisir Kanta Satapathy,* AIR 1999 SC 3265 : (1999) 7 SCC 725.

79. *State of Haryana v. Inder Prakash,* AIR 1976 SC 1841 : (1976) 2 SCC 977.
Also, *supra,* Ch. VIII, Sec. G(e).

80. AIR 1976 SC 2490.
Also, *West Bengal v. N.N. Bagchi,* AIR 1966 SC 447 : 1966 (1) SCR 771.

81. *R.C. Sood v. High Court of State of Rajasthan,* 1994 (Supp) 3 SCC 711 and AIR 1999 SC 707 : (1958) 5 SCC 493.

82. *Madan Mohan Choudhary v. State of Bihar,* AIR 1999 SC 1018 : (1999) 3 SCC 396.

83. Ch. VIII, Sec. G(e).

The Supreme Court has emphasized that an independent and honest judiciary being a *sine qua non* for the Rule of Law, the High Court should seek to protect honest judicial officers against ill-conceived or motivated complaints. The Supreme Court has laid down some guidelines for initiating a disciplinary action against a judicial or a quasi-judicial officer :

(i) where he has conducted in a manner reflecting on his reputation or integrity or good faith or devotion to duty;

(ii) there is *prima facie* material to show recklessness or misconduct in the discharge of his duty;

(iii) that he has acted negligently or that he omitted the prescribed conditions which are essential for the exercise of the statutory powers;

(iv) that he had acted in order to unduly favour a party;

(v) that he had been actuated by corrupt motive.[84]

K. PUBLIC SERVICE COMMISSIONS

For proper and efficient working of a democracy, it is very necessary that civil service be free of political pressures and personal patronage. It is therefore necessary to ensure that the best available person be selected for appointment to a post so as to avoid arbitrariness and nepotism in the matter of appointment. This objective can be achieved if civil servants are appointed solely on the basis of merit without any favouritism or nepotism or political pressures. A difficult task in any country, it becomes all the more difficult in a multi-lingual, multi-religious country like India which has a number of minority groups and backward classes and where the state is the most significant employer and government service has a prestige of its own.

This role and objectives are reflected in the opinion of the Supreme Court to the effect that Public Service Commissions are institutions of utmost importance created by the Constitution and for efficient functioning of a democracy it is imperative that such Commissions are manned by people of the highest skill and irreproachable integrity, so that selections to various public posts can be immunized from all sorts of extraneous factors like political pressure or personal favouritism and are made solely on considerations of merit. It was also held that since PSCs are a constitutional creation, principles of service law that are ordinarily applicable in instances of dismissal of government employees cannot be extended to proceedings for removal and suspension of PSC members.[85]

To achieve these objectives, the Constitution creates Public Service Commissions which are autonomous bodies and are immunized from various pressures so that they can function independently, fairly and impartially. Being a constitutional authority, it cannot be by passed by way of circular or otherwise.[86]

A Commission constituted in terms of Art.315 of the Constitution is bound to conduct examinations for appointment to the services of the State in terms of the

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84. See, *Union of India v. A.N. Saxena,* AIR 1992 SC 1333; *Union of India v. K.K. Dhawan,* AIR 1993 SC 1478; *P.C. Joshi v. State of Uttar Pradesh,* AIR 2001 SC 2788.

85. *Ram Kumar Kashyap v. Union of India,* (2009) 9 SCC 378.

86. *State of Uttaranchal v. Alok Sharma,* (2009) 7 SCC 647, 657 : (2009) 6 JT 463.

Rules framed by the State. It is, however, free to evolve the procedure for conduct of examination. While conducting the examination in a fair and transparent manner as also following known principles of fair play, it cannot completely shut its eyes to the constitutional requirements of Article 335 of the Constitution of India.[87]

The independence of the members of these commissions is secured by several constitutional provisions as noted below. In this connection, the Supreme Court has observed:

> "The values of independence, impartiality and integrity are the basic determinants of the constitutional conception of Public Service Commissions and their role and functions".

Investigation into the affairs of the Public Service Commission even though it might affect the image of the Commission, cannot be a ground to stall investigation. On the other hand, the investigation has to be done in a transparent manner.[88]

It is through these Commissions both at the Centre and in the States that the bulk of government servants are recruited and, thus, the guarantee given by Art. 16(1) is sought to be concretised.[89] These Commissions also advise Governments in matters of discipline pertaining to civil servants. This ensures that disciplinary action is not taken on extraneous considerations.

The appellant Commission which has been constituted in terms of Art. 315 of the Constitution of India is bound to conduct examination for appointment to the services of the State in terms of the Rules framed by the State. It is, however, free to evolve procedure for conduct of examination. While conducting the examination in a fair and transparent manner as also following known principles of fair play, it cannot completely shut its eyes to the constitutional requirements of Article 335 of the Constitution of India.[90]

How such a Commission would judge the merit of the candidates is its function. Unless the procedure adopted by it is held to be arbitrary or against the known principles of fair play, the Courts will not ordinarily interfere therewith.[91]

The significance of the role played by a Public Service Commission has been underlined by the Supreme Court in *Ahok Kumar Yadav v. State of Haryana*,[92] in the following words:

> "….the Public Service Commission occupies a pivotal place of importance in the State and the integrity and efficiency of its administrative apparatus depends considerably on the quality of the selections made by the Public Service Commission. It is absolutely essential that the best and the finest talent should be drawn in the administration and the administrative services must be composed of men who are honest, upright and independent and who are not swayed

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87. *Andhra Pradesh Public Service Commission v. Baloji Badhavath,* (2009) 5 SCC 1 : (2009) 5 JT 563.
88. *Seema Dhamdhere, Secretary, Maharashtra Public Service Commission v. State of Maharashtra,* (2008) 2 SCC 290 : (2007) 13 JT 658.
89. *Supra*, Ch. XXIII, Sec. A.
90. *Andhra Pradesh Public Service Commission v. Baloji Badhavath,* (2009) 5 SCC 1 : (2009) 5 JT 563.
91. *Andhra Pradesh Public Service Commission v. Baloji Badhavath,* (2009) 5 SCC 1 : (2009) 5 JT 563.
92. AIR 1987 SC 454, 477 : (1995) 4 SCC 417.

by the political winds blowing in the country. The selection of candidates for the administrative services must therefore be made strictly on merits, keeping in view various factors which go to make up a strong, efficient and people oriented administrator."

"To achieve these objectives, it is necessary that the chairman and members of the Public Service Commission are eminent men possessing a high degree of calibre, competence and integrity, who would inspire confidence in the public mind about the objectivity and impartiality of the selections to be made by them."

The Court has, therefore, exhorted every State Government "to take care to see that its Public Service Commission is manned by competent, honest and independent persons of outstanding ability and high reputation who command the confidence of the people and who would not allow themselves to be deflected by any extraneous considerations from discharging their duty of making selections strictly on merit…."

Unfortunately, the opposite of what the Supreme Court has envisaged is happening in practice. The State Governments seek to pack the Service Commissions with pliable persons.

(i) UNION PUBLIC SERVICE COMMISSION

(a) COMPOSITION

The U.P.S.C. consists of a Chairman and a number of members who are appointed by the President who, of course, acts in this matter, as in all other matters, on the advice of the concerned Minister [Arts. 315(1) and 316(1)].

No qualifications are prescribed for the Commission's membership except that, as nearly as may be, one-half of the members should be persons who have held offices for at least ten years either under the Government of India or that of a State [Proviso to Art. 316(1)]. This provision envisages that such persons as are well versed in the internal exigencies of the public service are given adequate representation on the Commission, so that suitable, experienced and fit persons may be appointed to the civil services.

The President may appoint an acting Chairman of the Commission if the office of the Chairman falls vacant, or if the Chairman is unable to discharge his functions due to absence or some other reason. The acting Chairman functions till the chairman is able to resume his duties, or the person appointed as Chairman enters on the duties of the office [Art. 316(1-A)].

The Constitution does not fix the number of members of the Commission. This task has been left to the Central Government. Thus, according to Art. 318, the President may, by regulations, determine the number of members of the Commission and their conditions of service. The power of the Central Government to determine the conditions of service of a member of the Commission is, however, subject to the restriction that they cannot be varied to the disadvantage of a member after his appointment.

A member of the Commission is to hold office for six years from the date he takes charge of his office, or until he attains the age of sixty-five years, which-

ever is earlier [Art. 316(2)]. A member may, however, resign from his office by writing to the President [Art. 316(2)(a)].

(b) REMOVAL OF A MEMBER

Provisions exist in the Constitution for the removal of the Chairman or a member before the expiry of his term [Arts. 316(2)(b) and 317]. He can be removed only by the order of the President on the ground of misbehaviour. Such an order can be passed after—(1) the President makes a reference to the Supreme Court, and (2) the Court, after holding an inquiry, reports to the President that the person concerned ought to be removed from office [Art. 317(1)]. These procedural safeguards envisaged in Art.317 are to protect PSC members from undue political pressures or personal facvouritism and vendetta, so that a Public Commissions is able to discharge their constitutional obligations in full measure.[1]

At the stage of clause (1) of Art. 317 a tentative conclusion that, if not rebutted, the charges of misbehaviour would stand made out and it is not necessary to consider in detail the evidence on record to reach a conclusion as to whether the charges stood proved.[2]

In a reference made by the President under Article 317(1) of the Constitution, the question relating to misbehaviour by the Chairman/Chhattishgarh Service Commission came up for consideration before the Supreme Court. On facts, the Court found that the evidence did not warrant any conclusion of misbehaviour. But in the course of the judgment, the Court expressed certain views regarding the object behind the provisions of Article 315 and 317 of the Constitution. In relation to Article 315. The Court held that the object of the Article is to ensure that the Commission should be independent and impartial body as indicated by their salary etc. being charged on the Consolidated Fund of the State and their removal by following the procedure laid down in the Constitution i.e. their offices were constitutionally protected. The Court also noted that misbehaviour is not defined in Article 317 but what constitutes misbehaviour in the these words :

> "The Chairman of the Public Service Commission is expected to show absolute integrity and impartiality in exercising the powers and duties as Chairman. His actions shall be transparent and he shall discharge his functions with utmost sincerity and integrity. If there is any failure on his part, or he commits any act which is not befitting the honour and prestige as a Chairman of the Public Service Commission, it would amount to misbehaviour as contemplated under the Constitution. If it is proved that he has shown any favour to the candidate during the selection process, that would certainly be an act of misbehaviour."[3]

There have been a few references made to the Supreme Court by the President under Art. 317(1) as regards the members/Chairmen of State Public Service Commissions.[4] The Supreme Court has ruled that in a reference under Art. 317(1), it can go into questions of fact, summon witnesses, and record their evi-

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1. *Ram Kumar Kashyap v. Union of India*, (2009) 9 SCC 378.
2. *S.S. Joshi Re*, (2005) 8 SCC 501.
3. (2009) 8 SCC 41, reference under Article 317(1) of the Constitution of India, Chhattisgarh Public Service Commission—Ref. No. 1 of 2006, decided on 8th July, 2009.
4. See, *infra*, for provisions regarding State Public Service Commissions.

dence. Upon the facts found, the Court can pronounce whether the charge of misbehaviour or incapacity has been established against the member/Chairman.[5]

The Supreme Court has ruled in the under-mentioned case[6] that the issue of misconduct of a member of the Commission does not come to an end even after the expiry of his term.

Hearing or an opportunity to show cause against a proposed reference is not contemplated.[7] There is, however, an indication of a qualification in the Court's subsequent observations to the effect that it is not necessary that principles of audi alteram partem rigorously followed in domain of service law need to be applied with same degree of rigour in proceedings involving removal and suspension of members of State Public Service Commission.[8]

In a reference against a member of the Haryana P.S.C., the Supreme Court delegated the task of recording evidence to the additional district and sessions judge at Delhi.[9]

In *Ref. Punjab Public Service Commission*,[10] two questions were referred to the Supreme Court: (1) Had the respondent-member slapped the lady chairperson of the Commission; (2) whether he should be removed from office? The Supreme Court answered in the affirmative. The Court pointed out that persons occupying high public offices should maintain irreproachable behavior and a certain minimum standard of code of conduct is expected of them. In the circumstances of this case, the member concerned miserably failed to maintain the standard of conduct expected of a member of the Public Service Commission and, so, he was held to be guilty of misbehaviour under Art. 317(1).

In a reference made by the President against a member of the Haryana Public Service in 1995, the Supreme Court answered the reference in the affirmative holding that the member be removed from the office of the member of the Commission on the ground of misconduct.[11]

In a reference made by the President against the Chairman of the Bihar Public Service Commission, the Court, after hearing the matter and the charges levelled against him, found that the Chairman could not be held to be guilty of any misbehaviour within the meaning of Art. 317(1) inviting action for his removal from office. Nevertheless, the Court adversely commented on his conduct as Chairman, B.P.S.C. He did not, at times, exhibit exemplary behaviour or conduct expected of him. There were many lapses on his part. The Court underlined the significance of impartiality and objectivity on the part of these Commissions in the following words:[12]

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5. For these reference, see: *In the matter of: Ref. under Art. 317(1),* AIR 1983 SC 996 : (1983) 4 SCC 258; *Ref. Punjab Public Service Commission,* (1990) 4 SCC 262; *Ref. Sher Singh, Member, State of Haryana, P.S.C.,* AIR 1997 SC 906; In *R/o. Dr. Ram Ashray Yadav, Chairman, State of Bihar, Public Service Commission,* AIR 2000 SC 1448 : (2000) 4 SCC 309.

6. See, *Ref. Punjab PS, supra.* Also, *Ram Ashray Yadav v. State of Bihar,* AIR 1998 Pat 125.

7. *H.B. Mirdha Re,* (2005) 6 SCC 789.

8. *Ram Kumar Kashyap v. Union of India,* (2009) 9 SCC 378.

9. In the matter of: Ref. under Art. 317(1), AIR 1983 SC 996 : (1983) 4 SCC 258.

10. *Ref. Punjab Public Service Comm.*, (1990) 4 SCC 262.

11. *Re: Sher Singh, supra,* footnote 5.

12. In *R/O Ram Ashray Yadav,* AIR 2000 SC 1448 at 1456 : (2000) 4 SCC 309.

> "The credibility of the institution of Public Service Commission is founded upon faith of the common man on its proper functioning. The faith would be eroded and confidence destroyed if it appears that the Chairman or the members of the Commission act subjectively and not objectively or that their actions are suspect. Society expects honesty, integrity and complete objectivity from the chairman and members of the Commission. The Commission must act fairly, without any pressure or influence from any quarter, unbiased and impartially, so that the society does not loose confidence in the Commission. The high constitutional trustees, like the Chairman and Members of the Public Service Commission must for ever remain vigilant and conscious of these necessary adjuncts."

In this reference, the Court concluded that no charge of misbehaviour was established against Dr. Yadav, although, at times, he "did not exhibit exemplary behaviour or conduct, expected of him." There were "lapses" on his part but not "misbehaviour" within the meaning of Art. 317 of the Constitution inviting action of his removal from office under Art. 317(1).

In *Joshi*[13] the President made a reference to the Supreme Court in relation to the conduct of a member of Maharashtra Public Service Commission. Referring to its earlier decisions[14] the Court noticed the high character of the institutions and laid down the approach to be as to whether the materials disclosed conduct of the member (a constitutional functionary) which would be misbehaviour within the meaning of Art. 317(1) of the Constitution. Several charges were framed against her including that she did not inform the Commission that her daughter was a candidate for the examination. Her plea that the daughter ultimately did not appear for the examination was considered to be irrelevant by the Supreme Court. The Court answered the reference by opining that the member had not behaved in a manner befitting a member of constitutional body like the Public Service Commission.

The President may suspend the Chairman or a member in respect of whom a reference has been made to the Supreme Court until he passes final orders [Art. 317(2)]. The issuance of suspension orders is as per the "procedure established by law" and not in derogation of the same. Hence petitioners were not entitled to any opportunity to show cause or to be heard before orders of suspension were passed by Governor under Art. 317(2), after the President had referred a matter to Supreme Court.[15]

Further, the President is empowered to remove a member or the Chairman of the Commission [Art. 317(3)], without reference to the Supreme Court, if he—(*a*) is adjudged an insolvent; or (*b*) engages during his term of office in any paid employment outside the duties of his office; or (*c*) is, in the opinion of the Presi-

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13. *Sayalee Sanjeev Joshi (Smt.) Member, Maharashtra Public Service Commission, In Re*, (2007) 11 SCC 547 : AIR 2007 SC 2809.

14. In the Matter of Reference under *Article 317(1) of the Constitution of India*, (1983) 4 SCC 258; Reference under Article 317(1) of the Constitution of India regarding *Enquiry & Report on the Allegations against Sh. M. Megha Chandra Singh, Chairman, Manipur Public Service Commission*, 1994 Supp (2) SCC 166 : (1994) 2 JT 63; *In Re : Reference under Article 317(1) of the Constitution of India*, (1990) 4 SCC 262 : AIR 1997 SC 906; *Sher Singh, in Re*, (1997) 3 SCC 216 : AIR 1997 SC 906; In *R/O Dr. Ra, Ashray Yadav, Chairman, Bihar Public Service Commission*, (2000) 4 SCC 309 : AIR 2005 SC 1448.

15. *Ram Kumar Kashyap v. Union of India*, (2009) 9 SCC 378.

dent, unfit to continue in office by reason of infirmity of mind and body [Art. 317(3)].

Infirmities referred to in Art. 317(3)(c) must be such as disable the member from efficient discharge of his functions. Further, the infirmity must be post-appointment. When a blind university professor was appointed as a member of the State Public Service Commission, he could not be removed on the ground of infirmity under Art. 317(3)(c) because his infirmity was pre, and not post, appointment.[16]

The question whether a member ought to be removed on the ground of infirmity is left solely to the President [*i.e.* the Central Executive] for determination. It is for him to determine in his subjective satisfaction whether the infirmity is of such a nature as to in capacitate the concerned member from discharging the functions of his office.[17]

According to Art. 317(4), if the Chairman or a member of the Commission becomes in any way concerned or interested in a contract or agreement made by or on behalf of the Central or the State Government, or participates in any way in the profit thereof or in any benefit or emolument arising therefrom, otherwise than as a member and in common with other members of an incorporated company, he is to be deemed to be guilty of misbehaviour for purposes of Art. 317(1).

(c) OTHER PROVISIONS

A person who holds office as a member of the Commission cannot be re-appointed to that office on the expiry of his term of office [Art. 316(3)], nor is he eligible for any other employment under the Central or the State Government [Art. 319(c)]. He can, however, be appointed as the Chairman of the Union Public Service Commission, or a State Public Service Commission [Art. 319(c)].

Article 319(c) bars "any other employment". This phrase includes even an employment by contract.[18]

The Chairman of the Commission is not eligible for any further employment either under the Government of India or under the Government of a State [Art. 319(a)]. Appointment of the Chairman of the Commission as the chairman of a statutory board which is not under the Government does not violate Art. 319(a).[19] These restrictions have been imposed on a member or the Chairman of the Commission because the Commission serves the Government and decides matters in which the Government is directly interested, *viz.*, recruitment of persons to civil service. A Minister might possibly influence a member of the Commission by promising him something else after retirement if he recommends a certain candidate in whom the Minister may be interested.

Between the Executive and the Commission, the relation is a very close and integral one, and so the necessary precautions have to be taken.[20] Thus, to ensure that the members of the Commission discharge their duties with impartiality, it is

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16. *Jai Shankar Prasad v. State of Bihar*,, (1993) 2 SCC 597 : AIR 1993 SC 1906.
17. *Ibid.*
18. *Union of India v. U.D. Dwivedi*, AIR 1997 SC 1313 : (1997) 3 SCC 182.
19. *Sher Singh, Member State of Haryana, P.S.C.*, AIR 1997 SC 906 : (1997) 3 SCC 216.
20. VIII *CAD*, 259-60; IX *CAD*, 574.

necessary that they ought not to be able to look up to the Executive for any favour.

The Supreme Court has ruled that when a member of a Commission is appointed as its Chairman, he shall hold the new office for six years, or until the age of superannuation, whichever is earlier.[21]

The expenses of the Union Public Service Commission, including any salaries, allowances and pensions payable to or in respect of the members of the staff of the Commission, are charged on the Consolidated Fund of India [Art. 322].[22] This provision frees the Commission from parliamentary pressure.

The President may by regulations make provisions with respect to the number of the staff of the Commission and their conditions of service [Art. 318].

It is clear from the above provisions that every precaution has been taken by the framers of the Constitution to ensure independence of the members of the Commission and to immunize the Commission from political pressures. The expenses of the Commission have been charged on the Consolidated Fund, and so the Commission has been rendered free from Parliamentary pressure. Provisions immunizing the Commission from the Executive influence are: restriction on varying the conditions of service to the disadvantage of a member after his appointment; fixed tenure of the members; removal of the members only after a verdict of the Supreme Court; and restrictions on their re-employment after retirement from the commission.

(d) FUNCTIONS OF THE COMMISSION

It is the duty of the Union Public Service Commission to conduct examinations for appointment to the services of the Union [Art. 320(1)]. This does not mean that the examination should always be competitive and not selective. The object of holding the examination is to test the capacity of the candidates and just to have an idea whether a particular candidate is fit for the proposed appointment or not. In addition to the results of the examination, other considerations may also be kept in view in making appointments, *e.g.*, the *viva voce* test.[23]

PSCs must scrupulously follow the statutory rules during recruitment and in making appointment.[24]

The Commission, if requested for the purpose by two or more States, has to assist those States in framing and operating schemes for joint recruitment for any services for which candidates possessing special qualifications are required [Art. 320(2)].

Under Art. 320(3), the Commission has many advisory functions to discharge. It is to be consulted on—

(*i*) All matters relating to methods of recruitment to civil services and for civil posts [Art. 320(2)(a)].[25]

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21. *State of Mysore v. R.V. Bidap*, AIR 1973 SC 2555 : (1974) 3 SCC 337.
22. *Supra*, Ch. II, Sec. J(ii)(h).
23. *Kesava v. State of Mysore*, AIR 1956 Mys 20.
On *viva voce* test see, *supra*, Chs. XXI and XXIII, Sec. B(b).
24. *Inder Parkash Gupta v. State of J&K*, (2004) 6 SCC 786 : AIR 2004 SC 2523.
25. See Art. 146(1), Proviso, regarding appointment of officers and servants of the Supreme Court, *supra*.

The provision is directory and not mandatory and any appointment by the Government without consulting the Commission would not be invalid.[26]

(*ii*) The principles to be followed in making appointments to civil services and posts, in making promotions and transfers from one service to another, and on the suitability of candidates for such appointments, promotions or transfers [Art. 320(3)(b)].[27]

(*iii*) All disciplinary matters affecting a person serving under the Government in a civil capacity, including memorials or petitions relating to such matters [Art. 320(3)(c)]. This provision has been discussed below.

(*iv*) Any claim by or in respect of a person in government service in a civil capacity, that any costs incurred by him in defending proceedings instituted against him in respect of acts done or purported to be done in execution of his duty should be paid out of the Consolidated Fund of India [Art. 320(3)(d)].

(*v*) Any claim for the award of a pension in respect of injuries sustained by a person while in a government service, in a civil capacity, and any question as to the amount of any such award [Art. 320(3)(e)].

It is the duty of the Commission to advise the President on any matter referred to it by him. However, the President is empowered to frame regulations specifying the matters in which either generally, or in any particular class of cases or circumstances, it is not necessary to consult the Commission [Proviso to Art. 320(3)]. Such regulations are to be laid before each House of Parliament for not less than 14 days as soon as possible after they have been made. The regulations are subject to such modifications, whether by way of repeal or amendment, as both Houses of Parliament may make during the session in which they are so laid [Art. 320(5)].

The Commission need not be consulted in the following cases:

1. While making reservations of appointments or posts in favour of any backward class of citizens which, in the opinion of the Government, is not adequately represented. Such a power has been conferred on the Government under Art. 16(4) [Art. 320(4)].[28]

2. While taking into consideration, under Art. 335, the claims of the Scheduled Castes or Scheduled Tribes in making appointments to the Central Services [Art. 320(4)].

3. Under proviso to Art. 320(3), the President as respects the all-India services and other services or posts for the Centre, may make regulations specifying the matters in which either generally, or in any particular cases, it will not be necessary to consult the Public Service

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26. On the analogy of Art. 320(3)(c), see below; *Dambarudhar v. State of Orissa*, AIR 1960 Ori 62; *H.S. Bedi v. Patiala*, AIR 1953 Pepsu 196.

27. See, *B.N. Nagarajan v. State of Mysore*, AIR 1966 SC 1943 : (1966) 3 SCR 682; *Md. Israils v. State of West Bengal*, AIR 2002 SC 511 : (2002) 2 SCC 306.

28. *Supra*, Ch. XXIII, Sec. E.

Commission. Similarly, the Governor can do in relation to the State Services.

Parliament may by law confer additional functions on the Commission regarding services of the Union, public institution, or a corporation created by law [Art. 321]. It has been held that besides the functions conferred on the Commission by the Constitution, other functions can be conferred on the Commission only by way of legislation and not by way of a departmental arrangement between Government and the Commission.[29]

Every year, the Commission presents to the President a report of the work done by it. The report, together with the Government's memorandum explaining the cases where the Commission's advice was not accepted, and the reasons for such non-acceptance, is to be laid before each House of Parliament. This constitutes a safeguard against arbitrary action on the part of the Executive in rejecting the Commission's advice [Art. 323(1)].

The Mysore High Court has held that since the Commission is an advisory or a consultative body to the Government, and also because under Art. 323 the Government has to explain the reasons for non-acceptance of the Commission's advice, it is not open to the Commission to withhold any information wanted by the Government.[30]

An important function of the Commission is that of giving advice in matters of discipline affecting a civil servant. The relevant provision is Art. 320(3)(c) according to which the Commission 'shall' be consulted on all disciplinary matters affecting a person serving under the Government of India in a civil capacity.

Consultation with the Commission on disciplinary matters affecting the civil servants has been provided for in order, first, to assure the Services that a wholly independent body, not directly concerned with the making of orders adversely affecting public servants, has considered with an open mind, the action proposed to be taken against a particular public servant; and, secondly, to make available to the Government an unbiased advice and opinion on matters vitally affecting the morale of the public services.

The phrase "all disciplinary matters affecting a person" in Art. 320(3)(c) is sufficiently comprehensive to include any kind of disciplinary action proposed to be taken in respect of a particular person.[31] The advice of the Commission is not however binding on the Government. But even so, the Government should consult the Commission, when it proposes to take any disciplinary action against a public servant, not as a mere formality, but with a view to getting proper assistance in assessing the guilt or otherwise of the person proceeded against and the suitability and adequacy of the penalty proposed to be imposed. Once Government takes action against a servant in consultation with the Commission, it is not necessary to consult it again when the servant files a review petition with the higher authorities.[32]

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29. *Mira Chatterji v. Public Service Comm.*, AIR 1958 Cal. 345.
30. *Kesava v. State of Mysore*, AIR 1956 Mys. 20.
31. *Pradyat Kumar v. Chief Justice, Calcutta High Court*, AIR 1956 SC 285 : 1955 (2) SCR 1331.
32. *Joseph John v. Travancore-Cochin*, AIR 1955 SC 160 : 1955 (1) SCR 1011.

The Supreme Court has held in *State of Uttar Pradesh v. Manbodhan Lal Srivastava*[33] that Art. 320(3)(c) is not mandatory. In that case, the Government of U.P. had reduced an officer in rank. The officer alleged that there was irregularity in the consultation of the State Commission by the Government. The Supreme Court was, therefore, called upon to decide whether irregularity in, though not complete absence of, consultation with the State Public Service Commission could enable the officer concerned to challenge the order passed by the Government. The procedure adopted in the case fulfilled the requirements of Art. 311.

The Supreme Court held that Art. 320(3)(c) does not confer any rights on a public servant so that the absence of, or any irregularity in, consultation would not afford him a cause of action in a Court of law. The main reasons for this view are:

(1) The opinion of the Commission has not been made binding on the Government. In the absense of such a binding character, it is difficult to see how non-compliance with this provision could have the effect of nullifying the final order passed by the Government. If the opinion of the Commission were binding on the government, it could have been argued with some force that non-compliance with the rule for consultation would have been fatal to the validity of the order proposed to be passed against a public servant.

(2) The Constitution does not provide for the contingency as to what is to happen in the event of non-compliance with this provision. It does not either expressly or impliedly provide that non-compliance will invalidate to the final order of the Government.

(3) The proviso to Article 320 itself indicates that in certain cases or classes of cases, the Commission need not be consulted. The President may make regulations to take away the protection of Art. 320(3)(c) in certain cases or classes of cases.

Though *Manbodhan* referred to the State Commission yet the same principle would apply to the Union Commission as well because Art. 320(3)(c) is common to both. The *Manbodhan* ruling has been reiterated by the Supreme Court in several cases.[34]

The efficacy of Art. 320(3)(c) has been very much diluted by the Supreme Court's decision in *Manbodhan*. There have been cases where action has been taken by the Government against its servants without consulting the Commission, and the Courts have had occasion to pass strictures against such a practice of ignoring Art. 320(3)(c) and not consulting the Commission. This has happened mostly at the State level.[35]

Not only Art. 320(3)(c), but the whole of Art. 320(3) has been held to be directory and not mandatory.[36] The recommendations made by the Commission are only advisory and it is for the Government to accept them or not. The only safe-

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33. AIR 1957 SC 912 : 1958 SCR 533.

34. See, *U.R. Bhatt v. Union of India*, AIR 1962 SC 1344 : 1962 (1) LLJ 656; *Ram Gopal v. State of Madhya Pradesh*, AIR 1970 SC 158 : (1969) 2 SCC 240.

35. See, for example, *Durga v. State of Punjab*, AIR 1957 Punj 97.

36. *A.N. D'Silva v. Union of India*, AIR 1962 SC 1130 : 1962 Supp (1) SCR 968; *State of Haryana v. Subash Chander Marwaha*, (1974) 2 SCC 220 : AIR 1973 SC 2216; *Jatinder Kumar v. State of Punjab*, (1985) 1 SCC 122 : AIR 1984 SC 1850.

guard is Art. 323 which makes the Government answerable to the legislature for departing from the Commission's recommendation.

The ruling in *Manbodhan* needs to be contrasted with the ruling in *Dinakar*.[37] A rule (Rule 4A) made by the Maharashtra Government said that the Government "may, in consultation with the Maharashtra Public Service Commission" (MPSC) make appointments in relaxation of the percentage fixed for promotees and directly appointed persons. The Supreme Court was called upon to consider the question whether under this rule consultation with the Commission was "directory" or "mandatory". The Court ruled that the word "may" in the rule ought to mean "shall" making consultation mandatory.

The Court made no reference to *Manbodhan.* Rejecting the argument that "may" used in the Rule is "directory", the Court observed that "….to give such a meaning would render the very object of consultation with MPSC wherever necessary nugatory. It would give unbridled power to the Government to dispense with the consultation with MPSC which may result into arbitrary exercise of powers by the authority." "This could never be the object of Rule 4-A. In our considered view, the word 'may' must mean "shall"…."[38]

There seems to be no reason as to why the logic of *Dinakar* ought not to be applied to the interpretation of Art. 320(3)(c). In view of *Dinakar*, the *Manbodhan* ruling calls for reconsideration by the Supreme Court.

(e) STAFF OF THE SUPREME COURT

The members of the staff of the Supreme Court do not fall within the purview of Art. 320(3)(*c*). Though they are the persons appointed to the public services and posts in connection with the affairs of the Union (as their salaries are paid out of the Consolidated Fund of India), yet they are not persons serving 'under the Government of India in a civil capacity' which phrase has reference to such persons in respect of whom the administrative control is vested in the Central Government functioning in the name of the President.

The administrative control in respect of the staff of the Supreme Court is vested in the Chief Justice who has the power to appoint, remove, and make rules for their conditions of service.[39] While the constitutional safeguards under Art. 311 are available to every person in the civil service including persons employed in the Supreme Court, the safeguard in Art. 320(3)(*c*) is not available to the staff of the Supreme Court, otherwise it would be contrary to the implications of Art. 146.[40]

(ii) STATE PUBLIC SERVICE COMMISSION

(a) COMPOSITION

The Constitution establishes a Public Service Commission in each State [Art. 315(1)]. It is possible for two or more States to have a Joint Public Service Commission [Art. 315(2)].

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37. *Dinakar Anna Patil v. State of Maharashtra*, (1999) 1 SCC 354 : 1999 SCC (L&S) 216.
38. *Ibid* 365. Also, *Keshav Chandra Joshi v. Union of India*, (1992) Supp (1) SCC 272 : AIR 1991 SC 284.
39. *Pradyat Kumar v. Chief Justice*, AIR 1956 SC 285 : 1955 (2) SCR 1331.
40. *Supra*, Ch. IV, Sec. I.

The basic policy of the Constitution is that each State should have its own Public Service Commission, but if for administrative or financial reasons it is not possible for each State to have a Commission of its own, two or more States may have a Joint Public Service Commission.

A Joint Commission for several States may be established by Parliament by law if a resolution to that effect is passed by each State Legislature concerned [Art. 315(2) & (3)]. Even the Union Public Service Commission, if requested by a State Governor to do so, may, with the approval of the President, agree to serve all or any of the needs of a State [Art. 315(4)].

The composition of the State Commissions is governed by the same constitutional provisions as apply to the Union Commission. Thus, a State Commission consists of a Chairman and several members who are appointed by the Governor [Art. 316(1)]. In case of a Joint Commission, the President makes these appointments [Art. 316(1)]. Like the U.P.S.C., as nearly as may be, one half of the members of a State Commission should be persons who have held a government office for at least ten years at the date of their appointment to the Commission [Proviso to Art. 316(1)].[41]

The Governor of the State (the President in case of a Joint Commission) may by regulations determine the number of members of the Commission and their conditions of service [Art. 318]. The conditions of service of a member cannot be varied to his disadvantage after his appointment [Proviso to Art. 318].

All provisions regarding the tenure of a member of the Union Commission apply *mutatis mutandis* to a member of a State Commission except with the following differences:

(1) The age of retirement of a member of a State Commission is 62 years instead of 65 years as in the case of a member of the U.P.S.C.

(2) To resign, a member of a State Commission writes to the Governor and a member of a Joint Commission to the President [Arts. 316 and 317].

The expenses of the State Commission are charged on the Consolidated Fund of the State [Art. 322].[42] The Governor makes provisions with respect to the number of the Commission's staff and their conditions of service.

Under Art. 317(1), the President makes a reference to the Supreme Court the question of misbehavior committed by the Chairman or a member of the State Public Service Commission for inquiry and report. If the Court reports that he should be removed from office on any such ground, then the President shall remove him.[43]

An interesting point concerning the State Public Service Commissions may be noted. While appointment of the Chairman or members of the State Commission is made by the State Governor (Art. 316(1)), the power to remove any of these

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41. *Supra*, Sec. K(i)(a).
42. *Supra*, Ch. VI.
43. For discussion on Art. 317(1), see, *supra*, 1753.

persons on the ground of misconduct vests in the President, and not the Governor. It is the President who makes a reference to the Supreme Court under Art. 317(1).

Under Art. 317(2) the governor has power to suspend a member/chairman of the State Public Service Commission in respect of whom a reference has been made to the Supreme Court under Art. 317(1).[44]

In *Sayalee Sanjeev Joshi*[45] the Court has propounded the approach to its exercise of jurisdiction on a reference. Its task is to find out as a fact whether materials disclosed conduct on the part of a member which, would constitute 'misbehaviour' within Art. 317 (1) of the Constitution. It has to consider admissibility and relevance of evidence adduced and cannot proceed on the basis of suspicion instead of proof.

A person holding office as a member of a State Commission is not to be reappointed on expiry of his term [Art. 316(3)]. The Chairman of a State Commission can be appointed as the Chairman or member of the Union Public Service Commission, or as the Chairman of any other State Commission, but not to any post under the Central or the State Government [Art. 319(b)]. A member, other than the Chairman, of a State Commission is eligible for appointment as the Chairman or member of the Union Public Service Commission, or as the Chairman of that State Commission, or of any other State Commission, but is not eligible for any other employment either under the Central or the State Government [Art. 319(d)].

It has been ruled by the Supreme Court in *Hargovind Pant v. Raghukual Tilak*,[46] that a member of a State Public Service Commission can be appointed as the Governor of a State. The main reason for this ruling being that the office of the Governor, is a high constitutional office and cannot be said to be under the Government of India.

(b) FUNCTIONS OF THE STATE COMMISSION

A State Public Service Commission discharges all those functions in respect of the State Services as does the Union Commission in relation to the Union Services. Therefore, the discussion under this heading for the U.P.S.C. holds good *mutatis mutandis* for a State Commission as well with this difference, however, that instead of the 'Union', 'President', and 'Parliament' the 'State', 'Governor' and the 'State Legislature' may be substituted [Art. 320].

The protection of Art. 320(3)(*c*) does not apply to the staff of the High Court and, therefore, the Chief Justice need not consult the State Public Service Commission when he dismisses a High Court employee.[47]

In case of subordinate judges, the Governor is to act on the recommendation of the High Court and need not consult the Public Service Commission for removal

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44. *Ram Ashray Yadav v. State of Bihar*, AIR 1998 Pat. 125
45. (2007) 11 SCC 547 : AIR 2007 SC 2924.
46. AIR 1979 SC 1109.
Also see, *su*pra, Ch. VII, Sec. A(I)(b).
47. *Pradyat Kumar v. C.J. of Calcutta H.C.*, AIR 1956 SC 285 : 1955 (2) SCR 1331; *supra*, 709.

of any such officer.[48] "There is no room for any outside body between the Governor and the High Court." In the instant case, the order of the Governor passed on the advice of the Commission (contrary to the advice of the High Court) was held to be constitutionally invalid and was thus quashed.[49]

The State Legislature may impose additional functions on the State Commission regarding the State Services, local authority, public institutions or any other corporate authority constituted by law [Art. 321].

The State Commission is to be consulted by the Governor while framing rules for appointment to judicial service other than the posts of District Judges [Art. 234].

The State Commission is to present to the Governor an annual report of the work done by it. The report and the Governor's memorandum explaining as respects the cases where the Commission's advice was not accepted and the reasons for such non-acceptance, are to be laid before the State Legislature [Art. 323(2)]. A Joint Commission presents a similar report to each of the concerned State Governors and each Governor then takes the action as detailed above [Art. 323(2)].

In *Hariharan*[50] a statutory provision requiring the Electricity Board to consult the State Public Service Commission in the matter of appointment of assistant engineers has been held to be mandatory.

The Supreme Court has ruled that a member of the Commission could not question the validity or correctness of the functions performed or duties discharged by the Public Service Commission as a body. A member is regarded as a party to the function discharged or duty performed by the Commission, even though the member concerned might have been a dissenting member, or a member in a minority, or a member who abstained from participation in the function performed or duty discharged.[51]

From time to time, the Supreme Court has cautioned the State Public Service Commissions to work as independent institutions without being pressurized by any one. For example, the Court has observed in *State of Uttar Pradesh v. Rafiquddin*:[52]

> "The Public Service Commission is a constitutional and independent authority. It plays a pivotal role in the selection and appointment of persons to public services. It secures efficiency in the public administration by selecting suitable and efficient persons for appointment to the services. The Commission has to perform its functions, and duties in an independent and objective manner unin-

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48. *State of Haryana v. Inder Prakash*, AIR 1976 SC 1841 : (1976) 2 SCC 977; *Baldev Raj v. Punjab & Haryana High Court*, AIR 1976 SC 2490 : (1976) 4 SCC 201.

49. *Supra*, Ch. VIII, Sec. G.

50. *R. Hariharan v. K. Balachandran Nair*, AIR 2000 SC 2933 : (2000) 7 SCC 399.
Also see, *State of Jammu & Kashmir v. Mrs. Raj Dulari Razdan*, AIR 1979 SC 586 : (1979) 1 SCC 461.

51. *Bihar Public Service Commission v. S.J. Thakur*, AIR 1994 SC 2466 : 1994 Supp (3) SCC 220.

52. AIR 1988 SC 162, 177 : 1987 Supp SCC 401.

> fluenced by the dictates of any other authority. It is not subservient to the directions of the Government unless such directions were permissible by law…."

The Public Service Commission is expected to be fair and impartial and to function free from any influence from any quarter. Unfortunately, these bodies have not always maintained these high standards in some of the States. This comes out clearly from the number of cases referred to the Supreme Court under art. 317(1).[53] All these cases refer to the State Public Service Commissions.

The Supreme Court has suggested that the Public Service Commissions must be made more functional, their efficacy be streamlined by appointing thereto people of eminence, experience and competence with undoubted integrity; recruit the candidates for posts in accordance with the rules and backdoor entry by nepotism be put an end to. The Court has also advised that the power under the proviso to Art. 320(3) be used sparingly. Free play of exercise of the power under the proviso to Art. 320(3) would undermine the efficacy of constitutional institutions, *viz.*, the Public Service Commissions.[54]

53. *Supra*, Sec. K(i)(b).
54. *V. Sreenivasa Reddy v. Govt. of A.P.*, AIR 1995 SC 586 : 1995 Supp (1) SCC 572.

PART VI

MISCELLANEOUS TOPICS

CHAPTER XXXVII

OBLIGATIONS

SYNOPSIS

A. SUCCESSION TO OBLIGATIONS

Arts. 294 to 297 deal with succession by the Central Government and State Governments to the property, rights, liabilities etc. of the various Governments functioning in India in the pre-Constitution era.

To appreciate the significance of these Constitutional provisions, it is necessary to remember that before 1947, India was a part of the British Empire; India was then partitioned into India and Pakistan, and India became a republic in 1950, with the inauguration of the new Constitution. Also, before 1947, India was divided into British India and the Princely India.

The British India was divided into several administrative units known as the Governors' Provinces. These Provinces became Part A States under the new Constitution. The Princely India consisted of a number of States under the Indian rulers and by merger out of these States were formed several Part B States in the new Constitution. In course of time, the nomenclature, Part A and Part B States, has been dropped from the Constitution, and all States have been placed on an

equal footing,[1] but Arts. 294 and 297 still use the old nomenclature—States of Part A and Part B.

By virtue of Art. 294(*a*), all property and assets which were vested in His Majesty (i.e., British King), immediately before the commencement of the Constitution, for the purposes of the Government of the Dominion of India, or a Governor's Province, became vested in the Union and the corresponding State under the present Constitution.

Article 294(*b*) vests in the Government of India, and the corresponding State, all rights, liabilities and obligations of the Government of the Dominion of India, or of a Governor's Province, whether arising out of contract or otherwise.

Article 294 declares which property would vest in the Union and which would vest in the State Government. In determining the property, assets, rights, liabilities and obligations of the Government immediately before the Constitution, the adjustments made as a result of the partition of India into India and Pakistan were to be taken into account. The assumption of the liabilities under Art. 294(*b*) does in no way derogate from the legislative power either of Parliament or a State legislature under the Constitution.[2]

The application of these constitutional provisions is illustrated by *Krishan Saran v. State of Uttar Pradesh.*[3] The right to run a ferry in a village across the Ganges was conferred on the petitioner by the East India Co. in 1781. The obligation and engagement thus incurred by the Company were assumed by the Government of India under the Government of India Act, 1858, and then by the State concerned under the new Constitution. Therefore, the right granted by the Company in respect of the ferry continued to operate unless taken away or destroyed by some valid law.[4]

Under Art. 295(1)(*a*) and Art. 295(1)(*b*), all property and assets, and all rights and obligations, contractual or otherwise, which were vested in or imposed on any Indian State (corresponding to a Part B State), immediately before the commencement of the Constitution, became vested in the Union, if the purpose for which the property and assets were held, or obligations imposed, fell within the Union List. The provisions of Arts. 295(1)(*a*) and (*b*) were subject to any agreement entered into in that behalf by the Government of India with the Government of that State.

Under Art. 295(2), the Government of each Part B State, as from the commencement of the Constitution, succeeded to all property, assets, rights, liabilities and obligations, vested in the corresponding Indian State, whether arising out of contract or otherwise, other than those referred to in Art. 295(1).

The wordings of Art. 295, not only denote a transference of the rights, liabilities and obligations to the Government of India, or to the State Government concerned, but also bind it to the obligations transferred to it and it is duty bound to discharge them. A few examples of the working of these constitutional provisions may be furnished here.

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1. *Supra*, Chap. V.
2. *Umeg Singh v. State of Bombay*, AIR 1955 SC 540 : (1955) 2 SCR 164.
3. AIR 1957 All 455.
4. Also see, *Union of India v. Mundra Salt and Chemical Industries*, AIR 2001 SC 203 : (2001) 1 SCC 222.

(i) Railways belong to the Union List (Entry 22, List I)[5] and, therefore, the liability of Madhya Bharat (a State) in respect of the Scindia State Railway (an enterprise run by the erstwhile Gwalior State—a Princely State), became the liability of the Government of India under the new Constitution. Hence, a suit for wrongful dismissal of an employee of the Scindia State Railway before its transfer to the Centre lay against the Union of India.[6]

(ii) The plaintiff retired from the service of Navanagar State (a Princely State) in 1937, but his pension was sanctioned by the State only in 1948. Thereafter, Navanagar was merged with Saurashtra and the Saurashtra Government agreed to continue his pension. The plaintiff, however, sued the Saurashtra Government for arrears of pension for the period of 1937 to 1948. His claim was rejected on the ground that he could not have sued Navanagar State for the arrears, as under the rules then prevailing in that State, pension could not be claimed as a matter of right. Accordingly, it was held that the Saurashtra Government was under no liability under Art. 295(2) to pay the arrears.[7]

An obligation flowing to the Centre or a State under Art. 295, can be nullified or abrogated by passing a law either by Parliament, or the State Legislature, as the case may be, provided there is nothing in the Constitution against enactment of such a law.[8]

The Maharajah of Gwalior by an order on 18-1-47 exempted from income-tax for 12 years a company set up by Birla Brothers in the State. In 1948, Gwalior merged with Madhya Bharat, and in 1950-51, assessment proceedings were started against Birla Bros., as the law levying income taxation was extended to Madhya Bharat.

The company's claim for exemption in terms of the Maharajah's order was negatived by the Supreme Court. The Court ruled that there was nothing in the Constitution restraining the power of Parliament to levy income-tax in the State. Art. 295(1) only provided that liabilities and obligations of the Government of India would be the same as in the case of the princely State which originally entered into contract. Therefore, the Government of India would have the same defences to such a contract as the previous Indian State would have had, and, if the contract could be affected by legislation previously, it could be equally affected after Art. 295(1)(*b*). The fact that the obligation of the Ruler of Gwalior under the said agreement devolved eventually on the Centre, by virtue of Art. 295(1)(*b*), did not take away the power of Parliament to pass a valid law within its competence, which did not transgress any constitutional limits, even though it might completely supersede the obligation arising out of the said agreement.[9]

The process of integration of the several princely States with the Indian Union passed through several stages. Before 1947, these States were under the suzerainty of the British Crown. This suzerainty came to an end with the passage of the Indian Independence Act, 1947, by the British Parliament. Thereafter, these States acceded to the Indian Union through instruments of accession. As most of

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5. *Supra*, Ch. X.
6. *Union of India v. Tej Narain*, AIR 1957 MB 108.
7. *Somchand Karamchand v. Saurashtra*, AIR 1953 Sau. 21.
8. *Supra*, Ch. X.
9. *Union of India v. Gwalior Rayon Silk Mfg. (Wvg.) Co. Ltd.*, AIR 1964 SC 1903 : (1964) 7 SCR 892.

the princely States were small and were not viable as such, they were merged *inter se* to form bigger units. Thereafter, these bigger units formed Part B States under the new Constitution as stated above.

Before 1947, many princely States had granted various concessions and assumed various obligations. After the inauguration of the Constitution of India in 1950, questions arose how far the respective Part B States, or the Centre, were liable for these obligations. The courts took the view that the merger of the princely States *inter se*, was an 'act of state';[10] a new sovereignty was created thereby which could have repudiated the obligations of the previous princely States. Against this new sovereignty, only such rights could be availed of as were recognised by it expressly or impliedly. When the Constitution came into force, only such previous obligations and liabilities could be enforced against a Part B State, or the Central Government, as the case may be, as had been recognised, and not repudiated, in the pre-Constitution era by the concerned Government.

After the Constitution came into force, the concerned Government could have abrogated the previous liabilities and obligations but only by acting within the terms of the Constitution. If the previous obligation had a statutory basis, the new successor Government could have passed a law if it had competence to do so under the Constitution. If the previous obligation was based in an agreement or administrative order, then the same could be abrogated either by an administrative order or law depending upon the circumstances of each case.

A was an employee of Wadhwan, a princely State. A Wadhwan law fixed the age of superannuation at 60. Wadhwan merged with Saurashtra in June, 1948. Saurashtra became a Part B State in 1950 when it retired A at the age of 55. A's claim for compensation for premature retirement was upheld by the Supreme Court.[11] A had a right under the Wadhwan law to remain in service till the age of 60 years. On merger, the State of Saurashtra, before 1950, could have repudiated the obligation as an 'act of state', but that was not done. The new State did not repeal the Wadhwan law. A's right was carried over after the new Constitution. A became an Indian citizen under the Constitution, and the state could not then repudiate its liability towards A as an 'act of state,' as there can be no 'act of state' between a State and its citizens.[12] A's rights could only be defeated by legislation, which had not been enacted.

The Supreme Court adopted a similar approach in *Virendra Singh v. State of U.P.*[13] In 1948, a Ruler of an Indian State granted a few villages to the petitioner. After the State acceded to the Indian Union, the Government sought to revoke the grant by an executive order. The Supreme Court held that the grant could be revoked only by law and not by executive order because, after the enforcement of the new Constitution, there could be no 'act of state' between the Sovereign and its own subjects.

Dalmia Dadri Cement Co., obtained some concessions in 1938 from the Ruler of Jind. In 1948, Jind merged with several other States to form a bigger unit known as the Patiala Union. By a law promulgated by it, the Union abrogated all laws operating in all the former States, and made the laws prevailing in the

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10. See below, Sec. B, for explanation of this concept.
11. *Bholanath J. Thaker v. Saurashtra*, AIR 1954 SC 680 : (1955) 1 LLJ 355.
12. *Infra*, Sec. B.
13. AIR 1954 SC 447 : (1955) 1 SCR 415.

Patiala State uniformly applicable throughout the Union. The Union then became a Part B State of the Indian Union and the Income-tax Act became applicable to it.

The Company claimed exemption from payment of income tax by virtue of the concession originally granted to it by the Jind Ruler. The Supreme Court rejected the contention because when the State merged, a new sovereignty was created; the rights granted by the States could be enforced against the Patiala Union only if it recognised them by conduct or an affirmative declaration. The Patiala Union did not affirm the contract between the company and the Jind Ruler. On the other hand, it abrogated all those rights by abrogating all old laws prevailing in the various States and applying the Patiala laws throughout. The Patiala Union not having assumed the obligation, it could not pass it to the Part B State or the Central Government and so the company was liable to be taxed.

The company had also argued that the law of the Patiala Union abrogating previous rights was inconsistent with the merger covenant signed by the State Rulers to form the Union. The Supreme Court ruled that the merger covenant was a matter between independent sovereigns, an 'act of state' pure and simple, and no resident of any of the merging States could enforce any of its terms in the municipal courts of the Union. The newly formed Sovereign was free to recognise or not the rights of the subjects of the merging States.[14]

A resident of Dholpur, a Princely State, secured a permit to export chuni in 1947 and deposited Rs. 30,000 as advance for export duty. He could export only a part of it till December, 1947, when the permit expired. He was entitled to the refund of the proportionate export duty for the quantity of chuni not exported under the Dholpur Law. In the meantime, Dholpur merged with the Matsya Union which was again merged with the United State of Rajasthan which then became a Part B State of Rajasthan on Jan. 26, 1950. The respondent filed a suit for refund of money against Rajasthan, and the Supreme Court upheld his contention.[15] The Court held that when the new State continued all the old laws until altered or repealed, it must have intended to respect all rights, and assume all liabilities, arising under the old laws. Under Art. 295(2), the liability ultimately fell on Rajasthan.

The basic difference between *Shyam Lal* and *Dalmia Dadri* was that in the latter case, the old laws were repealed and, thus, repudiated, while in the former, the old laws were continued and nothing was done to repudiate the past obligations.

B. ACT OF STATE

In many cases, mentioned above, the courts have utilised the concept of 'act of state' to free the Government from any liability. It is, therefore, necessary to have some idea of this concept.

Under the English law, an act of state is an act of the Government as a matter of policy performed in the course of its relations with another foreign State, or

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14. *Dalmia Dadri Cement Co. v. Commr., Income-tax,* AIR 1958 SC 816 : 1959 SCR 729.
Also see, *Amar Singhji v. State of Rajasthan,* AIR 1955 SC 504 : (1955) 2 SCR 303; *Amarchand Butail v. Union of India,* AIR 1964 SC 1658.

15. *State of Rajasthan v. Shyam Lal,* AIR 1964 SC 1495 : (1964) 7 SCR 174. Also, *Sudhansusekhar v. Orissa,* AIR 1961 SC 196 : (1961) 1 SCR 779.

during its relations with the subjects of that State, unless they are temporarily within the allegiance of the British Crown.

An act of state is an act of a Sovereign against another Sovereign, or an alien outside its territory. It is a sovereign act which is not grounded in law. As an act of state derives its authority not from municipal law, but from *ultra*-legal or *supra*-legal means, municipal courts have no power to examine its propriety or legality. There is legal immunity in respect of acts done by the State against an alien outside its territory.[16] An act of state cannot be questioned, or made the subject of legal proceedings. in a municipal Court. But there cannot be an act of state by the government against its own citizens.[17]

The principles were applied in India in a number of cases in the pre-Constitution era. In *Nabab of Carnatic v. East India Co.*,[18] a suit brought by the Nabab against the East India Company for an account of rents of his territories while in Company's possession under a political treaty between the Company and the Nabab, was dismissed as it was a matter between two Sovereigns, the Company having acted throughout in its political capacity.

In *East India Co. v. Syed Ally*,[19] the resumption by the Madras Government of a *jagir* granted by the former Nabab of Carnatic before the date of cession to the East India Co., was held to be an act of sovereign power and so exempt from the jurisdiction of the courts.

In *Secretary of State v. Kamachee Boyee Sahaba*,[20] a claim was made to the properties seized by the East India Company on the death of Raja of Tanjore without heirs. The Privy Council held that as the act was an act of state which was not grounded in municipal law, the courts had no jurisdiction in the matter, for transactions between independent States were governed by laws other than the municipal law.

In *Ex-Raja of Coorg v. East India Co.*,[21] the Company had made war against the Raja of Coorg, annexed his territory, and taken his property. The Raja filed a suit against the Company but it was dismissed on the ground that the Company had acted in its sovereign capacity.

There can be no act of state between a State and its subjects. An act done by a State against its citizens is not immune from judicial scrutiny; its legality and validity must be tested under the municipal law and in municipal courts.[22]

The above-mentioned principle can be illustrated by reference to *Forester v. Secretary of State*.[23] The Government of India on the death of Begum Sumroo, resumed property formerly belonging to her. The legality of this action was questioned by her heirs. It appeared that the Begum had not acquired the position of a Sovereign, that she was a British subject at the time of her death, and that the seizure of territories was not by arbitrary power belonging to a Sovereign, but was resumption, under colour of legal title, of lands previously held from the

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16. *Eshugbayi Eleko v. Govt. of Nigeria*, 1931 AC 662; *Johnstone v. Pedlar*, (1921) 2 AC 262.
17. *B.K. Mohapatra v. State of Orissa*, AIR 1988 SC 24 : 1987 Supp SCC 553.
18. 30 ER 391 and 521 (1791-93).
19. 7 MIA 555 (1827).
20. 7 MIA 476.
21. 54 ER 642 (1860).
22. *P.V. Rao v. Khusaldas*, AIR 1949 Bom. 277, 287.
23. I.A. Supp. Vol., 10.

Government by a subject under a particular tenure, on the alleged determination of that tenure. It was held that, as the seizure of land was under colour of title, it could not be an act of state and the questions raised in the suit were cognizable by a municipal Court.

These principles have been applied in independent India as well. Acquisition of territory by a sovereign State for the first time is an act of state, and it does not matter whether the acquisition has been brought about by conquest or cession.[24] An inhabitant of the acquired territory can have only such rights as the new Sovereign recognizes and the rights he had under the preceding rule avail him nothing. The merger of princely States with India is an act of state.[25]

The above-mentioned principle was applied in the *Dalmia Dadri* case noted above.[26] In *Saurashtra v. Memon Haji Ismail*,[27] the administration of the princely State of Junagadh, was taken over by the Government of India, and some property previously gifted by the former Nabab of Junagadh was resumed. The Supreme Court held that Junagadh was a sovereign State when its administration was assumed by the Indian Government and the State subjects were aliens and not Indian citizens at the time, and, therefore, the resumption of the property was an act of state, for which no action could be brought in a Court.

Certain rights created by a princely State in the State forests on the eve of its merger with the Indian Union were repudiated by the Government of Bombay which took over the administration of the State. The Supreme Court held in *State of Gujarat v. Vora Fiddali*[28] that merger was an act of state and the grantees under the previous ruler did not carry with them, on a change of sovereignty, any inchoate rights as against the new Sovereign.

The State of Bharatpur established a mandi at Bharatpur, and agreed to grant to the prospective buyers of plots a concession of 25 per cent in the customs duty on all goods imported from outside into the mandi and sold for consumption within the State as well as on export of goods from the mandi. The appellant purchased a plot in the mandi in 1946. Thereafter the State of Bharatpur merged with the Matsya Union which then merged with the Rajasthan State which abolished all free mandis. Thereupon, the appellant filed a suit to recover the excess amount of customs duty paid to the Rajasthan Government. The Supreme Court decided against the appellant.[29] The Court ruled that the successor State did not automatically inherit the rights and obligations of the merged State. The contractual obligations of the preceding State could bind the succeeding sovereign State only if it recognised, either expressly or impliedly, those obligations.

Accession of one State to another is an 'act of state' and the subjects of the former State may claim protection of only such rights as the new Sovereign recognises as enforceable in its municipal courts. Even if an obligation was recognized by the new Government, the Legislature would still be competent to enact a

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24. *Promod v. State of Orissa,* AIR 1962 SC 1288 : (1962) 1 Supp SCR 405.
25. *B.K. Mohapatra v. State of Orissa,* AIR 1988 SC 24 : 1987 Supp SCC 553.
26. *Supra,* footnote 14.
Also see, *Virendra Singh v. State of Uttar Pradesh,* AIR 1954 SC 447 : (1955) 1 SCR 415; *State of Madras v. Rajagopalan,* AIR 1955 SC 817 : (1955) 2 SCR 817.
27. AIR 1959 SC 1383 : (1960) 1 SCR 537.
28. AIR 1964 SC 1043 : (1964) 6 SCR 461.
29. *Firm Bansidhar Premsukhdas v. State of Rajasthan,* AIR 1967 SC 40 : 1966 Supp SCR 81.

law altering the terms and conditions of a previous contract, or of a grant under which the liability of the Government arose. The legislative competence of Parliament, or of the State Legislatures can only be circumscribed by an express prohibition contained in the Constitution itself. Without there being any provision in the Constitution prohibiting legislation on the subject, there is no fetter on the plenary powers of the legislature to legislate on the topics enumerated in the relevant lists.[30]

Accordingly, in *Maharaja Shree Umaid Mills Ltd. v. Union of India*,[31] it was held that there is nothing in Article 295 of the Consitution which prohibits Parliament from enacting a law altering the terms and conditions of a contract, or of a grant, under which the liability of the Government of India arises, or to impose excise duty or income tax in territories which became Part B States, and no such prohibition can be read into Article 295 by virtue of some contract entered into with any person by the then ruler of an Indian State.[32] This means that Art. 295 speaks only of devolution of the liability; it does not act as a limitation upon the legislative competence of the Union or a State Legislature.

C. ESCHEAT

According to Art. 296, any property in India which, "if this Constitution had not come into force", would have vested in His Majesty, or the Ruler of an Indian State by escheat, lapse or *bana vacatia* for want of a rightful owner, shall vest in a State, if the property is situated there, and in the Union, in any other case. Accordingly, location of the property is the primary rule to determine whether the property vests in the Centre or a State.

By a proviso to Art. 296, the rule of *situs* has been made to give way to the rule of user. If any property which, at the date when it would have accrued by escheat, lapse or *bona vacatia*, was in the possession or control of the Government of India or of a State, shall, according as the purposes of its user were purposes of the Union or of a State, vest in the Union or in that State.

The Article does not say what property would accrue to the Government by lapse, escheat or *bona vacatia*. What it does is to maintain the *status quo* prevailing in India before the Constitution. The words 'if this Constitution had not come into force' signify that the Constitution itself envisages no change in the laws regarding escheat, lapse or *bona vacatia*.

On failure of heirs, natural or legal, the property of the deceased reverts to the State as *bona vacatia*.[33] Before the Government puts forward a claim of escheat, onus lies heavily on it to prove the absence of any heir of the deceased anywhere in the world.[34] The doctrine of *bona vacatia* applies to a dissolved company whose assets, if any, will be taken over by the state. It is not necessary to have any provision for that purpose in the Companies Act in view of Art. 296.[35]

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30. *Jagannath Baksh Singh v. United Provinces*, AIR 1949 PC 127; *Umeg Singh v. State of Bombay*, AIR 1955 SC 540 : (1955) 2 SCR 164; *supra*, Ch. X.
31. AIR 1963 SC 953 : 1963 Supp (2) SCR 515.
32. See, BHIMSEN RAO, *Act of State Doctrine in India*, 12 *JILI* 304 (1970).
33. *Phuman Singh v. State of Punjab*, AIR 1961 Punj. 200.
34. *State of Bihar v. Radha Krishna Singh*, AIR 1983 SC 684 : (1983) 3 SCC 118.
35. *In re U.N. Mandal's Estate*, AIR 1959 Cal. 490.

The Government takes by *escheat* all property—movable or immovable—for want of an heir or successor. This is an incident of sovereignty and rests on the ultimate ownership of the state of all property within its jurisdiction.

The Supreme Court has explained the concept of escheat in *Sheo Nand.*[36] Escheat literally means "to revert to the state". This event happens in default of heirs or devisees. When there is no owner of property, it vests in the state and this is known as *bona vacatia*. Consequently, the property of an intestate dying without leaving lawful heirs, and the property of a dissolved corporation pass to the Government as *escheat* or *bona vacatia*.[37]

Certain statutes also make provisions regarding *Escheat.* For example, S. 29 of the Hindu Succession Act provides that if an intestate has left no heir qualified to succeed, such property shall devolve on the Government subject to the obligations and liabilities to which an heir would have been subject.

The legislative power to enact legislation relating to Escheat falls under entries 35 and 44 in the State List and entry 32 in the Union List.[38]

D. THINGS OF VALUE IN TERRITORIAL WATERS

Article 297 asserts India's sovereign rights over sea-wealth.[39] Originally, Art. 297 merely Stated that all lands, minerals and other things of value underlying the ocean within the territorial waters, or the continental shelf, of India vest in the Union and are held for the purposes of the Union.

The genesis of this Article may be said to lie in the dispute which arose in America between the California State and the Central Government as to whether territorial waters belonged to the Centre or the maritime States. California had granted leases of petroleum and other minerals deposited in the sea-bed in territorial waters. The Centre claimed that the sea-bed with all its minerals vested in it and, therefore, the State had no right to deal with them.

The Supreme Court decided the controversy in favour of the Centre mainly on the ground that the protection and control of the territorial waters was a function of the national external sovereignty. The Court held that California was not the owner of the territorial belt, and that the Centre, rather than the State, had full dominion and power over the lands, minerals and other products therein.[40] In *U.S. v. State of Texas,*[41] the Supreme Court held that the Centre and not the State had the right to oil and other products under the bed of the ocean below low water mark off the shores of Texas.[42]

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36. *Sheo Nand v. Dy. Director of Consolidation, Allahabad,* AIR 2000 SC 1141 : (2000) 3 SCC 103.

37. *P. Leslie & Co. v. V.O. Wapshare,* AIR 1969 SC 843 : (1969) 3 SCR 203.
Also see, *Bombay Dyeing and Mfg. Co. v. State of Bombay,* AIR 1958 SC 328 : 1958 SCR 328; *Supdt. and Remembrancer of Legal Affairs, State of West Bengal v. Corpn. of Calcutta,* AIR 1967 SC 997 : (1967) 2 SCR 170.

38. See, *supra,* Ch. X.

39. V.S. MANI, *India's Maritime Zones and International Law,* (1979) 21 *JILI* 336.

40. *U.S. v. State of California,* 332 US 18 (1975).
Also, *U.S. v. State of Louisiana,* 339 US 699 (1950).

41. 339 US 707 (1950).

42. *DOWLING and EDWARDS, AMERICAN CONST. LAW,* 213 (1954).

The bases of the Centre's paramount rights in these cases were the national interests, national responsibilities, and national concerns. Consequent upon these decisions, the U.S. Congress enacted the Submerged Land Act, 1953, which vested in, and assigned to, the States the 'title to and ownership of' their respective portions of the submerged land and resources in land and water.[43]

The framers of the Indian Constitution apprehended that in future the maritime States might raise the issue that anything underlying the ocean within the territorial waters vested in them. In order to negative the possibility of any such contention being raised in future, the Constitution-makers put Art. 297 in the Constitution[37] which enacted precisely the law laid down by the U.S. Supreme Court in the cases mentioned above.

It is one of the moot points of International Law as to what exactly is the extent of territorial waters. Because of this uncertainty, the Constitution did not prescribe the extent of territorial waters. On the 22nd March, 1956, the President by a proclamation prescribed the limits of territorial waters at six nautical miles measured from the appropriate base-line. But a fresh proclamation was issued by the President on December 3, 1956. It recited that whereas International Law recognises that on the high seas adjacent to its territorial water, a coastal State may exercise the control necessary to prevent and punish the infringement within its territorial waters of its customs, fiscal, immigration and sanitary regulations, control has been assumed up to a distance of 12 nautical miles from the base line from which the width of the territorial waters is measured.

By another proclamation concerning fishing activities in the high seas adjacent to territorial waters, control was assumed within a distance of 100 nautical miles from the outer limits of territorial waters.

By another proclamation, dated the 30th August, 1955, full and exclusive sovereign rights of India were declared by the President on the continental shelf. The proclamation stated that whereas valuable natural resources are known to exist on the sea-bed and in the sub-soil of the continental shelf and the utilisation of such resources is being made practicable by modern technological progress; and whereas it is established by international practice that for the purpose of exploring and exploiting such resources in an ordinary manner, every coastal State has sovereign right over the sea-bed and sub-soil of the continental shelf adjoining its territory; accordingly, India has, and always had, full and exclusive sovereign right over the sea-bed and sub-soil of the continental shelf adjoining its territory and beyond its territorial waters.

The words "all lands, minerals and other things of value underlying the ocean" in the constitutional provision are of great significance. One of the moot points of International Law is whether there is any difference between what may be called surface rights, mineral rights and soil rights. Article 297 asserts that all lands, minerals and other things of value underlying the ocean vest in the Union.

The Madras High Court considered the interesting question whether the Chank fisheries[44] in the territorial waters of Sivaganaga vest in the Centre or the Madras

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43. VIII *CAD*, 889-892.

44. *A.M.S.S.V.M. Co. v. State of Madras*, AIR 1954 Mad 291: *P.S.A. Susai v. Director of Fisheries*, (1965) II MLJ 35. For a critique of the case see, M.K. NAWAZ AND LAKSHMI JAMBHOLKAR, *The Chank Fisheries Case Revisited*, 13 *JILI* 494 (1973).

Government. The Court voted in favour of the State on the following three grounds, *viz.*:

(i) Entry 21, List II, is 'Fisheries'[45] while entry 57 in List I, runs as "Fishing and fisheries beyond territorial waters".[46]

Reading the two entries together, the State has been held to have competence to legislate generally on fisheries, and that only the fisheries and fishing rights beyond territorial waters fall outside the State jurisdiction. Therefore, a State law regulating the use of fisheries in territorial waters would fall within the State sphere and Art. 297 does not affect this position. The rights of the Centre over territorial waters are subject to the legislative powers of the States. Even if territorial waters vest in the Centre under Art. 297, entry 21 in List II, is sufficient to clothe the States with power to enact laws in respect of fisheries in territorial waters.

(ii) Before 1950, these fisheries vested in the Province of Madras and so under Art. 294, these must now vest in the corresponding State and not in the Centre.[47]

(iii) The High Court opined that under Art. 297, territorial waters do not vest in the Centre. What this provision vests in the Centre is what underlies the ocean within territorial waters and not the territorial waters themselves.

According to the High Court, the two concepts—territorial waters and the seabed—do not stand in the same position. For the purpose of the vesting under Art. 297, the dividing line lies between the bed of the ocean and the waters above it and that what does not underlie the bed of the ocean would be outside the purview of Art. 297.

This view of the High Court is arguable. The framers of the Constitution took the view that "anything above land goes with the land. If there is a tree above the land, the tree goes with the land. Water is above the land and so it goes with the land."[48] The framers, therefore, thought that the word 'land' in Art. 297 would denote not only land but also water over it, and by declaring that land within territorial waters belonged to the Centre, the Article would also impliedly declare that the territorial waters over this land belonged to the Centre.

However, the question of ownership of territorial waters does not appear to be of much practical significance. It is purely a Federal-State question and not one of International Law according to which the territory of India not only includes its physical territory but also territorial waters. The valuable resources within territorial waters have been vested in the Centre. The laws of a State within its legislative sphere will operate on the territorial waters adjacent to it. The question of ownership thus appears to be of academic interest.

The words "for the purposes of the Union" in Art. 297 do not necessarily mean that the maritime States have been deprived of all and every kind of advantages accruing from the ocean. These words are flexible and do not militate against

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45. *Supra*, Ch. X.
46. *Ibid*.
47. *Supra*, Sec. A.
48. VIII *CAD*, 892.

some of the benefits being allotted to the maritime or coastal States by the Centre.[49]

For a very long time, the law of the sea has been debated in an international conference and consensus has emerged among the nations on three points :

(*i*) the limit of the territorial waters should extend to 12 miles;

(*ii*) the exclusive economic zone will extend to 200 miles; and

(*iii*) the continental shelf may go beyond 200 miles.

Accordingly, Art. 297 has been amended, and its scope enlarged, by the Constitution (Fortieth) Amendment Act, 1976, so as to enable Parliament to enact suitable legislation in terms of the international consensus.[50]

Article 297(1) now provides that all lands, minerals and other things of value underlying the ocean within the territorial waters, or the continental shelf, or the exclusive economic zone, of India shall vest in the Union and be held for the purposes of the Union.

According to Art. 297(2), all other resources of the exclusive economic zone of India shall also vest in the Union and be held for the purposes of the Union.

Further, Art. 297(3) provides that the limits of the territorial waters, the continental shelf, the exclusive economic zone, and other maritime zones of India shall be such as may be specified, from time to time, by or under any law made by Parliament.

Thus, while originally, only territorial waters and the continental shelf were mentioned in Art. 297, now it refers, besides these concepts, to India's exclusive economic zone and other maritime zones. All things of value underlying the territorial waters or the continental shelf, the economic Zone of India, along with all other resources of the economic zone, vest in India for the purpose of the Union. Formerly, the extent of territorial waters and continental shelf were fixed through presidential proclamations. Now, the power vests in Parliament to specify the limits of (i) territorial waters, (ii) Continental shelf, and (iii) economic zone.

Under Art. 297, Parliament has enacted the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976. The main features of this Act are as follows:

(*i*) India has sovereignty over territorial waters which will extend to 12 nautical miles measured from the appropriate baseline but the Central Government may alter this limit keeping in view international law and state practice. Such a notification can be issued after its approval by both Houses of Parliament.

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49. Similar questions have arisen in Canada and Australia.

For Canada, see the Advisory Opinion of the Supreme Court of Canada handed down on the 7th November, 1967, in *In the Matter of Offshore Mineral Rights*.

For Australia see, O'CONNEL, *Problems of Australian Coastal Jurisdiction*, 42 *Australian Law JI.*, 39 (1968); *Lumb, The Off-Shore Petroleum Agreement & Legislation, ibid.*, 453; *State of New South Wales v. Commonwealth*, 50 ALJR 218; for a note on the case see, 50 ALJ 153 (1976).

50. For this Amendment, see, *infra*, Ch. XLII.

(*ii*) In the contiguous zone of 12 miles beyond the territorial waters, India will exercise jurisdiction over security, immigration, health, customs and other fiscal matters. The extent of contiguous zone can also be varied by the Central Government with the approval of Parliament.

(*iii*) India has sovereignty over its continental shelf which extends to 200 miles or the outer edge of the continental margin whichever is longer.

(*iv*) India's exclusive economic zone extends up to 200 nautical miles.[51] But the extent of the zone can be varied by the Centre with Parliament's approval.

(*v*) The sovereignty of India extends to the historic waters. The limit of such waters is to be specified by the Central Government.

E. BARRING COURTS' JURISDICTION IN DISPUTES ARISING OUT OF CERTAIN TREATIES

Article 363(1) bars all courts from having any jurisdiction in any dispute arising out of a pre-Constitution treaty, agreement, covenant, engagement or *sanad* executed between a Ruler of an Indian State and the Government of India, or in any dispute in respect of any right accruing under or any liability or obligation arising out of any of the provisions of the Constitution relating to any such treaty etc.

This Article refers to the numerous agreements and covenants entered into between the then Government of India and the Rulers of the Indian States as a part of the arrangements by which the Indian States were incorporated with the rest of India before the inauguration of the new Constitution.

These arrangements and covenants were in the nature of treaties between two States and, as such, were 'acts of state' outside the purview of the municipal courts.[52]

There are two conditions for the application of Art. 363(1):

(*i*) the covenant with the Ruler must have been entered into before the coming into force of the Constitution, and

(*ii*) the covenant must continue in force after the commencement of the Indian Constitution.

Article 363(1) bars the jurisdiction of each and every Court. A few features of this provision have been already explained earlier.[53] A few more points regarding the Article may be noted here.

The Supreme Court has held that it could not entertain *inter alia* the following claims because of Art. 363(1) :

(i) a challenge by the Ruler of an Indian State, who had entered into a merger-agreement with the Government of India, that the agreement was void as being without consideration;[54]

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51. S.P. JAGOTA, *The Sea Around Us, The Illustrated Weekly, Dec. 19-25*, 1976, pp. 8-17.
52. *Supra*, Sec. B.
53. *Supra*, Ch. IV, Sec. C(iii)(d).
54. *State of Seraikella v. Union of India,* AIR 1951 SC 253 : 1951 SCR 474.

(ii) a challenge by the *jagirdars* of the erstwhile Indian States which had merged in the State of Bombay to the *vires* of a Bombay Act abolishing *jagirs* on the ground that the Act contravened the letters of guarantee which had been given to the Rulers.[55]

(iii) The Supreme Court has ruled that in view of Art. 363 "any dispute arising out of the Merger Agreement, or the Instrument of Accession, is beyond the competence of the Courts to enquire into."[56]

The only way to bring such cases before the Supreme Court is to invoke its advisory jurisdiction.[57]

The following matter has been held as not barred by Art. 363(1). The Ruler of Ratlam passed orders raising the rates at which the plaintiffs were to be paid for the supply of liquor to the warehouses in the Ratlam State. After the merger of the State, all the old laws were continued by the newly formed State of Madhya Bharat. This right subsisted even after the commencement of the Constitution in 1950, and the liability of Ratlam became the liability of the new State of Madhya Bharat under Art. 295(2).[58] As it was not a claim to enforce any right under the covenant of merger, Art. 363 did not apply. Art. 363 bars the jurisdiction of the courts only in respect of disputes *arising out* of the covenant.[59]

Article 363 does not come into picture in cases arising under the existing law.[60] The ex-Ruler of a merged State evicted the appellants who had been in occupation of his private land. A suit by the evicted tenants to be restored to possession, was held maintainable as it arose out of the action of eviction by the ex-Ruler and not out of the merger agreement.[61]

Execution of a money decree against an ex-Ruler was not barred as the dispute had nothing to do with the agreement of merger and so was not covered by Art. 363.[62]

PRIVY PURSES OF THE RULERS

As noted above, numerous agreements and covenants were entered into between the Government of India and the erstwhile Indian Rulers guaranteeing to them privy purses and other personal privileges in lieu of their accession to the Union of India. The Constitution originally contained three provisions guaranteeing the privy purses and Rulers' personal privileges.

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55. *Umeg Singh v. State of Bombay,* AIR 1955 SC 540 : (1955) 2 SCR 164. Also, *Raghubar Sarup v. State of Uttar Pradesh,* AIR 1959 SC 909; *Joginder Sen v. Union of India,* AIR 1967 HP 6.

56. *Maharaja Pravir Chandra Bhanj Deo Kakatiya v. State of Madhya Pradesh,* AIR 1961 SC 775 : (1961) 2 SCR 501. Also see, *State of Jammu & Kashmir v. Karan Singh,* AIR 1997 J&K 132.

57. *Supra,* Ch. IV, Sec. F.

58. *Supra,* Sec. A.

59. *State of Madhya Bharat v. Behramji,* AIR 1958 MP 71.

60. *Bholanath J. Thacker v. Saurashtra,* AIR 1954 SC 680 : (1955) 1 LLJ 355; *Lachhman Dass v. State of Punjab,* AIR 1963 SC 222 : (1963) 2 SCR 353.

61. *Jagannath Behera v. Harihar Singh,* AIR 1958 SC 239 : 1958 SCR 1067.

62. *Thakoresaheb Khanji v. Gulam Rasul Chandbhai,* AIR 1955 Bom 449. Also, *Pratapsinhji v. State of Bombay,* AIR 1957 Bom 155.

(i) Art. 291 charged the privy purses payable to the Rulers on the Consolidated Fund of India,[63] and exempted the same from levy of income tax.

(ii) Art. 362 obligated Parliament and State Legislatures while making laws, and the Centre and the States while exercising their executive power, to have due regard to the assurances and guarantees made in the covenants or agreements with regard to the Rulers' personal rights etc.

(iii) Art. 366(22) provided that 'Ruler' of an Indian State would mean a prince, chief or other person by whom any such agreement or covenant was entered into and who, for the time being, was recognised by the President as the 'Ruler' of the State.

In course of time, the Central Government decided to abolish privy purses and other privileges of the Rulers. For this purpose, the Government of India moved a Constitution Amendment Bill in Parliament, but the same could not be enacted as it failed to secure the requisite majority in Rajya Sabha.[64]

The Government then took recourse to Art. 366(22) for this purpose. On September 7, 1970, the President issued an omnibus order under Art. 366(22) derecognising all the rulers. The validity of this order was challenged in the Supreme Court through a petition under Art. 32 in *Madhav Rao Scindia v. Union of India*.[65]

A question for consideration of the Court was whether it was barred from taking cognisance of the petition under Art. 363. The Court answered in the negative. It interpreted Art. 363 narrowly in accordance with the well known rule of interpretation of provisions barring jurisdiction of the courts that they must be strictly construed for the "exclusion of the jurisdiction of a civil Court, and least of all the Supreme Court, is not to be lightly inferred." The Court therefore held that the bar of Art. 363 applied only to Art. 362 which was a provision relating to a treaty, covenant etc. Art. 291 was free from the restraints of Art. 363 as its dominant purpose was to ensure payment of privy purses, charge them on Consolidated Fund and exempt them from income tax.

It was also held that Art. 366(22) would also be within the bar of Art. 363 so long as the President in recognising a Ruler was effectuating the provisions of the covenant or agreement. But, "where the President acts wholly outside the provisions of Art. 366(22), his action can be questioned because the bar applies on *bona fide* and legitimate action and not to *ultra vires* action." The Presidential Order withdrawing recognition of all rulers was held to be wholly outside Art. 366(22). The President was incompetent to withdraw recognition of all Rulers. "The continuity of a Ruler of an Indian State is obligatory so long as the Ruler is alive or a successor can be found." Accordingly, the Court held by a majority that the Presidential Order was *ultra vires*.[66]

Thereafter, Art. 363A was introduced in the Constitution by the Twenty-sixth Constitutional Amendment in 1971. With this, the recognition of the Indian Rul-

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63. *Supra*, Ch. II.
64. For Constitution Amending Process, see, *infra*, Ch. XLI.
65. AIR 1971 SC 530 : (1971) 1 SCC 85.
66. See also, *infra*, Ch. XL and XLII.

ers by the President came to an end. Along with this, privy purses payable to the Indian Rulers also came to an end.[67]

F. CONTINUANCE OF THE PRE-CONSTITUTION LAWS

The Government of India Act, 1935, was repealed by Art. 395 of the Constitution, but the laws in force in India immediately before the commencement of the Constitution, were continued in force under Art. 372(1) until altered, repealed or amended by a competent legislature or other authority.[68] The term 'law in force' includes a law passed or made by a legislature, or other competent authority, in India before the commencement of that Constitution, and not previously repealed even though it might not have been put into operation.

The effect of the above provision is to continue the entire body of law as prevailing in India before the Constitution came into force. Not only statutory law, but also non-statutory law like the Law of Torts,[69] Hindu Law, Mohammedan Law, customs having the force of law,[70] the common law of England which had been adopted as the law of India before the Constitution,[71] the Letters Patent of High Courts,[72] all were continued in force.

Laws which were of a temporary nature[73] were not to continue beyond the period for which they were enacted. Similarly, laws which had been previously repealed, or which had died a natural death, were not to be revived.[74] The word 'law' includes delegated legislation[75] and, therefore, regulations or orders having the force of law were also continued.[76] Art. 372 saved an order of legislative nature but not a mere administrative order.[77]

The Supreme Court has ruled in *Dena Bank*[78] that the rule of the Common Law that the right of the state to recover tax arrears from an assessee has a priority over the right of a private person to recover his unsecured private debt from

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67. See, *infra*, Ch. XLII, for the Amendment.

68. Art. 372(2) empowered the President to adapt and modify the pre-Constitution laws so as to bring them in accord with the provisions of the Constitution. The power was to subsist for three years after the Constitution. This constitutional provision made it possible to adapt the pre-Constitution laws within a short span of time without throwing a great burden on Parliament.

69. *Director of Rationing v. Corpn. of Calcutta,* AIR 1960 SC 1355 : (1961) 1 SCR 158; *infra*, Sec. H.

70. *Motesingh v. Chandra Bali,* AIR 1959 MP 212; *Gopalan v. State of Madras,* AIR 1958 Mad 539; *In the matter of Basanta Chandra Ghosh,* AIR 1960 Pat 430.

71. *Dir of Rationing v. Corp. of Cal., supra,* footnote 67; *B.S. Corp. v. Union of India,* AIR 1956 Cal 26.

72. *Nirmalchand v. Smt. Parmeshwari Devi,* AIR 1958 MP 333; *In re Ranganayakulu,* AIR 1956 AP 161; *In the matter of B.C. Ghosh,* footnote 70, *supra*.

73. *Explanation* III to Art. 372.

74. *State of U.P. v. Jagamander,* AIR 1954 SC 683 : 1954 Cri LJ 1736.

75. *Supra,* Ch. II, Sec. N.

76. *Edward Mills v. Ajmer,* AIR 1955 SC 25 : (1955) 1 SCR 735; *Seshadri, R.M. v. State of Madras,* AIR 1954 Mad 543; *In re Ranganayakulu,* AIR 1956 AP 161.

77. *Madhavrao v. Madhya Bharat,* AIR 1961 SC 298. Also see, *Edward Mills v. Ajmer,* AIR 1955 SC 25 : (1955) 1 SCR 735; *Atindra v. Gillot,* AIR 1955 Cal 543; *State of Madhya Pradesh v. Gokulchand,* AIR 1957 MP 145; *John K.O. v. State,* AIR 1956 TC 117; *Narsing Pratap Dev v. State of Orissa,* AIR 1964 SC 1793 : (1967) 7 SCR 112; *State of Madhya Pradesh v. Lal Rampal,* AIR 1966 SC 820.

78. *Dena Bank v. Bhikhabhai Prabhudas Parekh & Co.*, (2000) 5 SCC 694.

the assessee, being "law in force in British India under Art. 372(1) continues to operate even now. The common-law rule is founded on the rule of necessity and public policy.

In *Superintendent and Legal Remembrancer, West Bengal v. Corporation of Calcutta,*[79] the Supreme Court held by a majority that Art. 372 did not continue all the norms of interpretation applied by the courts in the pre-Constitution India, as distinguished from the principles of substantive law. The courts can now decide whether these norms should or should not apply to interpret the statutes in Independent India.

Article 372(1) continued the pre-Constitution laws subject to the provisions of the Constitution. Thus, no law is to be valid if it contravenes a Fundamental Right or any other provision of the Constitution.[80]

A pre-constitutional law enacted while concept of equality between two sexes was not known may no longer be valid because of the social and political values of the makers of the Constitution once it is accepted that they intended to apply equality in all spheres of life which as reflected in articles 14 and 15 of the Constitution. But here also absolute equality is not contemplated and it would be permissible for the State to make a classification on the ground of sex so long as classification is founded on a rational criteria and the societal conditions which prevailed in the early 20th century may not be a rational criteria in the 21st century.[81]

As regards the distribution of powers between the Centre and the States, however, the validity of a law is to be tested with reference to the competence of the enacting legislature under the scheme of distribution prevailing at the time the law was enacted and not under the new Constitution.[82] Thus, if a law was invalid when it was made, no question of its continuance after the Constitution arises.[83] If the pre-Constitution law was made by a competent legislature at the time, it will continue to subsist even if the enacting legislature loses its competence after the Constitution came into force, provided the law in question does not fall foul of any constitutional provision.[84]

In *State of Madras v. Menon,*[85] the Supreme Court held that such of the British statutes as applied to India before the Constitution, but the language of which did not accord with the new independent status of India, could not be regarded as being applicable after the Constitution. The question in the instant case was whether the Fugitive Offenders Act, 1881, was continued by Art. 372. The Court found that the scheme of the Act was that the British possessions which were contiguous to one another, and between whom there were frequent intercommunication, were treated as one integrated territory and a summary procedure was adopted to extradite per-

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79. *Infra*, footnote 92.

80. *Panch Gujar v. Amar Singh,* AIR 1954 Raj 100; *T.H. Vareed v. Travancore Cochin,* AIR 1956 SC 142, 145 : (1955) 2 SCR 1022, *S.I. Corporation v. Board of Revenue,* AIR 1964 SC 207; *Union of India v. Bellary Municipality,* AIR 1978 SC 1803; See also *District Registrar and Collector v. Canara Bank,* (2005) 1 SCC 496 : AIR 2005 SC 186.

81. *Anuj Garg v. Hotel Association of India,* (2008) 3 SCC 1 : AIR 2008 SC 663.

82. *Kanpur Oil Mills v. Judge, Sales Tax,* AIR 1955 All 99; *State of West Bengal v. Tarun Kumar,* AIR 1974 Cal 39; *B.V. Patankar v. Sastry,* AIR 1961 SC 272 : (1961) 1 SCR 591.

83. *Umaid Mills v. Union of India,* AIR 1963 SC 953 : (1963) Supp (2) SCR 575.

84. *S.I. Corpn. v. Board of Revenue,* AIR 1964 SC 207 : (1964) 2 SCR 280; See also *John Vallamattom v. Union of India,* (2003) 6 SCC 611 : AIR 2003 SC 2902.

85. AIR 1954 SC 517 : (1955) 1 SCR 280.

sons committing offences in this integrated territory. After India became a Sovereign Democratic Republic under the new Constitution, India could no longer be described as a British possession and so it could not be grouped amongst British possessions and, therefore, the Fugitive Offenders Act was no longer applicable. Art. 372 could not save this law because the grouping was repugnant to the concept of a Sovereign Democratic Republic.

The principle of priority of debts owed to state over private debts is not inconsistent with anything in the Republican Constitution. It is essential to the proper functioning of any state that the debts due to it should have a priority over debts owed to private individuals.[86]

The decisions of the Privy Council were binding on all courts in India, and the law declared by the Privy Council was the law, before the Constitution became operative on January 26, 1950. Under Art. 225, the law administered in any High Court on January 25, 1950, continues to be the same law as was administered by it prior to the Constitution subject to the provisions of the Constitution and of any law made by any competent legislature.[87]

Under Art. 372(1) also, the pre-Constitution laws remain in force until altered or repealed or amended by a competent legislature or authority. Therefore, the law declared by the Privy Council as well as the Federal Court remains binding on the High Courts even after January 25, 1950, until the Supreme Court rules otherwise.[88]

The position of the Supreme Court is somewhat different from this point of view. The decisions of the Privy Council and of the Federal Court are not binding on the Supreme Court though these decisions are of persuasive authority and are entitled to all respect and attention which they deserve. Thus, in *State of Bihar v. Abdul Majid*,[89] the Supreme Court refused to follow the Federal Court's decision in *State of Punjab v. Tara Chand*[90] and the Privy Council's decision in *High Commissioner for India v. Lall*.[91] Similarly, in the *Legal Remembrancer* case,[92] the Supreme Court disagreed with the view expressed by the Privy Council in *Province of Bombay v. Municipal Corporation*.[93]

Article 372(1) makes it clear that the pre-Constitution laws continued in force after the Constitution may be altered, amended or repealed by a competent legislature.

G. SUITS BY OR AGAINST THE GOVERNMENT

Article 300 lays down that the Government of India, or of the State, may sue or be sued by the name of the Union of India or of the State respectively. The Centre or a State can thus be sued as a juristic personality.

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86. *Builders Supply Corpn. v. Union of India*, AIR 1965 SC 1061 : (1965) 2 SCR 289.
87. *Supra*, Ch. VIII, Sec. C(ii).
88. *Pritam Singh v. State*, AIR 1950 SC 169 : 1950 SCR 453; *Calcutta Corporation v. Director of Rationing*, AIR 1955 Cal 282; *Chatturbhuj v. Moreshwar*, AIR 1954 SC 236 : 1954 SCR 817; *Bihar v. Abdul Majid*, AIR 1954 SC 245 : 1954 SCR 786; *Bombay v. Chhaganlal*, AIR 1955 Bom 1; *Srinivas v. Narayan*, AIR 1954 SC 379 : (1955) 1 SCR 1; *Radharani v. Sisir Kumar*, AIR 1953 Cal 524.
89. *Supra*, note 87. Also, *supra*, Ch. XXXVI, Sec. C.
90. AIR 1947 FC 23.
91. AIR 1948 PC 121.
92. AIR 1967 SC 997 : (1967) 2 SCR 170, *infra*, Sec. H.
93. 73 I.A. 271; see, *infra*, next Section.

As regards the extent of government liability, the Article declares that the Government of India, or of a State, may be sued "in relation to their respective affairs in the like cases as the Dominion of India and the corresponding Provinces, or the corresponding Indian States might have sued or been sued", if the Constitution had not been enacted. This, however, is subject to any law made by Parliament or a State Legislature.

Under this provision, the liability of the Centre or a State is co-terminous with that of the Dominion of India, or a Province, before the Constitution. Under S. 176 of the Government of India Act, 1935, this liability was co-extensive with that of the Secretary of State for India under S. 32 of the Government of India Act, 1915. The Act of 1915, in turn made it co-extensive with that of the East India Company prior to the Government of India Act, 1858. S. 95 the Act of 1858, declared that all persons would have and take the same suits, remedies and proceedings against the Secretary of State in Council for India as they could have against the East India Company.

The consequence of the above provisions is that in order to understand the extent of the present-day liability of a Government in India, it becomes necessary to know the extent to which the Company was liable before 1858.

To start with, the Company was purely a mercantile body. Gradually, it acquired territories in India and also the sovereign powers to make war and peace and raise armies.[94] As it was an autonomous corporation, having an existence of its own, and bearing no relationship of servant or agent to the British Crown, the immunity enjoyed by the Crown was never extended to it.[95]

H. STATUTORY LIMITATIONS ON STATE LIABILITY

A reference to Art. 300 shows that it is open to Parliament or a State Legislature to enact a law giving a right to sue in favour of, or against, the Government in a case in which such a right does not exist, or taking away or restricting an existing right to sue.

A number of statutes expressly enact provisions to immunize the Government from any liability thereunder. The list of such Acts is too long to be given here, but the modern tendency of the Government is to immunize itself through statutory formulae.

A formula of very common occurrence in the present day statutes is: "No suit, prosecution or other legal proceeding shall lie against any person for anything in good faith done or intended to be done under this Act." This formula does not, however, protect an *ultra vires* act from being challenged in a Court.[96] Even damages may be awarded against the Government for an act which is *mala fide* and an abuse of power and causes injury to an individual.[97]

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94. M.P. JAIN, *OUTLINES OF INDIAN LEGAL HISTORY*, 1—172 .
95. WADE & PHILLIPS, *CONSTITUTION LAW*, 623 et. seq. (1977).
96. *Union of India v. Ayed Ram*, AIR 1958 Pat 439; *Kamala Mills v. State of Bombay*, AIR 1965 SC 1942 : (1966) 1 SCR 64; *Bharat Kala Bhandar v. Dhamangaon Municipality*, AIR 1966 SC 249 : (1965) 3 SCR 499; *Dhulabhai v. State of Madhya Pradesh*, AIR 1969 SC 78 : (1968) 3 SCR 662.
97. *Prem Lal v. U.P. Government*, AIR 1962 All 233; *Bhiwandi Municipality v. K.S. Works*, AIR 1975 SC 529 : (1974) 2 SCC 596; *S.I. Syndicate v. Union of India*, AIR 1975 SC 460.

Rice was procured under an order passed under the Essential Commodities Act. The order was later found to be *ultra vires*. The Act contains the immunity clause mentioned above. Nevertheless, the High Court ruled that the Government must make good the loss caused to the concerned person as he was made to supply rice at less than the market price without legal authority. No question of good faith arises in the situation. The clause in question can protect only legal orders.[1]

An interesting question which has arisen in Independent India has been whether a statute would bind the State without expressly saying so. The Supreme Court discussed this question first in *Director of Rationing and Distribution v. Corporation of Calcutta*.[2]

Section 386(1)(*a*) of the Calcutta Municipal Act prohibited any person from storing rice, flour, etc., in any premises without a licence granted by the corporation. The Director of Rationing, West Bengal Government, was prosecuted by the corporation for storing foodgrains without obtaining a licence from the corporation. The question was whether the Government was bound by the said provision.?

In Britain, the maxim "King can do no wrong" operates. One of the results of this maxim is that the King is not bound by a statute unless he is expressly named, or unless he is bound by necessary implication, or unless the statute, being for the public good, it would be absurd to exclude the King from its purview.[3]

That was the law accepted in India also before independence and the arrival of the new Constitution, as was authoritatively laid down by the Privy Council in *Province of Bombay v. Municipal Corporation*.[4] The main question for consideration in the *Director of Rationing* case was whether this rule based on the concept of monarchy could still apply in the Republican India which had no monarchy. The Supreme Court ruled by a majority that the old rule continued to be valid for several reasons, *viz*.:

(i) There were no words in the Constitution to support the proposition that the position changed after the Republican form of Government had been ushered in by the Constitution.

(ii) The immunity of the Government from the operation of certain statutes and, particularly, statutes creating offences, was based upon the fundamental concept that the Government or its officers could not be a party to committing a crime—analogous to the 'prerogative of perfection' that the King can do no wrong—and had been adopted as a rule of statutory interpretation in India on the ground of public policy.

(iii) The rule was not peculiar to a monarchical system but applied even to a republican system such as that in the U.S.A.[5]

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1. *State of Gujarat v. Janta Pauva Factory*, AIR 1983 Guj 64.
2. AIR 1960 SC 1355 : (1961) 1 SCR 158.
3. STREET, *GOVERNMENTAL LIABILITY*, Ch VI.
4. 73 I.A. 271.
Also see, *Corporation of Calcutta v. Sub-postmaster, Dharamatala*, 54 CWN 429, in which this rule was followed. But in *State of Punjab v. Buyers Syndicate*, AIR 1958 Punj 456, the Punjab High Court did not follow this rule.
5. *U.S. v. United Mine Workers of America*, 91 L E d 884; *U.S. v. Reginald P. Wittek*, 93 L Ed 1406; *Jess Larson v. Domestic and Foreign Commerce Corp*., 93 L Ed 1628.

(iv) All pre-Constitution laws had been continued by Article 372.[6]

Accordingly, the rule of statutory interpretation that the State was not bound by a statute unless it was so provided in express terms, or by necessary implication, was still good law. Therefore, the Court held that the Director of Rationing could not be prosecuted as there was nothing in the statutory provision in question to suggest that the Government was bound by it by necessary implication.

The rule laid down in the *Rationing* case[7] was often criticised on the ground that it was difficult to apply[8] and was socially and politically objectionable.[9] The Law Commission suggested the adoption of the rule that the State would be bound by a statute in the absence of express words or necessary implication to the contrary.[10] The Supreme Court got another opportunity to review its earlier ruling in *Superintendent and Legal Remembrancer, State of West Bengal v. Corp. of Calcutta*.[11]

Under S. 218 of the Calcutta Municipal Act, 1881, every person who exercises or carries on in Calcutta any trade has to take out a license and pay the prescribed fees to the Corporation. The State of West Bengal was carrying on the trade of a daily market without obtaining a licence from the Corporation as was required under S. 218. The question arose whether the State was bound to take out a licence under S. 218.? The Supreme Court differing from its earlier ruling in the *Director of Rationing* case now held by a majority of 8 to 1 that the rule that the State would not be bound by a law unless expressly mentioned or by necessary implication was only a rule of construction and not a part of the substantive law and was not continued after the new Constitution. Art. 372 continued only the substantive law and not the norms of interpretation.[12]

The Court refused to apply the rule in the new context as there was no Crown in India. The archaic rule based on the prerogative of the Crown had no relevance to a democratic republic; it was inconsistent with the rule of law based on the doctrine of equality,[13] and it introduced conflicts and discrimination. Accordingly, S. 218 was held to bind the State of West Bengal as well. Thus, the rule was laid down that an Act would apply to citizens as well as the State unless it expressly or by necessary implication excepted the State from its operation.

The Supreme Court followed this ruling in *Union of India v. Jubbi.*[14] The Court held that the Himachal Pradesh Abolition of Big Landed Estates and Land Reforms Act, 1953, would bind every landlord whether an individual or the Government. The Court pointed out that the Act sought to free the tenants of landlordism and ensure to them security of tenure. That being the paramount object of the legislature, it was hardly likely that it would make any discrimination between the State and the citizen in the matter of application of the Act. There was

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6. *Supra*, Sec. F.
7. The Court again followed the rule in *State of Punjab v. O.G.B. Syndicate Ltd.,* AIR 1964 SC 669 : (1964) 5 SCR 387.
8. GLANVILLE WILLIAMS, *CROWN PROCEEDINGS*, 49, 53.
9. FRIEDMAN, *LAW AND SOCIAL CHANGE*, Ch 12.
10. *FIRST REPORT*, 29-30.
11. AIR 1967 SC 997 : (1967) 2 SCR 170.
12. *Supra*, Sec. F.
13. *Supra*, Ch. XXI.
14. AIR 1968 SC 360 : (1968) 1 SCR 447.

nothing in the Act to indicate that the State was exempt from its purview. Thus, the claim of the respondent, a tenant of the Union Government, that he had acquired proprietary rights in the land under the Act in question was sustained.

CHAPTER XXXVIII

TORTIOUS LIABILITY OF THE GOVERNMENT

SYNOPSIS

A. SOVEREIGN IMMUNITY

(a) P&O CASE

An important question which occurs frequently concerns governmental liability for torts of its servants.[1] As noted above, Art. 300 of the Constitution maintains the pre-Constitution *status quo* in this regard. This means that the liability of the present government is *pari passu* with the liability of the East India Company.[2] This means that the law regarding the tortious liability of the Government was frozen at the 1858 stage in India. The position was reminiscent of the days when the East India Company ruled India. The Company had a dual capacity—commercial and sovereign. The Company was exempt from any tortious liability in its sovereign capacity.

The leading case in the area is *P & O Steam Navigation Co. v. Secretary of State*.[3] The P & O Co. made a claim for damages for injury caused to its horse by the negligence of some workmen in the Government Kidarpur Dockyard. The Bombay High Court ruled that where an act was done in the exercise of sovereign powers, which could not be lawfully exercised except by a sovereign, or private individual delegated by a sovereign to exercise them, no action would lie. On the other hand, the Secretary of State would be liable for damages occasioned by the negligence of servants of the Government if the negligence was such as would render an ordinary employer liable.

Two principles thus emerged from the case:

(1) Apart from special statutory provisions, suits could have been brought against the East India Company, and, consequently, against the Sec-

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1. For a detailed discussion of the topic see, JAIN, *A TREATISE ON ADMINISTRATIVE LAW*, II.
2. *Supra*, Ch. XXXVII, Sec. G.
3. 5 Bom HCR App. 1.

retary of State as successor to the Company, in respect of acts done in the conduct of undertakings which might be carried on by private individuals without sovereign powers.

(2) The Secretary of State was not liable for any thing done in exercise of sovereign powers.

The first rule has been accepted without dissent since it was laid down, but there has been a conflict of judicial opinion as regards the second rule. In some cases, this rule has been followed literally while in others it has been treated as an *obiter dicta* and has been departed from.

First, a few examples may be mentioned here where the above mentioned rules have been followed :

In *Secretary of State v. Cockraft*,[4] the plaintiff was injured by the negligent leaving of a heap of gravel on a military road over which he was walking. The suit brought by the plaintiff for damages against the government was held not maintainable because the military and the maintenance of military roads was a sovereign, and not a private, function.

In *Secretary of State v. Moment*,[5] the Privy Council held that a suit for damages for wrongful interference with the plaintiff's property could be brought against the government, as such a suit would have lain against the East India Company under the ruling of the *P & O.* case.

The plaintiff was convicted for the offence of embezzlement. Later, it transpired that he had not committed the offence with which he was charged. He brought a suit for damages against the Secretary of State. The suit was dismissed because it was a sovereign function of the government to take cognisance of offences and try them.[6]

In *Gurucharan*,[7] it was held that no suit would lie against the government for wrongful confinement, as it was discharging a sovereign function.

The Secretary of State was held not liable for torts of the servants employed in a government hospital as maintenance of hospitals for public benefit out of public revenue was regarded as a sovereign function.[8]

The Forest Range Officer wrongfully interfered with the removal of timber by the purchaser of the forest. The Secretary of State was held to be liable for the officer's wrongful acts as these arose out of the exercise of commercial, and not sovereign, functions.[9]

Under the Defence of India Act, 1915, certain classes of goods could be commandeered by the government, the price of such goods being settled by arbitration. Some of the goods commandeered were not taken delivery of by the government as the war came to an end. The claim for damages by the supplier was rejected for a commandeering order was held to be a sovereign act.[10]

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4. AIR 1915 Mad 993.
5. 40 IA 48.
6. *Mata Pd. v. Secretary of State,* AIR 1931 Oudh 29.
7. *Gurucharan v. State of Madras,* AIR 1942 Mad 539.
8. *Etti C. v. Secretary of State,* AIR 1939 Mad 663.
9. *Secretary of State v. Sheoramjee,* AIR 1952 Nag 213.
10. *Kessoram Poddar v. Secretary of State,* ILR 54 Cal 969; *Purnendu Deb v. India,* AIR 1956 Cal 66.

No cause of action arose when a person was killed by rash and negligent driving of a military truck by a military driver while engaged on military duty because it was held to be a sovereign function.[11] A military truck was carrying carbon dioxide gas from the factory to a Navy ship. Due to rash driving, a ten year old boy was injured. The court refused to award any damage on the ground that he was injured during the discharge of a sovereign function.[12]

The government was held not responsible for damages for injury caused to a person by a road roller which was engaged in maintaining roads as this was held to be a sovereign function.[13]

To this strict rule of government liability, an exception was, however, made, viz., where the government detained any land, goods and chattels belonging to a subject, the government was held liable to pay compensation.[14] Thus, the government was held liable to pay damages for trespass over, and injury to, the plaintiff's property by troops during the Second World War,[15] or for removing earth from the plaintiff's land and placing it on the railway track under construction.[16]

(b) HARI BHANJI

In another line of cases, a broader view of government liability, and a narrower view of the *P&O* ruling, was adopted by the High Courts, insofar as these cases accepted the first, but not the second, proposition laid down therein and which have been stated above.

These cases propounded the view that the *P & O*. case was an authority for the proposition that the government was responsible for injuries in the course of transactions of a commercial or private character, but that it did not exclude liability in other respects. Accordingly, these cases held that the government was liable for all acts other than an 'act of state',[17] and that the distinction based on, 'sovereign' and 'non-sovereign' functions was not well founded. The view was taken that the acts of the government fell either outside, or within, the municipal law and that it was only the former of which the courts could not take cognizance.

The leading case in this category was *Secretary of State v. Hari Bhanji.*[18] The fact, however, remains that the decisions accepting the second proposition of the *P. & O.* case, and excluding the government from liability for sovereign functions, far outnumbered the cases following the *Hari Bhanji* ruling.

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11. *Union of India v. Harbans Singh,* AIR 1959 Punj 39.
12. *Thangarajan v. Union of India,* AIR 1975 Mad 32.
13. *Krishnamurthy v. State of Andhra Pradesh,* AIR 1961 AP 283.
14. *State of Bihar v. Sonabati,* AIR 1954 Pat 513; *Uday Chand v. Province of Bengal,* 51 CWN 537.
15. *Union of India v. Ram Kamal,* AIR 1953 Ass 116.
16. *Union of India v. Muralidhar,* AIR 1952 Ass 141.
17. *Supra*, Ch. XXXVII.
18. ILR 5 Mad 273.

Also see, *Ross v. Secretary of State,* AIR 1915 Mad. 434; *P.V. Rao v. Khushaldas,* AIR 1949 Bom 277; *Wyllie v. Secretary of State,* AIR 1928 Lah 346; *Union of India v. Muralidhar, supra,* footnote 16.

In *State of Bihar v. Sonabati, supra,* footnote 14, the state was held guilty of committing contempt of court.

B. VIDYAWATI CASE

In 1962, the Supreme Court was for the first time since the constitution came into force called upon to consider the question of state liability for the tortious acts of its servants in *State of Rajasthan v. Vidhyawati.*[19] The driver of a jeep, owned and maintained by the State of Rajasthan for the official use of the collector, drove it rashly and negligently, while bringing it back from the workshop after repairs, and fatally injured a pedestrian. The Court held that the State was vicariously liable for the negligence of the driver.

Referring to the *P.&O.* case, the Court derived the proposition that the government would be liable for damages occasioned by negligence of its servants if the negligence was such as would render an ordinary employer liable. At another place, the Court observed that to uphold the vicarious liability of the State would be only to recognise the old established rule going back to more than 100 years at least.

Along with this, the Court also made certain general observations underlining the need to hold the State liable vicariously. "Viewing the case from the point of view of first principles", observed the Court, "there should be no difficulty in holding that the State should be as much liable for tort in respect of a tortious act committed by its servant within the scope of his employment and functioning as such, as any other employer." At another place, the Court stated, "Now that we have, by our Constitution, established a Republican form of government, and one of the objectives is to establish a socialistic state with its varied industrial and other activities, employing a large army of servants, there is no justification in principle, or in public interest, that the state should not be held liable vicariously for the tortious act of its servant."

A careful reading of the Court's opinion in *Vidyawati* suggests that while the Court did make some observations justifying a broader view of the state's liability for torts of its servants than what the *P. & O.* case had laid down, in effect, neither did it overrule the test of sovereign functions to determine government's liability nor did it refer to it, nor did it specifically say that the function in the instant case out of which the liability arose was non-sovereign.

There was a possibility that the *Vidhyawati* case, in course of time, might have been the precursor of a new trend in the area of state liability, but this process got arrested by the Court's subsequent pronouncement in *Kasturi Lal Ralia Ram Jain v. State of Uttar Pradesh.*[20] In the instant case, the police seized some gold from Ralia Ram on suspicion that it was stolen property. It was kept in the government malkhana but was misappropriated by a constable who fled to Pakistan. Ralia Ram was acquitted of the charge. The question arose whether the State was liable to compensate Ralia Ram for the loss caused to him by the police officers employed by the State.

The Supreme Court held on the basis of the *P & O* case that no claim lay for compensation if the tortious act was committed in the course of an undertaking or employment which was referable to the exercise of sovereign power. The Court explained away the *Vidhyawati* ruling by saying that when the government

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19. AIR 1962 SC 933 : 1962 Supp (2) SCR 989. For comments on the case, see, 4 *JILI* 279, 287 (1962).

20. AIR 1965 SC 1039 : (1965) 1 SCR 375. For comments on the case, see, 7 *JILI* 246 (1965).

employee was driving the car from the workshop to the collector's residence, he was not employed on a task referable to the State's sovereign power, for the employment of a driver to drive the jeep for the use of a civil servant was an activity not connected in any manner with the State's sovereign power.

In the instant case, the act giving rise to damages had been committed by the State's employee during the course of his employment which fell within the concept of sovereign power and so the claim for damages could not be entertained. The power to arrest a person, seize him, search him, and seize property found with him were powers conferred on the specified officers by statute and, in the ultimate analysis, these were powers which could be properly characterised as sovereign powers.

The Court, however, noted that the position regarding the scope of tortious liability of the state in India was very unsatisfactory and suggested that a law be enacted to deal with the problem on the lines of the Crown Proceedings Act of England.

The law regarding government's tortious liability was extremely outmoded and antiquated and unjust to the people. The distinction between sovereign and non-sovereign functions, which the Supreme Court perpetuated through the *Kasturilal* ruling, was irrational in the modern context. In effect, the proposition that the state was exempt from liability for a sovereign act amounted to applying the doctrine of 'act of state' to the relationship between the state and the citizen, although, according to the theory of English law, there can be no 'act of state' between the state and its subjects.[21]

On this reasoning, it appeared to be necessary that the view of the *P. & O.* case should be discarded, as whatever justification there might have been for this ruling during the British period, there was hardly any justification for the same in Independent India. The state today embarks on so many varied activities, and state activities have made a deep impact on all facets of an individual's life. It was, therefore, necessary that the liability of the state should match its present-day role and not be confined to the *laissez faire* era which *P. & O.* represented.

In the modern context, it is extremely difficult to distinguish between sovereign and non-sovereign functions. For example, it could plausibly be argued, on the facts of the *Vidhyawati* case, that administration, and, accordingly, maintenance of transport for an administrative officer, is a sovereign function. On the other hand, on the facts of the *Kasturilal* case, it could plausibly be argued that keeping of gold in the malkhana amounted to bailment—an activity which can be undertaken by a private person as well.[22]

The difficulty of characterising a governmental activity as 'sovereign' or 'non-sovereign' can be highlighted by some judicial pronouncements. For example, running of railways was regarded as a sovereign function by one High Court,[23] but non-sovereign by another,[24] and the Supreme Court held it to be a non-sovereign function.[25]

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21. *Supra*, Ch. XXXVII, Sec. B.
22. *State of Gujarat v. Memon Mahomed Haji Hasan,* AIR 1967 SC 1885 : (1967) 3 SCR 938.
23. *Bata Shoe Co. v. Union of India,* AIR 1954 Bom 129.
24. *Maharaja Bose v. Governor Gen. in Council,* AIR 1952 Cal 242.
25. *Union of India v. Ladulal Jain,* AIR 1963 SC 1681 : (1964) 3 SCR 624.

In all democratic countries, a wider view of state liability has now come to be accepted than was the case in India. Before 1947, in Britain, the Crown was immune from any liability for torts committed by its servants because of the common law maxim that the King can do no wrong which implies that neither the King can authorise a wrong nor any wrong be imputed to him. The position was changed by the Crown Proceedings Act, 1947, which made the Crown, within certain exceptions, liable in torts like a private person of full age and capacity. The exceptions, *inter alia*, are defence of the realm, maintenance of armed forces and postal service.[26]

A similar result had been achieved in the U.S.A. as early as 1946 by the Federal Tort Claims Act. The law in India as laid down in *Kasturi Lal* did not compare favourably with these enactments in other democracies and time appears to have come when the Indian law should also be brought in line with modern democratic thinking on the subject.

As the Supreme Court had suggested in *Kasturilal*, the situation could be redeemed by a legislative enactment and not by judicial process.[27] As early as 1956, the Law Commission of India had adversely commented upon the state of law in India.

The Law Commission referred to the expanding scope of functions of a welfare state. "While the responsibilities of the State have increased, the increase in its activities has led to a greater impact on the citizens". Therefore, the Commission recommended:

> "The old distinction between sovereign and non-sovereign functions or governmental and non-governmental functions should no longer be invoked to determine the liability of the state."

The Commission even drafted a Bill to define the scope of the state's tortious liability,[28] but no law has yet been enacted for the purpose.[29]

C. JUDICIAL PRONOUNCEMENTS

Failure of Parliament to do anything to ameliorate the situation in the area of government's tortious liability, has led the courts to show activism in this area and improve the situation through their pronouncements. For sometime, the courts have been alleviating the situation by restricting the concept of 'sovereign' function, and holding many modern functions performed by the government as 'non-sovereign'.

To identify a non-sovereign function, the courts adopt a simple test: Is the function such which can be performed by an ordinary person? To take an example, in *Union of India v. Savita Sharma*,[30] a military truck going to the railway station to bring military personnel to the unit headquarters dashed against a vehicle and injured its occupants. The High Court ruled that the driver of the truck

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26. WADE, *Administrative Law*, 698 (1982).
27. Also see, *Thangarajan v. Union of India*, AIR 1975 Mad 32, *supra*, footnote 12, where the High Court adversely commented upon the prevailing state of law in India.
28. *First Report*, 6.
29. BLACKSHIELD, *Tortious Liability of Government* : Jurisprudential Case Note, 8 *JILI* 643 (1966). Also see, 12 *JILI* 333.
30. AIR 1979 J&K 6.

was not engaged in performing any sovereign function as transportation of military personnel from one place to another could be performed by any one.

A sovereign function is one which can be performed only by the state and not by private individuals. Thus, the function is sovereign when to maintain law and order, police uses lathicharge on an unruly procession. Such an action is not justiciable.[31]

Accordingly, the following functions *inter alia* have been held to be non-sovereign:

(i) Running of bus service by the state;[32]

(ii) Banking business run by the state;[33]

(iii) Activities of the public works department of the state;[34]

(iv) Construction of a reservoir for facilitating supply of drinking water to the residents of a town;[35]

(v) Use of a military vehicle to carry hockey and basketball teams to an Indian Air Force Station to play matches against the Indian Air Force;[36]

(vi) Transportation of records, ranging machines and other equipment in a military truck from the workshop to the School of Artillery.[37]

(vii) In *Shyam Sunder v. State of Rajasthan*,[38] famine relief work by a State has been held to be a non-sovereign function. It is a function which can be undertaken by private individuals as well and there is nothing peculiar about it so that it might be predicated that the state alone can legitimately undertake such a work.

In the instant case, a truck belonging to the Public Works Department was engaged in famine relief Work. The truck met with an accident because of the negligence of the driver. The State was held liable to pay compensation for the person who died in the accident. The Supreme Court rejected the plea of the State that famine relief was a sovereign function.

(viii) Running of railways has been held to be a commercial activity.

(ix) Establishing *Yatri Niwas* at various Railway Stations to provide lodging and boarding facilities to passengers on payment of charges is regarded as a part of the commercial activity of the Union of India. This activity cannot be equated with the exercise of sovereign power.[39]

Over time, due to various judicial pronouncements, the area of "sovereign" function of the state has shrunk very much. The area of "non-sovereign" functions has correspondingly expanded over time.

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31. *State of Madhya Pradesh v. Chironjilal*, AIR 1981 MP 65; *State of Orissa v. Padmalochan*, AIR 1975 Ori 41.
32. *Amulya Patnaik v. State of Orissa*, AIR 1967 Ori 116; *Satya Narain v. Distt. Engineer*, AIR 1962 SC 1161 : 1962 Supp (3) SCR 105; *State of Madras v. ESI Corp.*, AIR 1967 Mad 372.
33. *State of U.P. v. Hindustan Lever*, AIR 1972 All 488.
34. *State of Madhya Pradesh v. Ram Pratap*, AIR 1972 MP 219.
35. *State of Mysore v. Ramchandra*, AIR 1972 Bom 93.
36. *Satya Wati v. Union of India*, AIR 1967 Del 98.
37. *Union of India v. Sugrabai*, AIR 1969 Bom 13.
38. AIR 1974 SC 890.
39. *Chairman, Railway Board v. Chandrima Das*, AIR 2000 SC 988 : (2000) 2 SCC 465.

The Supreme Court has expressly dissented with its earlier ruling in *Kasturi Lal Rallia Ram v. State of Uttar Pradesh*[40] and it has not been followed in subsequent cases. The Supreme Court has recently obsevered[41]:

> "The theory of sovereign power which was propounded in *Kasturi Lal's* case has yielded to new theories and is no longer available in a welfare state. It may be pointed out that functions of the Government in a welfare state are manifold, all of which cannot be said to be the activities relating to exercise of sovereign powers. The functions of the state not only relate to the defence of the country or the administration of justice, but they extend to many other spheres as, for example, education, commercial, social, economic, political and even marital. These activities cannot be said to be related to sovereign power".

In the non-sovereign area, the principle of vicarious liability operates between the government and its servants while acting within the scope of their employment. This means that the government has to pay damages if a person is injured by any tortious act of any of its servants. As the 'sovereign' area is shrinking, and the 'non-sovereign' area expanding through judicial activism, it means that the government is increasingly becoming liable to pay damages if any of its employees commits a tortious act against a private person. A few examples of this judicial approach are given below.

A person was killed in an accident with a jeep driven by a government employee during the scope and course of his employment. The government was held liable to pay damages to the widow of the deceased on the principle of vicarious liability for its servant's tortious act,[42] as driving a jeep is a non-sovereign function. Any person can drive a jeep.

The driver of a military vehicle while driving to the railway station to bring *jawans* of the army from there to the unit headquarters, injured some persons on the way by his rash and negligent driving. The High Court held the government liable to pay compensation as the act of transportation (even of *jawans*) was not a sovereign function. Such an act could be performed even by a private transporter.[43]

A cyclist was knocked down while a crane belonging to the defence department was being towed away for repairs by army personnel. Holding the Central Government liable, the High Court said that the function of towing away bore no imprint of any sovereign function. The court even suggested that the government should not plead sovereign immunity in such cases but seek to defend the suit on merits.[44]

Similarly, the government was held liable when an accident occurred because of the negligence of the driver of a missile carrier.[45]

Plying of buses by government by way of commercial activity does not amount to running the buses on public service. Thus, the state is liable to pay compensation for injuries caused by negligent driving of such buses.[46]

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40. *Supra*, footnote 20.
41. *Chairman, Rly Board, infra*, footnote 71.
42. *Annamalai v. Abithakujambal*, AIR 1979 Mad 276.
43. *Union of India v. Savita Sharma*, AIR 1979 J & K 6.
44. *Union of India v. Sadashiv*, AIR 1985 Bom 345.
45. *Pushpinder Kaur Sekhon v. Corporal Sharma*, AIR 1985 P&H 81.
46. *Satya Narain v. District Engineer, P.W.D.*, AIR 1962 SC 1161 : 1964 Supp (3) SCR 105.

The employees of the Government of India who run the railway, manage railway stations and *Yatri Niwas* constitute a component of the government machinery which carries on the commercial activity. If any of such employees commits a tortious act, the Central Government of which they are employees, can, subject to other legal requirements being satisfied, be held vicariously liable in damages to the person wronged by those employees.[47]

The state has been held liable for acts of negligence committed by hospital employees in the course of their employment in the state run hospitals.[48]

In an earlier case,[49] the Bombay High Court had ruled that running of hospitals was part of the sovereign function of the government and so the state could not be held liable for the tortious acts of the hospital employees. But this view has now been overruled. The court has now held that the running of hospitals is not a sovereign function. It is neither a 'primary and inalienable' function of a constitutional government nor it is such that 'no private citizen can undertake the same'. So, the state is liable for the negligence of the hospital staff. The Supreme Court has reiterated this ruling.[50]

A poor lady having a number of children got herself operated at a government hospital for complete sterilisation. Thereafter, she gave birth to a child. For the negligence of the hospital staff, the Supreme Court awarded damages to the lady, equal to the cost of bringing up the 'unwanted' child upto the age of 18.[51] This establishes the principle of vicarious liability of the state for the negligence of its medical officers.[52]

Damages were awarded against the State for negligence of its prison staff which resulted in the death of a prisoner.[53] The Court rejected the contention that the State was not liable as the establishment and maintenance of the prison is part of the sovereign functions of the State. The Court ruled that there was violation of Art. 21 of the Constitution. The Court observed:[54] "Thus, fundamental rights, which also include basic human rights, continue to be available to a prisoner and those rights cannot be defeated by pleading the old and archaic defence of immunity in respect of sovereign acts……"

The above cases show that the area of "sovereign immunity" has been very much restricted by the courts over a period of time.

The present-day liberal judicial approach as regards the liability of the state for the tortious acts of its servants has been described by the Supreme Court in *Nagendra Rao* as follows:[55]

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47. *Chairman, Rly Board, supra*, footnote 41.
48. *Mohd. Shafi Suleman Kazi v. Dr. Vilas Dhondu Kavishwar,* AIR 1982 Bom 27.
49. *State of Maharashtra v. A.H. Khodwe*, ILR 1980 Bom 660.
Also see, footnote 8, *supra.*
50. *Achutrao Haribhau Khodwa v. State of Maharashtra*, (1996) 2 SCC 634.
51. *State of Haryana v. Santra*, (2000) 5 SCC 182 : AIR 2000 SC 1888.
52. *Legal Aid Committee v. State of Bihar*, (1991) 3 SCC 482; *Dr. Jacob George v. State of Kerala*, (1994) 3 SCC 430 : 1994 SCC (Cri) 774; *Paschim Banga Khet Mazdoor Samity v. State of West Bengal*, AIR 1996 SC 2426 : (1996) 4 SCC 37.
53. *State of Andhra Pradesh v. Challa Ramakrishna Reddy*, (2000) 5 SCC 712 : AIR 2000 SC 2083.
54. *Ibid*, 726.
For a detailed discussion on Art. 21, see, *supra* Ch. XXVI
55. *N. Nagendra Rao & Co. v. State of Andhra Pradesh*, AIR 1994 SC 2663 : (1994) 6 SCC 205.
Also see, *Common Cause, Registered Society v. Union of India*, AIR 1999 SC 2979 : (1999) 6 SCC 667.

> "The modern social thinking of progressive societies and the judicial approach is to do away with archaic State protection and place the State or the Government par with any other juristic legal entity. Any watertight compartmentalisation of the functions of the State as "sovereign" and "non-sovereign" or "governmental" and "non-governmental" is not sound. It is contrary to modern judicial thinking… In welfare state, functions of the state are not only defence of the country or administration of justice or maintaining law and order but it extends to regulating and controlling the activities of people in almost every sphere, educational, commercial, social, economic, political and even marital. The demarcating line between sovereign and non-sovereign powers for which no rational basis survives has largely disappeared. Therefore, barring functions such as administration of justice, maintenance of law and order and repression of crime etc. which are among the primary and inalienable functions of a constitutional government, the State cannot claim any immunity".[56]

In *Nagendra Rao,* the appellant carried on the business in fertilizer and foodgrains. Huge stocks of foodgrains, fertilizers and other commodities were seized by police authorities. The appellant represented to the state authorities several times that fertilizer be sold otherwise it would become useless. No steps were taken by the authorities to do the needful. At last, the stock seized was released as the appellant was found to be not guilty of any breach of law. But the appellant refused to take delivery of the stock because of deterioration in quality. He filed a suit to recover the price of the stock by way of compensation.

After reviewing the case-law, the Supreme Court held the state liable to make good the loss to the appellant. Criticizing the doctrine of "sovereign immunity", the Supreme Court stated :

> "No civilised system can permit an executive to play with the people of its country and claim that it is entitled to act in any manner as it is sovereign : No legal or political system today can place the state above law as it is unjust and unfair for a citizen to be deprived of his property illegally by negligent act of officers of the State without any remedy."

The Supreme Court has thus given short shrift to the argument of "sovereign immunity".

In *Nagendra Rao,* the Supreme Court propounded two basic propositions, viz. (1) In modern state, the distinction between sovereign or non-sovereign functions does not exist, (2) Barring such functions as administration of justice, maintenance of law and order and repression of crime etc., which are among the "primary and inalienable" functions of a constitutional government, the state cannot claim any immunity.

The court went on to say that "barring functions such as administration of justice, maintenance of law and order and repression of crime etc. which are among the primary and inalienable functions of a constitutional Government, the state cannot claim any immunity".

In retrospect, one can say that non-enactment of a law defining the scope of tortious liability of the state has proved to be a blessing in disguise in the long run. Had such a law been enacted, the law in the area would have been circumscribed within the narrow confines of the statutory provisions of the enacted law. Absence of legislation, on the other hand, gave an opportunity for the full play of

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56. *Nagendra Rao v. State of Andhra Pradesh,* AIR 1994 SC 2663 at 2683 : (1994) 6 SCC 205.

judicial creativity and the Supreme Court has thus been able to transform an archaic law concerning state tortious liability in to a very liberal law favouring the citizen *vis-à-vis* the state.

D. STATUTORY FUNCTIONS

A restriction on the state liability for tortious acts of its servants arising out of the maxim of 'respondent superior' is that a master is not liable for the acts of its servants performed in the discharge of a duty imposed on them by law.[57] This principle of the English law has been followed in numerous cases in India. It has thus been ruled in several cases that where an official perform an act in exercise of statutory powrs, then the aggrieved person has no remedy against the state, as such the rationale underlying this judicial approch is that since the official acts under the statute, his action is not subject to the control of the state. Hence the principle of vicarious liability does not apply.

Following are some of the cases which illustrate the above approach.

In *Shivabhajan v. Secretary of State,*[58] certain bundles of hay were attached by the chief constable of Mahim because they were believed to be stolen property. The person from whose possession hay was attached was prosecuted but acquitted. The hay was lost in the meantime. The person concerned sued the Secretary of State for compensation for negligence of the chief constable. The High Court held that the Secretary of State was not liable as the chief constable had acted under powers conferred on him by the Criminal Procedure Code.

In *Ross v. Secretary of State,*[59] the Secretary of State was held not liable for the wrongful acts of the district magistrate done by him in the exercise of statutory authority.

In *Secretary of State v. Srigobinda Chaudhuri,*[60] a suit for damages against the Secretary of State for misfeasance, wrongs, negligence or omissions of duties of managers appointed by the court of wards was rejected because these officers of the government acted in exercise of statutory powers.

In *Secretary of State v. Ramnath,*[61] the deputy collector by mistake paid some money to a person who was not entitled to it. The Secretary of State was held not liable for the mistake of the deputy collector as it was committed in exercise of his statutory duties.

The police recovered some stolen property which was deposited in *malkhana.* The property was stoeln from there. The High Court ruled that the State was not liable to pay damages as its servant was performing a statutory obligation.[62]

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57. *Tobin v. The Queen,* 143 ER 1148; *Nireaha v. Baker,* 1901 AC 561.
58. ILR 28 Bom 314.
59. AIR 1915 Mad 434.
60. AIR 1932 Cal 834.
Also see, *Ram Shankar v. Secretary of State,* AIR 1932 All 575.
61. AIR 1934 Cal 128.
Also, *Uday Chand v. Province of Bengal,* 51 CWN 537.
62. *Ram Ghulam v. State of Uttar Pradesh,* AIR 1950 All 206.
Also see, *Mohd. Murad v. State of Uttar Pradesh,* AIR 1956 All 75.

A certain quantity of non-duty-paid tobacco was seized from the plaintiff's shop and the Collector of Central Excise, acting under S. 33 of the Central Excise and Salt Act, confiscated the seized tobacco which could be released on payment of duty and fine. The plaintiff paid the duty and the fine, but, thereafter, the tobacco was sold by the Department and the sale proceeds deposited in the government treasury. The plaintiff brought a suit against the Union of India for damages for the tort of conversion. The Union of India was held not liable, for the Department acted under statutory power. But, to the extent the sale proceeds were deposited in the treasury, the Government was benefited and the plaintiff was entitled to the refund of this money.[63]

Hard coke supplied by the plaintiff to a jute mill belonging to the Military Department was rejected as it was not up to the specification. The Deputy Coal Commissioner then gave directions for its disposal by sale and for payment of the price thus realised to the plaintiff. This was done under the statutory powers conferred on the Commissioner by the Coal Control Order. The plaintiff brought a suit against the Government of India to recover the price stipulated, but it was dismissed and the Government was held not liable. The court ruled that assuming that the Commissioner exceeded his statutory authority, the plaintiff should have sued him and not the Government for the doctrine of respondent superior could not be applied so as to make the Government responsible when the Commissioner was acting in exercise of his statutory powers, and not under the control or order of the Government.[64]

Under the Rajasthan Public Safety Act, the Rajasthan Government conferred power on the Commissioner to make arrests. The Commissioner arrested the plaintiff and the State Government approved the action. The order of the Commissioner was found not to have been made in good faith. The plaintiff's suit for damages against the State Government was rejected on the ground that the Commissioner was exercising a statutory power; that the delegation did not make him an agent of the Government for he had to exercise his own discretion in the matter; in the circumstances, the maxim 'respondent superior' did not apply. Where a Government officer purports to act under a statutory power conferred upon him, he cannot be said to be acting as an ordinary agent of the State, and whatever wrong he does is his own and not that of his employer.[65]

The above rule to immunize the state from liability does not, however, apply in a situation where the impugned act has been expressly authorised by the state or the state has been profited by its performance.[66] In such a case, the state is liable for the wrongful acts of the servants even though performed under their statutory duties. In *Saurashtra v. Vallabhdas,*[67] confiscation of grams, their detention and release, were expressly authorised by the Saurashtra Government and no discretion was left to its officers. The State Government was, therefore, held liable for the loss occasioned to the importers.

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63. *Union of India v. Ayed Ram,* AIR 1958 Pat 439.
64. *Union of India v. Dhansar Coal Co.,* AIR 1959 Pat 347.
65. *State of Rajasthan v. Rikhabchand,* AIR 1961 Raj 64.
Also, *State of Uttar Pradesh v. Chhotey Lal,* AIR 1967 All 327.
66. *Uday Chand v. Prov. of Bengal, supra,* footnote 61; *Ross v. Secy. of State of Madras,* AIR 1915 Mad 434; *Bihar v. Sonabati,* AIR 1954 Pat 513; *Abdul Kadir v. Saurashtra,* AIR 1956 Sau 62.
67. AIR 1956 Sau 65.

The principle laid down in the above cases is not rational. An official of the government always remains its agent whether he functions under an order of the government or under powers conferred on him by a statute, for the Legislature confers powers on him only because he is an agent of the government.

The principle mentioned above boils down to this: if the power is conferred by a statute on the government, and the government directs an officer to do something in pursuance of this power, the government is liable for the acts of the officer. But, if the power is conferred directly on the officer by a statutory provision, then the government is not liable. It means that if the officer acts under the direction of the Executive, the government is liable. But if the officer acts under the direction of the Legislature, the government is not liable.

This dichotomy between the Executive and the Legislature is irrational as both constitute parts of the same government and each and every act of the government is carried on within the framework of law. Powers are conferred on public servants by the Legislature because they are government servants. Had they not been government servants powers would not have been conferred on them.

Also, for an ordinary citizen, it makes little difference whether the act which injures him has been done by a public servant under direct authority of a statute, or under the instructions of the government. Further, it can be argued that legislative authorisation to an officer to perform a duty only extends to performing it in good faith and not negligently.

The rule is unjust in the modern administrative age when more and more statutory powers are being conferred on government servants. It is, therefore, necessary that by suitable legislation the government should be made liable for all wrongful acts of its servants, whether performed in discharge of a statutory function or otherwise during the course of their employment.[68]

The validity of the above-mentioned rulings seems to have been shaken by the Supreme Court decision in *N. Nagendra Rao & Co. v. State of Andhra Pradesh*[69]. Fertilizer belonging to the appellants was seized by the district revenue officer in exercise of statutory powers under s. 6A of the Essential Commodities Act. No steps were taken, as required by the statutory provision, to dispose of the fertilizer with the result that it deteriorated in quality in course of time. The collector released the stock of fertilizer as no violation of any law by the appellants could be established. The appellants filed a suit for compensation against the State of Andhra Pradesh for negligence of its officers. The Court held the State liable to pay the value of the damaged fertilizer to the appellants along with interest thereon even though it could be argued that the concerned official was acting in pursuance of statutory powers.

The Supreme Court has ruled in *Nagendra* that the vicarious liability of the State is linked with the negligence of its officers. If the officer can be sued personally, there is no reason or rationale for the proposition that the State cannot be sued. "If a suit is maintainable against the officer personally, then there is no reason to doubt that it would not be maintainable against the State".[70]

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68. Law Comm. of India, *First Report*, 33.
69. AIR 1994 SC 2663 : (1994) 6 SCC 205, *supra*, footnote 55.
70. *Ibid.*, at p. 2683.

E. DAMAGES AND WRITS

Ordinarily, a person has to file a civil suit against the government to claim damages as it raises questions of fact for which the court has to take oral evidence. This is a protracted process for civil litigation in India is an extremely slow and tardy process.

However, lately, a new judicial trend has emerged. Damages have been awarded against the government by the Supreme Court and the High Courts through writ petitions under Arts. 32 and 226,[71] for infringement of Fundamental Rights, especially of Art 21. The matter has already been discussed earlier.[72] A detailed discussion on this topic falls more appropriately within the compass of Administrative Law.[73] Here the matter is referred to only in an outline.

The Supreme Court has observed on this point[74] :

> "However it cannot be understood as laying a law that in every case of tortious liability recourse must be had to a suit. When there is negligence on the face of it and infringement of Art. 21 is there it cannot be said that there will be any bar to proceed under Art. 226 of the Constitution. Right to life is one of the basic human rights guaranteed under Art. 21 of the Constitution."

In *Rudul Sah v. State of Bihar*[75] the Supreme Court awarded compensation for illegal detention. Reference, has already been made to *Chairman, Rly. Board v. Chandrima Das*.[76]

In a number of cases,[77] compensation has been awarded on account of police atrocities,[78] or custodial deaths.[79]

Compensation has also been awarded for medical negligence in government hospitals.[80] In the instant case, the Supreme Court has ruled that Art. 21 imposes on the state an obligation to safeguard the life of every person. The state-run hospitals and the medical officers employed therein are duty bound to extend medical assistance for preserving human life. Violation of this duty amounts to violation of Art. 21. Adequate compensation can be awarded by the court for such violation by way of redress in proceedings under Art. 32 or Art. 226.

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71. See, Ch. XXIII, Sec. A(q); Ch. VIII, Sec. D(r), *supra.* See the following cases : *Nilabati Behera v. Orissa,* AIR 1993 SC 1960 : (1993) 2 SCC 746; *supra; Kumari (Smt.) v. Tamil Nadu,* AIR 1992 SC 2069 : (1992) 2 SCC 223; *D.K. Basu v. West Bengal,* AIR 1997 SC 610 : (1997) 1 SCC 416, *supra; Chairman, Rly Board v. Mrs. Chandrima,* AIR 2000 SC 988 : (2000) 2 SCC 465.

72. See, *supra,* Ch. XXXIII, under Art. 32; *supra,* Ch. VIII, under Art. 226; *supra,* Ch. XXVI, Sec. H under Art. 21.

73. See, JAIN, *A TREATISE ON ADMINISTRATIVE LAW,* II.

74. *Rudul Shah v. Union of India,* AIR 1983 SC 1086 : (1983) 4 SCC 141.
Also, *Bhim Singh v. Jammu and Kashmir,* AIR 1986 SC 494; *supra; D.K. Basu v. State of West Bengal,* AIR 1997 SC 610 : (1997) 1 SCC 416.

75. *Supra,* footnote 74.

76. AIR 2000 SC 988; *supra,* Ch. XXVI, Sec. J(l).

77. See for example, *People's Union for Democratic Rights v. State of Bihar,* AIR 1987 SC 355; *D.K. Basu v. Ashok K. Johri,* AIR 1997 SC 610 : (1997) 1 SCC 416.

78. *D.K. Basu v. Ashok K. Johri, supra.*

79. *Nilabati Behara v. State of Orissa,* AIR 1993 SC 1960 : (1993) 2 SCC 746; *People's Union for Civil Liberties v. Union of India,* AIR 1997 SC 1203; *supra.*

80. *Dr. Jacob George v. State of Kerala,* (1994) 3 SCC 430.
Also see, *Paschim Banga Khet Mazdoor Samity v. State of West Bengal,* AIR 1996 SC 2426, *Marri Yadamma v. State of Andhra Pradesh,* AIR 2002 AP 164.

HIV infected blood was transfused in a woman patient in a hospital maintained by a government corporation. The Andhra Pradesh High Court in *M. Vijaya v. Chairman and Managing* that the writ petition was maintainable. The court referred to Art. 21 of the Constitution which guarantees a dignified human existence to the Indians and not a mere animal existence. Art. 21 confers a right to enjoy all facilities of life. Accordingly, the High Court directed payment of Rs. one lac to the petitioner by way of compensation as a public law remedy. This was in addition to whatever compensation may be granted to her in a civil suit.

A child of seven years studying in a municipal school was crushed to death by a vehicle while crossing road in front of the school. The child had gone out during school hours to fetch drinking water, as water was not available within the school premises. The Court treated it as a matter of negligence to discharge the duty of care by the school authorities and awarded damages on a writ petition filed under Art. 226.[81]

When a prisoner was killed in a bomb attack on him while lodged in the prison, the Supreme Court awarded compensation for breach of his right to life guaranteed by Art. 21. The court asserted that even a prisoner has Fundamental Rights including other human rights.[82]

The court may however refuse to issue a writ to pay compensation when disputed questions of fact arise and the tortious liability is clearly denied by the state.[83] In such a situation recourse ought to be had to a civil suit. On the other hand, when there is negligence on the face ot it on the part of the state and Art. 21 is infringed, Right to life is one of the basic human rights guaranteed under Art. 21.[84]

The above discussion shows that over time, the Supreme Court and the High Courts have transformed the archaic concept of no state liability in the area of tortious liability into that of state liability.

When breach of a Fundamental Right is not involved, the courts are very selective in avoiding damages in writ jurisdiction. The Calcutta University delayed inordinately delcaration of result of a candidate. He filed a writ petition in the High Court under Art. 226 for compensation for the negligence of the University. Holding that the matter ought to be agitated in a civil court and not through a writ petition, the Supreme Court observed that in its writ jurisdiction, the Supreme Court or a High Court "would not award damages against public authorities merely because they have made some order which turns out to be *ultra vires,* or there has been some inaction in the performance of the duties unless there is malice or consious abuse. Before exemplary damages can be awarded it must be shown that some fundamental right under Art. 21 has been infringed by arbitrary or capricious action on the part of the public functionaries and that the sufferer was a helpless victim of that act."[85]

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81. *All India Lawyers Union v. Union of India,* AIR 1999 Del 120.
82. *State of Andhra Pradesh v. Challa Ramkrishna Reddy,* AIR 2000 SC 2083 : (2000) 5 SCC 712.
83. *Grid Corporation of Orissa Ltd. v. Sukamani Das,* AIR 1999 SC 3412 : (1999) 7 SCC 298; *Tamil Nadu Electricity Board v. Sumathi,* AIR 2000 SC 1603 : (2000) 4 SCC 543.
84. See, Ch. XXI, Sec. D(iv); Ch. XXVI, Secs. H and J; Ch. VIII, Sec. D(r); Ch. XXXIII, Sec. A(q), *supra.*
85. *Rabindra Nath Ghosal v. University of Calcutta,* (2002) 7 SCALE 137 : AIR 2002 SC 3560 : (2002) 7 SCC 478.

CHAPTER XXXIX

GOVERNMENT CONTRACTS

SYNOPSIS

A. INTRODUCTORY

The subject of government contracts has assumed great importance in modern times. To-day state is the source of wealth. In the modern era of a welfare state, government's economic activities are expanding and the government is increasingly assuming the role of the dispenser of a large number of benefits. More and more of an individual's wealth to-day consists of new forms of property. More and more individuals and businesses enjoy largess in the form of government contracts, licences, quotas, mineral rights, jobs, etc. Most of these forms of wealth are in the nature of 'privileges', though some may be regarded as legal rights.[1]

There is thus need to develop some norms to protect individual interest in such wealth. The basic question is to regulate, structure and discipline government discretion to confer such benefits.

B. POSITION IN BRITAIN

At Common Law, before 1947, the Crown could not be sued in a Court on a contract. This privilege was traceable to the days of feudalism when a lord could

1. Charles A. Reich. The New Property, 73 *Yale LJ* 733 : (1964); also by the same author. Individual Rights and Social Welfare: The Emerging Legal Issues, 74 *Yale LJ* 1245 (1965).

not be sued in his own courts. Another maxim which was pressed into service was that the King can do no wrong.

A subject could, however, seek redress against the Crown through a petition of right in which he set out his claim, and if the royal flat was granted, the action could then be tried in the Court. The royal fiat was granted as a matter of course, but not as a matter of right, and there was no remedy if the fiat was refused.

The Crown Proceedings Act, 1947, abolished this procedure and permitted suits being brought against the Crown in the ordinary courts to enforce contractual liability, a few types of contracts being, however, excepted.[2]

C. POSITION IN INDIA : ART. 299 OF THE CONSTITUTION

(a) FORMATION OF CONTRACTS

Article 299(1) of the Constitution lays down three conditions which the contracts made in the exercise of the executive power of the Centre or a State must fulfil to be valid: These conditions are:

(1) Such contracts must be *expressed* to be made by the President/ Governor as the case may be;

(2) Such contracts made in exercise of the *executive* power are to be *executed* on behalf of the President/Governor as the case may be; and

(3) The contracts are to be '*executed*' by *such* persons and in *such* manner as the President/Governor may direct or authorise.

(4) The word *executed* in Art. 299(1) indicates that the contract between the government and any person must be in writing. A mere oral contract is not sufficient for the purposes of Art. 299(1).[3]

Questions often arise whether a contract not fulfilling the above requisites is valid.

Generally, the courts have taken the position that Art. 299(1) has not been inserted in the Constitution for the sake of mere form. Its function is to safeguard the government from being saddled with liability for unauthorised contracts. The provisions have been embodied to protect the general public as represented by the government. The terms of the Article have therefore been held to be mandatory and not merely directory. This means that a contract not couched in the particular form stipulated by Article 299(1) cannot be enforced at the instance of any of the contracting parties. Neither the government can be sued and held liable for

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2. WADE AND PHILLIPS, *CONST. LAW*, 623 *et. seq.* (1977).
3. For detailed discussion of this topic see: JAIN & JAIN, *Principles of Administrative Law,* Ch. XXII (1986); Jain, *A Treatise on Adm. Law*, II (2002).

breach of such a contract, nor can the government enforce such a contract against the other contracting party.[4]

The Supreme Court has observed in *K.P. Chowdhry v. State of Madhya Pradesh*,[5] that "in view of Art. 299(1) there can be no implied contract between the Government and another person." Art. 299(1) being in 'mandatory terms' "no implied contract could be spelled out between the Government and the appellant" as "Art 299 in effect rules out all implied contracts between the Government and another person."[6] The Court also ruled that "if the contract between the Government and another person is not in full compliance with Art. 299(1), it would be no contract at all and could not be enforced either by the Government or other person as a contract."[7]

In *K.P. Chowdhry v. State of Madhya Pradesh*,[8] a person before bidding at an auction, signed a sale notice agreeing to abide by the terms of the auction. One of the terms was that if the bidder failed to complete the formalities after acceptance of his bid, his earnest money would be forfeited, the contract reauctioned at his risk and any deficiency occurring was to be recoverable from him as arrears of land revenue. The question arose whether signing of the sale notice by the bidder created any contract between the government and the bidder. It was not in full compliance of Art. 299. The Supreme Court held that there was no contract between the bidder and the government. The Court also ruled out any implied contracts between government and another person.

The Court justified this strict view by saying that if implied contracts between the government and other persons were allowed, they would, in effect, make Art. 299 a dead letter, for then a person who had a contract with the government which was not executed at all in the manner provided in Art. 299(1) could get away by pleading that an implied contract be inferred from the facts and circumstances of the case.

The Court took a similar rigid stand in *Mulamchand v. State of Madhya Pradesh*.[9]

But, then, the courts have also realised that insistence on too rigid observance of all the conditions stipulated in Art. 299 may not always be practicable. Hundreds of government officers daily enter into a variety of contracts, often of a petty nature, with private parties. At times, contracts are entered into through cor-

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4. *Chatturbhuj v. Moreshwar*, AIR 1954 SC 236 : 1954 SCR 236; *Bhikraj Jaipuria v. Union of India*, AIR 1962 SC 113 : (1962) 2 SCR 880; *Mulamchand v. State of Madhya Pradesh*, AIR 1968 SC 1218 : (1968) 3 SCR 214; *Jit Ram Shiv Kumar v. State of Haryana*, AIR 1980 SC 1285 : (1981) 1 SCC 11; *Bishandayal & Sons v. Orissa*, AIR 2001 SC 544.

A contract for the supply of goods would not cease to attract S. 7(*d*) of the Representation of the People Act merely because it does not comply with Art. 299(1) and as such is not enforceable against the government: *Chatturbhuj v. Moreshwar*, *supra*; also see, *Abdul Rahiman Khan v. Sadasiva Tripathi*, AIR 1969 SC 302; *Konappa Rudrappa Nadgouda v. Vishwanath Reddy*, AIR 1969 SC 447 : (1969) 1 SCR 395.

But in *Laliteshwar Prasad v. Bateshwar Prasad*, AIR 1966 SC 580 : (1966) 2 SCR 63, the Court refused to extend the *Moreshwar* principle to a situation where a contract not complying with Art. 299 has in fact not been ratified.

5. AIR 1967 SC 203 : (1966) 3 SCR 919.

6. *Ibid.*, at 207.

7. Also see, *Mulamchand v. State of Madhya Pradesh*, AIR 1968 SC 1218 : (1968) 2 SCR 880.

8. AIR 1967 SC 203 : (1966) 3 SCR 919.

9. AIR 1968 SC 1218 : (1968) 2 SCR 880.

respondence or even orally. It would be extremely inconvenient from an administrative point of view if it were insisted that each and every contract must be effected by a ponderous legal document couched in a particular form.

The judicial attitude to Art. 299 has sought to balance two motivations:

(*i*) on the one hand, to protect the Government from unauthorised contracts; and

(*ii*) on the other hand, to safeguard the interests of unsuspecting and unwary parties who enter into contracts with government officials without fulfilling all the formalities laid down in the Constitution.

A strict compliance with these conditions may be inequitable to private parties, and, at the same time, make government operations extremely difficult and inconvenient in practice. Consequently, in the context of the facts of some cases, the courts have somewhat mitigated the rigours of the formalities contained in Art. 299(1), and have enforced contracts even when there has been not full, but substantial, compliance with the requirements of Art. 299(1). In effect, it may be true to say that judicial view has oscillated between the liberal and the rigid interpretation of Art. 299.

A contract to be valid under Art. 299(1) has to be in writing. It does not, however, mean that there should always be a formal legal document between the government and the other contracting party for the purpose. A valid contract could emerge through correspondence, or through offer and acceptance, if all the conditions of Art. 299(1) are fulfilled.

In *Union of India v. Rallia Ram*,[10] the Chief Director of Purchases, Government of India, invited tenders for purchase of some cigarettes. The respondent's tender was accepted and the acceptance letter was signed by the Director and it contained an arbitration clause. The Supreme Court held that the constitutional provision [Art. 299(1)] did not in terms stipulate that only a formal document executed on behalf of the Government of India with the other contracting party was effective. In the absence of any direction by the President prescribing the manner in which a contract is to be executed, a valid contract may result from correspondence between the parties concerned. A tender for purchase of goods in pursuance of an invitation issued by, and acceptance in writing which is expressed to be made in the name of, the President and executed on his behalf by a person authorised for the purpose would conform to the requirements of Art. 299(1). In the instant case, the correspondence between the parties ultimately resulting in the acceptance note was held to amount to a contract. This means that a binding contract by tender and acceptance can come into existence if the acceptance is by a person duly authorized in this behalf by the President.[11]

Under Art. 299(1), a contract can be entered into on behalf of the government by a person authorised for the purpose by the President, or the Governor, as the case may be. The authority to execute the contract on behalf of the government may be granted by rules, formal notifications, or special orders; such authority may also be given in respect of a particular contract or contracts by the President/Governor to an officer other than the one notified under the rules. Art. 299(1) does not prescribe any particular mode in which authority must be con-

10. AIR 1963 SC 1685 : (1964) 3 SCR 164.
11. *Union of India v. N.K. Pri. Ltd.*, AIR 1972 SC 915 : (1973) 3 SCC 388.

ferred; authorisation may be conferred *ad hoc* on any person.[12] A contract entered into by an officer not authorised to enter the same is not valid or binding.[13]

In *Bhikraj Jaipuria v. Union of India*,[14] the firm tendered large quantity of foodgrains. The offer was accepted by the Railway Administration. A scheme to distribute it to railway employees was accepted by the Railway Board. Officers were authorised to take delivery, transport and distribute it. They fixed programme of inspection, kept wagons for taking delivery, returned empty wagons, entered into correspondence, accepted bills and railway receipts and made payments of bills. No express authority to execute contracts had been conferred on the Divisional Superintendent who had issued the purchase orders. Nevertheless, the Court inferred from the facts that he acted under special authority granted to him to enter into the contract for the purchase of foodgrains.

In the case mentioned below,[15] the respondent company made an offer to purchase surplus rails from the Railway Board. The letter accepting the offer was written by the Secretary to the Railway Board. The Supreme Court ruled that no binding or concluded contract came into effect because the only person authorised to enter into a contract for the sale of the rails was the Director of Stores, and the Secretary was not authorised to enter into the contract on behalf of the President of India.

Lastly, under Art. 299(1), a contract between the government and a private party to be enforceable has to be expressed in the name of the President (or the Governor). Even though a contract is made by a person authorised by the President (or the Governor) to make it, it will still not be enforceable against the government if it is not expressed to be made on behalf of the President (or the Governor).[16] The constitutional provision regarding the form of contract is regarded to be mandatory.

In *Bhikraj*, mentioned above, no formal contracts were executed for the supply of foodgrains by the appellant. He had merely offered to supply foodgrains by letters sent to the divisional Superintendent, East India Railway, and he had accepted those offers through purchase orders. These purchase orders were not expressed to be made in the name of the Governor-General, nor were they executed on behalf of the Governor-General, but were signed by the divisional superintendent himself. The Court ruled that the resultant contracts were unenforceable. The result was that the appellant in *Bhikraj* was held not entitled to claim compensation for the foodgrains supplied by him as the contract was not in the proper form.

This rule has at times been judicially criticised, for a contract fully in order otherwise becomes unenforceable only because of a single defect in form.[17] In some cases, however, the rigours of this rule have been somewhat relaxed because of considerations of practical convenience not only of the private parties entering into agreements with the government but even of the government itself. Thus, the mere fact that the signing officer fails to mention that he was signing

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12. *State of Bihar v. Karam Chand Thapur,* AIR 1962 SC 110 : (1962) 1 SCR 827.
13. *Union of India v. Chouthmal,* AIR 1976 MP 199.
14. AIR 1962 SC 113 : (1962) 2 SCR 880.
15. *Union of India v. N.K. Pvt. Ltd.,* AIR 1972 SC 915 : (1973) 3 SCC 388.
16. *Bhikraj Jaipuria v. Union of India, supra,* footnote 14.
17. See, *G.S. Partners v. Union of India,* AIR 1959 Cal 287.

on behalf of the President, has been regarded not an infirmity fatal to the validity of the contract when it was expressed to have been made on behalf of the President. According to the *Rallia Ram*[18] ruling, when an officer signs in his official capacity but fails to state in the description that the contract was being executed on behalf of the President, the Court could ignore the technicality if from the correspondence it could reasonably be inferred that the contract was executed on behalf of the President.[19]

But, in several cases, the courts have adopted the rigid concept of Art. 299(1). In *Karamshi v. State of Bombay*,[20] there was an agreement for the supply of canal water for the irrigation of a cane-farm entered into by letters, but no formal contract in the name of the Governor was executed. After supplying water for sometime, the supply was stopped by the government. The Court found from the documentary evidence that though an agreement had been reached between the government and the party concerned, yet it could not be enforced because no formal document was executed in the name of the Governor and it was also not clear whether the Superintendent Engineer who had entered into the agreement was legally authorized to do so. The letters in question mentioned the names of the Minister of Public Works Department as well as the government but these letters did not purport to emanate from the Governor. The Court did not like to stretch the point further for fear of its resulting in the negation of the constitutional provision.[21]

In the case mentioned below,[22] the Supreme Court has reiterated the well established principle that no valid contract between the State Government and a tenderer for any work can arise unless the acceptance letter is signed in the name of the Governor. Here, the Executive Engineer, P.W.D., accepted the tender of the respondent for construction of a bridge; the letter of acceptance was signed by him as Executive Engineer, but not in the name of the Governor. Later the respondent withdrew his offer. According to the P.W.D. Code, the Executive Engineer was authorised to enter into such a contract. Nevertheless, the Supreme Court ruled that no valid contract had come into existence between the State Government and the respondent. The Court refused to accept the plea of the State that as the Executive Engineer had authority to accept the tender on behalf of the Government, it must be presumed that the contract had been entered into in accordance with the provisions of Art. 299. The Court reiterated that Art. 299(1) has been enacted not merely for the sake of form but as a matter of public policy to protect the government against unauthorised contracts.

(b) RATIFICATION

Before 1968, a judicial view was expressed that though, ordinarily, the government could not be sued on informal contracts, yet the government could accept responsibility for them by ratifying them.[23] For example, in *Mondal*[24] the Supreme Court stated that a contract not conforming with Art. 299(1) was not 'void' in the 'technical sense' that it could not be ratified.

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18. *Supra*, footnote 10.
19. *D.G. Factory v. State of Rajasthan*, AIR 1971 SC 141 : (1970) 3 SCC 874.
20. AIR 1964 SC 1714 : (1964) 6 SCR 984.
21. Also, *Nanalal Madhavji v. Andhra Pradesh*, AIR 1982 Cal 167.
22. *State of Punjab v. Om Prakash Baldev Krishan*, AIR 1988 SC 2149 : 1988 Supp SCC 722.
23. *N. Purkayastha v. Union of India*, AIR 1955 Ass 33; *Chatturbhuj v. Moreshwar, supra*; *Laliteshwar Prasad v. Bateshwar Prasad*, AIR 1966 SC 580 : (1966) 2 SCR 63.
24. *State of West Bengal v. B.K. Mondal*, AIR 1962 SC 779 : 1962 Supp (1) SCR 876.

Again, in *Karam Chand Thapar*,[25] the Supreme Court expressed the view that when a contract was entered into by an unauthorized person, it could be ratified by the government, especially when the contract was for its benefit.

But, in *Mulamchand*,[26] the Supreme Court adopting a rigid view of Art. 299(1) held that there was no question of ratification or estoppel by or against the government in case of a contract not conforming to Art. 299(1). The Court reiterated the view that Art. 299(1) has not been enacted for the sake of mere form and, therefore, the formalities prescribed by it cannot be dispensed with. If the plea of the government regarding estoppel or ratification is admitted, that would mean repeal of an important constitutional provision intended for the protection of the general public.

In *State of Uttar Pradesh v. Murari Lal*,[27] the Court specifically said that "the consensus of opinion is that a contract entered into without complying with conditions laid down in Art. 299(1) is void". The Court was very specific that no question of ratification of such a contract could arise because being void it was not capable of ratification.

(c) NO ESTOPPEL

No estoppel can apply against the government if it seeks to nullify a contract which is not in the form as prescribed by Art. 299. "There is no question of estoppel or ratification in such a case".[28] Therefore, Art. 299(1) cannot be bypassed by invoking the doctrine of estoppel.

Estoppel can however apply in case of statutory contracts, or contracts by statutory bodies, as such contracts do not fall under the purview of Art. 299(1).[29]

(d) VOIDNESS OF CONTRACT IS RELATIVE

A view has been expressed that a contract not complying with the requirements of Art. 299 is only relatively void but not void for all purposes. It means that while the contract is not enforceable by the parties thereto, it can still subsist for some collateral purposes.[30]

(e) SERVICE AGREEMENTS

A contract of service with government is not to be struck down for non-compliance with the provisions of Art. 299.[31] The reason is that once appointed, the government servant acquires a status and his rights and obligations are no longer determined by consent of the two parties, but by statutory rules framed by the government under Art. 309.[32]

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25. *Bihar v. Karamchand Thapar Bros.Ltd.*, AIR 1962 SC 110.
26. *Infra*, footnote 28.
27. AIR 1971 SC 2210 : (1971) 2 SCC 449.
28. *Mulamchand v. State of Madhya Pradesh*, AIR 1968 SC 1218 : (1968) 3 SCR 214; *N. Ramanatha v. State of Kerala*, AIR 1973 SC 2461. *Bihar E.G.F. Cooperative Society v. Sipahi Singh*, AIR 1977 SC 2149 : (1977) 4 SCC 145; *Jit Ram Shivkumar v. State of Haryana*, AIR 1980 SC 1285 : (1981) 1 SCC 11.
29. *Gujarat State Financial Corp. v. Lotus Hotels Pvt. Ltd.*, AIR 1983 SC 848 : (1983) 3 SCC 379, see, *infra*.
30. *M. Mohammed v. Union of India*, AIR 1982 Bom 443.
31. *Ranjit Kumar v. State of West Bengal*, AIR 1958 Cal 551; *Union of India v. Jyotirmoyee*, AIR 1967 Cal 461.
32. *Supra*, Chapter XXXVI, Sec. B.

Usually, no formal document is executed between the government and the servant; government's service starts with nothing more than a letter of appointment. In this context, it is necessary to regard service contracts as falling out of the scope of Art. 299(1).

Bose, J., in *Parshotamlal Dhingra v. Union of India*,[33] has stated that, as a service contract with the government is subject to 'pleasure' under Art. 310(1),[34] and can be terminated at will despite an express condition to the contrary, it cannot be regarded as a contract in the usual sense of the term and, as such, it should not be brought within the purview of Art. 299(1).

(f) STATUTORY CONTRACTS

Article 299 does not apply to a statutory contract, i.e., a contract made in exercise of statutory powers and not general executive powers.[35] A distinction is thus drawn between contracts executed in exercise of the executive powers and those executed in exercise of the ordinary statutory powers. Art. 299(1) applies to the former, but not to the latter, types of contracts.

In *Lal Chand*,[36] the Supreme Court considered a contract granting exclusive privilege of liquor vending, executed in exercise of the statutory powers referable to the Punjab Excise Act, and the rules made thereunder. The Court held that the grant of exclusive privilege gave rise to a contract of a statutory nature, distinguished from the one executed under Art. 299(1) and, therefore, compliance with Art. 299(1) was not required in such a case.

The Supreme Court has clarified that only because one of the parties to the agreement is statutory or public body, the contract cannot be characterised as a statutory contract. The Court has observed on this point:[37]

> "Every act of a statutory body need not necessarily involve an exercise of statutory power. Statutory bodies, like private parties, have power to contract or deal with property. Such activities may not raise any issue of public law".

Allotment of land pursuant to declared socio economic policy of the state is an executive act covered under Art. 162 and not a contract coming within ambit of Art. 299.[38]

D. CONTRACTUAL LIABILITY

Article 299(2) immunizes the President, or the Governor, or the person executing any contract on his behalf, from any personal liability in respect of any

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33. AIR 1958 SC 36 : 1958 SCR 828; *supra*.

34. *Supra*, Ch. XXXVI, Sec. C.

35. *B.C. Gowda v. State of Mysore*, AIR 1974 Kant 135; *A Damodaran v. State of Kerala*, AIR 1976 SC 1533 : (1976) 3 SCC 61.

36. *State of Haryana v. Lal Chand*, AIR 1984 SC 1326.
Also, *Lalji Khimji v. State of Gujarat*, (1993) Suppl. (3) SCC 567; *Steel Authority of India v. State of Madhya Pradesh*, AIR 1999 SC 1630 : (1999) 4 SCC 76.

37. *Kerala State Electricity Board v. Kurien E. Kalathil*, AIR 2000 SC 2573, at 2576 : (2000) 6 SCC 293.
On statutory contracts, also see, *India Thermal Power Ltd. v. State of Madhya Pardesh*, AIR 2000 SC 1005, at 1009 : (2000) 3 SCC 379. To the extent, the terms of the contract entered into by a statutory body are fixed by a statute, the contract may be regarded as statutory.

38. *Govt. of A.P. v. Maharshi Publishers (P) Ltd.*, (2003) 1 SCC 95 : AIR 2003 SC 296.

contract executed for the purposes of the Constitution, or for purposes of any enactment relating to the Government of India heretofore in force.

This immunity is purely personal and does not immunize the government, as such, from a contractual liability arising under a contract which fulfils the requirements of Art. 299(1).[39]

RESTITUTION

Earlier, a view was expressed that when a contract was not in proper form, the exemption of Art. 299(2) would not apply to the officer executing the contract and it could be enforced against him personally under S. 230(3) of the Indian Contract Act.[40] But, a different view was expressed by the Supreme Court in *State of Uttar Pradesh v. Murari Lal.*[41] A contract entered into without complying with Art. 299(1) is void. There is no contract in the eyes of law and so S. 230(3) of the Contract Act is inapplicable.

The governmental liability is practically the same as that of a private person, subject, of course, to any statutory provision to the contrary.[42]

In order to protect innocent parties, the courts have held that if government derives any benefit under an agreement not fulfilling the requisites of Art. 299(1), the Government may be held liable to compensate the other contracting party under S. 70 of the Indian Contract Act, on the basis of a *quasi*-contractual liability, to the extent of the benefit received. The reason is that it is not just and equitable for government to retain any benefit it has received under an agreement which does not bind it. Art. 299(1) is not nullified if compensation is allowed to the plaintiffs for work actually done or services rendered on a reasonable basis and not on the basis of the terms of the contract.

The courts have adopted this view on practical considerations also. Modern government is a vast organisation. Officers have to enter into a variety of petty contracts, many a time orally or through correspondence without strictly complying with Art. 299. In such a case, if what has been done is for the benefit of the government for its use and enjoyment, and is otherwise legitimate and proper, S. 70 of the Contract Act should step in and support a claim for compensation made by the contracting parties notwithstanding the fact that the contract in question had not been made as required by Art. 299. If S. 70 were to be held inapplicable, it would lead to extremely unreasonable consequences and may even hamper the working of the government. Like ordinary citizens, even government should be subject to the provisions of S. 70.[43]

The basis of Section 70 of the Indian Contract Act is the equitable doctrine of restitution and not any implied contract. In *Mondal*,[44] *a* contractor constructed a building at the request of an official who had accepted his tender. The building was constructed and accepted by the government but the contractor was not paid. The government argued that the request in pursuance of which the building was

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39. *State of Bihar v. Sonabati*, AIR 1954 Pat 513.
40. *Chatturbhuj v. Moreshwar*, *supra*, footnote 4.
41. *Supra*, footnote 27.
42. *State of Bihar v. Abdul Majid*, AIR 1954 SC 245 : 1954 SCR 786.
43. *State of West Bengal v. B.K. Mondal*, AIR 1962 SC 779 : 1962 Supp (1) SCR 876; *New Marine Coal Co. v. Union of India*, AIR 1964 SC 152 : (1964) 2 SCR 859.
44. *State of West Bengal v. B.K. Mondal*, *supra*, footnote 43.

constructed was unauthorised and so there was no privity of contract between the contractor and the government. There was no contract fulfilling the requisites of Art. 299(1) and enforceable as such. The Supreme Court held that though the contract was unenforceable as it did not fulfil the requisites of Art. 299, yet the State was still liable to pay under S. 70 of the Contract Act on a *quasi*-contract for the work done by the contractor and accepted by the government.

Section 70 lays down three conditions, namely:

(*i*) a person should lawfully do something for another person or deliver something to him;

(*ii*) in doing so, he must not intend to act gratuitously, and

(*iii*) the other person for whom something is done or to whom something is delivered must enjoy the benefit thereof.

In *Mondal*, all the three elements had been satisfied and so the government was held liable.[45]

Similarly, if under a contract with a government, a person has obtained any benefit, he can be sued for the dues under S. 70 of the Indian Contract Act though the contract did not conform to Art. 299.[46] If the government has made any payments under a void contract, it can recover the same under S. 65 of the Contract Act.[47]

The *Mondal* principle has been applied in a number of cases.[48]

It needs to be emphasized that S. 70, Contract Act, does not deal with the rights and liabilities of parties accruing from a contract. It deals with the rights and liabilities of the parties accruing from relations which resemble those created by contract. Thus, in cases falling under S. 70, the person doing something for another cannot sue for specific performance of the contract nor can he ask for damages for breach of contract for the simple reason that no valid contract exits between the parties. All that S. 70 provides is that if the goods delivered are accepted, or the work done is voluntarily enjoyed, then the liability to pay compensation for the said work or goods arises. S. 70 deals with cases where a person does a thing not intending to act gratuitously and the other enjoys it.

Section 70, Contract Act, in no way detracts from the binding character of Art. 299(1). The cause of action for the respondent's claim under S. 70 is not any breach of contract by the government. In fact, the claim under S. 70 is based on the assumption that the contract in pursuance of which the respondent has supplied the goods, or made the construction in question, is ineffective and, as such, amounts to no contract at all. Thus, S. 70 does not nullify Art. 299(1). In fact, S. 70 may be treated as supplementing the provisions of Art. 299(1). What s. 70

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45. *Mulamchand v. State of Madhya Pradesh*, AIR 1968 SC 1218 : (1968) 3 SCR 214; *Manohar Lal v. Union of India*, AIR 1974 Pat 56; *Rambabu v. State*, AIR 1981 All 16.

46. *State of Orissa v. Rajballav*, AIR 1976 Ori 79.

47. *Pannalal v. Deputy Commissioner*, AIR 1973 SC 1174 : (1973) 1 SCC 639; *Union of India v. Sita Ram Jaiswal*, AIR 1977 SC 329 : (1976) 4 SCC 505; *Nanalal Madhoji v. State of Andhra Pradesh*, AIR 1982 Cal 167; *Union of India v. J.K. Gas Plant*, AIR 1980 SC 1330 : (1980) 3 SCC 469.

48. See, for example, *The New Marine Coal Co. v. Union of India*, AIR 1964 SC 152, 155 : (1964) 2 SCR 859.

prevents is unjust enrichment and it applies as much to individuals as to corporations and governments.

E. AWARD OF CONTRACTS

In modern times, the welfare state is the source of enormous wealth and more and more persons enjoy government largess in the form of jobs, contracts, licenses, quotas, mineral rights, concessions, etc. This raises the possibility of exercise of power by a government to dispense largess in an arbitrary manner. It is axiomatic that a government or any of its agencies ought not to be allowed to act arbitrarily and confer benefits on whomsoever they want. Questions have often arises whether the state is bound by any norms in dispensing its largess.

Since 1979, there have been far reaching developments in the law relating to government contracts outside Art. 299.[49] Art. 299 has a very limited range, *viz.,* it lays down only some formal rules regarding such mundane matters as how a contract between government and a private person is to be executed, or expressed, and who can enter into such a contract on behalf of the government? But Art. 299 does not say anything as to how the executive power to enter into contracts is to be exercised by the government? Whether there are any limitations subject to which this power is to be exercised? To what extent can there be judicial review of government contracts under Art. 226?

Before 1979, the position was that the Government enjoyed lots of discretion in the matter of awarding contracts to whomsoever it liked. The contractual freedom of the government was equated practically to that of a private person. The courts followed the general principle that the government was free to enter into a contract with any one it liked. Thus, the Supreme Court stated in *Achutan* in 1959[50] : "When one person is chosen rather than another, the aggrieved party cannot claim the protection of Art. 14 because the choice of the person to fulfil a particular contract must be left to the Government," and also that "a contract which is held from Government stands on no different footing from a contract from a private party."

The Kerala High Court observed in the same tenor in 1974[51] : "It is perfectly open to the Government even as it is to a private party to choose a person to their liking to fulfil a contract which they wished to perform."

But, in course of time, the judicial attitude has undergone a sea change on this question. The courts had to shed their passive attitude in this area as a realisation dawned on them that a welfare state exists for the welfare and common good of the largest number of people, and not for the good of the favoured few, and that the state does not enjoy the same freedom as a private person does because a government is always a government subject to rule of law in all its activities.[52]

So, the Supreme Court veered round to the view that there is need to develop some norms to regulate, structure and discipline the government discretion to

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49. For a more detailed discussion of this topic, see, Jain, *A Treatise on Administration Law,* II. Ch. XXIV.
50. *C.K. Achutan v. State of Kerala,* AIR 1959 SC 490 : 1959 Supp (1) SCR 787.
51. *G.E. & E. Co. v. Chief Engineer,* AIR 1974 Ker 23.
52. For discussion on this topic, see, *supra,* Ch. XXI, Sec. D(iv).

confer such benefits, and impose judicial review in this area to some extent. In 1975, in *Eurasian*,[53] the Supreme Court stated that "the government is not and should not be as free as an individual" in the matter of entering into contracts and that "whatever its activity, the government is still the government":

It is now well established that in dispensing its largess, the state is expected not to act as a private individual but should act in conformity with certain healthy standards and norms. The principle of non discrimination contained in Art. 14 has been applied by the Supreme Court in an area of great contemporary importance, *viz*., conferment of benefits and award of contracts by the government.[54]

The leading case in this area is *Ramana*.[55] In 1979, the Supreme Court laid down some principles for awarding contracts by a government or its agencies. The Court declared that the executive power of a government to award contracts would be subject to Art. 14 which means that no government can award contracts in an arbitrary or discriminatory manner. The government is still the government when it acts in the matter of granting largess and it cannot act arbitrarily in this respect. No government can give or withhold largess "in its arbitrary discretion or its sweet will". The government cannot discriminate between individuals in the matter of entering into contracts and the government action must be based on standards that are not arbitrary or unauthorised.

The government is bound by the standards which it announces it will observe. The government cannot relax those standards in favour of a specific person without bringing it to the notice of others who may be similarly situated. For example, if the notice inviting tenders says that the tenders would be received by a specific time on a specific date, then it will be wrong on the part of the concerned authority to receive a tender after the specified time and date.

The Court has also insisted that the norms laid down for qualification of the person to whom the contract is to be awarded ought to be "reasonable, objective and non-discriminatory" and must be strictly adhered to. The Court accordingly observed;

> "It must therefore follow as a necessary corollary from the principle of equality enshrined in Art. 14 that though the state is entitled to refuse to enter into relationship with anyone, yet if it does so, it cannot arbitrarily choose any person it likes for entering into such relationship and discriminate between persons similarly circumstanced, but it must act in conformity with some standard or principle which meets the test of reasonableness and non-discrimination and any departure from such standard or principle would be invalid unless it can be supported or justified on some rational and non-discriminatory ground."

The Court observed further :

> "The power or discretion of the government in the matter of grant of largess including award of jobs, contracts, quotas, licences, etc. must be confined and structured by rational, relevant and non-discriminatory standard or norm and if

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53. *Erusian Equipment & Chemicals Ltd. v. State of West Bengal*, AIR 1975 SC 266 : (1975) 1 SCC 70.

Also see, *Sukhdev v. Bhagatram,* AIR 1975 SC 1331 : (1975) 1 SCC 421; *Kasturi Lal v. State of Jammu & Kashmir*, AIR 1980 SC 1992*;* see also *Jespar I. Slong v. State of Meghalaya*, (2004) 11 SCC 485 : AIR 2004 SC 3533.

54. For discussion on Art. 14, see, Ch. XXI, *supra.*

55. *Ramana Dayaram Shetty v. International Airport Authority,* AIR 1979 SC 1628 : (1979) 3 SCC 489.

> the government departs from such standard or norm in any particular case or cases, the action of the government would be liable to be struck down, unless it can be shown by the government that the departure was not arbitrary but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory."

The following main principles emerge from *Ramana*:

(1) The government does not have an open and unrestricted choice in the matter of awarding contracts to whomsoever it likes.

(2) The government is to exercise its discretion in conformity with some reasonable non-discriminatory standards or principles.

(3) The government is bound by the standards laid down by it.

(4) The government can depart from these standards only when it is not arbitrary to do so and the departure is based on some valid principle which in itself is not "irrational, unreasonable or discriminatory".

The above-mentioned propositions have been reiterated by the Supreme Court in a number of cases. For example, in 1993, in *F.C.I. v. Kamdhenu Cattle Feed Industries*,[56] the Supreme Court has observed :

> "In contractual sphere as in all other state actions, the state and all its instrumentalities have to conform to Article 14 of the Constitution of which non-arbitrariness is a significant facet. There is not unfettered discretion in public law : A public authority possesses powers only to use them for public good. This imposes the duty to act fairly, and to adopt a procedure which is fairplay in action."

It is thus clear from the above observations of the Supreme Court that the government cannot act arbitrarily in the matter of entering into contractual relationship with third parties. It cannot choose any person it likes. Its action must conform to some standard or norm which is rational and non-discriminatory.

Since *Ramana*, in order to ensure that the government exercises its power to award contracts in a non-discriminatory manner, the Supreme Court has laid down *inter alia* the following propositions in respect of award of contracts by the government or its agencies :

(i) The government must lay down some norms or standards of eligibility. These standards ought to be rational and non-discriminatory. A democratic government cannot lay down arbitrary and capricious standards for the choice of persons with whom alone it will deal.

(ii) The government must adhere to, and must not deviate from, the standards laid down by it.[57]

(iii) The government ought not to award the contract to some one not fulfilling the prescribed conditions of eligibility. If the authority does so, its action becomes discriminatory since it excludes other persons similarly situate from tendering for the contract and that would be plainly arbitrary

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56. AIR 1993 SC 1601 : (1993) 1 SCC 71.
57. *West Bengal Electricity Board v. Patel Engineers*, AIR 2001 SC 682 : (2001) 2 SCC 451.

and without reason. The rule flows from Art. 14 as well as from Administrative Law.[58]

(iv) The terms and conditions issued in the advertisement inviting tenders cannot be altered to the advantage of a particular person having regard to the fact that if such favourable terms and conditions were known to all other participants, they would have participated in the tender.[59]

(v) Expression of different views and opinions in exercise of contractual powers may be there. However, such difference of opinion must be based on specified norms. Those norms may be legal norms or accounting norms. As long as the norms are clear and properly understood by the decision maker and the bidders and other stakeholders, uncertainty and question of breach of the rule of law will not arise.[60]

(vi) For execution of any work, tenders must be invited. The contract must be awarded to one with the lowest tender except when, in a specific case, there are some good reasons for not doing so.

As the Supreme Court has insisted in *Tata Cellular*[61] : "But the principles laid down in Art. 14 of the Constitution have to be kept in view while accepting or refusing a tender."

The Supreme Court has stated in another case[62] : "…….the Government had the right to either accept or reject the lowest offer but that of course, if done on a policy, should be on some rational and reasonable grounds."[63]

It is clear that when an instrumentality of the State acts contrary to public good and public interest, unfairly, unjustly and unreasonably, in its contractual, constitutional or statutory obligations, it really acts contrary to the constitutional guarantee found in Art. 14 of the Constitution. Therefore once the State or an instrumentality of the State is a party, it has an obligation in law to act fairly, justly and reasonably consistent with Article 14. Since the Export Credit Guarantee Corporation being an instrumentality of the State and a monopoly body had to be approached by the appellants by compulsion to cover its export risk and the policy was issued after seeking all required information and after receiving huge sums of money as premium exceeding Rs. 16 lakhs and the liability of the insurer under the policy arose when the default of the exporter occurred and thereafter when the Government of the country to which the goods were exported failed to fulfil its guarantee, the appellant was entitled to relief even though a suitable efficacious alternate remedy was available by way of a suit.[64]

Article 14 prohibits the Government from arbitrarily choosing a contractor at its will and pleasure. However, no person can claim a Fundamental Right to carry on business with the Government. All that he can claim is that in competing for

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58. *Premium Granites v. State of Tamil Nadu,* (1994) 2 SCC 691 : AIR 1994 SC 2233; *Raunaq International Ltd. v. I.V.R. Construction Ltd.,* AIR 1999 SC 393 : (1999) 1 SCC 492.
59. *G.J. Fernandez v. State of Karnataka,* AIR 1990 SC 958.
60. *Reliance Energy Ltd. v. Maharashtra State Road Development Corpn. Ltd.,* (2007) 8 SCC 1 : (2007) 11 JT 1.
61. *Tata Cellular v. Union of India,* AIR 1996 SC at 25.
62. *Union of India v. Hindustan Development Corporation,* AIR 1994 SC 1000.
63. *Lalzawmliana v. Mizoram,* AIR 2001 Gau 23.
64. *ABL International Ltd. v. Export Credit Guarantee Corporation of India Ltd.,* (2004) 3 SCC 553: (2003) 10 JT 300.

the contract, he should not be unfairly treated and discriminated against, to the detriment of the public interest. Thus the notices inviting tenders for supply of high security vehicle registration places are open to response by all, and even if one single manufacturer is ultimately chosen for a region or State, it cannot be said that the State has created a monopoly of business in favour of private party.[65]

In the context of privatisation of Delhi and Mumbai Airports and selection of joint venture partners by multi-tier bidding process alteration of terms of original tender documents could not be expanded or narrowed down at the evaluation stage as it was beyond authority and contrary to the scoring system that was to be followed.[66]

It is well settled that the State and its authorities including instrumentalities of States have to be just fair and reasonable in all their activities including those in the field of contracts. In the field of contracts the State and its instrumentalities ought to so design their activities as would ensure fair competition and non discrimination. They can augment their resources but the object should be to serve the public cause and to do public good by resorting to fair and reasonable methods.[67]

The Supreme Court has further intensified review in this area. In *Reliance Energy*[68] the Supreme Court has sought to co-relate the right conferred by Article 14 with those under Article 21 of the Constitution. It also laid down that the norms laid down by the administration must be clearly and properly understood by the administration as well as those interacting with the administration. If such norms are uncertain then the rule of law could be breached. The Court observed that legal certainty was an important aspect of the rule of law and any vagueness or subjectivity in such norms could result in unequal and discriminatory treatment and thereby violate the doctrine of "level playing field". Reliance Energy shows the depth to which a Court in exercise of its power of judicial review could travel when such norms are challenged on the grounds of uncertainty, vagueness and subjectivity.

In *Reliance Energy* the Supreme Court after referring to the three heads of judicial review namely illegality, irrationality and procedural impropriety, has held that all errors of law are jurisdictional errors.[69] This is a giant leap because a jurisdictional error has many ramifications e.g. whether it voids the exercise or whether the bar of alternative remedy would apply etc.

In *Reliance Airport*[70] the scoring system formed part of the evaluation process and its object was to provide identification of factor, alteration of marks of each

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65. *Assn. of Registration Places v. Union of India,* (2005) 1 SCC 679 : AIR 2005 SC 469.
66. *Reliance Airport Developers (P) Ltd. v. Airports Authority of India,* (2006) 10 SCC 1 : (2006) 10 JT 424.
67. *Jamshed Hormusji Wadia v. Board of Trustees, Port of Mumbai,* (2004) 3 SCC 214 : AIR 2004 SC 1815.
68. *Reliance Energy Ltd. v. Maharashtra State Road Development Corpn. Ltd.,* (2007) 8 SCC 1 : (2007) 11 JT 1.
69. *Reliance Energy Ltd. v. Maharashtra State Road Development Corpn. Ltd.,* (2007) 8 SCC 1 : (2007) 11 JT 1.
70. (2006) 10 SCC 1 : (2006) 10 JT 424.

of those factors and giving marks at different stages so as to achieve objectivity in the decision making process.[71]

Ordinarily a contract ought to be awarded after inviting tenders for the purpose. This provides an opportunity to all those who may be interested in securing the contract to offer their bids for the purpose. Also, the concerned authority may select the best offer on competitive price without affecting the quality of work. It eliminates favouritism and discrimination in awarding the contract. Award of a contract to an individual without inviting tenders is invalid as it amounts to "pick and choose" which violates Art. 14.[72]

In *Business Link*[73] it was contended that the notice inviting tenders was published in newspapers not having wide circulation. This contention was rejected on the finding that one of the newspapers in which the publication was made had a circulation of 39,600 copies per day for about 50 years and the other 30,000 copies per day for about 11 years in the city concerned. The argument that the advertisements were inadequate was negatived on the finding that 12% responded which was suggestive of wide circulation.[74]

The terms of the invitation to tender are not open to judicial scrutiny, the same being in the realm of contract. The government must have a free hand in setting the terms of the tender. The courts can scrutinize the award of the contracts. The courts cannot strike down the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical.[75]

When tenders are invited for execution of a work, the contract is awarded to the lowest tenderer which is in public interest. Ignoring the instructions subject to which the tenders are invited would encourage and provide scope for "discrimination arbit rareness and favourtism which are totally opposed to the Rule of Law and our constitutional values. The very purpose of issuing instructions is to ensure their enforcement lest "the Rule of Law should be a casualty." A writ Court can interfere if the lowest tender is illegally rejected.[76] The Supreme Court has however emphasized in the case noted below[77] that the rule that the contract ought to be awarded to the lowest tenderer applies when all things are equal. If the lowest tenderer does not satisfy the prescribed conditions, the contract cannot be awarded to him. "Merely because a bid is the lowest the requirements of compliance of rules and conditions cannot be ignored." The decision to reject the lowest tender must be based upon some reason which would satisfy and meet the requirements of Art. 14 of the Constitution. Also, the concerned authority is not obliged to award contract to a tenderer at the quoted price bid. The authority can always negotiate with the next tenderer (in case the lowest tender is out for any

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71. *Reliance Energy Ltd. v. Maharashtra State Road Development Corpn. Ltd.,* (2007) 8 SCC 1: (2007) 11 JT 1.

72. *Sterling Computers, supra; V. Sivakumar v. State of Kerala,* AIR 1999 Ker 49.

73. *Business Link v. A. S. Advertising Co.,* (2003) 10 SCC 258 : AIR 2004 SC 4959.

74. *Business Link v. A. S. Advertising Co.,* (2003) 10 SCC 258: AIR 2004 SC 4959.

75. *Directorate of Education v. Educomp Datamatics Ltd.,* (2004) 4 SCC 19 : AIR 2004 SC 1962. The proposition is expressed with undue rigidly e.g., would an eligibility criteria that is designed to favour a particular class.

76. *Pritam Singh v. State of Punjab,* AIR 1997 P&H 194; *Tata Cellular v. Union of India,* AIR 1996 SC 11.
See, Sec. F, *infra.*

77. *West Bengal Electricity Board v. Patel Engg. Co. Ltd.,* AIR 2001 SC 682 : (2001) 2 SCC 451.

reason) for awarding the contract on economically viable price bid.[78] A practical compulsion which necessitates an avoidable choice cannot be termed as perverse or lacking in rationality.[79]

In the case noted below,[80] the award of a contract was quashed because the decision of the concerned authority to reject the lower tender of the petitioner was found to be "totally arbitrary, capricious and devoid of any sense of fairplay".

In a given situation the Court may not upset the grant.[81]

Again on some occasions judicial review in tender matters have been restricted. In *Master Marine Services*[82] the tender document required bidder to have licence to act as surveyor/loss assessor under Insurance Act to prequalify. The appellant company did not have such licence in its name, but its chairman did. The contracting authority, exercising its power under tender conditions to do so, waived this technical requirement for various reasons given by it and the contract was awarded to the appellant on financial grounds since its bid for the work involved was lower. The Court found that 98 per cent of the work being of a clerical nature, which required no licence under Insurance Act, contracting authority was justified in awarding contract to appellant company primarily on financial/commercial considerations.

However, while ascertaining that principles of judicial review applied to the exercise of contractual powers by government bodies in order to prevent arbitrariness or favouritism, the Court cautioned that there are inherent limitations in the exercise of such review. If a review of the administrative decision is permitted indiscriminately it will be substituting its own decision, without the necessary expertise, which itself may be fallible. The Government must have freedom of contract. Free play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principles of reasonableness but must be free from arbitrariness unaffected by bias or actuated by *mala fides*. Such caution in quashing decision may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.[82]

A challenge to the award of contract to the appellant on ground that certain tender conditions relating to applicability of Rules relating to disposal/transportation of hazardous waste was vague in that whether correct Rules and sub rules had been mentioned and incorporated in the contract was turned down on the basis that such ground of attack was irrelevant, since the parties would be bound by the statutory obligations in any case.[83]

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78. *West Bengal Electricity Board v. Patel Engineering Co. Ltd.*, AIR 2001 SC 682 : (2001) 2 SCC 451. Also see : *Y. Konda Reddy v. State of Andhra Pradesh*, AIR 1997 AP 121.

79. *Reliance Airport Developers (P) Ltd. v. Airports Authority of India*, (2006) 10 SCC 1 : (2006) 10 JT 424.

80. *PSC Engineers Pvt. Ltd. v. Tripura*, AIR 2000 Gau 198.

81. *Subhash Projects & Marketing Ltd. v. W.B. Power Development Corpn. Ltd.*, (2005) 8 SCC 438 : AIR 2006 SC 116, where compensation was awarded by the Court in the facts and circumstances of the case.

82. *Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd.*, (2005) 6 SCC 138 : AIR 2005 SC 2299.

83. *Ganapathi Metals v. MSTC Ltd.*, (2005) 12 SCC 169.

The award of a contract for execution of a public work on the basis of competitive bidding has many advantages for the state:

(a) it offers fair opportunity to compete for the contract;

(b) the concerned authority may select the best person for the job on competitive price without compromising with the quality of work;

(c) it eliminates favouritism and discrimination in awarding the contract.

In the matter of a ward of dealership in petroleum products interpretation of the advertisement inviting application the principle of *casus omissus* can be invoked to gather the true import of an eligibility condition.[84]

A municipal committee awarded a contract to the second respondent with a view to help him, throwing all norms to the winds. The conditions advertised were revised to help him without advertising the same. The action of the committee was held to be arbitrary. The Court ruled that the revised norms ought to have been advertised in order to enable all the eligible persons to take part in the tender.[85]

There have been a large number of cases since *Ramana* in which the award of contracts by the government and its agencies have been challenged before the courts[86] and, in some ofthese cases, the award of contracts has been quashed because of improper exercise of power by the concerned authority.[87]

The Supreme Court has affirmed the decision of the High Court which in effect granted specific performance of a contract.[88]

According to the Supreme Court in *Tata Cellular*[89] the Court can review administrative discretion in awarding a contract on the following grounds : (1) Illelgality; (2) Irrationality and (3) Procedural Impropriety.

These principles have been reiterated by the courts in a number of cases.

In *Dinesh*,[90] the Railway Board rejected the tender of the respondent. The Supreme Court ruled that the Board had acted arbitrarily and without applying its mind while doing so. It was characterised as a "flagrant violation of the constitutional mandate of Art. 14."

In the instant case, there was a clause in the Guidelines issued along with the tender saying that the Railway was entitled to reject any tender offer without assigning any reasons. So, it was argued that the Railway had power to accept, or not to accept, the lowest tender. But the Supreme Court said that "a public

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84. *Sangeeta Singh v. Union of India,* (2005) 7 SCC 484 : AIR 2005 SC 4459.
85. *S.Y. Nawab v. Municipal Corpn. of Hyderabad,* AIR 2001 AP 403.
86. *Tata Cellular v. Union of India,* AIR 1996 SC 11; *Union of India v. Hindustan Development Corpn.,* AIR 1994 SC 989; *Asia Foundation and Construction Ltd. v. Trafalgar House Construction (I) Ltd.,* (1997) 1 SCC 738; *New Horizons Ltd. v. Union of India,* (1995) 1 SCC 478; *Delhi Science Forum v.,* (1996) 2 SCC 405.
87. *Sterling Computers Ltd. v. M. and N. Publications Ltd.,* AIR 1996 SC 51 : (1993) 1 SCC 445; *Harminder Singh v. Union of India,* AIR 1986 SC 1527; *Prestress India Corp. v. U.P. State Electricity Board,* AIR 1988 SC 2035; *Alok Prasad Varma v. Union of India,* AIR 2001 Pat 211; see also *Assn. of Registration Plates v. Union of India,* (2004) 5 SCC 364 : AIR 2005 SC 1354.
88. *State of M.P. v. Ramswaroop Vaishya,* (2003) 2 SCC 254 : AIR 2003 SC 1067.
89. *Tata Cellular v. Union of India,* AIR 1996 SC 11 : (1994) 6 SCC 651.
90. *Union of India v. Dinesh Engineering Corporation,* (2001) 8 SCC 491 : AIR 2001 SC 3887.

authority even in contractual matters should not have unfettered discretion". In contracts having commercial element, the authorities are bound to follow the norms recognised by the courts. This requirement is necessary to avoid unreasonable and arbitrary decisions being taken by public authorities whose actions are amenable to judicial review. As regards the specific clause mentioned above, the Court said:

> "This does not give an arbitrary power to railways to reject the bid offered by a party merely because it has that power. This is a power which can be exercised on the existence of certain conditions which in the opinion of the railways are not in the interest of the railways to accept the offer."

A few examples of this judicial approach may be cited here. Award of a contract is quashed on such grounds as, *mala fides*; corruption; favouritism; discrimination; arbitrariness; improper motives; non-application of mind on the part of concerned authority; award or terms of the contract being arbitrary or unreasonable;[1] contract awarded without any publicity.[2]

Award of a contract is quashed if the concerned authority takes into account irrelevant considerations;[3] or if the contract is awarded by accepting a tender at a higher rate against the interest of revence;[4] or if the contract is awarded to one who does not fulfil the prescribed eligibility conditions.

In *Chaitanya*,[5] the award of contracts was quashed by the Supreme Court. It characterised the award of contracts to ineligible persons in preference to eligible persons as an "unusual, wilful and perverse way of exercising the power of distributing state largess". It was argued on behalf of the state in the instant case that no loss would be caused to the State Exchequer by the award of the contracts. The Supreme Court rejected this argument saying that even if the award of the contracts "was not at the expense of the Exchequer, there could be no question that what was done was the distribution by the State of favours loaded with bounty by way of enabling the recipients of the favours to earn enormous profits".[6]

Award of a contract by the government or any of its authority may be quashed by the Court if the contract is entered into for a collateral purpose, or if there is discrimination or unreasonableness".[7]

There may however be some special circumstances when the Court may uphold award of a contract without inviting tenders for the same.[8] For example, a contract reached through negotiations between a State Government and a company to set up as a joint venture a multi-super-speciality hospital to give medical

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1. *G.J. Fernandez v. State of Karnataka*, AIR 1990 SC 958 : (1990) 2 SCC 488; *Centre for Public Interest Litigation v. Union of India*, AIR 2001 SC 80 : (2000) 8 SCC 606; *Common Cause, A Regd. Society v. Union of India*, AIR 1999 SC 2979, 2994 : (1999) 6 SCC 667; *Centre for Public Interest Litigation v. Union of India*, AIR 2001 SC 80.
2. *M.I. Builders Pri. Ltd. v. Radhey Shyam Sahu*, AIR 1999 SC 2468 : (1999) 6 SCC 464.
3. *Sterling Computers Ltd. v. M & N. Publications Ltd.*, AIR 1996 SC 51.
4. *Dutta Associates Pvt. Ltd. v. Indo Mercantiles Pvt. Ltd.*, (1997) 1 SCC 53; *P.S.C. Engineers Pvt. Ltd. v. Tripura*, AIR 2000 Gau 198.
5. In *Chaitanya Kumar v. State of Karnataka*, AIR 1986 SC 825 : (1986) 2 SCC 594.
6. *Ibid*, at 828.
7. *Asia Foundation & Construction Ltd. v. Trafalgar House Construction Ltd.*, (1997) 1 SCC 738; *Raunaq International Ltd. v. IVR Construction*, AIR 1999 SC 393 : (1999) 1 SCC 492.
8. *Kasturilal Lakshmi Reddy v. State of Jammu & Kashmir*, AIR 1980 SC 1992 : (1980) 4 SCC 1; *State of Madhya Pradesh v. Nandlal Jaiswal Bengal*, AIR 1987 SC 1109.

aid to government employees on a no profit no loss basis and give free medical aid to the poor people was held to be valid even though no tenders were invited for the same.[9] The State is not constitutionally obliged to shun a private party who offers to develop a Project and the State negotiates with such a party and agrees to provide resources and other facilities for the purpose of development of the project eg. a Port.[10] The example given by Panchal J. is instructive; "Please wait I will first advertise, see whether any other offers are forthcoming and then after considering all offers, decide whether I should get the Port developed through you". It would be most unrealistic to insist on such a procedure, particularly, in an area like Pondicherry, which on account of historical, political and other reasons, is not yet industrially developed and where entrepreneurs have to be offered attractive terms in order to persuade them to set up industries. The State must be free in such a case to negotiate with a private entrepreneur with a view to inducing him to develop the Port and if the State enters into a contract with such an entrepreneur for providing resources and other facilities for developing the Port, the contract cannot be assailed as invalid because the State has acted bona fide, reasonably and in public interest. The Court ruled that so long as the State action was *bona fide* and reasonable, it would not interfere merely on the ground that no advertisement was given or publicity made or tenders invited. Similarly, State can negotiate with a party to set up an industry in the State.[11] Tender conditions may have to be construed differently having regard to fact situation obtaining in each case. In a given situation there may be a variation of tender conditions. No hard and fast rule can be laid down therefor.[12]

A public sector undertaking in view of the principles of good corporate governance may accept such tenders which are economically beneficial to it and may vary the tender condition to a reasonable extent in public interest.[13]

Fixation of value of a tender is entirely within the purview of the executive and the courts have hardly any role to play in this process except striking down such action of the executive as is proved to be arbitrary.[14]

In the matter of formulating conditions of a tender document and awarding a contract of the nature of those for supply of HSVRP's, greater latitude is required to be conceded to the State authorities. Certain conditions have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work. Unless action of tendering authority is found to be malicious and a misuse of its statutory powers, tender conditions are unassailable. The manufacturer chosen to supply HSVRPs would, in fact, be a sort of agent or medium of the RTOs concerned for fulfillment of the statutory obligations in accordance with R. 50, Central Motor Vehicles Rules, 1989 (as amended), and these obligations would be better discharged if there is one manufacturer instead of multi manufacturers as suppliers. A contract providing for technical expertise, financial capability and experience qualifications with a long term of 15 years would serve

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9. *Tej Singh Sarupriya v. Rajasthan State Mines and Minerals Ltd.*, AIR 2001 Raj 225.
10. *Villianur Iyarkkai Padukappu Maiyam v. U.O.I.*, (2009) 7 SCC, 561, 605 : (2009) 8 JT 339.
11. *Kasturi Lal Lakshmi Reddy v. State of Jammu & Kashmir*, AIR 1980 SC 1992.
12. *BSN Joshi & Sons Ltd. v. Nair Coal Services Ltd.*, (2006) 11 SCC 548 : AIR 2007 SC 437.
13. *BSN Joshi & Sons Ltd. v. Nair Coal Services Ltd.*, (2006) 11 SCC 548 : AIR 2007 SC 437.
14. *Jespar I. Slong v. State of Meghalaya*, (2004) 11 SCC 485 : AIR 2004 SC 3533.

the dual purpose of attracting sound parties to stake their money in undertaking the job of supply of HSVRPs and safeguard the public interest by ensuring that for a long period the work of affixation of security HSVRPs would continue uninterrupted in fulfillment of the object of the scheme contained in R.50.[15]

If there are two alternatives available, of giving a short term or a long term contract, it is not for the Court to suggest that the short term contract should be given.[16]

F. ISSUE OF WRITS IN MATTERS OF CONTRACT

A writ petition can be moved in the High Court under Art. 226, or the Supreme Court under Art. 32, to challenge award of a contract on the grounds as discussed above. In the area of exercise of contractual powers by governmental authorities, the function of the courts is to prevent arbitrariness and favouritism and to ensure that the power is exercised in public interest and not for a collateral purpose.[17] The application of Article 14 in contractual matters as well as in matters relating to government policy has been stated in unqualified affirmative terms.[18]

After the award of the contract comes the stage of fulfilling the contractual obligations. There has been controversy on the question whether one could resort to the writ jurisdiction for imposing contractual obligations on a public authority.

Even when the courts had veered round to the view that the *award* of a contract by the government and its agencies would be amenable to the writ jurisdiction, to some extent, as stated above, they still maintained the position that the question of *breach* of a contract was one which fell primarily within the area of private law under the Contract Act, and that the remedy therefor lay in a civil Court and not under the writ jurisdiction of the High Courts under Art. 226.[19] The view was held for long that a writ petition would not be an appropriate remedy for imposing contractual obligations on the government.[20] "The interpretation and implementation of a clause in a contract cannot be the subject-matter of a writ petition".[21] If a term of a contract is violated, ordinarily the remedy is not a writ petition.

The Supreme Court stated this position in *Radhakrishnan*[22] where the Court maintained that after the government had entered into a contract with a private

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15. *Assn. of Registration Places v. Union of India*, (2005) 1 SCC 679 : AIR 2005 SC 469.
16. *Assn. of Registration Places v. Union of India*, (2005) 1 SCC 679 : AIR 2005 SC 469.
17. See, *Air India Ltd. v. Cochin International Airport Ltd.*, AIR 2000 SC 801; (2002) 2 SCC 617; *Asian Techs Ltd. v. State of Kerala*, AIR 2001 Ker. 388.
18. *Reliance Energy Ltd. v. Maharashtra State Road Development Corpn. Ltd.*, (2007) 8 SCC 1 : (2007) 11 JT 1; see also (2007) 2 SCC 1 : AIR 2007 SC 861.
19. For Art. 226, see, Ch. VIII, Secs. D and E.
20. *C.K. Achutan v. State of Kerala, supra*; *State of Bihar v. Jain Plastics and Chemicals Ltd.*, AIR 2002 SC 206 : (2002) 1 SCC 216.
21. *Kerala State Electricity Board v. Kurien V. Kalathil*, AIR 2000 SC 2573.
22. *Radhakrishan Agarwal v. State of Bihar*, AIR 1977 SC 1496.

party, the relations *inter se* between the contracting parties were not governed by any constitutional provision but by the provisions of the Contract Act which would determine the rights and obligations of the concerned parties. No question arose regarding the violation of Art. 14, or of any other constitutional provision, when the government was acting within the contractual field. In *State of Punjab v. Balbir Singh*,[23] the Supreme Court pointed out that a High Court had no jurisdiction to enforce the liabilities arising out of mutually agreed conditions of contract, in a writ proceeding under Art. 226 of the Constitution.

In *D.F.O. v. Biswanath Tea Co.*,[24] the Supreme Court ruled that a party could not claim under Art. 226 enforcement of contractual obligations and recover damages. Proper relief for the party would lie to seek specific performance of the contract or damages in a civil Court. The court has reiterated that it will not enforce the terms of a contract qua contract.[25]

One of the main reasons for this judicial stance was that question of breach of contract would depend on facts and evidence. Such seriously disputed questions regarding breach of contract ought to be investigated and determined on the basis of evidence which may be led by the contesting parties. This can be done in a properly instituted civil suit rather than in a writ petition.[26]

Where the dispute is purely a contractual dispute as to whether there is a right reserved in the private party to pass on the additional liability to the purchasers, such dispute is to be determined by the terms of the contract between the parties. It is necessary that the facts in each case have to be investigated, the terms of the contract between the parties determined on evidence and construed before the dispute can be satisfactorily adjudicated.[27]

The power of judicial review cannot be denied even in contractual matters or matters in which the Government exercised its contractual power.[28]

Permitting a contractor to get his bill paid the Supreme Court has observed that Art. 14 has received a liberal interpretation over the years and its scope has also been extended by creative interpretation[29] SINHA J. speaking for the 2 Judge Bench tried to distinguish Burmah Construction[30] which had held that a pure money claim could not furnish a cause of action in a proceeding under Art. 226 but the distinction is not traceable from what SINHA J said as he has not disclosed any reason.

But, then, judicial view began to undergo a change. The courts began to adopt the stance that Art. 14 strikes at arbitrariness in governmental action and ensures

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23. AIR 1977 SC 1717.
24. AIR 1981 SC 1368.
25. *Karnataka State Forest Industries Corporation v. Indian Rocks*, (2009) 1 SCC 150 : AIR 2009 SC 684.
26. *State of Bihar v. Jain Plastics and Chemicals Ltd.*, AIR 2002 SC 206.
27. *Defence Enclave Residents Society v. State of UP*, (2004) 8 SCC 321 : AIR 2004 SC 4877.
28. *Reliance Airport Developers (P) Ltd. v. Airports Authority of India*, (2006) 10 SCC 1 : (2006) 10 JT 424; see also (2007) 2 SCC 1 : AIR 2007 SC 861.
29. *Food Corporation of India v. SEIL Ltd.*, (2008) 3 SCC 440 : AIR 2008 SC 1101.
30. *Burmah Construction Co. v. State of Orissa*, AIR 1962 SC 1320.

fairness and equality of treatment. The Supreme Court has stated in *Shrilekha Vidyarthi v. State of Uttar Pradesh*[31] :

> "The scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies providing for adjudication of purely contractual disputes."

The Court then observed :

> "However, to the extent, challenge is made on the ground of violation of Art. 14 by alleging that the impugned act is arbitrary, unfair or unreasonable, the fact that the dispute also falls within the domain of contractual obligations would not relieve the state of its obligation to comply with the basic requirements of Art. 14. To this extent, the obligation is of a public character invariably in every case irrespective of there being any other right or obligation in addition thereto. An additional contractual obligation cannot divest the claimant of the guarantee under Art. 14 of non-arbitrariness at the hands of the state in any of its actions."

The position now is that where the dispute lies within the contractual field pure and simple, a writ petition is not maintainable. The relations between the parties are governed by the contract which determines the rights and obligations of the parties *inter se*. For example, the Supreme Court has ruled that the interpretation and implementation of a clause in a contract cannot be the subject-matter of a writ petition. If a term of a contract is violated, or whether the state has made excess payment to the contractor or not, these are disputes of a civil nature to be adjudicated in civil courts and not fit to be decided in writ petitions.[32]

But contractual obligations may fall under judicial review if there is some *public law element* involved therein. For example in *Sterling Computers*.[33]

It has been held that even in commercial contracts where there is a public element, it is necessary that relevant considerations are taken into account and the irrelevant consideration discarded.

In *LIC*,[34] the Supreme Court has observed:

> "The actions of the State, its instrumentality, any public authority or person whose actions bear insignia of public law element or public character are amenable to judicial review and the validity of such an action would be tested on the anvil of Art. 14"[35]

Thus, when the matter falls within the realm of public law rather than of private law, the High Court can take cognisance of the same under Art. 226.[36]

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31. AIR 1991 SC 537 : (1991) 1 SCC 212.
32. *Kerala State Electricty Board v. Kurien E. Kalathil*, AIR 2000 SC 2573 : (2000) 6 SCC 293; *N.T. Abraham v. State of Kerala*, AIR 2000 SC 3459; *Radharaman Enterprises v. Cuttack Municipal Corp.*, AIR 2001 Ori 57.
33. *Sterling Computers Ltd. v. M and N Publications Ltd.*, (1993) 1 SCC 445, 464.
34. *LIC of India v. Consumer Education and Research Centre*, AIR 1995 SC 1811, at 1822 : (1995) 5 SCC 482.
35. Also see, Ch. XXI, Sec. D(iv).
36. *Common Cause, a Registered Society v. Union of India*, AIR 1999 SC 2979 : (1999) 6 SCC 667.

If the government takes unreasonable and arbitrary decisions while acting in pursuance of a contract, the matter would fall under the writ jurisdiction. There is the duty on the state to act fairly in respect of a contract as well.[37] But where a municipality is financially handicapped, it would not be arbitrary to enter into contract with a private person to take house numbering, erection of street sign boards etc. on the condition that the entire costs of the project would be borne by the private party though some nominal payment would be made by the Corporation and although the private person would be free to let out to its clients space provided for advertising purposes.[38]

When some statutory element enters into a contract, a writ may be issuable. A writ may be issued when some features of public law are involved along with contractual relationship. In many cases of contracts between government and private persons, the concerned officers seek to exercise statutory or administrative powers. The exercise of such powers can not be viewed as exercise of powers under the contract between the government and the private party concerned. As the Supreme Court has observed in *Ram Sanehi*[39] : "We are unable to hold that merely because the source of the right which the respondent claims was initially a contract, for obtaining relief against any arbitrary and unlawful action on the part of a public authority he must resort to a suit and not a petition by way of a writ."

In *Ram Sanehi*, the petitioner had purchased, through an auction, the right to cut trees for a year. The Divisional Forest Officer (D.F.O.) passed an order depriving the petitioner of some timber cut by him. He filed a writ petition challenging the DFO's order on the ground that he was not given a hearing by him before passing the order. The DFO argued that the matter arose out of the terms of the contract and so no writ petition was maintainable.

The Supreme Court rejected the contention of the DFO and quashed the order passed by him stating that by his order, a public authority had deprived the petitioner of a valuable right. The writ petition was maintainable, even if the "right to relief arose out of an alleged breach of contract where the action challenged was of a public authority invested with statutory power".

This means that a writ petition is maintainable to challenge action by a public administrator when it is exercising statutory or administrative power even within the frame of contractual relationship between the authority and the person concerned. Besides, there is now a growing body of cases where writ petitions have been held maintainable where the contract has a statutory flavour, or where some question of public law is involved.[40]

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37. See, *Gujarat State Financial Corp. v. Lotus Hotels Pvt. Ltd.,* AIR 1983 SC 848; *Asst. Excise Commissioner v. Issac Peter,* (1994) 4 SCC 104; *Mahabir Auto Stores v. India,* AIR 1990 SC 1031; *Dwarka Marfatia & Sons. v. Board of Trustees of the Port of Bombay,* AIR 1989 SC 1642; *India v. Graphic Industries Co.,* AIR 1995 SC 409.

38. *M & T Consultants, Secunderabad v. S.Y. Nawab,* (2003) 8 SCC 100 : AIR 2004 SC 4942.

39. *D.F.O. v. Ram Sanehi Singh,* AIR 1973 SC 205.

40. See, *Surendra Nath v. DDA,* AIR 1988 Del 277; *M.S. Desai & Co. v. Hindustan Petroleum Corpn. Ltd.,* AIR 1987 Guj 20. This topic falls more appropriately in the area of Administrative Law rather than Constitutional Law. For detailed discussion on this topic, see, JAIN, A TREATISE ON ADMINISTRATIVE LAW, II

In regard to a challenge to a voluntary retirement scheme of a nationalized bank, the contention that the writ petition was not maintainable as the employees sought to enforce a contract has been repelled.[41]

The Indian Oil Corporation issued a letter of intent to the petitioner allotting a petrol pump to him. Later the Corporation cancelled the letter of intent. The Patna High Court quashed the order of cancellation under Art. 226 as being arbitrary as there was no material supporting the order. The Court asserted that arbitrariness is anathema to law.[42] The Court maintained that government and its agencies must act fairly even in contractual matters.[43]

However, confusion is worse confounded when the Supreme Court in regular intervals, says that contractual duties cannot be enforced by way of mandamus. For example, the court has said: (a) The contractual power is used for a public purpose and a contract cannot be characterised statutory simply because it is awarded by a statutory body;[44] (b) Mandamus will not be issued to compel the authorities to do something, unless it is shown that there is a statute which imposes a legal duty and the aggrieved party has a legal right under the statute to enforce its performance; (c) The prayer made in the writ petition is for issuance of a writ of mandamus to direct the NTC to supply the contracted goods (cloth) because it was a case of pure and simple business contract.[45]

The question relating to justiciability of matters pertaining to contracts has been considered also in many recent cases.[46] In *Ramchandra*[47] the Court recognized the necessity of a statutory authority while exercising its powers under the Act must necessarily take policy decisions and although a tender has been floated and before the completion of the process, a new policy is adopted, the question is not whether the offer of the appellants should have been rejected (being the highest offer) but is as to whether the Authority in law could have altered its policy in regard to disposal of its properties. A policy decision would involve change of the policy from time to time. But only because a change is effected, the same by itself does not render a policy decision to be illegal or otherwise vitiated in law. Hence the decision taken by the authority for canceling a tender process so as to enable it to have a relook of the entire project would not by itself be termed as arbitrary. And the point that the executive committee appointed by the Authority which dealt with the tender process did not cancel the tender was of no significance since it was the Authority, which "exercises a larger power" was clearly entitled to make alterations in the policy.

In ABL International the Court held that judicial review is not ousted merely because the activity of the authority relates to a contractual matter subject to the obvious that each case must be decided on its own facts. In Star Enterprises the Supreme Court pointed out that the traditional limitation relating to judicial

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41. *Bank of India v. O.P. Swarnakar,* (2003) 2 SCC 721 : AIR 2003 SC 858.
42. *Alok Prasad Verma v. Union of India,* AIR 2001 Pat 211.
43. *Mahabir Auto Stores v. Indian Oil Corporation,* AIR 1990 SC 1031 : (1990) 3 SCC 752.
44. *Binny Ltd. v. V. Sadasivan,* (2005) 6 SCC 657 : AIR 2005 SC 3202.
45. *National Textile Corpn. Ltd. v. Haribox Swalram,* (2004) 9 SCC 786 : AIR 2004 SC 1998.
46. *Ramchandra Murarilal Bhattad v. State of Maharashtra,* (2007) 2 SCC 588 : AIR 2007 SC 401; *ABL International Ltd. v. Export Credit Guarantee Corporation of India Ltd.,* (2004) 3 SCC 553 : (2003) 10 JT 300; *Star Enterprises v. City and Industrial Development Corporation of Maharashtra Ltd.,* (1990) 3 SCC 280.
47. (2007) 2 SCC 588 : AIR 2007 SC 401.

review have been vanishing and judicial scrutiny is being expanded. As Ranganath Misra, J said:

> "As the State has descended into the commercial field and giant public sector undertakings have grown up, the stake of the public exchequer is also large justifying larger social audit, judicial control and review by opening of the public gaze; these necessitate recording of reasons for executive actions including cases of rejection of highest offers".

By imposing a condition like purchase preference no option is left and a monopoly is being created. The increase in effectiveness of PSEs cannot be done on an uniform policy without examination as to whether such protection is necessary for a particular PSE. It has to be examined individually as to whether any differential treatment is called for, and therefore, directed that industry-wise assessment be done and if there is already cost effectiveness in any PSEs there may not be any need for the preference being given. The examination should be on the line as to whether any preference is called for and what would be the margin of preference which would ensure level paying field.[48] Where the State or its agency is unable to perform a contract for supplying granite blocks not because of any default on the part of the successful bidders, it is obliged to refund the deposits held by it and the threat of forfeiture by its instrumentality was unjust and arbitrary.[49]

G. SALE OF GOVERNMENT PROPERTY

The basic purpose observed in this area is that a public authority does not have an open end discretion to dispose of its property at whatever price it likes. The principle is that the sale should take place openly and the effort should be to get the best price. The several methods which can be employed for this purpose are : (i) public auction; (ii) inviting tenders for the property.

As the Supreme Court has observed in State of Uttar Pradesh v. Shiv Charan Sharma:[50]

> "Public auction with open participation and a reserved price, guarantees public interest being fully subserved".

The Supreme Court has laid down that mineral rights ought not to be granted through private negotiations but by holding a public auction where those interested in the matter may bid against each other. The Court has observed : "Public auction with open participation and a reserved price guarantees public interest being fully subserved."[51]

In *Haji T.M. Hassan v. Kerala Financial Corpn.;*[52] the Supreme Court has emphasized that public property owned by the state or its instrumentality should be sold generally by public auction or by inviting tenders. Observance of this rule

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48. *Doiwala Sehkari Shram Samvida Samiti Ltd. v. State of Uttaranchal,* (2007) 11 SCC 641 : (2006) 13 SCALE 540.

49. *Karnataka State Forest Industries Corporation v. Indian Rocks,* (2009) 1 SCC 150 : AIR 2009 SC 684.

50. AIR 1981 SC 1722 : 1981 Supp SCC 85.

51. *State of Uttar Pradesh v. Shiv Charan Sharma,* AIR 1981 SC 1722 : 1981 Supp SCC 85. Also, *Ram and Shyam Co. v. State of Haryana,* AIR 1985 SC 1147 : (1985) 3 SCC 267.

52. AIR 1988 SC 157 : (1988) 1 SCC 166.

not only fatches the highest price for the property but also ensures fairness in the activities of the state and public authorities. There should be no suggestion of discrimination, bias, favouritism or nepotism. But there may be situations when departure from this rule may become necessary. Such situations must however be justified by compulsion and not by compromise. It must be justified by compelling reasons and not by just convenience.

Balco,[53] is the latest pronouncement of the Supreme Court on the disposal of government property. 51% equity in Balco, a government undertaking, was sold to a private company by inviting tenders through global advertisement. The sale was challenged on various grounds but the Supreme Court rejected all the contentions and upheld the sale. The following three main propositions emerge from the Court decision:

(1) Divestment by the government in a public enterprise is a matter of economic policy which is for the government to decide. The Court does not interfere with economic policies unless there is a breach of law.

(2) Sale of an undertaking to the highest bidder after global advertisement inviting tenders at a price which was way above the reserve price fixed by the government could not be said to be vitiated in any way. The procedure followed was proper.

(3) The matter of fixation of the reserve price being a question of fact, the Court does not interfere unless the methodology adopted for the purpose is arbitrary

The State or its instrumentalities should not discharge their functions so as to aspire to earn a huge profit at the cost of those who are fully dependent upon it for supply of a monopoly item. They could however be permitted to make a reasonable profit.[54] In *Ashoka Smokeless*[55] the Supreme Court was considering the challenge under Articles 14 and 19 as to the validity of price fixation by the coal companies in the public sector by the method of e-auction through the internet. The Court referring to the constitutional and statutory obligations of the Central Government as well as the coal companies observed that since they were exercising monopolistic power, it was their duty to distribute coal equitably and at a fair price.[56] Although they are not expected to suffer losses but at the same time must make an essential commodity available at a fair price.[57] The Court considered the advantages as well as the disadvantages of e-Auction and indicated certain factors to be taken into consideration :

(i) The concept of price fixation is that all persons who are in requirement of the commodity should know the basis or criteria thereof;[58]

(ii) While adopting a policy decision as regards the mode of determining the price of coal, either fixed or variable, the coal companies were

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53. *Balco Employees Union (Regd.) v. Union of India*, AIR 2002 SC 350 : (2002) 2 SCC 333.
54. *Ashoka Smokeless Coal India (P) Ltd. v. Union of India*, (2007) 2 SCC 640 : (2007) 1 JT 125.
55. *Ibid.*
56. *Ibid.*
57. *Ibid* at 687.
58. *Ibid* at 691.

bound to keep in mind social and economic aspect of the matter. They could not take any step which would defeat the constitutional goal;

(iii) Arbitrary fixation of price and arbitrary mode of fixation would be violative of article 14 of the constitution;

(iv) A monopoly concern is meant to cater to the needs of all sections of people;

(v) E-auction is not a policy decision of the Central Government but a policy decision on the part of the executive of the Central Government and must be strictly construed in terms of Article 77 of the Constitution;

(vi) Since the price fixation of an essential commodity is to be determined on the touchstone of public interest, the state has to follow a rational and fair procedure and for that purpose may collect data, obtain public opinion, and may appoint an Expert Committee;

(vii) In the facts the coal companies proceeded only to safeguard their own interest as dealer and not as a State and primarily for a profit motive;

(viii) It was no defence for the coal companies to say that they were acting at the instance of the Central Government when there was no control over the price and had no say in the matter of fixation of price under the Colliery Control Order, 2000;

(ix) The government or the coal company could change an existing policy subject to satisfaction of the constitutional requirements and adopt e-advertisement or e-tender if due and proper transparency is maintained;

It would not be proper to confine these tests to price fixation through E-auction only. Most of these tests would be applicable to price fixation generally.

PART VII

CONSTITUTIONAL INTERPRETATION AND AMENDMENT

CHAPTER XL

CONSTITUTIONAL INTERPRETATION

SYNOPSIS

A. DOCTRINE OF JUDICIAL REVIEW

In democratic countries, the judiciary is given a place of great significance. Primarily, the courts constitute a dispute-resolving mechanism. The primary function of the courts is to settle disputes and dispense justice between one citi-

zen and another. But courts also resolve disputes between the citizen and the state and the various organs of the state itself.

In many countries with written constitutions, there prevails the doctrine of judicial review. It means that the constitution is the supreme law of the land and any law inconsistent therewith is void. The courts perform the role of expounding the provisions of the constitution and exercise power of declaring any law or administrative action which may be inconsistent with the constitution as unconstitutional and hence void. This judicial function stems from a feeling that a system based on a written constitution can hardly be effective in practice without an authoritative, independent and impartial arbiter of constitutional issues and also that it is necessary to restrain governmental organs from exercising powers which may not be sanctioned by the constitution.[1]

The responsibilities which a Court carries in a country with a written constitution are very onerous—much more onerous than the responsibilities of a Court without a written constitution. The courts in a country like Britain interpret the laws but not the Constitution, whereas the courts in a country with a written constitution interpret the provisions of the constitution and, thus, give meaning to the cold letter of the constitution. The courts thus act as the Supreme interpreter, protector and guardian of the supremacy of the constitution by keeping all authorities—legislative, executive, administrative, judicial or *quasi*-judicial—within legal bounds. The judiciary has the responsibility to scrutinize all governmental actions in order to assess whether or not they conform with the constitution and the valid laws made thereunder.

The Courts can declare any exercise of power invalid if it infringes any provision in the constitution. In a constitution having provisions guaranteeing Fundamental Rights of the people, the judiciary has the power as well as the obligation to protect the people's rights from any undue and unjustified encroachment by any organ of the State. Further, in a country having a federal system, the judiciary acts as the balance-wheel of federalism by settling disputes between the Centre and the States, or among the States *inter se*. Federalism is a legalistic form of government because of distribution of powers between the Centre and the States

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1. There is a wealth of material elucidating the contribution made by the U.S. Supreme Court to the development of the Constitution through its interpretative process : Douglas, *FROM MARSHALL TO MUKHERJEA* : STUDIES IN AMERICAN AND INDIAN CONSTITUTIONAL LAW, (1956); RAMASWAMY, THE CREATIVE ROLE OF THE SUPREME COURT OF THE UNITED STATES (1956); SCHWARTZ, THE SUPREME COURT (1957); SWISHER, THE SUPREME COURT IN MODERN ROLE (1958); ZIEGLER, THE SUPREME COURT AND THE AMERCIAN ECONOMIC LIFE (1962); MCCLOSKEY, ESSAYS IN CONSTITUTIONAL LAW (1962); FREUND, ON UNDERSTANDING THE SUPREME COURT (1951); ROBERTS, THE COURT AND THE CONSTITUTION (1951); CHASE & DUCAT, CONSTITUTIONAL INTERPRETATION (1974). Also, IRANI, THE COURTS AND THE LEGISLATURE IN INDIA, 14 ICLQ., 950 (1965); CAPPELLETTI JUDICIAL REVIEW IN THE ONTEMPORARY WORLD; HILLER, The LAW-CREATIVE ROLE OF APPELLATE COURTS IN DEVELOPING COUNTRIES; An Emphasis on East Africa, 24 *Int. & Comp LQ* 205 (1975); SEERVAI, THE POSITION OF THE JUDICIARY UNDER THE CONSTITUTION OF INDIA (1970); V.S. DESHPANDE, JUDICIAL REVIEW OF LEGISLATION (1975) and author's review thereof in 16 *JILI* 727 (1974); DIPLOCK, *The Courts as Legislators* (1965); JAFFE, ENGLISH & AMERICAN JUDGES AS LAW MAKERS (1969); M.P. JAIN, Role of the Judiciary in a Democracy, (1979) *JMCL* 239; S.P. SATHE, JUDICIAL ACTIVISM IN INDIA *(2002);* T.R. ANDHYARUJINA, JUDICIAL ACTIVISM AND CONSTITUTIONAL DEMOCRACY IN INDIA (1992). Court only interprets the law and cannot legislate thereof, if a provision of law gives rise to misuse, it is for the legislature to amend, modify or repeal it, if deemed necessary. *Sushil Kumar Sharma v. Union of India*, (2005) 6 SCC 281.

by the constitution itself, and, therefore, an arbiter is needed to draw a balance between the Centre and the States.[2]

The task of interpreting the constitution is a highly creative judicial function. A democratic society lives and swears by certain values—individual liberty, human dignity, rule of law, constitutionalism, limited government, and it is the task of the judiciary to so interpret the constitution and the law as to constantly inculcate these values on which democracy thrives. Also, the courts must keep in mind that the society does not stand still; it is dynamic and not static; social and economic conditions change continually. Therefore, the courts must so interpret the constitution that it does not fall behind the changing, contemporary societal needs. The words of the constitution remain the same, but their significance changes from time to time through judicial interpretation.[3]

Judicial review has two prime functions: (1) Legitimizing Governmental action; (2) to protect the constitution against any undue encroachments by the Government. These two functions are inter-related.

In exercising the power of judicial review, the courts discharge a function which may be regarded as crucial to the entire governmental process in the country. The bare text of the constitution does not represent in itself the 'living' law of the country. For that purpose, one has to read the Fundamental text along with the gloss put thereon by the courts. As Dowling has stated while evaluating the role of the U.S. Supreme Court; "The study of constitutional law may be described in general terms as a study of the doctrine of judicial review in action."[4]

This characterisation is true of the U.S.A. To some lesser extent, it is true of other constitutions as well. To what extent the judicial interpretation supplements the written text of a constitution depends on how creative and activist role is played by the courts. The task of rendering an authoritative interpretation of the constitution converts the courts into vital instruments of government and policy-making. Here is a challenging and creative task for the courts to perform.

The interpretative function of the constitution is discharged by the courts through direct as well as indirect judicial review. In direct judicial review, the Court overrides or annuls an enactment or an executive act on the ground that it is inconsistent with the constitution. In indirect judicial review, while considering constitutionality of a statute, the Court so interprets the statutory language as to steer clear of the alleged element of unconstitutionality.

JUSTICE DOUGLAS characterises this practice as "tailoring an Act to make it constitutional" and explains it further thus: "If a construction of the Act is possible that will save it from being constitutionally infirm, the Court will adopt that construction. This practice of saving an Act by construing it to avoid the constitutional issue has sometimes been carried a long way."[5] But this is a part of judicial strategy in deciding constitutional controversies. When a judge faced with several alternative interpretations of a constitutional provision, chooses one of these, he necessarily performs a 'law-making' function.

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2. *Supra*, Chs. X-XV.
3. Also see, next Chapter.
4. DOWLING, CASES AND MATERIALS ON CONSTITUTIONAL LAW, 19 (1965).
5. DOUGLAS, MARSHALL TO MUKHERJEA, 16; *infra*, See H, this Chapter.

Britain has no written constitution and, therefore, there is no direct judicial review there. But courts do resort to indirect judicial review at times. They interpret constitutional provisions restrictively to protect civil liberties.[6] Some rules of statutory interpretation have been developed with this aim in view, *e.g.*, a criminal law or a tax law should be strictly construed, or that judicial review of delegated legislation cannot be excluded unless there are clear words to that effect.[7]

The Constitution of Canada or Australia does not contain any express provision for judicial review, yet the process goes on and judicial review has become an integral part of the constitutional process. The historical origin of judicial review in these countries is traceable to the colonial era. The colonial legislatures were regarded as subordinate legislatures *vis-a-vis* the British Parliament[8] and they had to function within the parameters of the statutes enacted by the British Parliament. The colonial laws were, therefore, subject to judicial review, and this process continued long after the colonies ripened into self-governing dominions. The doctrine of judicial review was thus ingrained into the legal fabric of Canada and Australia and, therefore, no need was felt to include a specific constitutional provision in the basic laws of these countries.[9]

The doctrine of judicial review is an integral part of the American judicial and constitutional process although the U.S. Constitution does not explicitly mention the same in any provision. The Constitution merely says that it would be the supreme law of the land.

Before the Constitution, the legislation of the American colonies was subject to judicial review. But, after the Constitution, in 1803, in the famous case of *Marbury v. Madison,*[10] in one of its most creative opinions, the U.S. Supreme Court very clearly and specifically claimed that it had the power of judicial review and that it would review the constitutionality of the Acts passed by the Congress. The Court argued that the Constitution seeks to define and limit the powers of the legislature, and there would be no purpose in doing so if the legislature could overstep these limits at any time.

In the words of the Court: "Certainly all those who have framed the written constitutions contemplate them as forming the Fundamental and paramount law of the nation, and consequently, the theory of every such government must be that an act of the legislature, repugnant to the constitution, is void." And, further, "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the Court must either decide that case conformably to the law disregarding the constitution; or conformably to the constitution disregarding the law; the Court must determine which of these conflicting rules governs the case. This is the very essence of Judicial duty."

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6. *Infra*, footnote 18.
7. See, *supra*, Ch. I; Ch. II, Sec. N, *supra*.
8. *Supra*, Ch. II, Sec. M.
9. EDWARD MCWHINNEY, JUDICIAL REVIEW, 49-75 (1969); LEDERMAN, THE COURTS AND THE CANADIAN CONSTITUTION (1964).
10. 1 Cranch 137; 2 L Ed 60.

Thus, the theoretical foundation of the doctrine of judicial review in the U.S.A. is that in exercise of its judicial functions, the Supreme Court has the power to say what the law is, and in case of conflict between the constitution and a legislative statute, the Court will follow the former, which is the superior of the two laws, and declare the latter to be unconstitutional.

If a law inconsistent with the constitution were not to be declared void, then the written constitution loses all its value and significance. When a law is in opposition to the constitution, it is the duty of the courts to follow the constitution and not the law.

About the significance of judicial review in a written constitution, SCHWARTZ observes: "A constitution is naught but empty words if it cannot be enforced by the courts. It is judicial review that makes constitutional provisions more than mere maxims of political morality. In practice, there can be no constitution without judicial review. It provides the only adequate safeguard that has been invented against unconstitutional legislation. It is, in truth, the *sine qua non* of the constitutional structure."[11]

The doctrine of judicial review has made the U.S. Supreme Court a vital institution in the governmental process in the country.[12] In the U.S. Constitution the Fundamental Rights of the people are couched in very general phraseology, and the exceptions and restrictions thereon are worked out judicially from time to time in the context of contemporary socio-economic and political conditions.[13] For example, the phrase 'due process of law' used in the U.S. Constitution gives a good deal of leeway to the Supreme Court for creativity.[14]

Although the modern doctrine of judicial review is ascribed to *Marbury v. Madison,* as noted above, the idea underlying judicial review, namely, to test and invalidate 'state action' (legislative or executive) by reference to a higher organic instrument can be traced to the natural law doctrine according to which man-made law was susceptible to correction and invalidation by reference to a higher law.[15]

This natural law doctrine found expression in Britain in 1610 in *Dr. Bonham's* case,[16] where COKE, LCJ, asserted : "When an act of Parliament is against common law right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such act to be void." This doctrine did not, however, become fully operational in Britain. In course of time, this doctrine was jettisoned and its place was taken over by the theory of parliamentary sover-

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11. CONSTITUTIONAL LAW: A TEXTBOOK, 3 (1972).
12. See, RAOUL BERGER, GOVERNMENT BY JUDICIARY (1977).
13. For example, in 1952, the U.S. Supreme Court in *Brown v. Board of Education,* 347 US 483, invalidated segregation between the Whites and the Blacks in educational institutions overruling its earlier decision in *Plessy v. Ferguson,* 163 US 527 (1896). In *Reynolds v. Sims,* 377 US 533, the Supreme Court translated the equality principle in to the principle of "one man-one vote". The Court thus held that the seats in a House of State Legislature must be apportioned on population basis.
14. In *Gideon v. Wainwright,* 372 US 335, the Court accepted the right of an accused to have a lawyer at state expense, if he could not afford one himself. In *Miranda v. Arizona,* 384 US 436, the Supreme Court granted certain rights to an accused at the time of police interrogation.
15. M.J. HARMON, POLITICAL THOUGHT FROM PLATO TO THE PRESENT; Grant, The Natural Law Background of Due Process, 31 *Col LR* 56; Corwin, The 'Higher Law' Background of American Constitutional Law, 42 *Harv LR* 149.
16. 8 Coke's Reports, 114 at 118.

eignty. Because of the conflict between the Crown and Parliament, judges sided with Parliament and, in the process, accepted the theory of parliamentary sovereignty. The doctrine of judicial review then became confined to the colonies overseas. Even prior to the U.S. Constitution, the Privy Council did exercise powers of judicial review over the American and other colonies.[17]

But even in Britain indirect judicial review does go on all the time. As Wade points out: "All law students are taught that Parliamentary sovereignty is absolute. But it is the judges who have the last word. If they interpret an Act to mean the opposite of what it says, it is their view which represents the law."[18]

There are many who argue against the very concept of judicial review of constitutional issues. They characterise it as anti-majoritarian. In the U.S.A., since *Marbury v. Madison*,[19] the institution of judicial review has been a subject of perennial and even passionate debate among the scholars and jurists.

Some scholars have asserted that it is a usurpation of power by the judiciary as the Constitution is silent on the point of judicial review.[20] Others assert that review of legislation is not a judicial function and is very different from the function usually discharged by the courts. But several scholars have argued that it is not so and that the framers of the Constitution did envisage and contemplate judicial review.[21] Some have asserted that judicial review is undemocratic as the judges who declare statutes unconstitutional are neither elected by, nor are responsible to, the people.[22]

But there are many scholars who do not agree with this view. They argue that a democracy need not have all officials elected, and that judicial review is democratic as it promotes democracy by safeguarding the rights of the people and cabining government organs within the confines of the constitution.[23] In a democracy, the majority may not always be right and there always lurks the danger of oppression of the minority by the majority. Judicial review can keep such a tendency in check by keeping the majority within the bounds of the constitution. In the words of Chief Justice WARREN : "The Court's essential function is to act as the final arbiter of minority rights."

A democracy needs a forum, other than the legislature and the executive, for redressing the legitimate grievances of the minorities-racial, religious, political or others. In India, at the present time, the Supreme Court is laying great emphasis on vindication of the rights of the poor and deprived people.[24] This sentiment has been expressed graphically by a Supreme Court Judge as follows: "Judicial

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17. As early as 1727, the Privy Council declared a Connecticut statute null and void: *Winthorp v. Lechmere in* Thayer, *Cases on Constitutional Law*, 34 (1895).

18. WADE, CONSTITUTIONAL FUNDAMENTALS, 65.
Also see, J.A.G. GRIFFITH, THE POLITICS OF JUDICIARY (1977).

19. *Supra*, footnote, 10.

20. BOUDIN, GOVERNMENT BY JUDICIARY (1932); HAND, THE BILL OF RIGHTS (1958).

21. BERGER, CONGRESS V. THE SUPREME COURT (1969).

22. THAYER, The Origin and Scope of the American Doctrine of Constitutional Law, 7 *Harv LR* 129 (1889); SCHWARTZ, A BASIC HISTORY OF THE US SUPREME COURT, 87 (1970).

23. ROSTOW, The Democratic Character of Judicial Review, 66 *Harv, LR* 193 (1952); BLACK JR., THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY (1960); ATIYAH, JUDGES AND POLICY, *supra*, at 362-5.
See generally on Judicial Review, LEONARD W. LEVY, JUDICIAL REVIEW AND SUPREME COURT (1967).

24. See, *supra*, Ch. XXXIV on "Directive Principles".
Also see, *supra*, Chs. VIII, Sec. D(k) and XXXIII, Sec. B, under "Public Interest Litigation".

activism gets its highest bonus when its order wipes some tears from some eyes."[25] Thus, there are supporters and detractors of judicial review.

In spite of this debate, the fact remains that judicial review is an integral part of the American constitutional process, a part of the living Constitution in the U.S.A., and the same is true of India. There are overwhelming reasons as to why the courts should act as authoritative expounder of the constitution and possess power of judicial review.

A written constitution is not a self-executing document, and meanings of several provisions may not always be self-evident. Such a constitution would be reduced to a mere paper document in the absence of an independent organ to interpret, expound and enforce the same. The power of constitutional review by some organ of government is implicit in the concept of a written constitution which seeks to confer limited powers. In the absence of an accepted authority to interpret the constitution, a written constitution would promote discord rather than order in society when different organs of government take conflicting action in the name of the constitution, or when government takes action against the individual.

The legislature and the executive are politically partisan bodies and are committed to certain policies and programmes which they wish to implement. Therefore, they cannot be trusted with the final power of constitutional interpretation. They would often seek to bend the constitution to their own views and accommodate their own policies. The constitution would thus become a plaything of the politicians.

The judiciary is by and large free from active political bias, is politically neutral, and so can be expected to bring to bear a somewhat detached and non-political outlook on constitutional interpretation. If there is any institution in the country which can do so it is the judiciary. It can be expected to expound the constitution dispassionately, apolitically, coolly and with some sense of detachment, to the extent it is humanly possible to achieve such a mental condition in human beings.

The Court gives a reasoned decision after hearing arguments for and against a particular alternative. It is, therefore, regarded as the most suited to act as an umpire in constitutional controversies. In the absence of any effective enforcement machinery, the Fundamental Rights in the constitution will be reduced to mere formal and empty platitudes with no restraint on the government or the legislature.

Federalism and Fundamental Rights add new dimensions to the significance of the judicial role of constitutional interpretation. In the absence of an effective enforcement machinery, the Fundamental Rights will be reduced to mere platitudes. Similarly, the balance of power between the Centre and the States will become untenable if either of them were to have the power to decide for itself where the limits for its functions were to lie. It is only the courts, away from contemporary partisan political controversies, which can with some detachment draw the line between the functions of the Centre and the States.

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25. *The Punjab Rickshaw Pullers'* case, *infra*.
Also see, *State of Haryana v. Darshana Devi,* AIR 1979 SC 857 : (1979) 2 SCC 236; *D.S. Nakara v. Union of India,* AIR 1983 SC 130 : (1983) 1 SCC 305.

The judicial review serves as a necessary check on the possible excesses by the legislature and the executive. Judicial review helps in channelizing the acute and extreme controversies of the day into legal channels.

In the U.S.A., judicial review has been characterised as "the principal process of enunciating and applying certain enduring values of" the American society. As Justice JACKSON observes: "The people have seemed to feel that the Supreme Court, whatever its defects, is still the most detached, dispassionate and trustworthy custodian that our system affords for the translation of abstract into concrete constitutional commands."[26]

There is another more abiding consideration in favour of judicial review. Modern political thought draws a distinction between 'constitution' and 'constitutionalism'[27]. A country may have a constitution but not necessarily constitutionalism. Constitutionalism denotes a constitution not only of powers but also restraints as well. A constitution envisages checks and balances and putting the powers of the legislature and the executive under some restraints and not making them uncontrolled and arbitrary. "Constitutionalism has one essential quality: it is a legal limitation on government; it is the antithesis of arbitrary rule; its opposite is despotic government, the government of will instead of law....."[28] Judicial Review is the cornerstone of constitutionalism.

Even in Britain at present there is a growing demand that there should be a written constitution with judicial review. Judicial review plays a significant role in promoting constitutionalism, democratic values and rule of law in the country.[29]

In a parliamentary system, the majority automatically supports the government in office. This results in the powers of the legislature gravitating towards the executive. In such a context, in order to maintain personal rights and a balanced administration, some external restraint on government becomes an absolute necessity. Therefore, even if it slows down somewhat the implementation of socio-economic programmes, that is the price one has to pay for promoting constitutionalism, rule of law and democratic behaviour in the country.

It can also be argued that democracy should not be seen simply as the majority rule, it also includes a set of principles about the exercise of power. Also, a parliamentary majority on a particular issue may not reflect majority opinion in the society.

It is wrong to assume that a society is not democratic unless its legislature has unlimited powers. In a parliamentary system, the majority automatically supports the government of the day, and, thus, the powers of the legislature gravitate to the government and to maintain individual rights, some external restrictions on the government are absolutely necessary.

In any case, the controversy over the role of judicial review is merely academic at present as the people have come to accept it. They realize that the only

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26. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT, 23 (1965).
27. *Supra*, Ch. I.
28. MCLLLWAIN, CONSTITUTIONALISM, ANCIENT & MODERN, 21-22, 146 (1958). Also, *supra.*
29. SCARMAN, THE NEW DIMENSIONS OF ENGLISH LAW.
Also see, Lord Hailsham's Richard Dimbleby Lecture in the Times, Oct. 15, 1976. He has characterised the present-day government in Britain as "elective dictatorship".
Also, *supra*, Ch. 20, Sec. A.

way in which constitutional limitations can be enforced in practice is through the medium of the courts.

Finally, the following observations of Justice CARDOZO may be quoted in support of judicial review:[30]

> "The great ideals of liberty and equality are preserved against the assaults of opportunism, the expediency of the passing hour, the erosion of small encroachments, the scorn and derision of those who have no patience with general principles, by enshrining them in constitutions, the consecrating to the task of their protection a body of defenders. By conscious or sub-conscious influence, the presence of this restraining power, aloof in the background, but none the less always in reserve, tends to stabilize and rationalize the legislative judgment, to infuse it with the glow of principle, to hold the standard aloft and visible for those who must run the race and keep the faith."[31]

Justice CARDOZO accepted that the judiciary only rarely declares a statute unconstitutional but he insisted:

> "The utility of an external power restraining the legislative judgment is not to be measured by counting the occasions of its exercise ..... The restraining power of the judiciary does not manifest its chief worth in the few cases in which the legislature has gone beyond the lines that mark the limits of discretion. Rather shall we find its chief worth in making vocal and audible the ideals that might otherwise be silenced, in giving them continuity of life and of expression, in guiding and directing choice within the limits where choice ranges. This function should preserve to the courts the power that now belongs to them, if only the power is exercised with insight into social values, and with suppleness of adaptation to changing social needs."

But as CHARLES L. BLACK JUNIOR emphasizes judicial review has two aspects—that of imprinting governmental action with the stamp of legitimacy as well as that of checking political power when it encroaches on any ground forbidden by the constitution. Both these functions are interdependent; the legitimating and checking functions go hand in hand.[32]

It needs to be underlined that in spite of the avowed acceptance of the law creative role of the judges, they are not traditionally attuned to too much activism. The above statement of CHARLES EVANS HUGHES is really an over-statement and represents too drastic and too simplified an analysis of the complex position of the judiciary and the judicial review in the country's constitutional system. [33]

The judges are not absolutely free agents in rendering their decisions. They are bound *inter alia* by the taught tradition of the law, *stare decisis*, their own sense

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30. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, 91-93.

31. A similar idea is expressed by *EDWARD MCWHINNEY* in COMPARATIVE FEDERALISM in the following words:

> "The Court consists of elitist group of high talents, aspirations and ideals. Liberal democratic society rests, in the ultimate, on certain basic ideals such as, free speech, and discussion, freedom of association, freedom of conscience and when they are threatened by the Executive and Legislative authority, it is absurd to rest on any abstract academic conception of separation of powers and say that judges may not properly intervene in the protection of those interests. Thus, the maintenance of free society posits the existence of an independent judiciary and entrusting to the judiciary all the responsibilities in the ultimate for the preservation of the open society ideal."

32. THE PEOPLE AND THE COURT, 123.

33. *Infra*, footnote 51.

of self-restraint, the socio-economico-political setting in which they are deciding a controversy. The courts decide a matter only when it is brought before them and not otherwise. The Court's decisions may be reversed either by legislation or constitutional amendment and the Court may correct itself by overruling a previous decision.[34] The Judges have often reminded themselves of the restraints under which they function. In the pithy words of JUSTICE STONE of the U.S. Supreme Court:

> "The power of courts to declare a statute unconstitutional is subject to two guiding principles of decision.... One is that courts are concerned only with the power to enact statutes, not with their wisdom. The other is that while unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our exercise of power is our own sense of self-restraint. For the removal of unwise laws from the statute books appeal lies not to the courts, but to the ballot and to the processes of democratic government."[35]

B. *LITERAL V. LIBERAL APPROACH*

How do the courts approach their task of interpreting the constitution. Judicial attitude to the constitution is linked with another basic question of jurisprudential nature: Do courts make law or do they only declare law?

The old orthodox theory was that a judge never creates law, but that he only declares law. This mechanistic view of the judicial function was prevalent in Britain in the early twentieth century. This typical attitude was expressed by BLACKSTONE thus: the duty of the Court is not to 'pronounce a new law but to maintain and expound the old one.'[36] Even as late as 1951, Lord Chancellor JOWITT expressed a similar attitude.[37]

But, in modern times, this time-honoured fiction of the declaratory role of the judge has been dissented from. Lord DENNING has openly preached that the task of common law is to act as an instrument of evolution in accordance with the changing needs of the society and the demands of justice.[38] This view is shared by many other eminent British Judges, such as, Lords DIPLOCK, DEVLIN and REID.[39]

The law-creative function of the judges is very well recognised now.[40] The American realist jurists greatly emphasize such a judicial role.[41] A judge is not an automaton. He has his own scale of values and makes choices accordingly. If one interpretation of the law leads to unjust results, and another interpretation to just results, what prevents a Court from adopting the latter interpretation.

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34. *Infra*, this Chapter, Sec. J.
35. *U.S. v. Butler*, 297 US 1 (1935).
36. BLACKSTONE, COMMENTARIES, 69 (1808).
37. *Australian Law Convention* (1951).
38. DENNING, FROM PRECEDENT TO PRECEDENT; KEETON, VENTURING TO DO JUSTICE.
39. LORD DIPLOCK, *Judicial Development of Law in the Commonwealth*, (1978) 1 *MLJ* cviii—cxiii; Reid, The Judge as Lawmaker, 12 *JSPTL* 22 (1972); LORD HAILSHAM, The Independence of the Judiciary in a Democratic Society, (1978) 2 *MLJ* cxv.
40. P.N. BHAGWATI, Judicial Activism and Public Interest Litigation, (1985) *Col JI. of Transnational Law, 561*; ATIYAH, Judges and Policy, (1980) 15 *Israel LR* 346; *BAXI*, THE INDIAN SUPREME COURT AND POLITICS, (1980).
41. GRAY, THE NATURE AND SOURCES OF THE LAW, 84 (1931).

Influenced by these judicial attitudes, there have been two approaches to the interpretation of a written constitution. One approach is literal, mechanical, narrow interpretation of the constitution where the judgment of the Court constitutes a mere exegesis of the Fundamental text. This approach envisages that the constitution is treated as any other statute passed by the legislature and the same canons of interpretation are applied thereto as are usually applied to the interpretation of ordinary legislative enactments. This is the positivist or the Austinian approach.

The other is the liberal, purposive, law-creative interpretation of the constitution "with insight into social values, and with suppleness of adaptation to changing needs."[42] The courts start with the premise that the constitution being the Fundamental law of the land should be given a somewhat different treatment and interpreted more liberally than an ordinary statute. Interpretation of a statute affects only a limited number of people, but interpretation of the constitution and declaring a statute constitutional or unconstitutional affects the entire governmental functioning, policy-making and even the constitutional process in the country.

Thus, a constitution is not just one of the ordinary statutes. Here the courts play a creative role and even make law while interpreting the constitution. In discharging this task, the courts may have to make implications within the written words of the constitution to bring the whole thing in accord with the more acceptable contemporary norms. Passage of time has been a factor in the interpretative process. Sec. 118 of the Succession Act, 1925 was enacted to prevent persons from making ill-considered deathbed bequests under religious influence. The object behind the said legislation was, therefore, to protect a section of illiterate or semi-literate persons who used to blindly follow the preachers of the religion. Such a purpose has lost all significance with the passage of time and, therefore, has to be declared *ultra vires*.[43]

The courts have to balance public interest and individual interest. It may be that in a given situation, the judge may be faced with several alternative approaches to interpreting a constitutional provision, and when he chooses one of these, he is influenced by his own predisposition, values and policies and these may not necessarily be the same as those of the constitution-makers, or of the legislators enacting the law impugned. Here the role of the courts may not be very much different from being 'constituent' or that of 'law-making.' It has been pointed out that whereas larger interest of the country must be perceived, the law makers cannot shut their eyes to the local needs also. Constitutional interpretation is a difficult task. Its concept varies from statute to statute, fact to fact situations. Mostly the backward suffer from disability either for belonging to an oppressed community or by way of economical, cultural or social imbalances. The courts shall all along strive hard for maintaining a balance.[44]

It may be noted that ultimately it is a matter of judicial attitudes and choices as to how the judges approach the task of constitutional interpretation. At one time, there may be one undercurrent, and at another time, there may be another undercurrent. At one time, a Court may indulge in judicial passivism and at other time

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42. CARDOZO, *supra*, footnote 30.
43. *John Vallamattom v. Union of India,* (2003) 6 SCC 611, 622 : AIR 2003 SC 2902.
44. *Saurabh Chaudri v. Union of India,* (2004) 1 SCC 369.

the same Court may show signs of judicial activism depending upon the predisposition of the judges as well as the type of legislation being considered by them. If at one time the majority of the judges on the Court takes one view, invariably there may be a minority taking the other view. The Constitution is not an ephemeral legal document embodying a set of legal rules for the passing hour. It sets out principles for an expanding future and is intended to endure for ages to come and consequently to be adapted to the various crises of human affairs. Therefore, a purposive rather than a strict literal approach to interpretation should be adopted. A constitutional provision must be construed not in a narrow and constricted sense but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that a provision does not get fossilised but remains flexible enough to meet the newly emerging problems and challenges. This principle of interpretation is particularly apposite to the interpretation of Fundamental Rights.[45]

During the colonial days, the Privy Council would usually apply the canons of statutory interpretation to constitutional interpretation as well.[46] For example, the Privy Council said in *King-Emperor v. Benoari Lal Sharma*:[47] "The question whether the ordinance is *intra vires* or *ultra vires* does not depend on considerations of jurisprudence or policy. It depends simply on examining the language of the Government of India Act." In relation to Canada, the Privy Council said that it would apply to the British North America Act, 1867, the same methods of construction and exposition as were applied to other statutes.[48]

There were two main reasons for such an approach:

(1) the colonial constitutions, e.g., the Government of India Act, or the British North America Act, were only statutes of the British Parliament and so the British judges interpreted them as statutes;

(2) there was preponderant emphasis on the literal approach as the law creative role of the judges had not yet been fully recognised.

After the colonial era gave way to the commonwealth era, the attitude of the Privy Council towards interpretation of the constitutions of the ex-overseas colonies underwent a sea change. For example, in *Hinds v. The Queen*,[49] the Privy Council said: "To seek to apply to constitutional instruments the canons of construction applicable to ordinary legislation in the fields of substantive criminal or civil law would ..... be misleading."

In *Minister of Home Affairs v. Fisher*,[50] the Privy Council posed the question: should a constitution be interpreted according to the same rules as a statute? There were two answers to this question, said the Privy Council. One, recognising the status of the constitution as, in effect an Act of Parliament, there is room for interpreting it with less rigidity, and greater generosity, than other Acts. Two, the more radical answer is: to treat a constitutional institutional instrument such as this as *sui generis*, calling for principles of interpretation of its own, suitable to

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45. *M. Nagaraj v. Union of India*, (2006) 8 SCC 212 : AIR 2007 SC 71.
46. The high-water mark of this approach can be seen in *Kariapper v. Wijesinha*, (1968) AC 717.
47. (1945) 72 IA 57.
48. *Bank of Toronto v. Lambe*, 12 AC 575.
49. (1976) 1 All ER 356. Also see, *Liyanage v. Regina*, (1966) 1 All ER 650.
50. (1979) 3 All ER 21, 25. Also see, *Teh Cheng Poh v. Public Prosecutor*, (1979) 1 MLJ 50.

its character as already described, without necessary acceptance of all the presumptions that are relevant to legislation of private law. The Privy Council preferred the second option. The Privy Council was here interpreting the Fundamental Rights provisions of the Bermuda Constitution. The Privy Council concluded that these provisions "call for a generous interpretation avoiding the austerity of tabulated legalism, suitable to give to individuals the full measure of the Fundamental Rights and freedoms."

In the U.S.A., in the area of constitutional interpretation, judges have always accepted a law-creative role and from time to time have made statements putting emphasis on judicial activism in constitutional matters. For example, there is the famous dictum by CHARLES EVANS HUGHES to the following effect: "We are under a constitution, but the constitution is what the judges say it is."[51]

Voicing a similar approach, a scholar has said: "The texts of constitutional instruments.... seem merely to be the servants of ultimate judicial policies."[52] Thus, in the U.S.A., there has been a greater emphasis on law-creative function of the judiciary. The reason for this may be that the U.S. Constitution is a brief and compact document; it is couched in general language which can be interpreted and re-interpreted by the courts from time to time in the context of contemporary circumstances, *e.g.*, due process of law, interstate commerce, etc. The Supreme Court has thus evolved a number of doctrines which are not mentioned explicitly in the Constitution, *e.g.*, immunity of instrumentalities, separation of powers, police powers, etc.

Further, amendment of the U.S. Constitution has proved to be a very difficult process.[53] Therefore, by and large, it has fallen on the judiciary to re-orient the Constitution to new contemporary socio-economic situations by its interpretative process. In the absence of any such judicial effort, the U.S.A. would have been faced with a static Constitution and its social and economic progress would have been hampered. The Supreme Court has interpreted the U.S. Constitution in such a creative manner that an old document, of nearly 200 years in age, without many amendments, has been serving the needs of the present highly sophisticated technological era. In this way, the Court has not only played the role of an interpreter of the Constitution but even the role of a constitution-maker.

The truth was realised by the U.S. Judges quite early in the day that the interpretation of the Constitution was quite a different matter from interpretation of a statute. As MARSHALL, C.J., said in *McCulloch v. Maryland*:[54] "We must never forget that it is a constitution we are expounding" and that the Constitution is "intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs." BRANDEIS, J., has written :

> "Our Constitution is not a straight jacket. It is a living organism. As such it is capable of growth, of expansion and of adaptation to new conditions. Growth implies changes, political, economic and social. Growth which is significant manifests itself rather in intellectual and moral conceptions of material things."[55]

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51. ABRAHAM, THE JUDICIAL PROCESS, 326 (1968); ABRAHAM, THE JUDICIARY: THE SUPREME COURT IN THE GOVERNMENT PROCESS (1977).
52. EDWARD MCWHINNEY, *supra*, footnote 9, at 19.
53. See, *infra*, Ch. XLI.
54. 17 US 316.
55. HARVARD LAW SCHOOL, BRANDEIS PAPERS.

Courts must have regard to its "great outlines" and important objects. During the last 200 years, there have been quite a few famous law-creative judgments of the U.S. Supreme Court in relation to the U.S. Constitution.

It may be interesting to remember that exercise of the power of constitutional interpretation and judicial review of legislation may not always be smooth for the judiciary. At times, it involves the courts in controversies, and some of the judicial pronouncements may not be palatable to the government of the day, for example, in India, such controversies arose as a result of judicial approach to private property, especially on the question of compensation payable for compulsory acquisition of private property.[56] The Supreme Court's ruling in *Kesavananda* was not liked by the government which sought for an unrestricted power in Parliament to amend the Constitution.[57]

For example, in the U.S.A., in the 1930's, President Roosevelt, in order to fight the prevailing economic depression, initiated an ambitious economic programme, known as the New Deal, but the Supreme Court declared some parts of it unconstitutional. The President was so much annoyed at this that he proposed a plan of appointing a number of judges to pack the Court so as to tilt its decisions in favour of the New Deal programme.[58] But the plan was not pursued as it became very controversial and, with the resignation of one Judge, the President got an opportunity to appoint a Judge of his choice and, subsequently, most of the programme could be judicially upheld.

In Australia and Canada as well, judicial views expressed in relation to certain constitutional provisions have been criticised from time to time.[59]

But such controversies are inherent in any system of judicial review. Courts have no control over the cases which come to them for decision. When a case comes before it, the Court has to decide it one way or the other and, in a politically sensitive case, either way it will give rise to a controversy. Even if the courts were to refuse jurisdiction over a case, or refuse to give the relief asked for, it is still going to give rise to a controversy.

C. JUDICIAL REVIEW IN INDIA

Unlike the U.S.A., the Constitution of India explicitly establishes the doctrine of judicial review in several Articles, such as, 13, 32, 131-136, 143, 226 and 246.[60] The doctrine of judicial review is thus firmly rooted in India, and has the explicit sanction of the Constitution.

Article 13(2) even goes to the extent of saying that "The state shall not make any law which takes away or abridges the rights conferred by this Part [Part III containing Fundamental Rights] and any law made in contravention of this clause shall, to the extent of the contravention, be void."[61] The courts in India are thus

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56. *Supra*, Chs. XXXI and XXXII.
57. *Infra*, next Chapter.
58. CHARLES E. HUGHES, THE SUPREME COURT OF THE *US*, 84-7 (1936); JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY, 343 et seq.; COPE, ALFRED HAINES, FRANKLIN D. ROOSEVELT AND THE SUPREME COURT (1952).
59. MCWHINNEY, JUDICIAL REVIEW, 61-95 (1969).
60. *Supra*, Chs. IV, VIII, X, XX and XXXIII.
61. For discussion on Art. 13(2), see, *supra*, Ch. XX.

under a constitutional duty to interpret the Constitution and declare the law as unconstitutional if found to be contrary to any constitutional provision. The courts act as sentinel on the *qui vive* so far as the Constitution is concerned.

Underlining this aspect of the matter, the Supreme Court stated in *State of Madras v. Row* that the Constitution contains express provisions for judicial review of legislation as to its conformity with the Constitution and that the courts "face up to such important and none too easy task" not out of any desire "to tilt at legislative authority in a crusader's spirit, but in discharge of a duty plainly laid upon them by the Constitution."[62] The Court observed further: "While the Court naturally attaches great weight to the legislative judgment, it cannot desert its own duty to determine finally the constitutionality of an impugned statute."

As the Supreme Court emphasized in *Gopalan*: "In India it is the Constitution that is supreme" and that a "statute law to be valid, must in all cases be in conformity with the constitutional requirements and it is for the judiciary to decide whether any enactment is constitutional or not" and if a legislature transgresses any constitutional limits, the Court has to declare the law unconsitutional "for the Court is bound by its oath to uphold the Constitution."[63]

The doctrines of supremacy of the constitution and judicial review has been expounded very lucidly but forcefully by BHAGWATI, J., as follows in *Rajasthan v. Union of India*:[64]

> "It is necessary to assert in the clearest terms particularly in the context of recent history, that the constitution is *supreme* lex, the permanent law of the land, and there is no department or branch of government above or beyond it. Every organ of government, *be it the executive or the legislature or the judiciary*, derives its authority from the constitution and it has to act within the limits of its authority. No one however highly placed and no authority howsoever lofty can claim that it shall be the sole judge of the extent of its power under the constitution or whether its action is within the confines of such power laid down by the constitution. This Court is the ultimate interpreter of the constitution and to this Court is assigned the delicate task of determining what is the power conferred on each branch of government, whether it is limited, and if so, what are the limits and whether any action of that branch transgresses such limits".

Therefore, the courts in India cannot be accused of usurping the function of constitutional adjudication; it is a function which has been imposed on them by the Constitution itself. It is a delicate task; the courts may even find it embarrassing at times to discharge it, but they cannot shirk their constitutional responsibility.

Justifying judicial review, RAMASWAMI, J., has observed in *S.S. Bola v. B.D. Sharma*.[65]

> "The founding fathers very wisely, therefore, incorporated in the Constitution itself the provisions of judicial review so as to maintain the balance of federalism, to protect the Fundamental Rights and Fundamental freedoms guaranteed to the citizens and to afford a useful weapon for availability, availment and enjoyment of equality, liberty and Fundamental freedoms and to help to create

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62. AIR 1952 SC 196, 199 : 1952 SCR 597; Ch. XXIV, *supra*.
63. AIR 1950 SC 27; *supra*, Ch. XXVI, Sec. A.
64. AIR 1977 SC 1361 : (1977) 3 SCC 592.
65. AIR 1997 SC 3127, 3170.

> a healthy nationalism. The function of judicial review is a part of the constitutional interpretation itself. It adjusts the constitution to meet new conditions and needs of the time."

In a number of cases, the Supreme Court has emphasized upon the importance of judicial review in India. KHANNA, J., emphasized in *Kesavananda*:[66]

> "As long as some Fundamental Rights exist and are a part of the Constitution, the power of judicial review has also to be exercised with a view to see that the guarantees afforded by these Rights are not contravened…… Judicial review has thus become an integral part of our Constitutional system……"

In *Minerva Mills*[67] CHANDRACHUD, C.J.. speaking on behalf of the majority, observed :

> "It is the function of the Judges, may their duty, to pronounce upon the validity of laws. If courts are totally deprived of that power, the Fundamental Rights conferred on the people will become a mere adornment because rights without remedies are as writ in water. A controlled constitution will then become uncontrolled."

In his minority judgement in *Minerva*,[68] BHAGWATI, J., observed :

> "It is for the judiciary to uphold the constitutional values and to enforce the constitutional limitations. That is the essence of the rule of law, which *inter alia* requires that 'the exercise of powers by the government whether it be the legislature or the executive or any other authority, be conditioned by the Constitution and the law.' The power of judicial review is an integral part of our constitutional system…. the power of judicial review….. is unquestionably….. part of the basic structure of the Constitution."[69]

AHMADI, C.J., ……speaking on behalf of a bench of seven judges in *L. Chandra Kumar v. Union of India*,[70] has observed :

> "The judges of the Supreme Courts have been entrusted with the task of upholding the Constitution and to this end, have been conferred the power to interpret it. It is they who have to ensure that the balance of power envisaged by the Constitution is maintained and that the legislature and the executive do not, in the discharge of their functions, transgress constitutional limitations……."

Thus, the jurisdiction conferred on the Supreme Court under Art. 32 and on the High Courts under Arts. 226/227 of the Constitution has been held to be part of the inviolable basic structure of the Constitution which cannot be ousted even by a Constitutional Amendment.[71]

The scope of judicial review in India is somewhat circumscribed as compared to that in the U.S.A. In India, the Fundamental Rights are not so broadly worded as in the U.S.A., and limitations thereon have been stated in the Constitution itself and this task has not been left to the courts. The constitution-makers adopted this strategy as they felt that the courts might find it difficult to work out the limitations on the Fundamental Rights and the same better be laiddown in the Consti-

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66. See, *infra*, Ch. XLI.
67. *Infra*, Ch. XLI.
68. *Ibid.*
69. For the doctrine of the "Basic Structure of the Constitution, see, *infra*, Ch. XLI.
70. AIR 1997 SC 1125, 1150 : (1997) 3 SCC 261; see, Ch. VIII, Sec. I, *supra*.
71. For discussion on Arts. 32, 226 and 227, see, *supra*, Chs. VIII and XXXIII.
See, next Chapter, for discussion on the theory of 'Basic Structure' of the Constitution.

tution itself. The constitution-makers also felt that the judiciary should not be raised to the level of the 'super-legislature'.[72]

Whatever the justification for the methodology adopted by the constitution-makers, the inevitable result of this has been to restrict the range of judicial review in India. The Indian Constitution does not afford the same scope of judicial creativity to the courts as does the U.S. Constitution.[73] Further, over the years, the scope of some of the Fundamental Rights has been curtailed by constitutional amendments, and, thus, the scope of judicial review has been further restricted.[74] This process can be seen very clearly in the context of the right to property.[75]

In spite of all this, the Supreme Court does play a significant role in the Indian constitutional process. Since the commencement of the Constitution, the Supreme Court has rendered hundreds of decisions expounding various provisions of the Constitution, and, thus, a distinct constitutional jurisprudence has come into existence. In many cases, the Supreme Court has displayed judicial creativity of a very high order, for example, in *Kesavananda*[76] and in expanding the scope of Art. 21.[77]

The bare text of the Indian Constitution does not by itself give a full picture of the Indian Constitutional Law. To have a full comprehension thereof, one must read the constitutional text along with the gloss put on it by the Judiciary from time to time and case to case.

There is no denying the fact that there have been occasions when judicial pronouncements have not been palatable to the governments and the Legislatures in India. The exercise of the power of judicial review has at times generated controversies and tensions between the courts, the executive and the legislature. For example, the judicial pronouncements in the area of property relations,[78] legislative privileges,[79] and constitutional amendments[80] have been controversial and have even led to several constitutional amendments which were undertaken to undo or dilute judicial rulings which the Central Government did not like.

Efforts have been made in India to curtail the scope of judicial review in some constitutional areas. Cases like *Golak Nath*,[81] *Bank Nationalisation*[82] or *Kesavananda Bharati*[83] have raised passionate controversies in India.

The Law Minister in the Central Government once stated in Parliament that the courts had, through their exercise of power of judicial review, retarded the process of socio-economic development of the country, and, therefore, he justified certain restrictions on the powers of the courts to declare laws unconstitu-

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72. VII *CAD* 1195; IX *CAD* 1195-6; G. AUSTIN, THE INDIAN CONSTITUTION, 164 *et seq.* Also, *supra*, Chs. XXXI and XXXII.
73. *Supra*. Sec. A; Ch. XX, Sec. A, *supra.*
74. *Infra*, Chs. XLI and XLII.
75. *Supra*, Chs. XXXI and XXXII.
76. For *Kesavananda*, see, *infra*, next Chapter.
77. For discussion on Art. 21, see, Ch. XXVI, *supra*.
For discussion on this theme generally, see below.
78. *Supra*, Ch XXXI.
79. *Supra*, Chs. II, Sec. L; Ch. VI, Sec. H.
80. *Infra*, next Chapter.
81. *Infra*, next Chapter.
82. *Supra*, Ch. XXXI.
83. *Infra*, next Chapter.

tional.[84] But, in spite of all these hurdles, the institution of judicial review has a vibrancy of its own and has even been declared as the basic feature of the Constitution.

D. JUDICIAL CREATIVITY IN INDIA

(a) LITERAL INTERPRETATION

To begin with, generally speaking, the predominant approach of the Indian Judiciary was positivist, i.e., to interpret the Constitution literally and to apply to it more or less the same restrictive canons of interpretation as are usually applied to the interpretation of ordinary statutes. This is also described as the positivist approach. The approach emanates from the basic traditional therory that a judge does not create law but merely declares the law. Such a view prevailed in Britain in the XIXth and the early XXth centuries. Judicially, the principle was laid down in these words: "In interpreting the provisions of our Constitution, we should go by the plain words used by the constitution-makers."[85]

To some extent, the Constitution itself incorporates the principle of statutory construction. Art. 367 provides that the General Clauses Act, 1897,[86] shall apply for the interpretation of the Constitution as it applies for the interpretation of legislative enactments. The courts have held that not only the 'general definitions' in the General Clauses Act, but also the "general rules of construction" in the Act, apply to the Constitution.[87] Accordingly, the power to appoint in Art. 229(1) has been held to include the power of dismissal by virtue of S. 16 of the General Clauses Act.[88] The words 'person' in Art. 226 and 'offence' in Art. 20 have been given the same meaning respectively as Ss. 3(42) and 3(37) of the Act give to these words.[89] The General Clauses Act can be amended by Parliament. Art. 367 thus means that interpretation of many words and phrases used in the Constitution can be modified by Parliamentary legislation without amending the Constitution.

In the same *genre* falls the interpretation given to the expression 'sale of goods' in entry 54 in List II. The Supreme Court has held that the expression bears the same meaning as in the Sale of Goods Act.[90]

The position appears to be somewhat anomalous in so far as the meaning attached to a provision in the Constitution depends to some extent on parliamentary pleasure, and because of Art. 367, the courts have to acquiesce in it.

The crowning example of the strict constitutional interpretation can be seen in *Gopalan* which denuded Art. 21 of much of its efficacy and effectiveness and

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84. Parl. Debates on the Constitution (Forty-fourth) Amendment Bill; see, *infra*, Chs. XLI and XLII.
85. MUKHERJEA, J., in *Chiranjit Lal's* case, AIR 1951 SC at 58.
86. This Act contains, as it were, a legislative dictionary for India.
87. *Jugmendar Das v. State of U.P.,* AIR 1951 All 703; In re *Keshavan Madhav Menon,* AIR 1951 Bom 188; *Anand Bihari v. Ram Sahay,* AIR 1952 MB 31.
88. *Pradyat Kumar v. Chief Justice, Calcutta High Court,* AIR 1956 SC 285 L (1955) 2 SCR 1331; *Bool Chand v. Chancellor, Kurukshetra Univ.,* AIR 1968 SC 292 : (1968) 1 SCR 434.
89. *Bijoy Ranjan v. B.C. Das Gupta,* AIR 1953 Cal 289; *Jawala Ram v. Pepsu,* AIR 1962 SC 1246 : (1962) 2 SCR 503.
90. *Supra*, Ch. XI, Sec. D.

made 'personal liberty' a matter of legislative discretion which it would have been even in the absence of Art. 21.[1]

In *Keshavan Madhava Menon*,[2] the Supreme Court applied to the Constitution the rule of statutory interpretation that every statute *prima facie* is prospective unless expressly or by necessary implication it is made to have retrospective operation. On this basis, the Court held that Art. 13(1) was wholly prospective in so far as any proceeding initiated before the commencement of the Constitution would not abate but continue even though the relevant law was hit by a Fundamental Right.

In *Saka Venkata Rao*,[3] the Court interpreted Art. 226 narrowly as regards the High Court's jurisdiction to issue writs. This position had to be rectified by an amendment of the Constitution. These cases illustrate the general trend of judicial approach to the Constitution as a statute. In the same category may also be placed the following :

(*i*) the application of the doctrine of *res judicata* to the interrelationship of Arts. 32 and 226, by which the scope of Art. 32 has been somewhat cut down by the Supreme Court even when the Constitution places no such restriction on it ;[4]

(*ii*) the application of the law of limitation to writ petitions although the Constitution is silent on this point;[5]

(*iii*) the Supreme Court decision in the *Habeas Corpus* case during the emergency.[6]

The *Habeas Corpus* case has been characterised as one of the worst decisions rendered by the Supreme Court in its entire career because it struck at the very foundations of constitutionalism and the rule of law in the country. The Court failed to provide any protection to the people when its protection was needed most. The case can be explained as the consequence of narrow, restrictive, literal interpretation of the Constitution by the Supreme Court.

(b) LIBERAL INTERPRETATION

But then things have changed and the judicial approach to the Constitution is no longer solely and exclusively one of statutory interpretation. The liberal interpretation emerges because of the change in theory of the role of the judge. In course of time, the fiction of the declaratory role of the judge has been abandoned. The law creative role of a judge is very well recognised in modern times.

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1. *Supra*, Ch. XXVI, Sec. B(a).
See, SEERVAI, THE POSITION OF THE JUDICIARY UNDER THE CONSTITUTION OF INDIA, 62, where the author supports *Gopalan*. He appears to be a votary of literal interpretation of the Constitution. He praises *Gopalan* as a "landmark of Judicial wisdom, Judicial detachment and judicial restraint." However, few scholars share the views of SEERVAI as regards *Gopalan*. Any way, time has proved him wrong as Art. 21 has been very liberally interpreted since 1978.

2. *Supra*, Ch. XX. Sec. C.

3. *Infra*, next Chapter.
Also see, Ch. VIII, Sec. D(b), *supra.*

4. *Supra*, Ch. VIII, Sec. D(f).

5. *Ibid*., M.P. Jain, Judicial Review of Administrative Action in India, *Proceedings of the Third Commonwealth and Empire Law Conference, Sydney* (1965).

6. *Supra*, Ch. XXXIII.

The American Realist Jurists greatly emphasize such a judicial role. A judge is not an automaton; he has to make choices out of several alternatives.

The liberal approach is designed to give a creative and purposive interpretation to the Constitution "with insight into social values, and with suppleness of adaptation to changing needs."[7]. Our Constitution is organic in nature and being a living organ, it is ongoing. Hence, with the passage of time, the law must change.[8] Modern scholars by and large now favour liberal judicial approach to the Constitution. The Constitution is a mechanism under which laws are made; it is not a mere statute which only declares what the law is to be. Therefore, it is advocated that the Constitution must not be construed in a narrow or pedantic manner. New situations arise in the country which may never have been visualised by the constitution-makers at the time of the constitution making. Therefore, a generic interpretation or flexible construction need to be given to the Constitutional provisions so as to make the constitution as a living organism so that it may meet the needs of the changing society at different times. Law which was at one point of time constitutional may be rendered unconstitutional later.[9]

A constitution is intended to serve the needs of the day when it was enacted and also to meet the needs of the changing conditions in new circumstances. Constitution has no fixed meaning and its interpretation must be based on the experience of the people in the course of working of the Constitution. However the same thing cannot be said in relation to interpreting the words and expressions in a statute.[10]

In relation to Part III of the Constitution, it has been held that certain unarticulated rights are implicit in the enumerated guarantees. For example, freedom of information has been held to be implicit in the guarantee of freedom of speech and expression.[11]

The liberal judicial interpretation of the written constitution emanates from the feeling that the function of interpreting a written constitution is very crucial to the governmental process in the country and, therefore, the judicial approach to this task has to be entirely different from that of interpreting a statute. While interpretation of a statute one way or other affects only a limited number of persons, interpreting the constitution and declaring a parliamentary statute unconstitutional affects the entire governmental functioning, policy-making and the constitutional process in the country. The Constitution is at the base of the whole governmental fabric, it guarantees Fundamental Rights of the people; it guarantees a democratic government and rule of law in the country; it distributes powers between the various organs of the state, *viz.*, executive, judiciary and the legislature. A federal constitution distributes powers between the Centre and the States. Thus, interpretation of a constitution is a different exercise qualitatively than interpreting a statute.

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7. CARDOZO, *op. cit.*, Sec. F.
Also see, DENNING, FROM FREEDOM TO PRECEDENT; REID, The Judges as a law maker, 12 *J.S.P.T.L.* 22 (1972).

8. *Saurabh Chaudri v. Union of India*, (2003) 11 SCC 146 : AIR 2004 SC 361 regarding reservation.

9. *Indian Handicrafts Emporium v. Union of India*, (2003) 7 SCC 589 : AIR 2003 SC 3240.

10. *Ashok Tanwar v. State of H.P.*, (2005) 2 SCC 104 : AIR 2005 SC 614.

11. *M. Nagaraj v. Union of India*, (2006) 8 SCC 212 : AIR 2007 SC 71.

The liberal interpretation also has an ideological tinge to it, *viz.*, the courts cast themselves in the role of the protector and guardian of the Constitution, especially, of the Fundamental Rights of the people and the democratic values. The courts by adopting liberal approach constantly expand the frontiers of the people's Fundamental Rights so as to make the government more and more liberal and democratic. The courts seek to bring the static clauses in the constitutional document to life in conformity with the needs of a dynamic society. A creative interpretation of the Constitution would involve—

(i) interpreting the powers of the government affecting person or property somewhat restrictively rather than broadly; and

(ii) interpreting people's rights broadly and liberally rather than mechanically and literally.

Occasions are not wanting in India, when the Supreme Court has broken this self-imposed shackle and given a creative, purposive interpretation to constitutional provisions. At times, the consciousness that the Constitution is somewhat different from an ordinary statute—the essential difference being that it is the basic law of the country to which other statutes have to conform—has manifested itself and led the judiciary to interpret the Constitution liberally and broadly. The Supreme Court has recently declared, with a view to promote the highest democratic values in the country, that a popular mandate cannot override the Constitution. The Court has observed: "The constitution prevails over the will of the people as expressed through the majority party" in the Legislature. "The will of the people as expressed through the majority party prevails only if it is in accord with the Constitution," the Court has said.[12]

At times, the Supreme Court has emphasized that the Constitution must not be construed in any narrow and pedantic sense. To express this idea, KANIA, C.J. in *Gopalan* adopted the following quotation from an Australian case:[13] "Although we are to interpret words of the Constitution on the same principles of interpretation as we apply to any ordinary law, these very principles of interpretation compel us to take into account the nature and scope of the Act we are interpreting—to remember that it is a constitution, a mechanism under which laws are to be made and not a mere Act which declares what the law is to be". Many a time, the Supreme Court has stated the proposition that the Constitution should be interpreted liberally, as a constitution and not as a statute.[14]

In *Pathuma*,[15] the Supreme Court has emphasized that the judicial approach to the Constitution should be dynamic rather than static, pragmatic and not pedantic, elastic rather than rigid. Constitution is not to be interpreted as a mere statute but as a machinery by which laws are made.

The Supreme Court has observed in *India Cement.*[16] :

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12. *B.R. Kapur v. State of Tamil Nadu*, AIR 2001 SC 3435, at 3455 : (2001) 7 SCC 231. Also see, *supra*, Ch. I and Ch. VII.

13. HIGGINS J. In *Att. Gen., N.S.W. v. Brewery Employees Union*, 6 CLR 469, 611-12. Also, *James v. Commonwealth of Australia*, 1936 AC 578, 614.

14. *Pathumma v. State of Kerala*, AIR 1978 SC 771 : (1978) 2 SCC 1; *R.S. Joshi v. Ajit Mills*, AIR 1977 SC 2279 : (1977) 4 SCC 98.

15. *Pathumma v. State of Kerala, supra*, footnote 14.

16. *India Cement Ltd. v. State of Tamil Nadu*, AIR 1990 SC 85 : (1990) 1 SCC 12.

> "It has to be remembered that it is a constitution that requires interpretation. Constitution is the mechanism under which the laws are to be made and not merely an Act which declares what the law is to be."

In another case,[17] the Supreme Court has also observed :

> "A constitutional provision is never static, it is ever evolving and ever changing and, therefore, does not admit of a narrow, pedantic or syllogistic approach….. It seems well settled….. that constitutional provisions must receive a broad interpretation and the scope and ambit of such provisions, and in particular the Fundamental rights, should not be cut down by too astute or too restricted an approach."

The Supreme Court has emphasized in *Goodyear*[18] that the Constitution is to be construed not in a narrow or pedantic sense. It is to be construed not as mere law but as the machinery by which laws are to be made. The constitution is a living and organic thing and, therefore, it needs to be construed broadly and liberally.

Recently, in *S.R. Chaudhuri v. State of Punjab*,[19] the Supreme Court rejected the argument that Art. 164(4) [as well as Art. 75(5) which is in *pari materia* to Art. 164(4)][20] be interpreted in a literal manner on its "plain language". Instead, the Court argued in favour of a purposive interpretation of the provision. The Court observed in this connection:

> "Constitutional provisions are required to be understood and interpreted with an object oriented approach. A Constitution must not be construed in a narrow and pedantic sense. The words used may be general in terms but, their full import and true meaning, has to be appreciated considering the true context in which the same are used and the purpose which they seek to achieve... We must remember that a Constitution is not just a document in solemn form, but a living framework for the Government of the people exhibiting a sufficient degree of cohesion and its successful working depends upon the democratic spirit underlying it being respected in letter and in spirit."[21]

At another place, the Supreme Court has emphasized that the Articles should be so construed as to "further the principles of a representative and responsible Government".[22]

A few examples of this approach may be cited here:

(*i*) The principle of broad and liberal interpretation has been consistently applied to construction of legislative entries in the three Lists. These entries are given a broad sense beneficial to the widest possible amplitude of powers and not a narrow or restricted sense. The entries include within their scope and ambit all ancillary matters which legitimately come within the topics mentioned therein.[23]

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17. *Life Insurance Corp. of India v. Manubhai D. Shah*, AIR 1993 SC 171, at 176-177 : (1992) 3 SCC 637.
18. *Goodyear India Ltd. v. State of Haryana*, AIR 1990 SC 781, at 791 : (1990) 2 SCC 71.
19. AIR 2001 SC 2707 : (2001) 7 SCC 126; *supra*, Ch. VII, Sec. B.
20. See, *supra*, Chs. III, Sec. B; Ch. VII, Sec. B.
21. AIR 2001 SC at 2717.
22. *Ibid*, at 2719.
23. *Supra*, Ch. X, Sec. G(i).
Also, *Vishnu Agencies v. Commercial Tax Officer*, AIR 1978 SC 449, 458 : (1978) 1 SCC 520.

(*ii*) A significant matter in which the Supreme Court has not interpreted the Constitution literally pertains to the permissible limits within which Parliament can delegate legislative power on the executive. There is no specific constitutional provision covering this matter, yet the Supreme Court has implied a restriction on delegation from the Constitution—an approach which differs from that of statutory interpretation.[24]

(*iii*) In the *Express Newspaper* case,[25] while interpreting Art. 19(1)(*g*), the Court expounded the socio-economic theories regarding the concepts of 'living', 'minimum' and 'fair' wages, and introduced the principle of 'capacity to pay' as an essential ingredient in fixing 'living' and 'fair' wages. For this purpose, the Court quoted extensively from the Report of the Committee of Fair Wages, the Report of the Press Commission, and a number of other publications dealing with fixation of wages.

(*iv*) While delimiting the concept of the freedom of the press in *Express Newspaper*, the Supreme Court made use of the Report of the Commission on Freedom of Press in the U.S.A. The case constitutes a very good illustration of judicial policy-making.

(*v*) In *Quareshi*,[26] the Court mentioned various considerations—religious, economic, agricultural, nutritive—to decide the extent to which the slaughter of cattle could be prohibited with reference to Art. 19(1)(*g*).

The Supreme Court quoted from various reports, such as, the Report on Marketing of Cattle in India, the Report of the Cattle Preservation and Development Committee, etc.

The Court's judgment forms a very good essay on improvement of cattle wealth in India. It constitutes another good example of judicial policy-making giving guidance to the State Governments which were being politically pressurized on the issue of banning animal slaughter especially cow slaughter.

(*vi*) In deciding what is a reasonable restriction on a Fundamental Right under Art. 19, the Supreme Court has at times embarked on a broad canvas.[27]

While considering reasonableness of a restriction on the right to hold property under Arts. 19(1)(*f*) and 19(5), the Court stated in *Jyoti Pd. v. Delhi*:[28] "The criteria for determining the degree of restriction on the right to hold property which would be considered reasonable, are by no means fixed or static, but must obviously vary from age to age and be related to the adjustments necessary to solve the problems which communities face from time to time.... If law failed to take account of unusual situations of pressing urgency arising in the country, and of the social urges generated by the patterns of thought evolution

24. *Supra*, Ch. II, Sec. N.
25. *Supra*, Ch. XXIV, Secs. I and J.
26. *Supra*, Ch. XXIV, Sec. J(g).
27. *Ibid*.
28. *Ibid*.

and of social consciousness which we witness in the second half of the century, it would have to be written down as having failed in the very purpose of its existence."

The Court has further emphasized that in judging the validity of social legislation the "courts have necessarily to approach it from the point of view of furthering the social interest which it is the purpose of the legislation to promote, for the courts are not, in these matters, functioning as it were in *vacuo*, but as parts of a society which is trying, by enacted law, to solve its problems and achieve social concord and peaceful adjustment and thus furthering the moral and material progress of the community as a whole."

(*vii*) In the *Golak Nath* case,[29] the majority of the Supreme Court while holding the Fundamental Rights as non-amendable emphasized the great value and significance of these rights and expressed the apprehension that if these rights were to be diluted or curtailed then it would usher in a totalitarian regime in the country.

In support of this thesis, the Court quoted extensively from the writings of the various political thinkers.

HIDAYATULLAH, J., criticised the 'doctrinaire conceptualism' based on an "arid textual approach."[30]

A similar approach is visible in *Kesavananda Bharati*[31] and *Indira Nehru Gandhi v. Rajnarain*[32]—the two cases dealing with Amendments of the Constitution.

(*viii*) *Kesavananda* may be regarded as the high water-mark of purposive interpretation of the Constitution. The judgment depicts an attempt on the part of the Supreme Court to protect some of the basic values of the Constitution from the onslaught of transient majority in Parliament.[33]

(*ix*) The Supreme Court consistently sought to give some protection to 'private property', particularly, on the question of compensation, and this may be regarded as an instance of judicial policy-making.[34]

(*x*) Barring the emergency period of 1975-1977, the Supreme Court has provided some protection to persons detained in preventive detention by creatively applying the principles of Administrative Law.[35]

(*xi*) In *B. Banerjee v. Anita Pan*,[36] while considering the *vires* of a social legislation, the Supreme Court has emphasized upon the need on the

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29. *Infra*, next Chapter.
30. *Golak Nath*, *infra*, next Chapter.
31. *Infra*, next Chapter.
32. *Infra*, next Chapter.
Also see, *infra*, Ch. XLII.
33. *Infra*, next Chapter.
34. *Supra*, Ch. XXXI.
35. *Supra*, Ch, XXVII, Sec. D.
Also, M.P. Jain, note, 1 on 1813.
36. AIR 1975 SC 1145, 1148 : (1975) 1 SCC 166; *supra*, Ch. XXIV.

part of the government to present to the Court relevant socio-economic data in support of the impugned legislation.

In the words of K. IYER, J.: "Welfare legislation calculated to benefit weaker classes, when their *vires* is challenged in Court, cast an obligation on the State ..... to support the law, if necessary by a Brandeis brief and supply of socio-economic circumstances and statistics inspiring the enactment. Courts cannot, on their own, adventure into social research outside the record and if Government lets down the legislature in Court by not illumining the provisions from the angle of the social mischief or economic menace sought to be countered, the victims will be the class of beneficiaries the State professed to protect."

(*xii*) In the post emergency era beginning 1978, with its pronouncement in *Maneka Gandhi*,[37] the Supreme Court has breathed new vigour and life into the concept of personal liberty[38] and given new dimensions to the right to equality.[39] The Supreme Court has thus contributed much to the cause of human rights in India.

Many a time, the Supreme Court has asserted that "the attempt of the Court should be to expand the reach and ambit of Fundamental Rights rather than attenuate their meaning and content by process of judicial construction….."[40]

The impact of the liberal judicial approach on Fundamental Rights has been remarkable over a period of time. This is demonstrated in many ways.

One, the Supreme Court has given an extended meaning to Art. 142 giving an extension to its own power to give relief.[41]

Two, the Supreme Court has been expanding the horizon of Art. 12 primarily to inject respect for human rights and social conscience in India's corporate structure.[42]

Three, many Fundamental Rights have been broadly interpreted thus expanding the range and scope of these rights. For example, the right to equality contained in Art. 14 has been given a new dimension by the Supreme Court ruling that an unreasonable and arbitrary law or administrative action infringes Art. 14.[43]

The Court has inferred the right to know from the guarantee of free speech contained in Art. 19(1)(a).[44]

Four, *Maneka Gandhi*[45] has infused new vigour in the moribund Art. 21 by giving an expansive interpretation to the word 'life' therein as meaning not only mere 'animal existence' but 'life with human dignity'; 'the right to life includes the right to live with human dignity and all that goes along with it.[46] The

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37. *Supra*, Ch. XXVI, Sec. C.
38. *Ibid.*
39. *Supra*, Ch. XXI.
40. *Pathuma*, *supra*, footnote 14.
41. *Supra*, Ch. IV, Sec. G.
42. *Supra*, Ch. XX, Sec. D.
43. *Supra*, Ch. XXI, Sec. D.
44. *Supra*, Ch. XXIV, Sec. C(c).
45. *Supra*, Ch. XXVI, Sec. C.
46. *Supra*, Ch. XXVI, Sec. E(a).

Supreme Court has thus infused a qualitative concept in Art. 21. From this hypothesis, a number of rights have been implied from Art. 21 and a whole lot of human rights jurisprudence has sprung up. Art. 21 has become a reservoir of Fundamental Rights.

By an expansive interpretation of Art. 21, the Court has spelled out several Fundamental Rights which are not specifically mentioned in the Constitution. Some of the rights implied from Art. 21 are : right to livelihood, right to education, right to privacy, right to clean and pollution-free environment, right to shelter, right against sexual harassment, right to legal aid and speedy trial. These and various other rights are held to emanate from Art. 21 and, thus, this provision has become the source of many human rights and the scope of this Article is still being expanded.[47]

Art. 21 has thus been placed on the high pedestal of one of the few most cherished, expansive and significant rights guaranteed by the Constitution. As compared to the narrow, static and mechanical interpretation put by the Supreme Court on Art. 21 in *Gopalan*,[48] there has been a remarkable transformation in the range and scope of Art. 21 over time.

Five, the Supreme Court has ruled that there is no rule that unless a right has been expressly stated in the Constitution as a Fundamental Right, it cannot be treated as one. This means that a Fundamental Right need not be explicitly stated in the Constitution; it can also be implied from an expressly stated Fundamental Right. In the words of the Court : "This Court has not followed the rule that unless a right is expressly stated as a Fundamental Right, it cannot be treated as one."[49]

In course of time, the Supreme Court has developed a number of Fundamental Rights by its creative interpretative process out of the ones already expressly mentioned. To name a few implied rights, freedom of press has been implied from freedom of speech;[50] a bundle of rights implied from Art. 21 have already been mentioned above.

Six, another creditable achievement of the Supreme Court is to read Fundamental Rights along with the Directive Principles so as to supplement each other.[51] The Supreme Court has thus been able to expand the scope and content of several Fundamental Rights, especially, right to equality, right to life and freedom of carrying on trade or business. On this point, the Court has ruled in *Unni Krishnan v. State of Andhra Pradesh*,[52] "This Court has also been consistently adopting the approach that Fundamental Rights and directive principles are supplementary and complementary to each other and that the provisions in Part III (Fundamental Rights) should be interpreted having regard to the Preamble and the Directive Principles of the state policy."

This approach has served two purposes, *viz.*, : (1) it has given depth to many Fundamental Rights, as for example, Arts. 14 and 21; (2) many directive princi-

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47. *Supra*, Ch. XXVI, Sec. J.
48. *Supra*, Ch. XXVI, Sec. B(a).
49. *Unni Krishnan v. State of Andhra Pradesh*, AIR 1993 SC 2178, 2226 : (1993) 1 SCC 645. Also see, Ch. XXVII, Sec. A, *supra.*
50. *Supra*, Ch. XXIV, Sec. C(e).
51. On Directive Principles, see, Ch. XXXIV, Sec. C, *supra.*
52. AIR 1993 SC 2178 : (1993) 1 SCC 645.

ples, which are inherently non-enforceable, have become enforceable. Thus, a number of socio-economic Fundamental economic rights have been created in the process. *e.g.*, the right to economic justice.[53], right to economic empowerment of women and weaker sections of the society,[54] right to social justice[55].

Seven, the high watermark of judicial creativity has been reached by the Court in such cases as *Golak Nath*[56] and *Kesavananda*[57] in connection with the question of amendability of the Constitution. In these cases, the role played by the Court can even be characterised as constituent or that of constitution-making.

In *Golak Nath*, SUBBA RAO, C.J., explicity claimed a law-making role for the Supreme Court in the following words :[58]

> "……Arts. 32, 141 and 142 are couched in such wide and elastic terms as to enable this Court to formulate legal doctrines to meet the ends of justice. To deny this power to the Supreme Court on the basis of some outmoded theory that the Court only finds the law but does not make it is to make ineffective the powerful instrument of justice placed in the hands of the highest judiciary of this country."

With these words, the Supreme Court has openly asserted a law creative role for itself.

Recently, in *P. Ramachandra Rao v. State of Karnataka*,[59] RAJU, J., has expressed a liberal view of the powers of the Supreme Court in these pithy words:

> "Though this Court does not consider itself to be an *imperium in imperio* or would function as a despotic branch of "the state," the fact that the founding fathers of our Constitution designedly and deliberately, perhaps, did not envisage the imposition of any jurisdictional embargo on this Court, except in Article 363 of the Constitution of India is significant and sufficient enough, in my views, to identify the depth and width or extent of its powers. The other fetters devised or perceived on its exercise of powers or jurisdiction to entertain/deal with a matter were merely self-imposed for one or the other reason assigned therefor and they could not stand in the way of or deter this Court in any manner from rising up to respond in a given situation as and when necessitated and effectively play its role in accommodating the Constitution to changing circumstances and enduring values as a *sentinel on the qui vive* to preserve and safeguard the Constitution, protect and enforce the Fundamental Rights and other constitutional mandates—which constitute the inviolable rights of the people as well as those features, which formed its basic structure too and considered to be even beyond the reach of any subsequent constitutional amendment. In substance, this Court in my view, is the ultimate repository of all judicial powers at national level by virtue of it being the summit Court at the pyramidal height of administration of justice in the country and as the upholder and final interpreter of the Constitution of India and defender of the fundamentals of "rule of law."

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53. *Dalmia Cement v. Union of India*, (1996) 4 JT (SC) 555 : (1996) 10 SCC 104; *LIC v. Consumer Education and Research Centre*, AIR 1995 SC 1811; *E.S.C. Ltd. v. S.C. Bose*, AIR 1992 SC 573, *supra*, Ch. XXXIV, Sec. D.
54. *Ashok K. Gupta v. State of Uttar Pradesh*, (1997) 5 SCC 201, *supra*, Ch. XXXIV, Sec. D.
55. See, *supra*, Chapter XXXIV, Sec. D.
56. See, next Chapter.
57. For discussion on this case, see, next Chapter.
58. AIR 1967 SC at 1669 : (1967) 2 SCR 762.
59. (2002) 4 SCC 578, at 606.

A liberal approach is being followed by the courts in many common-law countries having written constitutions. It may be instructive to take note of some notable recent developments in the area of constitutional interpretation in some of these countries.

An outstanding example of the liberal approach is furnished by a recent case in Australia, *viz.*, *Nationwide News Pty Ltd. v. Wills.*[60] The Australian Constitution does not contain any Charter of Fundamental Rights. The significance of this case lies in the fact that the High Court has found the freedom of political discussion in the basic structure of the Constitution and declared a law enacted by the Australian Parliament unconstitutional on the ground of its unduly infringing such freedom.

The Court has argued that since the Constitution can thrive only when people have freedom of political discussion, therefore, this freedom ought to be regarded as a part of the Constitution. The case is the result of the belief that the Court has to play a major role in protecting the individual against both the legislature and the executive. The case creates the possibility of the High Court implying some basic rights of the people even though the Constitution is silent on the point. This is judicial creativity of a very high order.

The U.S. Supreme Court has never adopted a literal approach to the Constitution. It has always interpreted the U.S. Constitution as 'constitution' and not as a 'statute'. As early as 1810, Chief Justice Marshall of the US Supreme Court declared in *McCulloch v. Maryland* : "It is a Constitution we are expounding."

This statement underlines the difference between the static interpretation of a statute and the dynamic interpretation of a written constitution. It is because of such judicial approach that the U.S. Constitution drafted in 1787 has been able to keep abreast of the changing socio-economic needs of the dynamic American Society, especially when the process of constitutional amendment is exceptionally rigid. The Supreme Court has thus rendered a yeoman service to the cause of constitutionalism in the U.S.A.

The U.S. Supreme Court Judges frankly and avowedly take recourse to policy considerations and use socio-economic materials to interpret the Constitution.[61] The Court's approach is to canvass, directly and openly, the merits of alternative choices in arriving at a decision. Social and economic facts are directly incorporated into the briefs presented to the Supreme Court. Such briefs are known as the Brandeis Briefs.

Two main reasons for such an attitude on the part of the U.S. Supreme Court are: the brief and compact nature of the U.S. Constitution and use of very general and broad phrases therein which can be interpreted and re-interpreted by the courts, from time to time, in the context of contemporary circumstances, *e.g.*, such phrases as due process of law, interstate commerce, etc. The Court has therefore evolved a number of doctrines which are not mentioned explicitly in the

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60. (1992) 177 CLR 1.
Also see, *Australian Capital Television Pty. Ltd. v. Common-wealth,* (1992) 117 CLR 106. See for comments on this case, *Stephen Donaghue,* The Glamour of Silent Constitutional Principles, (1996) 24 *Fed. L.R.* 133.

61. Policy-making in a Democracy : "The Role of U.S. Supreme Court", (1957) *JI. Of Public Law,* 275-508.
Also, M.P. Jain, Role of the Judiciary in a Democracy, (1979) *JMCL* 239.

Constitution, *e.g.* immunity of instrumentalities, separation of powers, police powers, etc.

The U.S. Supreme Court has interpreted the U.S. Constitution in such a creative manner that an old document, of nearly 200 years of age, without many amendments, has been able to serve the needs of the present highly sophisticated and dynamic technological era. In this way, the Court has not only played the role of an interpreter of the Constitution but even the role of a constitution-maker.

Many outstanding decisions have been rendered by the Supreme Court on the Constitution; a few may be noted here. For example, while interpreting the due process clause, the Court has laid emphasis on the word 'due' which has been interpreted to mean 'just', 'proper' or 'reasonable'. Thus, the Supreme Court can pronounce whether a law affecting a person's life, liberty or property is reasonable or not. This had led the Court to create the doctrine of substantive due process as well as procedural due process.

The idea underlying procedural due process is that governmental action affecting the liberty of the subject, which violates natural justice without due procedure is void. Under this doctrine, the Court has endeavored to secure fair criminal trials. In *Miranda v. Arizona*,[62] the Supreme Court granted certain rights to an accused at the time of police interrogation. In *Gideon v. Wainwright*,[63] the Court accepted some rights of an accused at the time of police interrogation.

Under the substantive due process concept, the U.S. Supreme Court can strike down any arbitrary, unreasonable or capricious legislative or executive act as being volative of the Constitution. Thus, infliction of cruel and unusual punishment has been invalidated by the Court.[64]

The word 'liberty' in the due process clause has not been confined merely to 'personal liberty,' but has been given a much wider interpretation. It has been held to comprise economic rights and freedom of contract. Currently, the U.S. Supreme Court is endeavouring to derive from 'liberty' a constitutional protection for privacy, personal autonomy and some family relationship. As the Court has said in *Meyer v. Nebraska*,[65] the liberty protected by due process "denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by freemen".

A law forbidding use of contraceptives has been invalidated as invading the right of privacy – a penumbral right emanating from the V and XIV Amendments.[66] The Court has also ruled that a pregnant woman has a right to abort within the first trimester for, according to the Court : 'The right of privacy… is

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62. 384 U.S. 436 (1966).
Also see, *Argersinger v. Hamlin*, 407 U.S. 25.
63. 372 U.S. 335.
Also see, *Massiah v. United States*, 377 U.S. 201.
64. *Robinson v. California*, 370 U.S. 660; *Furman v. Georgia*, 408 U.S. 238 (1972).
65. 262 U.S. 390 (1923).
66. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

broad enough to encompass a woman's decision whether or not to terminate her pregnancy"[67] Thus, the state could not interfere with the decision of a woman to abort her pregnancy during the first trimester; in the second trimester, the state can regulate the abortion procedure and, in the third trimester, the state could forbid an abortion except when it is necessary to protect the life or health of the mother.

The concept of equality found in the XIV Amendment of the Constitution has been used by the Supreme Court to promote and preseve human freedom in several ways. In *Brown v. Board of Education*,[68] a monumental decision, the Court invalidated segregation between the whites and the blacks in educational institutions. The Court changed its old ruling regarding 'separate but equal'[69] to 'equal but not separation' so as to discourage racial segregation. "Separate educational facilities are inherently unequal" declared the Court. In *Reed v. Reed*,[70] distinction based on sex or *gender* has been held to be unconstitutional.

Generally, the Court has declared that classification cannot be made on the basis of criteria wholly unrelated to the objective of the statute. A classification must be reasonable, not arbitrary and must rest on some ground of difference having a fair and substantial relation with the objects of the legislation, so that all persons similarly circumstanced shall be treated alike.

In *Reynolds v. Sims*,[71] the Supreme Court translated the equality principle into the principle of "one man one vote". The Court thus held that the seats in a House of State Legislature must be apportioned on population basis.

The Supreme Court has broadly interpreted the First Amendment guaranteeing freedom of the press. Press is regarded not only as a "neutral conduct of information between the people and their elected leaders or as a neutral forum of debate", but also as a fourth institution outside the government as an additional check on the three official branches.[72]

In another case,[73] the First Amendment has been held to "support the view that the press must be free to publish news, whatever the source, without censorship, injunctions, or prior restraints".

These decisions by the U.S. Supreme Court have triggered revolutionary changes in social, economic and political structure of America's body politic. In the words of Chief Justice WARREN : "The Court's essential function is to act as the final arbiter of minority rights."[74]

The dynamic theory of constitutional interpretation of the constitution has been explained by Justice BRENNAM of the U.S. Supreme Court. For him, the

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67. *Roe v. Wade*, 410 U.S. 113 (1973).
68. 347 U.S. 483 (1953).
69. See, *Plessey v. Ferguson*, 163 U.S. 527 (1996).
70. 404 U.S. 71 (1971).
Also, *Frontiero v. Richardson*, 41 U.S. 677, holding discrimination based on sex as invalid.
71. 377 U.S. 553.
72. *New York Times v. Sullivan*, 376 U.S. 254 (1964).
73. *New York Times Co. v. U.S. (The Pentagon Papers case)*, 403 U.S. 713 (1971).
74. Quoted in Abraham, THE JUDICIARY : THE SUPREME COURT IN THE GOVERNMENT PROCESS, 189 (1977).

ultimate question of constitutional interpretation is: "what do the words of the text mean in *our* time?" He says :

> "We current Justices read the Constitution in the only way that we can : as Twentieth Century Americans. We look to the history of the time of framing and to the intervening history of interpretation. But the ultimate question must be, what do the words of the text mean in our time. For the genius of the Constitution rests not on any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs. What the constitutional fundamentals meant to the wisdom of other times cannot be their measure to the vision of our time. Similarly what those fundamentals mean for us, our descendants will learn, cannot be the measure to the vision of their time".

It is only because of such dynamic judicial approach that a constitution, nearly 200 years old, with only a few amendments made to it, has been able to endure and subsist. Had it been interpreted in a static manner, it would have failed to cope with the societal needs of the changing times.

The upshot of the above discussion is that interpretation of a constitution is a complicated exercise and cannot be looked upon merely as a matter of statutory interpretation. The constitution is not just an ordinary statute; it is the *ground-norm* and thus it conditions the entire legislative and executive process in the country. Its interpretation must of necessity proceed on lines somewhat different from interpreting, say, the Transfer of Property Act or the Indian Contract Act.

There is no doubt that the courts can with great advantage use socio-economic data to elucidate constitutional provisions and assess the constitutionality of controversial laws. At present, most of the legislation has economic overtones.

It is well to remember that, after all, judicial review of constitutional issues affects governmental policies in the ultimate analysis as the government has to keep itself within the bounds prescribed by the courts. Judicial review is not merely a sterile function of interpreting an "i" here and an "a" there, but it is a creative role which the courts discharge.

It may perhaps be mentioned here that even in Britian where the courts do not discharge the function of interpreting the constitution, the courts do not function in a mere mechanistic manner. The British courts also make policy choices and play a creative role in the development of law.[75] Constitutional interpretation is a more creative function than statutory interpretation.

E. NORMS OF CONSTITUTIONAL INTERPRETATION

(a) POLICY CONSIDERATIONS

In the U.S.A., the Supreme Court Judges avowedly take recourse to policy considerations in arriving at their conclusions on questions of constitutional interpretation. The judges freely use socio-economic materials in interpreting the Constitution and freely, directly and openly canvass the merits of alternative choices in arriving at a decision.[76]

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75. STEVENS, The Role of a Final Appeal Court in a Democracy: The House of Lords To-day, 28 *MLR* 509 (1965).

76. *Policy-making in a Democracy*: *The Role of US Supreme Court,* (1957) *JI. of Public Law*, 257-508.

This trend has become much more pronounced in the post-1937 era, i.e., after the Depression. This enables the judge to play an effective role in shaping, moulding, developing and creating constitutional law and is more meaningful than the traditional positivist literal approach which amounts to formalistic, mechanical approach of statutory interpretation of a constitutional document.

Even in Britain, where the doctrine of Supremacy of Parliament prevails,[77] and the function of the judges is to interpret statutes rather than the Constitution, scholars have asserted that judges have policies which they seek to implement through their decisions. As WADE says :

> "Today no apology is needed for talking openly about judicial policy. Twenty or thirty years ago judges questioned about administrative law were prone to say that their function was merely to give effect to the will of Parliament and that they were not concerned with policy. In reality they are up to their necks in policy....."[78]

At another place, he asserts that the judges are already immersed in 'politics' and 'have no hope of getting out of it", because they are "constantly having to decide cases which involve politics as well as law". Judges have to choose from "the wide range of alternative policies."[79]

By and large, until recently, the Indian Supreme Court Judges eschewed the policy approach as they treated the Indian Constitution as a statute and construed it according to the ordinary canons of statutory construction, except in one area, *viz.* the amendability of the Constitution.[80] One could usually come across such statements as the following strewn in the judicial pronouncements : "This Court is not concerned with policy or economic considerations."[81]

In *Cooper v. Union of India*,[82] the Supreme Court declared the economic considerations and policies underlying the Banks Nationalization Act "have little relevance in determining the legality of the measure." These statements mean that the Court is concerned with the law, as such, and not with the merits of the underlying policies. For example, whether nationalisation of banks is good or bad and whether it ought to be undertaken or not is a matter of legislative policy and the legislature is the best judge of the same and not the courts. To some extent, the same attitude prevails even to-day.

But, for some time now, the Judges seem to have become more forthcoming in adopting a 'policy' approach in interpreting constitutional provisions, as emphasis has come to be placed on a more creative law-making judicial role as regards constitutional interpretation.

This trend may be said to have become prominent with *Maneka Gandhi* where BHAGWATI, J., has openly declared that the role of the courts is to expand not to extenuate the Fundamental Rights.[83] This judicial policy has been translated into practical terms through a series of post-*Maneka* cases, particularly, in the area of

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77. *Supra*, Ch. II, Sec. M.
78. H.W.R WADE, CONSTITUTIONAL FUNDAMENTAL, 61-62.
79. *Ibid.*, 75-77. Also, GRIFFITH, THE POLITICS OF THE JUDICIARY, 211.
80. *Infra*, next Chapter.
81. *State of Bombay v. Bombay Education Society*, AIR 1954 SC 561, 567 : (1955) 1 SCR 568.
82. AIR 1970 SC 564, 601 : (1970) 1 SCC 248.
83. See, *Maneka Gandhi*, *supra*, Ch. XXVI, Sec. C; *Pathumma*, *supra*, footnote 14.

personal liberty and freedom of speech. Economic rights of the poor also now claim protection at the hands of the Supreme Court.[84]

Another notable trend is the emergence of 'public interest litigation' which is avowedly meant for the protection of basic rights of the poor and the deprived.[85]

Although the present judicial trend in India is towards liberal constitutional interpretation, it is not true to think that the literal approach is completely moribund. Such an approach does manifest itself from time to time. Also, one and the same judge may at one time resort to liberal approach but may at other time resort to literal approach.

A typical case-study in this connection is provided by the *Sankalchand* case[86], where the question was whether Art. 222 should be so interpreted as to permit transfer of a Judge from one High Court to another only with his consent, *i.e.*, consensual transfer. The question was whether the word 'transfer' in Art. 222 could be interpreted only to mean 'consensual' transfer and not compulsory transfer? The conflict in judicial approaches becomes obvious when the majority applying the literal approach interpreted Art. 222 on its own terms, but the minority (BHAGWATI and UNTWALIA, JJ.) applied liberal approach to interpreting Art. 222.

CHANDRACHUD, J., (a majority judge) treated the Constitution as a statute and applied to it the norms of statutory interpretation and even extolled the literal approach to the Constitution. On the other hand, BHAGWATI, J., imports into Art. 222, by necessary implication, the consent of the Judge to his transfer from one to another High Court and strongly decries the technique of literal interpretation of the Constitution in the following words:

> ".... when the Court interprets a constitutional provision, it breathes life into the inert words used in the founding document. The problem before the constitution Court is not a mere verbal problem... The Court cannot interpret a provision of the Constitution by making "a fortress out of the dictionary". The significance of a constitutional problem is vital, not formal: it has to be gathered not simply by taking the words and a dictionary, but by considering the purpose and intendment of the framers as gathered from the context and the setting in which the words occur .... (T)he process of constitutional interpretation is in the ultimate analysis one of reading values into its clauses".[87]

BHAGWATI, J., reads 'consent' into the provision to mean 'transfer' only as consensual transfer to give effect to the paramount intention of the constitution-makers to safeguard the independence of the superior judiciary by placing it out of the reach of the power of the executive. Another majority judge, K. IYER, J., who usually adopted a liberal approach in socio-economic matters adopted a literal approach in interpreting Art. 222.

As an illustration of his approach in socio-economic matters, note the following observation of the Court:

> "Our emphasis is on abandoning formal legalistics or sterile logomachy in assessing the vires of statutes regulating vital economic areas, and adopting instead a dynamic, goal-based approach to problems of constitutionality."[88]

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84. See, *supra*, Ch. XXXIV.
85. *Supra*, Chs. VIII, Sec. D(k) and XXXIII, Sec. B.
86. *Supra*, Ch. VIII, Sec. B(q).
87. AIR 1977 SC at 2362 : (1977) 4 SCC 193.
88. *State of Karnataka v. Ranganatha Reddy*, AIR 1978 SC 215 at 234 : (1977) 4 SCC 471.

(b) CONSTITUENT ASSEMBLY DEBATES

The debates of the Constituent Assembly running into hundreds of printed pages constitute a veritable source of information throwing a flood of light on the genesis of many provisions of the Constitution, and the ideas and reasons underlying their adopting. The courts do not rely very much on historical materials to interpret a provision of the Constitution. The report of the Drafting Committee on the Constitution, or the speeches of the members of the Constituent Assembly, the courts have emphasized, can be used only in case of ambiguity or for properly understanding the circumstances under which a provision of the Constitution was passed but not for the purpose of controlling its meaning.[89]

Where the language of a provision admits of two interpretations, the Court may resort to the historical materials.[90] The reason for not placing much reliance on the historical materials to interpret the Constitution has been explained in the following words: "A speech made in the course of the debate on a bill could at best be indicative of the subjective intent of the speaker, but it could not reflect the inarticulate mental process lying behind the majority vote which carried the bill. Nor it is reasonable to assume that the minds of all those legislators were in accord.

The Court could only search for the objective intent of the legislature primarily in the words used in the enactment, aided by such historical material as reports of statutory committees, preambles, *etc.*".[91] This reluctance to use the debates of the Constituent Assembly or reports of the various Committees appointed by it to interpret constitutional provisions may be regarded as emanating from the judicial approach of applying canons of statutory interpretation to the Constitution. But cases are not entirely wanting when some judges have taken recourse to this historical material to elucidate the meaning of a constitutional provision.[92] For example, Justice V.R. KRISHNA IYER quoted copiously from the Constituent Assembly Debates, in *Samsher Singh v. State of Punjab*[93] to come to the conclusion that the President is only a constitutional head. Copious extracts from the Constituent Assembly Debates are to be found in *Kesavananda,*[94] but still the rule has been reiterated that while one may seek confirmation of one's interpretation in debates, it is quite a different thing to interpret constitutional provisions in the light of the debates.

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89. *Travancore-Cochin v. Bombay Co. Ltd.,* AIR 1952 SC 366; *Aswini Kumar v. Arabinda Bose,* AIR 1952 SC 369 : 1953 SCR; *State of West Bengal v. Bella Banerjee,* AIR 1954 SC 170; KANIA, C.J., and FAZL ALI, J., in *Gopalan,* AIR 1950 SC 27, 38; *Automobile Transport v. State of Rajasthan,* AIR 1962 SC 1406; *The Golak Nath* case, *op. cit.*, at 1682, 1728.

90. See FAZL ALI, J., in *S.P. Gupta v. Union of India,* AIR 1982 SC 304-14; *supra*, Ch. VIII, Sec. B(c).

91. *Gopalan's* case, per PATANJALI SASTRI, J., AIR 1950 SC 27 at 73.

92. Some reference is made to the debates of the Constituent Assembly in *Sankal Chand, supra*, footnote 86, to show that the constitution-makers put a great premium on the independence of the judiciary.

In *State of Karnataka v. Ranganatha Reddy,* AIR 1978 SC 215, K. IYER, J., refers to the historical materials on the questions of compensation and public purpose in Art. 31, *supra*, Ch XXXI, Sec. C.

93. AIR 1974 SC 2192 at 2212-2219 : (1974) 2 SCC 831; *supra*, Ch. III, Sec. B.; Ch. VII, Sec. B.

94. AIR 1973 SC 1516 : (1973) 4 SCC 225; *infra*, next chapter.

Recently, in *S.R. Chaudhuri v. State of Punjab*,[1] while interpreting Art. 164(4)[2] the Supreme Court referred to the debates of the Constituent Assembly to find out the intention of the framers of the Constitution. The Court went on to assert in the instant case: "It is a settled position that debates in the Constituent Assembly may be relied upon as an aid to interpret a constitutional provision because it is the function of the Court to find out the intention of the framers of the Constitution."

In the U.S.A., the rule of excluding the debates has not always been adhered to; sometimes distinction is drawn between using materials to ascertain the purpose of the constitutional provision and using it to ascertain its meaning.[3] In Australia, the individual opinion of members of the Convention expressed in the debates is not referred to for the purpose of construing the Constitution.[4]

There is, however, enough in these historical materials of use and interest to a constitutional lawyer. A commentator has observed: "Indian Legal scholars can contribute to an understanding of Indian Constitutional development by clarifying the intentions of the original framers and the departures which the responsible leaders have found desirable. Whether or not the material they find is of a kind that courts will take into account under their rules of constitutional construction, it will throw light on the growth of India's organic law".[5]

Further, in America, 'the rich mine of original constitutional materials, more than a century and half old' has been worked out completely, but in India 'the ore has scarcely been touched.' A study of these materials (mainly Constituent Assembly Debates) may contribute much to an understanding of the intentions of the original framers of the Constitution and, consequently, to an understanding of the Constitution itself.[6] In view, however, of the general judicial attitude towards the historical sources, this task has to be performed by academic lawyers.[7]

(c) PREAMBLE

By itself alone, the Preamble to the Constitution can afford no basis for a claim of either government power or a private right.[8] Nevertheless, the preamble serves two significant ends. First, it indicates the source from which the Constitution derives its claim to obedience and legitimacy, namely, the People of India. Secondly, it states the great objects which the Constitution and the government established by it are expected to promote.[9]

The Supreme Court has clarified the status of the Preamble to the Constitution in several cases.[10] The declaration made by the People of India in exercise of

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1. AIR 2001 SC 2707, at 2717 : (2001) 7 SCC 126.
2. See, *supra*, Ch. VII, Sec. B, for this provision.
3. *U.S. v. Wong Kim Ark*, 169 US 649.
4. *Municipal Council of Sydney v. Commonwealth*, 1904 CLR 208.
5. Historical Footnote to Bela Banerjee's case, 1 *JILI* 375 (1959).
6. ALEXANDROWICZ, CONST. DEVELOPMENT IN INDIA, 18.
7. Several books based on these historical materials have been published. See, for example: AUSTIN, THE INDIAN CONSTITUTION; CORNERSTONE OF A NATION (1966), *supra*, 2; TEWARY, THE MAKING OF THE INDIAN CONSTITUTION (1967); GHOSH, THE CONSTITUTION OF INDIA: HOW IT HAS BEEN FRAMED (1966); B. SHIVA RAO, THE FRAMING OF INDIA'S CONSTITUTION, 4 Vols. (1966).
8. For Preamble, see, *supra*, Chs. I, Sec. E and XXXIV, Sec. A.
9. CORWIN, THE CONSTITUTION AND WHAT IT MEANS, 1 (1954).
10. See, *supra*, Ch. XXXIV, Sec. A, on this point.

their sovereign will in the Preamble to the Constitution is "a key to the mind of the constitution-makers",[11] which may show the general purposes for which they made the several provisions in the Constitution. But the Preamble is neither a part of the Constitution nor is it the source of any substantive power of the government. Such powers embrace only those powers which are either expressly granted by the Constitution or which may be implied from those granted. Nor can any prohibitions and limitations be implied on the government from the Preamble.

The Supreme Court has stated that "at the highest it may perhaps be arguable that if the terms used in any of the articles in the Constitution are ambiguous or are capable of two meanings, in interpreting them some assistance may be sought in the objectives enshrined in the Preamble."[12]

In *Kesavananda*, a view has been expressed that the Preamble to the Constitution is of extreme importance and the Constitution should be read and interpreted in "the light of the grand and noble vision expressed in the Preamble."[13] The view expressed in *Berubari*[14] that the Preamble was not a part of the Constitution was disputed by some Judges in *Kesavanda*.[15]

Recently, the Supreme Court has used the word 'socialist' in the Preamble to expound such principles as: "equal pay for equal work".[16] The concept has also been used to gain a liberal pension scheme for old retirees from government service,[17] as well as to seek economic empowerment of the weaker sections of the society.[18]

(d) SPIRIT OF THE CONSTITUTION

The Supreme Court has emphasized that it will confine itself to the written text of the Constitution for the purpose of judicial review and not take recourse to any abstract concept like the "spirit of the constitution."

Chief Justice KANIA observed in *Gopalan's* case that the courts "are not at liberty to declare an Act void because in their opinion it is opposed to a spirit supposed to pervade the Constitution but not expressed in words. Where the Fundamental law has not limited, either in terms or by necessary implication, the general powers conferred on the Legislature, we cannot declare a limitation under the notion of having discovered something in the Constitution which is not even mentioned in the instrument. It is difficult upon any general principles to limit the omnipotence of the sovereign legislative power by judicial interposition, except so far as the express words of a written Constitution give that authority."[19]

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11. Ref. on *Berubari*, AIR 1960 SC 845 : (1960) 3 SCR 250; *supra*, Ch. V, Sec. C.
12. Also, *Golak Nath*, AIR 1967 SC 1643, 1682 : (1967) 2 SCR 762; see next Chapter.
13. AIR 1973 SC 1506, 1579, 1680.
Also see, *Behram Khurshid Pesikaka v. State of Bombay*, AIR 1955 SC 123 : (1955) 1 SCR 613; *In re Kerala Education Bill*, AIR 1958 SC 956 : 1959 SCR 995.
14. *Supra*, footnote 11.
15. SIKRI, C.J., AIR 1973 SC 1503; Ray, J., *Ibid.*, at 1680.
16. *Randhir Singh v. Union of India, supra*, Ch. XXIII, Sec. C.
Also see, *P. Savita v. Union of India*, AIR 1985 SC 1124; *supra*, Chs. XXI, XXIII, Sec. C and XXXIV, Sec. D.
17. *D.S. Nakara v. Union of India, supra*, Ch. XXI, Sec. C(c).
18. See, *supra*, Ch. XXXIV, Sec. D, under "Directive Principles of State Policy".
19. AIR 1950 SC 42, Sec. B(a).

This theme has been reiterated time and again by the Supreme Court. MAHAJAN, J., observed in *State of Bihar v. Kameshwar*:[20] "It is well settled that recourse cannot be had to the spirit of the Constitution when its provisions are explicit in respect of a certain right or matter. When the Fundamental law has not limited either in terms or by necessary implication the general power conferred on the Legislature, it is not possible to deduce a limitation from something supposed to be inherent in the spirit of the Constitution. This elusive spirit is no guide in this matter. The spirit of the Constitution cannot prevail as against its letter. The courts are not at liberty to declare an act void because in their opinion it is opposed to the spirit supposed to pervade the Constitution but not expressed in words."

These statements put emphasis basically on the statutory or literal interpretation of the Constitution.[21] But, then, in cases on the constitutional amendment, the Supreme Court did renounce this approach and adopted the doctrine of immutability of the "basic features" of the Constitution which is a judge-made concept.[22] Then, there are cases in which the Supreme Court has invoked the concepts of independence of the Judiciary and Rule of law to interpret constitutional provisions.

(e) POLITICAL QUESTIONS

A question is raised at times whether the courts should entertain a political question. Many constitutional law questions have political overtones. Should the courts refuse to take cognisance of such questions?

If the courts do so, then the scope of constitutional litigation will be very much reduced and no ready-made machinery may be available to solve such questions and this may raise tensions in the body politic.

The plea of non-justiciability of a political question was raised by the Central Government as early as 1971 in *Madhav Rao Scindia v. Union of India*.[23] In this case, the Supreme Court went into the question of the validity of a Presidential order derecognising the rulers of the erstwhile Princely States. The argument against judicial review of the order was that recognition of a ruler by the President was a political question and that the Court ought not to take cognisance of the matter raised in that case. But the Court rejected the argument saying that the power of the President to determine the status of the rulers by cancelling or withdrawing recognition to abolish the concept of rulership with a view to effectuate government policy was liable to be challenged.[24] The Court quashed the order.

HEDGE, J., said in the same case: "There is nothing like a political power under our Constitution in the matter of relationship between the executive and the citizens."[25]

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20. AIR 1952 SC 252 at 309 : 1952 SCR 889.
Also see, *Keshavan Madhava Menon v. State of Bombay,* AIR 1951 SC 128 : 1951 SCR 228; *supra,* Ch. XX, Sec. F.
21. See *supra,* Sec. D(b).
22. See, next Chapter.
23. AIR 1971 SC 530 : (1971) 1 SCC 85; *supra,* Ch. XXXVII, Sec. E.
24. SHAH, J., *ibid*., 565.
25. *Ibid.* 619.

Next time, the same question cropped up in *State of Rajasthan v. Union of India*,[26] in relation to the power of the President to dissolve State Assemblies under Art. 356. The Supreme Court answered the question by saying that it would not entertain a purely political question which does not involve determination of any legal or constitutional right or obligation. The Court is concerned only with adjudication of legal rights and liabilities. But merely because a question has a political complexion, that by itself is no ground why the Court should shrink from performing its duty under the Constitution if it raises an issue of constitutional determination.

A constitution is a matter of purest politics, a structure of power. Merely because a question has a political colour, the Court cannot fold its hands. So long as a question arises whether an authority under the Constitution has acted within the limits of its power or exceeded it, it can certainly be decided by the Court. Indeed, it is its constitutional obligation to do so. The Constitution is the supreme *lex,* the paramount law of the land, and there is no department or branch of government above or beyond it.

In this connection, reference has been made to an American case, *Baker v. Carr*[27] where the U.S. Supreme Court held that it could entertain an action challenging a statute apportioning legislative districts as contrary to the equal protection clause. Justice BRENNAN expressed the view that "the mere fact that the suit seeks protection of a political right does not mean that it presents a political question". In this case, the U.S. Supreme Court decided that voting districts within a State should be of approximately equal proportion.[28]

The Court emphasized that the claim of the appellants that they were being denied equal protection was justiciable. If there is discrimination, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights. "The non-justiciability of a political question is primarily a function of the separation of powers". "The courts cannot reject as 'no-law suit' a *bona fide* controversy as to whether some action denominated "political" exceeds constitutional authority". The *Baker* decision did reverse a uniform course of decisions established by a number of cases of judicial non-interference in demarcation of voting districts. An example of what the U.S. Supreme Court regards as a non-justiciable political question is furnished by *Coleman v. Miller*.[29]

In *Rajasthan,* the Supreme Court did however suggest that it may not entertain a matter in which it could not lay down 'judicially discoverable and manageable standards.'[30]

Reference was again made to the 'political question' doctrine in *A.K. Roy v. India.*[31] The question was whether the President's satisfaction to issue an ordinance was justiciable, or could it be characterised as a non-justiciable political

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26. *State of Rajasthan v. Union of India,* AIR 1977 SC 1361, 1412 : (1977) 3 SCC 592; *supra,* Ch. XIII, Sec. D.
27. (1962) 369 US 186.
28. Other cases in this area are: *White v. Register,* 412 US 755 (1973); *Hoff v. Buckley,* 379 US 359 (1965).
29. (1939) 307 US 433.
30. *State of Rajasthan v. Union of India,* AIR 1977 SC 1361, at 1413 : (1977) 3 SCC 592.
31. AIR 1982 SC 710; *supra,* Chs. III, Sec. D(ii)(d) and VII, Sec. D(ii)(c).

question? The Court pointed out certain differences between the Indian and the American constitutional systems implying that the doctrine could not be adopted in India. The doctrine is based in the U.S.A. on the principle of 'Separation of Powers'; in the U.S.A., the President exercises power in his own right but, in India, he acts on the advice of the Council of Ministers. Thus, in India, "the President's 'satisfaction' is, therefore, nothing but the satisfaction of his Council of Ministers in whom the real executive power resides".

It was pointed out in *Roy*[32] that the doctrine of the political question has come under adverse criticism even in the USA so much so that the phrase "political question" has become "a little more than a play of words".

The question has been elaborately discussed by the Supreme Court in *R.C. Poudyal v. Union of India*[33]. The XXXVI Amendment[34] introduced Art. 371F in the Constitution granting statehood to Sikkim but at the same time making some special provisions for the State.[35] Art. 371F(f) provides for reservation of seats in the State Legislature based on ethnic group. It was argued that the Court should not consider the matter as it raised a political question. The Court rejected the contention and did consider the question whether Art. 371F(f) was constitutionally invalid as it destroyed a basic feature of the Constitution.

On the question of non-judiciability of a political question, the Court has maintained that "Our Court has received and viewed this doctrine with a cautious reservation."

The doctrine of 'political question' is invoked by the government whenever it seeks non-reviewability of certain actions or decisions taken by it. While the doctrine may not be invoked liberally so as to adversely affect judicial review, it need not be rejected completely also as there may be an occasion when a question may arise to which no legally ascertainable standard may be applicable and may be regarded as non-justiciable on that account.

One such occasion arose before the Delhi High Court sometime back.[36] There were riots in Delhi following the assassination of Prime Minister Indira Gandhi in which a number of Sikhs were killed. The Government refused to appoint an inquiry commission to inquire into the riots. The Delhi High Court refused to intervene saying that the refusal by the Government to appoint a commission of inquiry was a "political decision".

(f) FOREIGN PRECEDENTS

While construing the provisions of the Indian Constitution, constitutional precedents from such countries as the U.S.A., Canada, Australia and Britain are often cited before the Indian courts. The Supreme Court has, however, warned from time to time that foreign precedents have persuasive value but they ought to be used with caution and not indiscriminately.[37]

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32. *Ibid.*
33. AIR 1993 SC 1804, at 1844-45 : 1994 Supp (1) SCC 324; *supra*, Chs. V, Sec. B and IX, Sec. D.
34. See, *supra*, Chs. V and IX; also *infra*, Chs. XLI and XLII.
35. *Ibid.*
36. *Peoples Union for Democratic Rights v. Ministry of Home Affairs*, AIR 1985 Del 268, 283.
37. MUKHERJEE, J., in the *Delhi Laws Act* case, *supra*, Ch. II.

Foreign precedents as such are not binding on the Indian courts and they are thus free to use or not to use them. The Supreme Court has ruled in *Chaturbhuj v. Moreshwar*,[38] that it is not bound by the dicta and authority of the English cases.

The matter has been put in the right perspective by the Supreme Court in *Sundaramier v. Union of India*,[39] where the Court observed: "The threads of our Constitution were no doubt taken from other Federal Constitutions but when they were woven into the fabric of our Constitution their reach and their complexion underwent changes. Therefore, valuable as the American decisions are as showing how the question is dealt with in a sister Federal Constitution, great care should be taken in applying them in the interpretation of our Constitution. We must not forget that it is our Constitution that we are to interpret, and that interpretation must depend on the context and setting of the particular provision which has to be interpreted."

The same words used in constitutional enactments of various nations may bear different connotations. The social conditions also differ from country to country.

This warning notwithstanding, cases from other constitutions are often cited and considered by the Indian judiciary. The reason for this approach was explained by the Supreme Court itself in the *Atiabari* case:[40] "When you are dealing with the problem of construing a constitutional provision which is none too clear or lucid you feel inclined to inquire how other judicial minds have responded to the challenge presented by similar provisions in other sister constitutions." The Indian Courts thus adopt a selective process in applying foreign precedents.

A large number of American cases were cited in the *Express Newspaper* case[41] on the freedom of speech and expression on the ground that the freedom as enshrined in Art. 19(1)(*a*) "is based on the provisions in Amendment I of the Constitution of the U.S.A., and it would be, therefore, legitimate and proper to refer to those decisions of the Supreme Court of the U.S.A. in order to appreciate the true nature, scope and extent of this right".

Again, in *Indian Express Newspapers v. Union of India*,[42] American cases on the I Amendment were cited. But the Supreme Court said that it could not "solely" be guided by the American decisions, for the pattern of Art. 19(1)(*a*) is different from the I Amendment "which is almost absolute in its terms." "But in order to understand the basic principles of freedom of speech and expression and the need for that freedom in a democratic country, we may take them into consideration."[43]

On a few points , foreign precedents have been helpful in giving guidance, while on many others, they have not been followed. On the whole, the value of foreign precedents in interpreting the provisions of the Indian Constitution has been only marginal. Thus, the American Constitutional precedents on the Com-

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38. AIR 1954 SC 236 : 1954 SCR 817.
39. *Supra*, Ch. XI.
Also see, *L. Jagannath v. Authorised Officer, Land Reforms, Madurai,* AIR 1972 SC 425 : (1971) 2 SCC 893.
40. *Supra*, Ch. XV, Sec. D.
41. *Supra*, Ch. XXIV, Sec. C, under Art. 19(1)(a).
42. (1985) 1 SCC 641 : AIR 1986 SC 515.
43. *Ibid.*

merce Clause have not been followed as guiding factors to interpret Art. 301,[44] as the American Constitution does not contain provisions like Arts. 19(1)(*g*)[45] and 301.[46] In the U.S.A., the word 'commerce' has been interpreted broadly so as to include even gambling, the reason being that if 'commerce' were not so interpreted, gambling would fall outside the purview of the Commerce Clause and the Centre would then be unable to regulate it on an interstate basis. This approach obviously did not suit India where the purpose of suppressing gambling could be achieved only by denying that gambling is commerce and thus keep it out of the protection of Arts. 19(1)(*g*) and 301.[47]

The Supreme Court has expressed reservations in following American cases to interpret the term 'reasonable restrictions' in Art. 19(6) because of the difference in social conditions.[48] In *Sundaramier's* case, the Supreme Court again refused to follow the American position of denying to the importing States power to levy sales tax on interstate commerce. It was argued that interstate commerce being with the Centre in India, the States should be denied the power to levy a sales tax on interstate sales on the American analogy. The Supreme Court refused to accept the argument and decided the question on an interpretation of Art. 286.[49]

In *Travancore-Cochin v. Bombay Co.*[50] while interpreting Art. 286, the Supreme Court refused to follow the American cases on the Commerce Clause regarding the 'export stream' of goods and their immunity from taxation by the States on the ground that the U.S. Commerce Clause and Art. 286 "are widely different in language, scope and purpose, and a varying body of doctrines and tests have grown around their interpretations extending or restricting, from time to time, their operation and application in the context of the expanding American commerce and industry".

Similarly, the Supreme Court in India has refused to apply such American concepts as police power and original package. As regards police powers, FAZL ALI, J., said in the *Chiranjit Lal* case[51] that the principles underlying the concept were not peculiar to the U.S.A., but were recognised in every modern civilized country. But, in later cases, the doctrine has been completely refused recognition in India.[52] MUKHERJEA, J., in the very same case refused to import the doctrine in India stating: "In interpreting the provisions of our Constitution, we should go by the plain words used by the Constitution-makers and the importing of expressions like 'police power' which is a term of variable and indefinite connotation in American Law can only make the task of interpretation more difficult".[53] The Court characterised the expression "police power" as alien to the scheme of the Indian Constitution.

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44. *Supra*, Ch. XV, Sec. D.
45. *Supra*, Ch. XXIV, Secs. I and J..
46. *Supra*, Ch. XV, Sec. D.
47. *Supra*, Chs. XV, Sec. D, and XXIV, Secs. I and J.
48. *Pathumma v. State of Kerala,* AIR 1971 SC 771 : (1978) 2 SCC 1.
49. *Supra*, Ch. XI, Sec. J.
50. *Ibid.*
51. AIR 1951 SC 41, Ch. XXXI, Sec. A.
52. *Supra*, Ch. XXXI under Art. 31. *K.K. Kochuni v. State of Madras*, AIR 1960 SC 1080 : (1960) 3 SCR 887.
53. *Synthetics & Chemicals Ltd. v. State of Uttar Pradesh*, AIR 1990 SC 1927 : (1990) 1 SCC 109; *supra*, Ch. XI.

The doctrine of original package has been discussed by the Indian Supreme Court in the *Balsara* case.[54] The doctrine applies in the U.S.A. to commodities imported from foreign countries and envisages that importation is not over till goods remain in original package[55] and so the constituent States of the U.S.A. have no power to tax imports till the original package is broken or there is at least one sale if the goods remain in original package.

The doctrine was cited in the *Balsara* case to interpret the word 'import' in entry 41, List I,[56] broadly and so to curtail the State power correspondingly. The Supreme Court refused to accept the doctrine in view of the scheme of legislation outlined in the Constitution in which the various entries in the legislative lists have been expressed in clear terms and precise language. In the U.S.A., widest meaning could be given to the Commerce Clause as it was not to be reconciled with any State power. In India, entry 41 in List I has to be limited in view of entry 8, List II,[57] dealing with intoxicating drugs.

The doctrine of immunity of instrumentality evolved in the U.S.A. has also not found acceptance in India.[58]

The Supreme Court has refused to apply in India the American doctrine of preferred Fundamental Rights. The doctrine envisages that any law restricting freedoms of speech, press, religion or assembly must be taken on its face to be invalid till it is proved to be valid.[59] The result of this doctrine is to shift the burden of proof on the shoulders of those defending the law, without raising in their favour the presumption of the validity of the legislation. In India, this doctrine has not found a foot-hold. As the Supreme Court has stated, it is not possible to say that any one Fundamental Right is superior to the other or that Art. 19 contains a hierarchy.[60]

The Supreme Court has refused to apply the American doctrine of substantive due process on the ground that "it seeks to set up the courts as arbiters of the wisdom of the Legislature in enacting the particular piece of Legislation."[61] To some extent, however, the doctrine has been incorporated in Art. 14 under which a statute can be declared unconstitutional if it is "arbitrary or unreasonable;"[62] as well as in Art. 19 in the concept of "reasonable restrictions".[63]

The following principles, *inter alia*, of the American Constitution have found acceptance at the hands of the Indian Supreme Court:

(1) No one whose right is not directly affected can question the constitutionality of law. But this rule of standing has been liberalized and is now subject to public interest litigation.[64]

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54. *State of Bombay v. Balsara,* AIR 1951 SC 318 : 1951 SCR 682.
55. *Brown v. Maryland,* 25 US 419; *Leisy v. Hardin,* 135 US 100.
56. *Supra*, Ch. X, Sec. D.
57. *Ibid*.
58. *Supra*, Ch. XI, Sec. J(ii).
59. *Kovacs v. Cooper,* 373 US 77 (1947).
60. *Madhu Limaye v. S.D.M., Monghyr,* AIR 1971 SC 2486 : (1970) 3 SCC 746; *supra,* Ch. XXIV.
61. *State of Andhra Pradesh v. McDowell & Co.,* AIR 1996 SC 1628 at 1641 : (1996) 3 SCC 309.
62. *State of Tamil Nadu v. Ananthi Ammal,* (1995) 1 SCC 519; *supra,* Ch. XXI, Sec. C(q).
63. *Supra*, Ch. XXIV, Sec. B.
64. *Supra*, Chs. VIII, Sec. D(j) and XXXIII, Sec. A(n).

(2) There is a presumption in favour of the constitutionality of a statute challenged under Art. 14.[65]

(3) The constitutionality of a statute is to be tested under Art. 14 by applying the principle of reasonable classification.[66]

Justifying the adoption of the American principle for interpreting Art. 14, the Supreme Court has observed as follows: Art. 14 is adopted from the last clause of S. 1 of the XIV Amendment of the U.S. Constitution. It may, therefore, be reasonably assumed that the Constitution-makers while enshrining the guarantee of equal protection of laws in the Constitution, were aware of its content as delimited by the judicial interpretation in the U.S.A. In adopting the views of the American courts, therefore, the courts in India would not "be incorporating principles foreign to our constitution, or be proceeding upon the slippery ground of apparent similarity of expressions or concepts in an alien jurisprudence developed by a society whose approach to similar problems on account of historical or other reasons differ from ours."[67]

But many a time, while interpreting Art. 14, the Supreme Court of India has refused to follow the American cases on the equality clause in the U.S. Constitution with the remark that while the American cases provide useful guidance, they cannot be followed as such.[68]

(4) The legislature should lay down the policy while delegating legislative power to the executive.[69]

(5) In the *Express Newspaper* case, the American principle that laws regulating payment of wages to the Press do not abridge freedom of speech and expression was made use of by the Supreme Court to hold that appointment of a wage board to fix minimum wages of the journalists does not infringe Art. 19(1)(*a*).[70]

(6) In the *Golak Nath* case, five Judges of the Supreme Court have adopted the doctrine of prospective overruling—a doctrine which has its origins in the U.S.A.[71]

(7) In *Govind v. State of Madhya Pradesh*, the Supreme Court referred to the concept of 'right to privacy' evolved in the U.S.A. and showed readiness to adopt the same in India to some extent while interpreting Arts. 19(1) and 21.[72]

(8) As regards the all important American doctrine of due process of law, the Supreme Court first refused to apply the same in India.

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65. *Supra*, Ch. XXI.
Also see, *infra*, Sec. H.
The relevant American cases are: *Middleton v. Texas Power and Light Co.*, 249 US 159; *Lindsley v. Natural Carbonic Gas Co.*, 220 US 61.
66. *Supra*, Ch. XXI.
67. *State of Uttar Pradesh v. Deoman*, AIR 1960 SC 1125 : (1961) 1 SCR 14; *supra*.
68. *Air India v. Nergesh Meerza*, AIR 1981 SC 1829, 1852 : (1981) 4 SCC 335.
69. *Supra*, Ch. II, Sec. N.
70. *Supra*, Ch. XXIV, Sec. J(e).
71. *Infra*, next Chapter.
72. *Supra*, Ch. XXVI, Sec. J(m).

In *Gopalan*,[73] the Supreme Court refused to read the American concept of "due process" in the words "procedure established by law" found in Art. 21, on the ground that ".... when the same words are not used it will be against the ordinary canons of construction to interpret a provision in our constitution in accordance with the interpretation put on a somewhat analogous provision in the constitution of another country, where not only the language is different, but the entire political conditions and constitutional set up are dissimilar."

But in *Maneka Gandhi*, the Supreme Court reversed this position and integrated the concept of procedural due process with procedure established by law in Art. 21. This matter has already been discussed earlier.[74]

(9) Following the American cases holding that commercial speech is protected under the First Amendment to the U.S. Constitution, the Supreme Court has also ruled in *Tata Press Ltd. v. Mahanagar Telephone Nigam Ltd.*[75] that commercial speech is also protected in India under Art. 19(1)(a).[76]

Cases from Australia on S. 92 of the Australian Constitution have been freely cited in connection with the interpretation of Art. 301, but the impact of these cases has not been much as there is nothing in Australia like Arts. 19(6) and 302-304.[77] Still, the Australian view has been adopted in India in certain respects, *e.g.*, gambling is not commerce;[78] Art. 301 outlaws only 'direct' restraints on trade, commerce and intercourse;[79] compensatory taxes were not hit by the concept of freedom of trade and commerce.[80]

The developments in the area of the doctrine of 'immunity of instrumentalities' in Australia have been noted by the Supreme Court in India while expounding the scope of Arts. 285 and 289.[81]

The major contribution of the Canadian Constitution to the interpretative process of the Indian Constitution has been the doctrine of 'pith and substance' which has been evolved in Canada to interpret the legislative lists contained in Ss. 91 and 92 of the British North America Act.[82] On the doctrine of 'immunity' also, the views of the Supreme Court in India have corresponded to those of the Canadian Courts.[83]

While interpreting the term 'excise' in the relevant legislative entries in India, the Supreme Court has not followed the judicial views expressed in any one of the other three Federal Constitutions. But the Supreme Court has taken its cue

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73. *Ibid*, Sec. B(a).
74. *Supra*, Ch. XXVI, Sec. C.
75. AIR 1995 SC 2438, 2442-2445 : (1995) 5 SCC 139.
76. See, *supra*, Ch. XXIV, Sec. C(k).
77. *Supra*, Ch. XV.
78. *Supra*, Chs. XV and XXIV. The relevant Australian case in *Mansell v. Beck*, 30 Aust. LJ 346.
79. *Supra*, Ch. XV.
80. *Ibid*.
81. *Supra*, Ch. XI, Sec. J(iii).
82. *Supra*, Ch. X, Sec. G(iv).
83. *Supra*, Ch. XI, Sec. J(ii).

from these constitutions in holding that the Central Government in India can levy duties of excise and customs on goods manufactured or imported by a State.[84]

The Indian Constitution borrows from Britain the basic feature of parliamentary form of government.[85] India very closely follows Britain in the area of legislative privileges.[86] In several cases, the Supreme Court has surveyed the developments in the area in Britain over time and taken note of several cases from there to interpret Arts. 105 and 194.[87]

Widest possible use of English precedents has been made in India under Arts. 32 and 226.[88] The courts have power to issue writs under these provisions and the conditions and circumstances under which writs may be issued in India have been determined by and large on the basis of the principles evolved in Britain, though the Supreme Court has emphasized that the courts in India should only follow broad and Fundamental principles of these writs and not all the procedural technicalities and nuances thereof in the English law.[89] For Arts. 32, 226 and 136, at times, differentiation is made between administrative and *quasi*-judicial functions for which purpose again cases from Britain are freely cited.[90] Again, on the concept of natural justice, the cases from Britain are freely cited.[91]

It is also of interest to note that some of the principles of the English Common law which emanate form the existence of the monarchy in Britain have been found not applicable to the republican form of government in India and have thus been specifically departed from, *e.g.*, the English Common law doctrine that the State is not bound by a statute unless specifically named therein is not followed in India.[92] Similarly, unlike Britain, a civil servant in India can sue for arrears of his salary.[93]

In *U.N.R. Rao v. Indira Gandhi*,[94] it was urged that the Supreme Court should interpret Art. 75(3) on its own terms regardless of the conventions that prevail in Britain. To this the Court's reply was that if the words of an article are clear, notwithstanding any relevant convention, effect will no doubt be given to the words. "But it must be remembered that we are interpreting a Constitution and not an Act of Parliament, a Constitution which establishes a Parliamentary system of Government with a Cabinet. In trying to understand one may well keep in mind the conventions prevalent at the time the Constitution was framed."[95]

F. PRINCIPLE OF HARMONIOUS INTERPRETATION

The Constitution should be so interpreted as to give effect to all its parts. The presumption is that no conflict or repugnancy was intended by the framers

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84. *Supra*, Ch. XI, Sec. J(ii).
85. *Supra*, Chs. I, II, III, VI and VII.
86. *Supra*, Chs. II, Sec. L and VI, Sec. H.
87. *Ibid*.
88. *Supra*, Chs. IV, VIII, Sec. D and XXXIII, Sec. A.
89. *Supra*, Ch. VIII, Sec. D.
90. *Supra*, Chs. IV, Sec. D, VIII, Sec. D and XXXIII, Sec. A.
91. See, *supra*, Ch. VIII, Sec. E(iv)(d).
92. *Supra*, Ch. XXXVII, Sec. G.
93. *Supra*, Ch. XXXVI, Sec. C(a).
94. AIR 1971 SC 1002, 1003 : (1971) 2 SCC 63.
95. *Supra*, Ch. III, Sec. B.

between the various provisions of the Constitution. Accordingly, it has been laid down that if certain provisions in the Constitution appear to be in conflict with each other, these provisions should be interpreted so as to effect a reconciliation between them so that, if possible, effect could be given to all.[1] This is, what is known as, the rule of harmonious interpretation.

The principle has been applied to resolve conflict between Arts. 25(2)(*b*) and 26(*b*),[2] and to delimit the mutual relationship between the Directive Principles and Fundamental Rights.[3] Art. 14 has been held to control Art. 310.[4]

The principle of harmonious construction has been applied to interpret the entries in the various legislative lists.[5] The Fundamental Rights and the legislative privileges have also been reconciled so as to give effect to both as far as possible.[6] Reconciliation has also been effected between Arts. 13 and 359.[7] The principle of harmonious interpretation has been applied to Fundamental Rights and Directive Principles so as to give effect to both as far as possible.[8]

In *Shankari Prasad*,[9] the Court reconciled the conflict between Art. 13 and Art. 368 by applying the principle of harmonious interpretation. According to Art. 13, no 'law' can abridge any Fundamental Right. According to Art. 368, on the other hand, Parliament can amend any constitutional provision by passing a law according to the procedure laid down in Art. 368. If both these Articles are given a broad interpretation, a conflict, arises between them. It can be argued that a 'law' passed under Art. 368 abrogating or restricting a Fundamental Right would fall foul of Art. 13. A Constitution Amendment Act is a 'law' and if it is abrogative of a Fundamental Right, it would be void under Art. 13. In *Shankari Prasad*, PATANJALI SASTRY, J., rejected this contention and sought to interpret both Articles harmoniously by ruling that Art. 13 would exclude a Constitution Amendment Act from its purview. He observed :

> "In short, we have two Articles (Arts. 13 and 368) each of which is widely phrased, but conflicts in its operation with the other. Harmonious construction requires that one should be read as controlled and qualified by the other. We are of the opinion that in the context of Article 13 'law' must be taken to mean rules or regulations made in exercise of ordinary legislative power and not amendments to the Constitution made in exercise of constituent powers, with the result that Article 13(2) does not affect amendments made under Article 368."

Later, in *Golak Nath*,[10] the Supreme Court disagreeing with the approach in *Shankari Prasad* held that Art. 13 controlled Art. 368. But, then, in *Kesavananda*[11] the Court again reverted to the *Shankari Prasad* view as regards the inter-relation of Arts. 13 and 368 and, thus, differed with the *Golak Nath* ruling.

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1. MUKHERJEA, J., in *Gopalan's* case, AIR 1950 SC 27, 93 : 1950 SCR 27.
2. *Moinuddin v. State of Uttar Pradesh*, AIR 1960 All 484; *Supra*, Ch XXIX.
3. *Venkataramana v. State of Mysore*, AIR 1958 SC 255 : 1958 SCR 895; *supra*, Ch XXXIV.
4. *Supra*, Chs. XXI and XXXVI, Sec. C.
5. *Supra*, Ch. X, Sec. G(ii).
6. *Supra*, Chs. II, Sec. L(iii) and VI, Sec. H.
7. *Supra*, Chs. XX, Sec. C and XXXIII, Sec. F. *Mohd. Yaqub v. State of Jammu and Kashmir*, AIR 1968 SC 765 : (1968) 2 SCR 227.
8. In re *Kerala Education Bill*, AIR 1958 SC 956 : 1959 SCR 995; *supra*, Ch. XXXIV, Sec. C.
9. See, next Chapter.
10. *Ibid.*
11. *Ibid.*

G. PROSPECTIVE OVERRULING

A proposition of some significance was enunciated by five Judges of the Supreme Court in *Galak Nath* in an attempt to soften somewhat the impact of declaring a law unconstitutional after it has remained on the statute book for sometime.[12]

Traditionally, a judicial declaration that a law is unconstitutional is deemed effective prospectively as well as retrospectively. An unconstitutional law is regarded to have been void from its very inception.[13] The theory is that the judge "does not make law but discovers or finds true law". Therefore, when a Court decision changes the earlier law, then this law should be regarded not as 'new', but as having been there all the time which the Court has now discovered. Accordingly, the law as now found by the Court must apply to the past as well as future transactions.

As against this view, the U.S. Supreme Court has developed the doctrine of 'prospective overruling'. The Court has in some cases taken the position that rather than disturb the past transactions, the new view of the law adopted by the Court might be made effective as regards future transactions only. The doctrine of 'prospective overruling' envisages that a well-established precedent may be overruled from a future date and not retrospectively. The U.S. Supreme Court asserts that it has power to decide on a balance of all relevant considerations whether a decision overruling a previous principle should be applied retroactively or not.[14] Thus, declaring a law invalid may not necessarily affect transactions and vested rights prior to, but may operate only with respect to transactions and rights arising after, the judicial invalidation of the law. The Court thus consciously modifies a rule and also makes it operative only as to the future transactions.

This doctrine overtly testifies to the law-making function of the judiciary. This doctrine implies a clear admission by the courts that they do make new law, and the posing of the question whether the new rule should be applied retrospectively or only prospectively indicates awareness of its law-making aspects. As Sawer points out, this view rests to some extent on acceptance of the modern view that law in general is not a fixed and durable set of rules, but something whose meaning and application varies from time to time and is actually established only in the act of judicial decision.[15]

Retrospective overruling may cause administrative inconvenience in some situations and, by disturbing vested rights, may cause hardship to those who may have acted on the basis of the old rule. The doctrine of prospective overruling seeks to avoid such harsh results.[16]

The application of the doctrine remains uncertain. In the words of the U.S. Supreme Court itself: ".... there is no inflexible rule requiring in all circumstances

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12. *Infra*, Ch. XLI, for discussion on *Golak Nath*.
13. See, *infra*, Sec. I.
14. *Linkletter v. Walker*, 381 US 618, 629 (1965).
15. MODERN FEDERALISM, 71.
16. *Great Northern Rly. v. Sunburst Oil & Ref. Co.*, 287 US 358 (1932); *Chicot County Drainage District v. Baxter State Bank*, 308 US 371 (1940); *Griffin v. Illinois*, 351 US 12 (1956); *Wolf v. Colorado*, 338 US 25; *Jenkins v. Delaware*, 395 US 213 (1969); *Williams v. U.S.*, 401 US 646 (1971); *Hill v. California*, 401 US 797.

either absolute retroactivity or complete prospectivity for decisions construing the broad language of the Bill of Rights ..... Rather we have proceeded to weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation."[17]

A scholar has thus explained the circumstances when the Court would resort to 'prospective' rather than 'retrospective' overruling:

> "In general, it may be said that to warrant prospectivity, there must be an awareness that the results of 'normal' retrospectivity would be, not merely inconvenient, but gravely unjust or would involve an extremely burdensome sorting out process for courts or administrators. Injustice to a single litigant will normally not suffice. What is required is that retrospectivity would disrupt the private lives of many citizens or would throw a substantial network of business arrangements or property transactions into doubt or confusion; or would destroy the validity of elaborate administrative arrangements or property transactions into doubt or confusion; or would destroy the validity of elaborate administrative arrangements which had already been worked out, and which as a practical matter could not possibly be reopened or, as in the recent American cases, the matter may need to be decided by reference to the particular social policy which the "new" rule is designed to implement. Given that this social policy is in any event being implemented for the future by the 'new' decision, will its implementation really be much enhanced by making it retrospective? And, whatever degree of enhancement such retrospectivity would bring, is it sufficient to outweigh the frustration which "normal" retrospection might bring to other social policies?"[18]

There have been dissentient voices from the bench against the doctrine. It has been asserted that the Court should faithfully enforce the safeguards guaranteed by the Bill of Rights.[19]

In *Golak Nath*, five out of 11 Judges took recourse to the doctrine of prospective overruling. While holding that Parliament could not amend Fundamental Rights, they declared that this norm would operate only in the future and not retrospectively. This meant that none of the amendments made to the Fundamental Rights up to the date of the *Golak Nath* decision would be invalidated. Thus, while all amendments made to the Fundamental Rights till *Golak Nath* were to remain effective, thereafter Parliament was not to be competent to modify Fundamental Rights.[20]

The Supreme Court took recourse to the doctrine of prospective overruling because of the fact that between the coming into force of the Constitution on January 26, 1950, and the date of the judgment in *Golaknath*, a number of constitution amendments amending the Fundamental Rights had been enacted and all these amendments were treated as valid by the Supreme Court in *Shankari Prasad* and *Sajjan Singh.* Based on these Amendments the State legislatures had en-

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17. *Williams v. U.S., ibid.*

18. A.R. Blackshield, Fundamental Rights and the Economic Viability of the Indian Nation, 10 *JILI* 183, 227 (1968). Also see, W.S. Hooker Jr., Prospective Overruling in India: *Golak Nath* and After, 9 *JILI* 596 (1967).
Andrew G.L. Nicol, Prospective Overruling: A New Device for English Courts, 39 *Mod. LR* 542 (1976).

19. Justice Black in *De Backer v. Brainard,* 396 US 28, 34.
Also, Justice Harlan in *Mackey v. US.*, 401 US 667, 676.

20. See, *infra*, next Chapter, on Constitutional Amendment.

acted agrarian legislation revolutionizing the agrarian social structure. If *Golak Nath* ruling were now given a retrospective ruling, all this wholesome legislation would fall to the ground. This would have resulted in a chaotic situation in the country, as a large number of laws enacted in pursuance of the pre-*Golak Nath* Amendments would have become void. To avoid such a situation, the Court ruled that the *Golak Nath* ruling would have only a prospective effect.

Justifying the application of the doctrine of prospective overruling the Court observed:

> "Should we now give retrospectivity to our decision, it would introduce chaos and unsettle the conditions in our country. Should we hold that because of the said consequence Parliament had power to take away Fundamental rights, a time might come when we would gradually and imperceptibly pass under a totalitarian rule… As the highest Court in the land we must evolve some reasonable principle to meet the extraordinary situation… To meet the present extraordinary situation that may be caused by our decision, we must evolve some doctrine which has roots in reason and precedents so that *the past may be preserved and the future protected.*[21]

It needs to be noted that the Judges put certain restrictions on the applicability of the doctrine of prospective overruling, namely:

(*i*) The doctrine of prospective overruling would for the time being be used only in constitutional matters;

(*ii*) this doctrine would be applied only by the Supreme Court itself and by no other Court as it has the constitutional jurisdiction to declare law binding on all courts in India.

(*iii*) the precise version of prospectivity to be imposed is to be a matter for the Court's discretion, "to be moulded in accordance with the justice of the cause or matter before it".

There is no gainsaying the fact that 'prospective overruling' doctrine avowedly recognises the law and policy-making role of the Supreme Court.[22]

It may also be pointed out here that in *Golak Nath*, 'prospective overruling' has been applied in an extremely narrow area, *viz.*, in the case of invalidity of constitutional amendments which had been in force for a long time and which had become the basis of a mass of legislation affecting agrarian economy. On the other hand, in the U.S.A., the rule of 'prospective overruling' has been applied in case of changes in judicial views as regards the scope and interpretation of constitutional provisions generally.

There is, however, one point to note in this connection. The Supreme Court Judges used the doctrine of prospective overruling in *Golak Nath* very differently from the way the doctrine has been made use of in the U.S.A. In the U.S.A., the theory of prospective overruling has been applied to hold the impugned law invalid from the date of the decision and not earlier. But in *Golak Nath*, all the constitution amendments were to remain valid for ever, even after the Supreme Court decision in *Golak Nath*, only the principle of non-amendability of the Fundamental Rights was to apply in future. If the American doctrine had been

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21. Emphasis added.
22. DOWLING, CASES AND MATERIALS ON CONSTITUTIONAL LAW, 892-7 (1970).

applied, the amendments ought to have been held invalid from the date of the *Golak Nath* decision if not earlier. Therefore, the Supreme Court diluted the doctrine of prospective overruling still further in its application in India.

A very significant use of the doctrine of prospective overruling is to be found in the *Mandal* case.[23] In *Mandal* decided in the year 1992, the ratio of *Rangachari*,[24] decided in 1962, was overturned. Nevertheless, the Supreme Court ruled that the *Mandal* ruling would come into effect after 5 years. The Court thus postponed giving effect to the *Mandal* ruling for five years from the date of the judgment. This was not only extending the principle of prospective overruling but even further elongating the same for 5 more years by postponing the operation of the *Mandal* ruling.

The Supreme Court upheld the constitutional validity of the Court ruling in *Mandal vis-à-vis* Art. 13(2) of the Constitution[25] in *Ashok Kumar Gupta v. State of Uttar Pradesh*.[26] Under the *Rangachari* ruling, which had been in operation for three decades, a number of persons of the Scheduled Castes and Schedule Tribes had got promotion. The Supreme Court showed judicial creativity in *Ashok* so as to avoid any hiatus in the operation of the *Rangachari* ruling, and to bring about smooth transition of the operation of the law of promotions for S/Cs and S/Ts. It was necessary to do so to adjust the competing claims of both the disadvantaged and the advantaged sections of the society. The Court observed in *Ashok*: "The prospective overruling of *Rangachari* ratio in *Mandal* case is constitutional and fulfils the competing equality between sections of the society."[27]

There are examples of the Supreme Court applying the doctrine of prospective overruling in another area, *viz.*, when the Court declares a statute unconstitutional, it may make the ruling operational in future from the date of the decision without affecting the validity of the past transactions. In *Githa Hariharan*,[28] the Supreme Court gave a new interpretation to s. 6(a) of the Hindu Minority and Guardianship Act so as to protect it from being declared unconstitutional under Arts. 14 and 15, on the ground of gender discrimination. But the Court gave a prospective effect to the new interpretation. No past transaction was to be reopened or questioned on the basis of this judgment.

The High Court of Rajasthan declared a circular, giving preference on the basis of 'residence' in a district in the matter of Government appointments as unconstitutional *vis-à-vis* Arts. 16(2) and 16(3). On appeal, the Supreme Court affirmed the High Court ruling but held that the ruling would be effective from the date of the High Court judgment and that appointments made prior to that judgment would not be disturbed.[29]

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23. *Indra Sawhney v. Union of India*, AIR 1993 SC 477 : 1992 Supp (3) SCC 217; *Indra Sawhey v. Union of India*, AIR 2000 SC 498 : (2000) 1 SCC 168; *supra*, Ch. XXIII, Sec. G.
24. AIR 1962 SC 36 : (1962) 2 SCR 586; *supra*, Ch. XXIII, Sec. D(c) and G.
25. For Art. 13(2), see, *supra*, Ch. XX, Sec. C.
26. (1997) 5 SCC 201.
27. *Ibid*, at 222.
28. *Githa Hariharan v. Reserve Bank of India*, AIR 1999 SC 1149, at 1155 : (1999) 2 SCC 228.
29. *Kailash Chand Sharma v. State of Rajasthan*, (2002) 6 SCC 562.
Also see, *supra*, Ch. XXIII.

In *India Cement*,[30] while declaring the cess as unconstitutional, the Court ruled that the State would not be liable to refund the cess already collected by it.[31]

The Court applied the doctrine of prospective overruling in *Raymond*,[32] but this case did not raise a constitutional question. The Court gave a new interpretation to a statutory provision. Had this view been applied retrospectively, the Electricity Board would have been placed under a huge financial liability. To avoid such a contingency, the Court ruled that the new view of the law would be applied prospectively and not retrospectively.

The Court adopted a similar approach in *Union of India v. Mohd. Ramzan Khan*.[33]

In a way, the Supreme Court has applied the doctrine of prospective overruling in a different context in *Suman Gupta v. State of Jammu and Kashmir*.[34] The Court ruled that vesting of absolute power in the State Government to nominate candidates for admission to medical colleges outside the State infringed Art. 14 but refused to disturb the nominations already made as these candidates had already covered a substantial part of their course of studies. The Court suggested that a proper procedure for the purpose must be designed for the future by theMedical Council of India. In this way, the principle laid down by the Court was to be operative in future.[35]

H. CONSTITUTIONALITY OF A STATUTE

The doctrine of parliamentary sovereignty as it obtains in England does not prevail here except to the extent and in the fields provided by the Constitution. The entire scheme of the Constitution is such that it ensures the sovereignty and integrity of the country as a republic and the democratic way of life by parliamentary institutions based on free and fair elections.[36]

A law to be valid must conform with the constitutional norms. The unconstitutionality of a statute arises from various constitutional violations, *e.g.*

(1) violation of the scheme of distribution of powers between the Centre and the States;

(2) infringement of a Fundamental Right;

(3) violation of other constitutional restrictions/limitations.

The power to legislate is a plenary power vested in the legislature and unless those who challenge the legislation clearly establish that their Fundamental

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30. *Orissa Cement Ltd. v. State of Orissa*, AIR 1991 SC 1676, at 1717.

31. Also see, *Orissa Cement Ltd. v. State of Orissa*, AIR 1991 SC 1676 : 1991 Supp (1) SCC 430; *Somaiya Organics (India) Ltd. v. State of Uttar Pradesh*, AIR 2001 SC 1723 : (2001) 5 SCC 519, *supra*, Ch. XI.

32. *Raymond Ltd. v. State of Madhya Pradesh Electricity Board*, AIR 2001 SC 238 : (2001) 1 SCC 534.

33. AIR 1991 SC 474, *supra*, Ch. XXXVI, Sec. G(a).
Also see, *Managing Director, ECIL, Hyderabad v. B. Karunakar*, AIR 1994 SC 1074 : (1993) 4 SCC 727, *supra*, Ch. XXXVI, Sec. G(a).

34. AIR 1983 SC 1235 : (1983) 4 SCC 339; *supra*, Ch XXI.

35. The Supreme Court has adopted a similar attitude in several other cases, e.g., *Janki Prasad v. State of Jammu & Kashmir*, AIR 1973 SC 930 : (1973) 1 SCC 420; *P. Rajendran v. State of Madras*, AIR 1968 SC 1012 : (1968) 2 SCR 786.

36. *People's Union for Civil Liberties v. Union of India*, (2003) 4 SCC 399 : AIR 2003 SC 2363.

Rights under the Constitution are affected or that the legislature lacked legislative competence, they would not succeed in their challenge to the enactment bought forward in the wisdom of the legislature. Conferment of a right to claim the benefit of a statute, being not a vested right, the same could be withdrawn by the legislature which made the enactment. It is open to the legislature to bring in a law that has retrospective operation. When it affects vested rights or accrued rights, that question will have to be considered in that context. But the right to take advantage of a statute has been held to be not an accrued right.[37]

A statute which is not within the scope of legislative authority, or which offends some constitutional restriction or prohibition is unconstitutional and hence invalid. A statute to be valid ought to be with respect to a matter assigned to the particular legislature which has enacted it. This essentially refers to the question of distribution of powers between the Centre and the States.[38] Parliament has exclusive power to legislate with respect to any of the matters enumerated in List I, notwithstanding anything contained in clauses (2) and (3) of Article 246. The *non obstante* clause under Article 246(1) indicates the predominance or supremacy of the law made by the Union Legislature in the event of an overlap of the law made by Parliament with respect to a matter enumerated in List I and a law made by the state legislature with respect to a matter enumerated in List II of the Seventh Schedule. However both Parliament and the State Legislatures are supreme in their respective assigned fields. It is the duty of the Court to interpret the legislations made by Parliament and the state legislature in such a manner as to avoid any conflict. But if the conflict is unavoidable, and the two enactments are irreconcilable then by the force of the *non obstante* clause in clause (1) of Article 246, the parliamentary legislation would prevail notwithstanding the exclusive power of the state legislature to make a law with respect to a matter enumerated in the State List. Repugnancy between the parliamentary legislation and the state legislation can arise in two ways. First, where the legislations, though enacted with respect to matters in their allotted sphere overlap and conflict. Second, where the two legislations are with respect to matters in the Concurrent List and there is a conflict. In both the situations, parliamentary legislation will predominate, in the first, by virtue of the *non obstante* clause in Article 246(1), in the second, by reason of Article 254(1).[39]

The norms to interpret the entries, and to assess whether a statute falls within an entry, have already been considered.[40] Any way, it may be mentioned here that these entries are to be interpreted broadly as these are not powers but fields of legislation. It is the judicial policy to give the widest amplitude to the language of these entries.[41]

A special mention may be made here of the rule of 'pith and substance' which means that to determine whether a statute is *ultra vires* the enacting legislature, its pith and substance, its true character, is to be ascertained. The advantage of

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37. *Mylapore Club v. State of T.N.*, (2005) 12 SCC 752 : AIR 2006 SC 523.
38. *Supra*, Ch. X.
39. *Govt. of A.P. v. J. B. Educational Society*, (2005) 3 SCC 212 : AIR 2005 SC 2014; For detailed discussion see Chapter X on "Legislature Relations"
40. *Ibid*, Sec. G.
41. *Ibid*, Sec. G(i).
Also see, *Jilubhai Nanbhai Khachar v. State of Gujarat*, AIR 1995 SC 142, 148 : 1995 Supp (1) SCC 596.

the rule is that it avoids a law being declared unconstitutional merely because it incidentally trenches into the prohibited legislative area. The rule thus adds a further dimension to the legislative power of a legislature.[42]

When a statute has been enacted by a State Legislature, its operation ought not to extend beyond the concerned State boundaries. For this purpose, the principle of territorial nexus is applied.[43]

In addition, the impugned statute should not infringe any other fetter, restriction or prohibition which may be imposed by the Constitution, *e.g.*, Fundamental Rights. Art. 13(2) specifically declares that a law taking away or abridging a Fundamental Right "shall, to the extent of contravention, be void."[44]

As stated earlier,[45] a statute cannot be struck down merely because the Court thinks it to be arbitrary or unreasonable. Any such ground of invalidity must be related to a constitutional provision, such as, Arts. 14, 19 or 21.[46] Challenge on ground of wisdom of legislation is not permissible as it is for the legislature to balance various interests.[47]

However, the Court has also pointed out that the principles on which constitutionality of a statute is judged is its reasonableness and that is to be judged having regard to the various factors including the effect thereof on the persons to whom it is applicable carrying on a business. If the state in exercise of its delegated power imposes condition the same has to be a reasonable condition. It had to be definite and not vague. When a statute provides for a condition which is impossible to be performed its unreasonableness shall be presumed and it would be for the State in such a situation to justify the reasonableness of such conditions.[48]

Although carrying on trade of liquor may not be a Fundamental right, but the contractual rights given to a licensee in terms of the provision of a statute are enforceable. The terms of the licence are governed by the statute and since the violation thereof could lead to penal consequences, interpretation principles requires the application of reasonableness, equity as well as good conscience.[49] Hence where a person may be held guilty even if the contents of ethyl alcohol exceeds 8.1% marginally in the liquor on which a person is trading in alcohol, the statute or the statutory conditions must show as to what extent he can go and to what

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42. *Supra*, Ch. X, Sec. G(iv); see also *State of Gujarat v. Akhil Gujarat Pravasi V.S. Mahamandal*, (2004) 5 SCC 155 : AIR 2004 SC 3894.

43. *Supra*, Ch. X, Sec. A.

44. *Supra*, Ch. XX, Sec. C.

Whether arbitrariness and unreasonableness or manifest arbitrariness and unreasonableness, being facets of Art. 14 are available or not as grounds to invalidate legislation (both primary and subordinate has been referred to a larger Bench in view of the decision in *Mardia Chemicals*, (2004) 4 SCC 311; *Malpe Vishwanath Acharya*, (1998) 2 SCC 1 (both cases striking down primary legislation on ground of arbitrariness and unreasonableness and being decisions of three Judge Benches) and *S. G. Jaisinghani*, AIR 1967 SC 1427 and *Shrilekha Vidyarthi*, (1991) 1 SCC 212 (two Judge Bench)(both cases striking down subordinate legislation on ground of arbitrariness and unreasonableness), on the one hand, and *McDowell & Co.*, (1996) 3 SCC 709, and *Khoday Distilleries*, (1996) 10 SCC 304 (both being decisions by three Judge Benches), on the other hand *Subramaniam Swamy v. Director, CBI*, (2005) 2 SCC 317 : (2005) 2 JT 382.

45. *Supra*, Ch. II, Sec. M.

46. *Supra*, Chs. XXI, XXIV and XXVI.

47. *Mylapore Club v. State of T.N.*, (2005) 12 SCC 752 : AIR 2006 SC 523.

48. *Hasham Abbas Sayyad v. Usman Abbas Sayyad* (2007) 2 SCC 355 : AIR 2007 SC 1077.

49. *Hasham Abbas Sayyad v. Usman Abbas Sayyad*, (2007) 2 SCC 355 : AIR 2007 SC 1077.

extent he cannot. The matter cannot, thus, be left to an act of nature. In the absence of such mode or machinery it will suffer from the vice of vagueness or unreasonableness.[50]

The judicial function of assessing the constitutional legitimacy of legislation is both delicate and responsible. To declare a statute unconstitutional places an onerous burden on the courts, for a statute is enacted by an elected legislature which is conversant with the needs and aspirations of the people. The courts, therefore, do not hold legislation unconstitutional in a light vein. They have to draw a fine balance between the 'felt necessities of the time' and 'constitutional fundamentals'.

India being a signatory to the Declaration on the Right to Development adopted by the World Conference on Human Rights and Article 18 of the United Nations Covenant on Civil and Political Rights, 1966, the impugned provision of a statute must, therefore, also be judged having regard to the aforementioned treaties and covenants.[51]

As has already been stated, the courts impose on themselves a good deal of self restraint in performing their task of judicial review of legislation. The courts will hold a statute unconstitutional only as a last resort. The courts do not cavel at legislation but go to great lengths to uphold legislation impugned before them. The truth is that the courts in India (like the courts elsewhere) have evolved certain canons, strategies, maxims and norms by which opportunities to assess the constitutionality of statutes and holding them invalid are minimised. The courts usually resort to these strategies either to make challenges to legislation difficult or to by-pass such challenges.

The first important principle is that only a person whose right is directly affected by a law can challenge its constitutionality. A person cannot impeach a law because someone else is hurt. It is the fact of injury to the complainant himself, and not to others, which justifies judicial interference. But this rule of *locus standi* is now subject to the growth of the concept of public interest litigation.[52]

In dealing with a constitutional controversy, a Court is slow to embark upon an unnecessarily wide or general inquiry. The courts adjudge only concrete cases and do not indulge in pronouncing abstract, theoretical principles. This is called the process of "empiric adjudication".[53] The Court seeks to confine its decision, as far as may be reasonably practicable, within the narrow limits of the controversy between the concerned parties in a particular case.[54] A Court does not embark upon larger or academic questions but confines itself to those questions which arise from the provisions of the impugned statute.

The judicial attempt is to narrow, not to broaden, the area of conflict and express its opinions only on specific issues in controversy. The courts have often emphasized that in constitutional matters, it is advisable to decide only those points which necessarily arise for determination on the facts of the case before the Court.[55] The Supreme Court has said in *A.K. Roy* : "The position is now

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50. *State of Kerala v. Unni,* (2007) 2 SCC 365 : (2006) 13 SCALE 208.
51. *John Vallamattom v. Union of India* (2003) 6 SCC 611 : AIR 2003 SC 2902.
52. *Supra,* Chs. IV, VIII and XXXIII.
53. *Sukhdev v. Bhagatram,* AIR 1975 SC 1331, 1349 : (1975) 1 SCC 421.
54. *Atiabari,* AIR 1961 SC 232, 251 : (1961) 1 SCR 809; *supra,* Ch. XV, Sec. D.
55. *U.N.R. Rao v. Indira Gandhi,* AIR 1971 SC 1002 : (1971) 2 SCC 63; *supra,* Ch. III, Sec. B.

firmly established that the Court will decide no more than needs to be decided in a particular case. Abstract questions present interesting challenges, but it is for scholars and text-book writers to unravel their mystique. It is not for the courts to decide questions which are but of academic importance."[56] Earlier the Court had observed in *Basheshar Nath*:[57] "This case should not make any pronouncement on any question which is not strictly necessary for the disposal of the particular case". Constitutional issues not directly arising for decision are not decided by the Court.[58]

The Courts do not adjudicate upon a constitutional question unless it is absolutely necessary to do so for disposal of the case in hand.[59] If a statute is challenged under several constitutional provisions, but if the question of its validity can be disposed of with reference to one constitutional provision only, the Court would not then usually go into the question of its unconstitutionality under the other constitutional provisions. For example, in *Saghir Ahmad*,[60] the Court found an impugned law bad under Arts. 19(1)(*g*) and 31(2) and so it refrained from going into the question whether or not the impugned law was bad under Art. 301 as well because it was no longer necessary to decide that question.

A Court would not cover the ground which is strictly not relevant for the purpose of deciding the matter before it. *Obiter* observations and discussion of problems not directly involved in a proceeding before them are generally avoided by the courts in constitutional matters.[61] Accordingly, a Court would go into the question of *vires* of a statute only when it is attracted by the facts of the case. If the issue is not so attracted, then the courts would not go into its constitutionality, because in that case, the decision would be purely academic and courts do not decide constitutional issues merely as an academic exercise.[62]

A statute cannot be declared invalid on the ground that it contains vague or uncertain or ambiguous or mutually inconsistent provisions.[63]

A legislation may not be amenable to challenge on ground of violation of Art. 14 when it is intended to give effect to principles specified under Art. 15 or 16 or when the differentiation is not unreasonable or arbitrary but when a classification is made which is per se violative of constitutional provisions, the same cannot be upheld.[64]

If there is a challenge to the legislative competence the courts will try to ascertain the pith and substance of such enactment on a scrutiny of the Act in question. In this process, it is necessary for the courts to go into and examine the true character of the enactment, its object, its scope and effect to find out whether the

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56. *A.K. Roy v. Union of India*, AIR 1982 SC at 724; *D.C. Wadhwa v. State of Bihar*, AIR 1987 SC 579; *Gurudevdatta VKSSS Maryadit v. State of Maharashtra*, AIR 2001 SC at 1985 : (2001) 4 SCC 534.
57. *Basheshar Nath v. Commr., Income Tax*, AIR 1959 SC 149, 157 : 1959 Supp (1) SCR 578.
58. See, *Ashok K. Gupta v. State of Uttar Pradesh*, (1997) 5 SCC 201.
59. *H.M. Trivedi v. V.B. Raju*, AIR 1973 SC 2602 : (1974) 3 SCC 415.
60. *Supra*, Chs. XXIV, Secs. I and J and XXXI, Sec. C(ii).
61. *Naresh v. State of Maharashtra*, AIR 1967 SC 1 : (1966) 3 SCR 744; *supra*, Ch. XXIV, Secs. C and D.
62. *State of Bihar v. Hurdut R.M. Jute Mills*, AIR 1960 SC 378 : (1960) 2 SCR 331.
63. *Nand Lal v. State of Haryana*, AIR 1980 SC 2097, 2100 : 1980 Supp SCC 574, *A.K. Roy v. Union of India*, AIR 1982 SC 711, 737 : (1982) 1 SCC 271.
64. *E. V. Chinnaiah v. State of AP*, (2005) 1 SCC 394 : AIR 2005 SC 162.

enactment in question is genuinely referable to the field of legislation allotted to the State under the constitutional scheme.[65]

But in construing a statute, where a right is not explicitly taken away, a presumption must be raised that the legal right existing in favour of a person has not been taken away.[66]

While considering the constitutionality of a statute, the courts usually do not use such materials as the legislative debates, statements of objects and reasons annexed to the relevant bill in the legislature, except for the limited purpose of ascertaining the conditions prevailing at the time of its enactment and the extent and urgency of the evil sought to be remedied by it.[67]

In the U.S.A., it is an established practice to directly incorporate social and economic facts into the briefs presented to the Supreme Court by the parties. This kind of brief is known as the Brandies brief. It is generally recognised in the U.S.A. that underlying questions of fact—political, social and economic—do condition the constitutionality of legislation and constitute a social element in decision-making by the Court.[68]

In India, by and large, the courts still seek to ignore extra-legal materials pertaining to measures impugned before them and seek to derive their ratio of decisions largely from the language of the statute and the decided cases. The courts tend to ignore the fact that often problems presented in constitutional cases are not purely legal but have political, social and economic connotations as well. The courts go too much by the words of the statute maintaining a divorce between law and politics, economics or sociology. The courts do not recognise the fact that if materials from other social sciences are also taken into consideration, the dry statutory provisions may have an ampler meaning especially when their constitutional *validity* is being considered.

The Courts generally lean towards the constitutionality of a statute upon the premise that a legislature appreciates and understands the needs of the people, that it knows what is good or bad for them, that the laws it enacts are directed to problems which are made manifest by experience, that the elected representatives in a legislature enact laws which they consider to be reasonable for the purposes for which these laws are enacted and that a legislature would not deliberately flout a constitutional safeguard or right.[69] The legislature composed as it is of the elected representatives of the people is supposed to know and be aware of the needs of the people and what is good or bad for them and that a Court cannot sit in judgment over the wisdom of the Legislature.[70] Therefore, usually, the pre-

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65. *E. V. Chinnaiah v. State of A.P.* (2005) 1 SCC 394 : AIR 2005 SC 162.
66. *ICICI Bank Ltd. v. SIDCO Leathers Ltd.,* (2006) 10 SCC 452 : AIR 2006 SC 2088.
67. *J.R.G. Mfg. Ass. v. Union of India,* AIR 1970 SC 1589; *B. Banerjee v. Anita Pan,* AIR 1975 SC 1146 : (1975) 1 SCC 166, *supra,* Sec. D.
68. MCWHINNEY, JUDICIAL REVIEW, 17, 22, 175-89.
69. *Ram Krishna Dalmia v. S.R. Tendolkar,* AIR 1958 SC 538 : 1959 SCR 279; *Vrajlal Manilal and Co. v. State of Madhya Pradesh,* AIR 1970 SC 129; *B. Banerjee v. Anita Pan, supra,* note, 54; *Bachan Singh v. State of Punjab,* AIR 1982 SC 1325 : (1982) 3 SCC 24.
70. *State of Andhra Pradesh v. McDowell & Co.,* AIR 1996 SC 1628, 1641.

sumption is in favour of the constitutionality of the statute, and the onus to prove that it is unconstitutional lies upon the person who challenges it.[71]

The Supreme Court has stated the principle as follows:[72]

> "A statute is construed so as to make it effective and operative. There is always a presumption that the legislature does not exceed its jurisdiction and the burden of establishing that the legislature has transgressed constitutional mandates, such as, that relating to Fundamental Rights is always on the person who challenges its *vires*."

This rule of presumption has been borrowed from the U.S.A.[73] Thus, the law in question is treated as valid unless the parties to litigation challenge it on constitutional grounds. FAZAL ALI, J., stated in *Charanjit Lal*[74] :

> "……..it is the accepted doctrine of the American Courts, which I consider it to be well-founded on principle, that the presumption is always in favour of the constitutionality of an enactment, and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles."

Recourse may not always be taken to the principles of presumption in favour of constitutionality of statute or reading down of statute to uphold validity of a statute.[75]

Since no particulars or material was placed on record to substantiate the contention that the Notification dated 20th August, 1991 bringing into force Maharashtra Act 15 of 1987 was issued due to pressure brought about by a section of lawyers and for extraneous consideration, the contention was rejected.[76]

To sustain the presumption of constitutionality, the Court may take into consideration matters of common knowledge and may assume every state of facts which can reasonably be conceived as existing at the time of the enactment of the legislation in question.[77]

The Supreme Court has stated in *Commr. of Sales Tax, Madhya Pradesh, Indore v. Radhakrishan*,[78] that for sustaining the presumption of constitutionality, the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived and an even read down this section.

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71. *Charanjit Lal Chowdhuri v. Union of India*, AIR 1951 SC 41; *Bombay v. F.N. Balsara*, AIR 1951 SC 318 : 1951 SCR 682; *Ram Krishna Dalmia v. S.R. Tendolkar*, AIR 1958 SC 538 : 1959 SCR 279; *Mahant Moti Das v. S.P. Sahi*, AIR 1959 SC 942 : 1959 Supp (2) SCR 563; *Delhi Transport Corporation v. D.T.C. Mazdoor Congress*, AIR 1991 SC 101 : 1991 Supp (1) SCC 600.

72. *Union of India v. Elphinstone Spinning and Weaving Co. Ltd.*, AIR 2001 SC 724, at 733 : (2001) 4 SCC 139.

73. *Middleton v. Texas Power and Light Co.*, 249 US 152, 157; *supra*, Sec.

74. AIR 1951 SC 41 : 1950 SCR 869.

75. *State of W. B. v. Kesoram Industries Ltd.*, (2004) 10 SCC 201 : AIR 2005 SC 1646.

76. *Jamshed N. Guzdar v. State of Maharashtra*, (2005) 2 SCC 591 : AIR 2005 SC 862.

77. *Ramkrishna Dalmia v. Tendolkar*, AIR 1958 SC 538 : 1959 SCR 279; *Hamdard Dawakhana v. Union of India*, AIR 1960 SC 554, 560 : (1960) 2 SCR 671; *R.K. Garg v. Union of India*, AIR 1981 SC 2138, 2146; *Bank of Baroda v. Rednam*, AIR 1989 SC 2105 : (1989) 4 SCC 470; *Gauri Sahankar v. Union of India*, (1994) 6 SCC 349; *Amrit Banaspati Co. Ltd. v. Union of India*, AIR 1995 SC 1340 : (1995) 3 SCC 335; *New Delhi Municipal Committee v. State of Punjab*, AIR 1997 SC 2847. For presumption of constitutionality see also *Karnataka Bank Ltd. v. State of Andhra Pradesh*, (2008) 2 SCC 254 : (2008) 1 SCALE 660.

78. AIR 1979 SC 1588 : (1979) 2 SCC 249.

Affidavits may be filed to show reasons for the enactment of the law in question, the circumstances in which it was conceived and the evils it was to cure.[79] For example, in *Pannalal Binjraj v. Union of India*,[80] a challenge to the validity of classification was repelled by placing reliance on an affidavit filed on behalf of the Central Board of Revenue disclosing the true object of enacting the impugned provisions in the Income-tax Act.

In *Musaliar*,[81] the Court relied on an affidavit filed by the State to ascertain the circumstances which prevailed at the time when the law under consideration had been passed and which necessitated the passing of that law.

A statute cannot be challenged on the ground of *mala fides*.[82]

At times, the Supreme Court has used the Statement of Objects and Reasons accompanying the Bill, which later became the Act impugned, to ascertain the circumstances which prevailed at the time of the passage of the Act impugned to determine its purposes and object. "For the limited purpose of appreciating the background and the antecedent factual matrix leading to the legislation, it is permissible to look into the Statement of Objects and Reasons of the Bill which actuated the step to provide a remedy for the then existing malady."[83] For example in *Musaliar*,[84] the Statement of Objects and Reasons was used for judging the reasonableness of a classification made in an enactment to see if it infringed, or was contrary to, the Constitution. The Supreme Court reiterated in *State of West Bengal v. Union of India*,[85] that the Statement of Objects and Reasons accompanying a Bill when introduced in Parliament, can be used for the limited purpose of understanding the background and the antecedent state of affairs leading up to the legislation."[86]

On behalf of the Constitution Bench, MUDHOLKAR, J., observed in *Burrakur Coal Co. v. Union of India*,[87]:

> "Where the validity of a law made by a competent legislature is challenged in a Court of law, that Court is bound to presume in favour of its validity. Further, while considering the validity of the law the Court will not consider itself restricted to the pleadings of the state and would be free to satisfy itself whether under any provision of the Constitution the law can be sustained."

To the same effect is the observation of the Constitution Bench in *Sanjeev Coke Manufacturing Co. v. Bharat Coking Ltd.*,[88]:

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79. Cases cited in Ch. XXXIII Also, *K.K. Kochunni v. State of Madras*, AIR 1959 SC 725 : 1959 Supp (2) SCR 316.
80. AIR 1957 SC 397 : 1957 SCR 397.
81. *Thangal Kunju Musaiar v. M. Venkitachalam Potti*, AIR 1956 SC 246 : (1955) 2 SCR 1196.
82. *General Manager, North West Railway v. Chanda Devi*, (2008) 2 SCC 108 : (2007) 14 SCALE 296, meaning obviously notice in fact.
83. *Gurudevdatta VKSSS Maryadit v. State of Maharashtra*, AIR 2001 SC 1980, at 1989 : (2001) 4 SCC 534.
84. *Supra*, footnote 81.
85. AIR 1963 SC 1241 : (1964) 1 SCR 371.
86. But see an earlier case, *Aswini Kumar Ghose v. Arabinda Bose*, AIR 1952 SC 369 : 1953 SCR 1, where the Supreme Court had ruled out the Statement of Objects and Reasons appended to the Bill "as an aid to the construction of a statute".
87. AIR 1961 SC 953 at 963 : (1962) 1 SCR 44.
88. AIR 1983 SC 239 : (1983) 1 SCC 147.
Also see, *New Delhi Municipality Committee v. State of Punjab*, AIR 1997 SC at 2903 : 91997) 7 SCC 339.

> "Validity of the legislation is not to be judged merely by affidavits filed on behalf of the state, but by all the relevant circumstances which the Court may ultimately find and more especially by what may be gathered from what the legislature has itself said."

In *Gauri Shankar*,[89] the Supreme Court has observed that "in order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation."

The burden is upon the person who attacks the constitutional validity of a law to show that there has been a transgression of the constitutional principles. The allegations regarding the violation of a constitutional provision should be specific, clear and unambiguous and it is for the person who impeaches the law as violative of a constitutional guarantee to show that the particular provision is infirm for the reasons stated by him.[90]

At times, the onus placed on the petitioner to establish the unconstitutionality of a statute may be very onerous. This happened in *Chiranjit Lal*[91] where the majority in the Supreme Court dismissed the petition as the petitioners could not discharge the onus satisfactorily. The minority, however, protested against casting such a burden on the petitioner.

At times, the judges have departed from the normal rule of presumption of constitutionality. When on the face of the impugned statute, there is no classification at all, and no attempt made to select any individual with reference to any differentiating attribute peculiar to it and not possessed by others, the courts may not let the state depend on the presumption in favour of the validity of the statute under Art. 14.[92]

If, however, the petitioner is able to establish that the legislation has invaded his Fundamental Rights then the Court may shift the onus on the state to justify the law. In some cases, under Art. 19, when a law has been found *prima facie* to violate a Fundamental Right, the Supreme Court has shifted the onus on the state to place materials before the Court to show that the impugned law comes within the permissible limits.[93] For example, the Court has argued that when an invasion of a right under Art. 19(1)(*g*) has been established, the state should then satisfy the Court that the legislation falls within the purview of Art. 19(6) which is in the nature of an exception to Art. 19(1)(*g*).[94]

A similar rule of onus has been applied in regard to Art. 304. When a law has been shown to invade the right to freedom of trade, the state ought to prove that the restrictions imposed are reasonable and in public interest within the meaning of Art. 304(*b*).[95] But this again is not a universal rule and in *Anita Pan*, while

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89. *Gauri Shankar v. Union of India*, (1994) 6 SCC 349.
90. *Amrit Banaspati Co. Ltd. v. Union of India*, AIR 1995 SC 1340, at 1343 : (1995) 3 SCC 335.
91. *Supra*, Ch. XXI, Sec. C(r).
92. *Supra*, Ch. XXI, Sec. B.
93. *Supra*, Ch. XXIV, Secs. B and J(a).
94. *Vrajlal Manilal and Co., supra*; *Saghir Ahmad, supra*; *Khyerbari Tea Co. v. Assam, supra*. Also, *supra*, Ch. XXIV, Sec. B and Sec. I.
95. *Khyerbari Tea Co., supra*, Ch. XV, Sec. E.

considering the validity of a law under Art. 19(1)(*f*), the Court presumed the validity of the law.[1]

In regard to constitutional validity of the pre-constitution laws, the Supreme Court has taken the position that all such laws remain operative till the Court declares any of them void. Therefore, it is not for the state to establish the validity of any such law as no such law is regarded as unconstitutional to start with. The burden is on him who contends that a particular law has become void after the commencement of the Constitution.[2] Pre-constitutional laws must also conform to provisions of Part III. Even the unamended Section 73 of the Stamp Act, 1899 must conform to the provisions of Part III of the Constitution.[3]

Under Art. 21, it is the state which has to establish the constitutional validity of a law depriving a person of his life or personal liberty.[4]

While assessing the validity of a law, the Court does not consider itself restricted to the pleadings of the state and is free to satisfy itself whether the law in question can be sustained under any constitutional provision which might not have been specifically pleaded in its support. When the government sought to sustain a law under Art. 31A(1)(*e*), but the Supreme Court found it sustainable under Art. 31(2) and not under Art. 31A(1)(*e*), the Court held it valid even though the government had not invoked Art. 31(2).[5]

The courts are very reluctant to declare a law to be unconstitutional and they do so only as a last resort. This can be shown by one or two examples.

The Punjab Cycle Rickshaw (Regulation of Licence) Act, 1976, was challenged under Art. 19(1)(*g*). The object of the Act was to provide that only the rickshaw-pullers who were owners of the rickshaws could get licence to pull the rickshaw. The Act was challenged on the ground that it contained no provisions to enable the rickshaw-pullers to become the rickshaw owners. The Supreme Court held that the purpose of the Act was to ameliorate the economic conditions of the rickshaw-pullers and to protect them from exploitation. The Court took into account an administrative scheme introduced by nationalised banks to enable the rickshaw-pullers to become the owners thereof. The Court referred to the principle that the validity of one statute should not be made to depend on another unconnected statute, but if two or more statutes form parts of one and the same legislative scheme, then both may be considered together.[6] In the instant case, the Court considered the Act and the scheme together on the ground that the scheme supplied the mechanics for the operation of the Act, and that the Act and the scheme were closely connected and constituted an integrated plan. Over and above this, the Court also formulated a set of guidelines of its own to make the Act and the scheme of the banks work more effectively.[7]

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1. *B. Banerjee v. Anita Pan*, AIR 1975 SC 1146 : (1975) 1 SCC 166.
2. *Madhu Limaye v. S.D.M., Monghyr*, AIR 1971 SC 2486 : (1970) 3 SCC 746.
3. *People's Union for Civil Liberties v. Union of India*, (2004) 2 SCC 476 : AIR 2004 SC 1442.
4. *Supra*, Ch. XXVI.
5. *Burrakur Coal Co. v. Union of India, supra*; also *supra*, Ch. XXXI, Sec. C(iii).
6. *Lord Krishna Sugar Mills v. Union of India, supra*, Ch. XXIV, Sec. I.
7. *Azad Rickshaw-Pullers' Union v. State of Punjab*, AIR 1981 SC 14 : 1980 Supp SCC 601; *Man Singh v. State of Punjab*, (1985) 4 SCC 146 : AIR 1985 SC 1737.

In *A.K. Roy v. Union of India*,[8] the National Security Act conferred power to detain a person if he was acting in any manner "prejudicial to the maintenance of supplies and services essential to the community". The Court found this phrase to be vague and imprecise as it was not made clear as to which 'supplies' or 'services' were regarded essential to the community. In the absence of any definition of 'supplies and services essential to the community', the detaining authority could extend the application of this clause to any commodities or services which it regarded essential to the community. The clause was, therefore, capable of wanton abuse as it enabled the authorities to detain a person in respect of any commodity or service. The clause violated Art. 21 as it was violative of "fairness and justness of procedure". Nevertheless, the Court did not strike down the clause but merely directed that no person was to be detained under the clause unless, "by a law, order or notification made or published fairly in advance, the supplies and services the maintenance of which is regarded as essential to the community and in respect of which the order of detention is proposed to be passed, are made known appropriately, to the public." Moreover, "people should be forewarned if new categories are to be added to the list".

The courts usually adopt a liberal attitude towards socio-economic legislation.

For example, in *B. Banerjee v. Anita Pan*,[9] a drastic law controlling accommodation and rents in urban areas, and imposing drastic restrictions on the right of the landlords to evict their tenants, was challenged under Art. 19(1)(*f*). The High Court declared the law to be invalid. But, on appeal, the Supreme Court held it valid by majority. The Court took the position that it was bascially a social legislation, a piece of social justice, and was designed to reduce the hardships of tenants in big towns where there was scarcity of accommodation. Therefore, it should not be invalidated if a reasonable interpretation can save it unless the violation of landlords' Fundamental right was manifest. Referring to the statement of Justice STONE, mentioned above, the Court stated that it "hesitates to strike a socially beneficial statute dead, leading to escalation of the mischief to suppress which the High House legislated—unless, of course a plain breach of Fundamental right of the citizen is manifest".

The Supreme Court has stated several times that in case of economic legislation, the Court feels more inclined to judicial deference to legislative judgment.[10]

In this connection, the Supreme Court has observed[11] :

> "Another rule of equal importance is that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion etc. It has been said by no less a person than HOLMES, J., that the legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrinaire or straight jacket formula and this is particularly true in case of legislation dealing with economic matters, where, having regard to the nature of the problems required to be dealt with, greater play in the joints has to be allowed to the legislature. The Court should feel more inclined to give judi-

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8. AIR 1982 SC 710 : (1982) 1 SCC 271; *supra*, Ch. XXVII, Sec. C(i)(a).
9. Chs. XXXI, Sec. B and XXXIV.
10. *Delhi Cloth & Gen. Mills Co. Ltd. v. Union of India,* AIR 1983 SC 937; *R.K. Garg v. Union of India,* AIR 1981 SC 2138, 2147 : 91981) 4 SCC 675; *Union of India v. Elphinstone Spn. & Wvg. Co. Ltd*., AIR 2001 SC at 735 : (2001) 4 SCC 139; *Morey v. Doud*, (1957) 354 US 457.
11. *Amrit Banaspati Co. Ltd. v. Union of India,* AIR 1995 SC 1340, at 1343 : (1995) 3 SCC 335.

> cial deference to legislative judgement in the field of economic regulation than in other areas where Fundamental human rights are involved….."

Similarly, the courts adopt a liberal attitude towards tax legislation. Explaining its attitude towards such legislation, the Supreme Court said in *Hoechst Pharmaceuticals Ltd. v. State of Bihar*:[12]

> "On questions of economic regulations and related matters, the Court must defer to the legislative judgment. When the power to tax exists, the extent of the burden is a matter for the discretion of the law-makers. It is not the function of the Court to consider the propriety or justness of the tax, or enter upon the realm of legislative policy....".

But, in *Indian Express Newspapers v. Union of India*,[13] the Supreme Court expressed a different view. The Court was assessing the *vires* of the levy of customs duty on newsprint *vis-a-vis* the freedom of the press under Art. 19(1)(*a*). The Court was thus seeking to reconcile the levy of the customs duty on the newsprint with the freedom of the press. The Court expressed its approach in the matter in these words:

> "It is true that this Court has adopted a liberal approach while dealing with fiscal measures and has upheld different kinds of levies.... But in the cases before us the Court is called upon to reconcile the social interest involved in the freedom of speech and expression with the public interest involved in the fiscal levies imposed by the Government specially because newsprint constitutes the body, if expression happens to be the soul. In view of the intimate connection of newsprint with the freedom of the press, the tests for determining the vires of a statute taxing newsprint have, therefore, to be different from the tests usually adopted for testing vires of the taxing statutes. In the case of ordinary taxing statutes, the laws may be questioned only if they are either openly confiscatory or a colourable device to confiscate. On the other hand, in the case of a tax on newsprint, it may be sufficient to show a distinct and noticeable burdensomeness, clearly and directly attributable to the law."[14]

In assessing the constitutionality of a statute, the Court is not concerned with the motives, *bona fides* or *mala fides* of the legislature. No *mala fides* or motives are attributed to the legislature.[15] The Legislature, as a body, cannot be accused of having passed a law for an extraneous purpose. "Even assuming that the executive, in a given case, has an ulterior motive in moving a legislation, that motive cannot render the passing of the law *mala fide*. This kind of transferred malice is unknown in the field of legislation."[16]

If the legislature is competent to pass a particular law, the motives which impelled it to act are really irrelevant.[17] Similarly, the Court is not concerned with the wisdom of the legislature in enacting a particular law.[18] The 'constitutional-

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12. AIR 1983 SC 1019 : (1983) 4 SCC 45.
13. (1985) 1 SCC 641 : AIR 1986 SC 515.
14. *Ibid.*, at 686.
Also, *supra*, Ch. XXIV, Sec. C(h).
15. *G.C. Kanungo v. State of Orissa*, AIR 1995 SC 1655, at 1660-61 : (1995) 5 SCC 96.
16. *K. Nagaraj v. State of Andhra Pradesh*, AIR 1985 SC 551 at 556 : (1985) 1 SCC 523.
17. *K.C. Gajapati Narayan Deo v. State of Orissa*, AIR 1953 SC 375 : 1954 SCR 1; *Gullapalli N. Rao v. State of Andhra P.S.R.T. Corp.*, AIR 1959 SC 308 : 1959 Supp (1) SCR 319; *supra*, Ch. II, Sec. M.
18. *Y.V. Srinivasamurthy v. State of Mysore*, AIR 1959 SC 894.

ity' and not 'unwisdom' of a legislation is the narrow area of judicial review.[19] The Court cannot sit in judgment over the wisdom of the legislature. A law cannot be struck down merely because the Court thinks it to be unjustified or unwise. As the Supreme Court has stated:[20] "What form a regulatory measure must take is for the legislature to decide and the Court would not examine its wisdom or efficacy except to the extent that Article 13 of the Constitution is attracted." On this point, the Supreme Court has observed in *State of Andhra Pradesh v. McDowell & Co.* :[21]

> "No enactment can be struck down by just saying that it is arbitrary or unreasonable. Some or other constitutional infirmity has to be found before invalidating an Act. An enactment cannot be struck down on the ground that Court thinks it unjustified. The Parliament and the legislatures, composed as they are of the representatives of the people, and are supposed to know the needs of the people and what is good and bad for them. The Court cannot sit in judgment over their wisdom."

It is only a law which has to be tested with reference to Art. 13.[22] Flag Code containing the executive instructions of the Central Government is not "law" within the meaning of Art. 13 and for the purposes of Arts. 19(2) to (6) and therefore cannot impose restrictions on the rights enumerated under Arts. 19(1) (a) to (e) and (g). But the guidelines as laid down under the Flag Code deserve to be followed to the extent it provides for preservation of dignity and respect for the National Flag. The right to fly the National Flag is not an absolute right. The freedom of expression for the purpose of giving a feeling of nationalism is met by showing respect to the flag. The State may not tolerate even the slightest disrespect.[23]

The Courts also are not concerned with the need or propriety of laws. The judicial function is not to canvass the legislative judgment, or to hold the impugned statute to be ill-advised or unjustified or not justified by the facts on which it is based. The function of the courts is to see whether the law in question transgresses any constitutional restriction imposed on the legislature.[24]

The constitutionality of a statute passed by a competent legislature cannot also be challenged on the ground that it is not reasonable or just unless the Constitution expressly imposes such a stipulation as in Art. 19.[25] Mr. Justice Douglas has very forcefully reiterated this point thus: "Congress acting within its constitutional powers, has the final say on policy issues. If it acts unwisely the electorate can make a change."[26]

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19. Mr. Justice STONE in *U.S. v. Butler*, 297 US 1; *Murthy Match Works v. Asst. Collector of Central Excise*, AIR 1974 SC 497, 503 : (1974) 4 SCC 428; *B. Banerjee v. Anita Pan*, AIR 1975 SC 1146, 1153 : (1975) 1 SCC 166.

20. *Delhi Cloth & Gen. Mills Co. Ltd. v. Union of India*, AIR 1983 SC 937, 947, 950.

21. AIR 1996 SC 1628 at 1641 : (1996) 3 SCC 709.
See also *Legal Remembrancer's Manual not covered. State of U.P. v. Johri Mal*, (2004) 4 SCC 714 : AIR 2004 SC 3800.

22. *State of Kerala v. Chandramohanan* ,(2004) 3 SCC 429 : AIR 2004 SC 1155, Government circulars—Not law within the meaning of Art 13.

23. *Union of India v. Naveen Jindal*, (2004) 2 SCC 510 : AIR 2004 SC 1559.

24. *Chiranjit Lal v. Union of India, supra*, Ch. XXI, Sec. C.

25. *Supra*, Ch. XXIV, Sec. B.

26. *Railway Employees' Department v. Hansen*, 351 US 225 (1956).

The possibility of abuse of a statute otherwise valid does not impart to it any invalidity.[27] Conversely a statute which is invalid as being unreasonable cannot be saved because it is being administered in a reasonable manner.[28]

Reference may also be made in this connection to the doctrine of colourable legislation discussed earlier.[29]

For the purpose of determining whether a particular enactment curtails a Fundamental Right or not, the Supreme Court has expounded not one but several formulae and, speaking generally, the particular formula which happens to be favourable to the validity of the legislation impugned, is usually adopted by the Court.

One such formula is that a law is not questionable under a Fundamental Right unless the legislation is directly in respect of it. Thus, a law can be attacked under Art. 19(1)(*a*), if it is directly in respect of the subject covered by Art. 19(1)(*a*), but not if it touches that Article only incidentally or indirectly. If the law in question directly abridges the freedom of speech, it may be repugnant to Art. 19(1)(*a*), but it may not be invalid if it relates to some other right and affects the freedom of speech only incidentally or indirectly.[30]

This was the test applied in *Gopalan* to repudiate the argument that the validity of the Preventive Detention Act be judged under Art. 19(1)(*a*) as well. KANIA, C.J. held that such a question could arise only when the legislation directly attempted to control a citizen's freedom of speech and expression, but it was not directly in respect of Art. 19(1)(*a*), and the right guaranteed in that Article was abridged as a result of operation of other legislation, then the question of application of Art. 19(1)(*a*) would not arise. "The true approach", observed the Judge,"is only to consider the directness of the legislation and not what will be the result of the detention otherwise valid, on the mode of detenu's life".[31]

The same test was applied again in *Ram Singh v. Delhi.*[32] Had the Court taken into consideration the effect of detention on the freedom of speech, and, thus, applied Art. 19(1)(*a*), the detention in *Ram Singh's* case might have been invalid. But, instead, the Court took the view that the order of preventive detention did not fall within the purview of Art. 19(1)(*a*) as its direct object was preventive detention and not the infringement of the freedom of speech and expression which was merely consequential to detention.

Another test applied in some cases, very much like the above test, is that of 'pith and substance', or true nature or character, or the subject-matter of the impugned statute. In *State of Bombay v. R.M.D.C.*,[33] while considering the validity

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27. *R.K. Garg v. Union of India*, *supra*, footnote 10; *Union of India v. Elphinstone Spn. & Wvg. Co. Ltd.*, AIR 2001, at 735 : (2001) 4 SCC 139.

28. *Collector of Customs, Madras v. Nathella Sampathu Chetty*, AIR 1962 SC 316, at 332 : (1962) 3 SCR 786.

29. *Supra*, Ch. X, Sec. G(v).

30. *Naresh v. State of Maharashtra, supra*, Ch. XXIV, Sec. C.
The Supreme Court held that the High Court's order in the instant case was directly concerned with giving protection to the witness with a view to obtain true evidence from him in order to do justice between the parties. If incidentally it affected the right of the petitioner under Art. 19(1)(*a*), that would not affect the validity of the order.

31. *Supra*, Ch. XXVI, Sec. B(a).

32. AIR 1951 SC 270; *supra*, Ch. XXVI, Sec. C.

33. *Supra*, Ch. XXIV, Sec. I(c).
Also see, *Cooverji v. Excise Commr.*, Ch. XI, Sec. H.

of the Bombay Lotteries and Prize Competitions Control and Tax (Amendment) Act, 1952, *vis-a-vis* Arts. 19(1)(*g*) and 301, the Supreme Court pointed out that in pith and substance the impugned Act was in respect of betting and gambling and since betting and gambling did not constitute trade, commerce or business, the validity of the Act need not be decided upon by the yardstick of reasonableness and public interest laid down in Arts. 19(6) and 304.[34]

In the *Atiabari* case,[35] however, the Supreme Court doubted whether the doctrine of pith and substance could be applied to an area other than the legislative lists.[36]

In *Hamdard Dawakhana v. Union of India*,[37] the Court again expressed a doubt whether the doctrine was relevant to determining the constitutional validity of a statute with reference to a Fundamental Right. There the law was challenged as being unconstitutional under Art. 19(1)(*a*). Instead of the pith and substance doctrine, the Court preferred the doctrine of 'true character and nature' which meant that the subject-matter of the impugned legislation, the area in which it is intended to operate, its purport and intent should be determined to adjudicate upon its constitutionality.

To do so, it is legitimate to take into consideration all factors, such as, the history of the legislation, the purpose thereof, the surrounding circumstances and conditions, the mischief which is intended to be suppressed, the remedy for the disease which the legislature resolved to cure and the reason for the remedy. The justification for the approach is that the Court should look to the substance, rather than the form, of the legislation impugned.

It is not, however, very clear as to what precisely is the difference between 'pith and substance' and 'true character and nature'. The two doctrines appear to be convergent except for verbal differentiation.[38]

The test of "true nature and character" was first proposed by MAHAJAN, J., in *Dwarkadas v. Sholapur Mills*.[39] In *Sundaramier's* case,[40] the test of true nature and scope was applied to adjudge the constitutionality of a statute with reference to Art. 286.

In some cases, the test of real effect and impact of the impugned legislation on the Fundamental Right has been applied. In the *Kerala* case, the Supreme Court took recourse to the test of 'effect and impact'.[41] This test was narrowed down to some extent in *Express Newspaper* where the Supreme Court considered the 'direct and inevitable consequences'[42] of the impugned Act as distinguished from its 'remote consequences'.

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34. *Supra*, Chs. XV, Sec. D(a) and XXIV, Secs. B and J(a).
35. *Supra*, Ch. XV, Secs. C and E.
36. Ch. X, Sec. G(iv)
37. *Supra*, Ch. XXIV, Secs. C (k).
38. Also see, *Mahant Moti Das v. S.P. Sahi*, AIR 1959 SC 942 : 1959 Supp (2) SCR 563.
39. AIR 1954 SC 119 : 1954 SCR 674; *supra*, Ch. XXIV, Sec. I; Ch. XXXI, Sec. C(ii).
40. AIR 1958 SC 468; *supra*, Ch. XI, Sec. J(i).
41. *Supra*, Ch. XXXIV, Sec. B.
Also see, *State of Bombay v. Bombay Education Society*, *supra*, Ch. XXX, Sec. A; *M.H. Quareshi v. State of Bihar*, *supra*, Ch. XXIV, Sec. J(g).
42. *Supra*, Ch. XXIV, Sec. C.

In the *Bank Nationalisation* case,[43] the Court advocated the test of the 'effect of the law' or its 'direct operation' upon the individual's right to assess the validity of a law with reference to a Fundamental Right. The Court emphasized that it was the substance of the legislation and its practical result which should be considered rather than the pure legal form. A similar test was applied in *Sakal Papers* where the validity of the order was adjudged under Art. 19(1)(*a*) and not under Art. 19(1)(*g*).[44]

The Supreme Court has stated in *Man Singh v. State of Punjab*[45] "that the true test of the validity of a statute must be the 'effect and consequence' of its operation on the citizen's Fundamental Right. The object underlying the legislation embodies the intent of the Legislature in enacting it, but the Court has to consider the question whether its impact on the Fundamental Right can be regarded as a reasonable restriction on the exercise of the right. "The focal point during such examination is the Fundamental right, and the duty of the Court must be to consider the quality and degree of the encroachment made by the operation of the statute on the citizen's exercise of that right."

A good deal of discussion on the applicability of these various tests is to be found in *Express Newspapers*. There the Working Journalists Act, 1955, was challenged on the ground that, in substance, in its 'true nature and character' and in 'effect and operation', it regulated employment in the newspaper industry and thus fell within the prohibition of Art. 19(1)(*a*) as affecting the freedom of the press. The Court, however, thought that the true nature of the Act was to regulate the service conditions of working journalists. It might result in certain disadvantages to the newspaper industry but these were only 'incidental' and 'extraneous' to the Act.

The Court formulated the proposition thus: unless the disadvantages accruing to the newspaper industry under the Act were the 'direct and inevitable' consequences of the Act, it could not be struck down. There was an interesting argument in the case on whether Art. 19(1)(*a*) would operate only when legislation "directly" dealt with the "freedom of speech and expression", or also when the statute in 'effect' affects that right. The Court did not give a definitive ruling on the 'subject-matter' v. 'effect' controversy.

The 'subject-matter' test is narrower in the sense that it would permit indirect encroachments on a Fundamental Right. It appears that the Court did not favour any of these tests but favoured instead an intermediate position, viz., the test of 'true nature' of the legislation in question. This test is narrower than the 'effect' test for it permits incidental encroachments on the Fundamental Right in question but it is broader than the 'subject-matter' test because, even though a legislation does not deal with a Fundamental Right, yet it may become bad if it imposes restrictions on the right which are not inconsequential or incidental.[46]

In *Bennett Coleman*,[47] the Supreme Court applied the 'effect' test. There the constitutional validity of a legislation not directly in respect of Art. 19(1)(*a*), nevertheless, affecting freedom of speech was assessed with reference to Art.

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43. AIR 1970 SC 564, 597; *supra*, Ch. XXXI, Sec. C(iii).
44. *Supra*, Ch. XXIV, Sec. C(f).
45. (1985) 4 SCC 146 : AIR 1985 SC 1737.
46. M.P. JAIN, Justice Bhagwati and Indian Constitutional Law, 2 *JILI* 31, 37.
47. *Supra*, Ch. XXIV, Sec. C(g).

19(1)(*a*). It had been argued in *Bennett Coleman* that the subject-matter of the newsprint policy (the validity of which was challenged in the case) was not freedom of speech but rationing of imported commodity. The government also invoked the rule of pith the substance for the purpose. The Court ruled that the tests of "pith and substance" or the "subject-matter", and of "direct and incidental effect" of legislation were relevant to the question of legislative competence but were irrelevant to the question of Fundamental Rights. The test to be applied in such a case was whether the "effect" of the impugned action was to take away or abridge Fundamental Rights. A legislation may have a 'direct' effect on a Fundamental Right although its direct subject-matter might be different. The object of the law was irrelevant when it infringed a Fundamental Right. A difficulty in this test is to assess whether the 'consequence' of a provision on a Fundamental Right is 'direct' or 'indirect'. This may give rise to a difference of opinion. But this test helps better in preservation of the Fundamental Rights than the 'subject-matter' test.[48]

In *Maneka Gandhi*, BHAGWATI, J., used the test of "direct and inevitable effect" as "in the absence of operational criteria for judging 'directness' it would give the Court an unquantifiable discretion to decide whether in a given case a consequence or effect is direct or not". According to him, the test of 'direct and inevitable effect' would quantify the extent of directness necessary to constitute infringement of a Fundamental Right. He applied the test to see whether the impugned section violated freedom of speech and/or freedom of occupation.[49]

The above discussion shows that the judiciary keeps a number of options open to itself. This gives to the judicial review some flexibility and elasticity, and to the courts a good deal of maneuverability in discharging their function of adjudicating upon the constitutionality of legislation. This also creates uncertainty as to the judicial response to a particular problem because what test will the Court apply in a particular situation cannot be predicated with definiteness or with certainty.

A reference has already been made to the technique of indirect judicial review.[50] Here the Court so interprets the law as to sustain its validity. If a statutory provision is capable of two possible interpretations, so that by one it is rendered unconstitutional, and by the other it becomes constitutional, the Court will prefer the interpretation which saves and preserves the provision in preference to the one which destroys it. The principle is that if certain provisions of law construed in one way will be consistent with the Constitution, and if another interpretation would render them unconstitutional, the Court would bear in favour of the former construction.[51] This strategy is adopted because of the concern of the Court to salvage a legislation to achieve its objective and not to let it fall merely because of a possible ingenious interpretation. Words are not static but dynamic. As the Supreme Court has observed:[52]

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48. *Supra*, Ch. XXIV, Sec. B.
Also, *supra*, Ch. XXVI, Sec. C.

49. *Supra*, Ch. XXVI, Sec. D.

50. *Supra*.

51. *The Mysore State Electricity Board v. Bangalore Woollen, Cotton and Silk Mills Ltd.*, AIR 1963 SC 1128 : 1963 Supp (2) SCR 127; *Delhi Transport Corpon. v. D.T.C. Mazdoor Congress*, AIR 1991 SC 101, 167-170, 175-180, 201-205 : 1991 Supp (1) SCC 600.

52. *B.R. Enterprises v. State of Uttar Pradesh*, AIR 1999 SC 1867, at 1906 : (1999) 9 SCC 700.

> "It is also well settled, first attempt should be made by the Courts to uphold the charged provision and not to invalidate it merely because one of the possible interpretations leads to such a result, howsoever attractive it may be. Thus, when there are two possible interpretations, one invalidating the law and the another upholding, the latter should be adopted. For this, the courts have been endeavoring, sometimes to give restrictive or expansive meaning keeping in view the nature of legislation, may be beneficial, penal or fiscal etc….. Yet in spite of this, if the impugned legislation cannot be saved, the courts shall not hesitate to strike it down."

In another case,[53] the Supreme Court has observed: "Words are not static but dynamic and courts must adopt that dynamic meaning which upholds the validity of any provision."

In *Githa Hariharan v. Reserve Bank of India*,[54] the Supreme Court reinterpreted s. 6(a) of the Hindu Minority and Guardianship Act, 1956, so as to "retain it within constitutional limits."

The courts have evolved the technique known as 'reading down' a statute and the courts often resort to this strategy to ensure constitutionality of the statute in question.[55] This technique involves interpreting general words in a statute narrowly. As the Supreme Court has observed : "… for upholding any provision, if it could be saved by reading it down, it should be done, unless plain words are so clear to be in defiance of the Constitution."[56]

A few examples of the application of the technique of 'reading down' may be cited here. The Central Legislature enacted the Hindu Women's Rights to Property Act conferring certain rights on Hindu women in 'property'. The Central Legislature had jurisdiction only on 'non-agricultural property, and not 'agricultural' property. Accordingly, to save the Act from unconstitutionality, the Federal Court interpreted the word 'property' used in the Act as referring to "property other than agricultural land". The Court observed :[57]

> "When a Legislature with limited and restricted powers makes use in an Act of a word of such wide and general import as "property", the presumption must be that it is using it with reference to that kind of property with respect to which it is competent to legislate and to no other."

Parliament enacted the Prize Competitions Act to provide for the control and regulation of prize competitions. The expression "prize competitions" was defined very broadly. To save the Act from unconstitutionality, the Supreme Court in *RMDC*[58] restricted its meaning to such competitions as are of a gambling nature.

In *Kedar Nath v. State of Bihar*, s. 124A I.P.C., was interpreted in the narrower sense and was thus sustained against a challenge under Art. 19(2). Sedition

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53. *Quarry Owners Association v. State of Bihar*, AIR 2000 SC 2870, 2886 : (2000) 8 SCC 655.
54. AIR 1999 SC 1149, 1153.
Also see, *Union of India v. Elphinstone Spinning and Weaving Co. Ltd.*, AIR 2001 SC at 733 : (2001) 4 SCC 139.
55. *DTC v. DTC Mazdoor Congress, supra; B.R. Enterprises v. State of Uttar Pradesh, supra.*
56. *B.R. Enterprises, supra.*
57. In Re, *The Hindu Women's Rights to Property Act, 1937*, AIR 1941 FC 72
58. *RMD Chamiarbaugwalla v. Union of India*, AIR 1957 SC 628 : 1957 SCR 930; *supra*, Ch. XXIV, Sec. I(e).
Also, *BR. Enterprises v. State of Uttar Pradesh*, AIR 1999 SC 1867 : (1999) 9 SCC 700.

was defined as meaning words, deeds or writings having a tendency or intention to disturb public tranquility, to create public disturbance or to promote disorder. The Supreme Court rejected the broader view of S. 124A that incitement to public order was not an essential element of the offence of sedition under this section. This broad view would have made s. 124A unconstitutional *vis-a-vis* Art. 19(1)(*a*) read with Art. 19(2).[59]

When an interpretation of a clause makes it vulnerable to attack under Art. 14, it should be avoided. If there is obvious anomaly in applying the law, the Court could shape the law to remove the anomaly and give effect to the purpose of the legislature. That could be done, if necessary, even by modification of the language used.[60]

A good example of application of the strategy of reading down is provided by *Rt. Rev. Magr. Mark Netto v. Govt. of Kerala.*[61] The State Government made a rule which was challenged as violative of the right conferred upon the minorities by Art. 30. If the rule were to be interpreted broadly it could fall foul of Art. 30. So, the rule was interpreted restrictively so as to be inapplicable to a minority educational institution. The Court observed :[62]

> "We do not think it necessary or advisable to strike down the Rule as a whole but to restrict its operation and make it inapplicable to a minority educational institution in a situation like the one which arose in this case."

The Supreme Court has explained the scope of the doctrine of reading down as follows :[63]

> "It is thus clear that the doctrine of reading down or of recasting the statute can be applied in limited situations. It is essentially used, firstly, for saving a statute from being struck down on account of its unconstitutionality. It is an extension of the principle that when two interpretations are possible one rendering it constitutional and the other making it unconstitutional, the former should be preferred….. The second situation which summons its aid is where the provisions of the statute are vague and ambiguous and it is possible to gather the intentions of the legislature from the object of the statute, the context in which the provision occurs and the purpose for which it is made."

It is not be proper to read down the provisions of a statute in relation to the period during which the statute was subsisting as it would then affect persons who never went to Court, because during the period it existed it did not apply to them.[64]

When adherence to statutory language leads to unjust or illogical results, and, thus, makes the law vulnerable to attack under Art. 14, the Court may take recourse to indirect judicial review. The Supreme Court has observed in this con-

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59. *Supra*, Ch. XXIV, Sec. D(b).

60. *Union of India v. Filip Tiago De Gama*, AIR 1990 SC 981 at 985 : (1990) 1 SCC 277.
Also, *Mahadeolal Kanodia v. The Administrator-General of West Bengal*, AIR 1960 SC 936 : (1960) 3 SCR 578.

61. AIR 1979 SC 83 : (1979) 1 SCC 23; *supra*, Ch. XXX, Sec. B; Sec. C(h).

62. The Court applied the same strategy in *New Delhi Municipal Committee v. State of Punjab*, AIR 1997 SC 2847 at 2903, 2904 : (1997) 7 SCC 339.

63. *Delhi Transport Corporation v. D.T.C. Mazdoor Congress*, AIR 1991 SC 101, at 180; see also reading down statute to save arbitrariness and exercise of discretionary power. *Salem Advocate Bar Association v. Union of India*, (2005) 6 SCC 344 : AIR 2005 SC 3353.

64. *Punjab Dairy Development Board v. Cepham Milk Specialities Ltd.*, (2004) 8 SCC 621 : AIR 2004 SC 4466.

nection that if there is obvious anomaly in the application of the law, the Court could shape the law to remove the anomaly. If the strict grammatical interpretation gives rise to absurdity or inconsistency, the Court could discard such interpretation and adopt an interpretation which will give effect to the purpose of the legislature. That could be done, if necessary, even by modification of the language used. A law does not deal with specific controversies which the courts decide. A law incorporates general purpose behind the statutory words, the Court decides specific cases. If a given case falls well within the general purpose of the legislature, but not within the literal meaning of the statute, then the Court must strike the balance.[65]

A similar approach is to be seen in *Govind v. State of Madhya Pradesh*[66] where police regulations were restrictively read by the Court and thus held valid under Art. 19(1)(*d*).

Thus, reading down a statute to ensure its constitutionality is a common judicial strategy. As KRISHNA IYER, J., has said in *Bhim Singhji v. Union of India*:[67] "…. reading down meanings of words with loose lexical amplitude is permissible as part of the judicial process. To sustain a law by interpretation is the rule."

But it is not in every case that the Court would resort to the technique of 'reading down' the statute. When the provision in question is cast in a definite and unambiguous language, and its intention is clear, the Court will not mend or bend it but declare it unconstitutional leaving it to the legislature to amend it if it so desires. One example of the Court refusing to apply the doctrine of reading down is furnished by *Minerva Mills Ltd. v. Union of India*,[68] The Court refused to read down Art. 31C to save it from the challenge of unconstitutionality. The Court ruled that "if the Parliament has manifested a clear intention to exercise an unlimited power, it is impermissible to read down the amplitude of that power so as to make it limited. The principle of reading down cannot be invoked or applied in opposition to the clear intention of the legislature."

The Supreme Court also refused to apply the doctrine of reading down in *DTC*.[69] A service regulation was made conferring power on the authority to terminate the services of a permanent and confirmed employee without assigning any reason by giving one month's notice. The regulation was characterised as arbitrary, discriminatory and violative of Art. 14. The Court ruled : "The language of the regulation is so crystal clear that no two interpretations are possible to be placed on it and hence it is not permissible to read in it any meaning other than what is clearly sought to be conveyed by it."[70]

There are instances where instead of reading down the impugned law, the Court may read something therein to uphold its validity. A few examples of such judicial approach may be cited here.

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65. *Mahadeolal Kanodia v. The Administrator General of West Bengal*, AIR 1960 SC 936 : (1960) 3 SCR 578; *Union of India v. Filip Tiago De Gama*, AIR 1990 SC 981, 955 : (1990) 1 SCC 277.
66. AIR 1975 SC 1378; *supra*, Ch. XXIV, Sec. G.
67. AIR 1981 SC at 242 : (1981) 1 SCC 166.
68. See, *infra*, next Chapter.
69. *DTC v. DTC Mazdoor Congress*, *supra.*
70. AIR 1991 SC at 181.

In *State of Mysore v. Bhat,*[71] instead of holding the law invalid under Art. 14 on the ground of lack of procedural safeguards, the Supreme Court read natural justice into the law and sustained its validity, but quashed the orders made thereunder because of denial of natural justice.

In *Express Newspaper,*[72] the Supreme Court read the ingredient 'capacity to pay' into the law enacted for fixing wages even though the law had failed to specify the same and held it valid. Instead, the Court quashed the decision of the wage board as it had not taken this ingredient into consideration while fixing the wages. This technique avoided a re-enactment of the law in question but only required a revision of the wage board's decision keeping in view the capacity of the industry to pay.[73]

Just because the constitution validity of a statutory provision is pending in appeal before the Supreme Court, it does not bar the High Court from deciding an issue relating to such a provision.[74]

I. EFFECT OF UNCONSTITUTIONALITY

If an Act is initially unconstitutional being violative of a Fundamental Right, its invalidity cannot be cured by framing rules for removing the infirmities from which the Act was suffering. Thus, the Maharashtra Vacant lands (Prohibition of Unauthorised Occupation and Summary Eviction) was held to be violative of Art. 14 and 19(1)(f). The unconstitutionality of the Act was not cured by framing the Rules thereunder.[75]

What is the effect of a judicial declaration that a legislative enactment is unconstitutional?

In an American case, the answer to the question was given as follows: "An unconstitutional Act is not a law, it confers no rights, it imposes no duties, it affords no protection, it creates no office; it is, in legal contemplation, as inoperative as though it has never been passed."[76]

A similar theme is present in certain observations of MAHAJAN, J., in the *Keshavan Madhava Menon* case.[77]

When the Supreme Court declares a law unconstitutional, the decision is binding on all courts in India under Art. 141.[78] The virtual effect thereof is that the decision operates as a judgment *in rem* against all persons who may seek relief subsequenlty and it is not necessary for them to establish the unconstitutionality of the statute again. The courts are bound to ignore an unconstitutional law.

If a person is prosecuted for contravening a section, a part of which has been declared unconstitutional, no onus is cast on the accused to prove that his case

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71. AIR 1975 SC 596 : (1975) 1 SCC 110; *supra*, Ch. XXI, Sec. D.
72. *Supra*, Ch. XXIV, Sec. J(e).
73. M.P. JAIN, Justice Bhagwati and the *Indian Constitutional Law*, 2 JILI, 31, 38.
74. *Carona Ltd. v. Parvathy Swaminathan & Sons*, (2007) 8 SCC 559 : AIR 2008 SC 187.
75. *State of Maharashtra v. Kamal S. Durgule*, AIR 1985 SC 119 : (1985) 1 SCC 234 for Art. 14, see, Ch. XXI, *supra;* for Art. 19(1)(f), see, Ch. XXXI, Sec. B.
76. *Norton v. Shelby County*, 118 US 425, 442 (1886).
77. AIR 1951 SC 128 : 1951 SCR 228; *supra*, Ch. XX, Sec. F.
78. *Supra*, Ch. IV, Sec. I(e); Sec. J.

falls under the unconstitutional portion. To succeed, the prosecution must establish that the accused has contravened the constitutional, and, thus, the enforceable, portion of the section.[79]

An unconstitutional statute is void since its inception; it is regarded as *non-est*.[80] Anything done under it is void and illegal; even convictions made under it are set aside; anything done under it, whether closed, completed, or inchoate, is wholly illegal and the person affected is entitled to relief in one shape or another.[81]

What is stated above is the general effect of the declaration of a statute as unconstitutional. But there may be cases where the Court may tone down the drastic effect in exercise of its power to "mould relief."[82] As stated earlier, the Court may apply the doctrine of prospective overruling.[83] As the Supreme Court has observed in *Orissa Cement Ltd. v. State of Orissa*:[84]

> "… The declaration regarding the invalidity of a provision and the determination of the relief that should be granted in consequence thereof are two different things and, in the latter sphere, the Court has, and must be held to have, a certain amount of discretion. It is a well settled proposition that it is open to the Court to grant, mould or restrict the relief in a manner most appropriate to the situation before it in such a way as to advance the interests of justice. It will be appreciated that it is not always possible in all situations to give a logical and complete effect to a finding…"

Thus, there have been cases where a tax levied by a State has been declared to be unconstitutional but while the Court has barred the State from collecting the tax in future, it has freed the state from the obligation of refunding the tax already collected. Ordinarily, once the tax is held unconstitutional, the tax ought to be held bad *ab initio* from the date of its origin. But, the Supreme Court exercising its power to mould relief under Art. 142, has modified the position by ruling that the past collection of the tax would not be regarded as invalid. This has been done to protect the financial position of the concerned State.[85]

Viewed in this light, the doctrine of Prospective Overruling, discussed earlier, may be regarded as an aspect of the Supreme Court's power to mould relief. The principle is that the Court "moulds the reliefs claimed to meet the justice of the case—Justice not in its logical but in its equitable sense."[86] The Supreme Court has been specifically given this power under Art. 142 of the Constitution. Under Art. 142, the Court has power to do 'complete justice'.[87]

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79. *Behram v. State of Bombay*, AIR 1955 SC 133; *supra*, Ch XX, Sec. F.
80. See, *Behram Khurshed Pesikaka v. State of Bombay*, AIR 1955 SC 123, 145 : (1955) 1 SCR 613; *R.M.D.C. v. Union of India*, AIR 1957 SC 628, 633; *M.P.V. Sundararamier & Co. v. State of Andhra Pradesh*, AIR 1958 SC 468, 489 : 1958 SCR 1422; *Mahendra Lal Jaini v. State of Uttar Pradesh*, AIR 1963 SC 1019, 1029-1031 : 1963 Supp (1) SCR 912.
81. *Supra*, Ch. XX, Sec. F.
82. See, *supra*, Chs. XXXIII, Sec. A(o) and VIII, Sec. D(q).
83. See, *supra*, Sec. G under "Prospective Overruling".
84. AIR 1991 SC 1676, at 1717 : 1991 Supp (1) SCC 430.
85. For Art. 142, see, *supra*, Ch. IV, Sec. G.
86. *Somaiya Organics (India) Ltd. v. State of Uttar Pradesh*, AIR 2001 SC 1723, 1731 : (2001) 5 SCC 519.
87. See, footnote 85, *supra*.

In *Ashok Kumar Gupta v. State of Uttar Pradesh*,[88] the Supreme Court has characterised the doctrine of Prospective Overruling as a method evolved by the courts to adjust competing rights of parties so as to save transactions "whether statutory or otherwise, that were effected by the earlier law". The Court has further observed that it was a "rule of judicial craftsmanship with pragmatism and judicial statesmanship as a useful outline to bring about smooth transition of the operation of law without unduly affecting the rights of the people who acted upon the law as it operated prior to the date of the judgment overruling the previous law." Ultimately, it is a matter of the discretion of the Supreme Court and is relatable directly to the grant of relief by the Court.

What is the effect on an unconstitutional statute of a constitutional amendment which removes the constitutional objection due to which the statute was declared invalid? The matter has already been discussed earlier.[89] In the *Sundaramier* case,[90] the Supreme Court applying the Doctrine of Eclipse held that the portions of a statute declared bad under Art. 286 were revived when the Article was amended so as to remove the constitutional quencher.

But this principle is not applied to a statute which may be invalid because of excessive delegation.[91] A law was challenged before the Supreme Court on this ground. Pending the Court's decision, an amending Act was enacted to remove the defect. The Supreme Court ruled by a majority that when an Act is bad on the ground of excessive delegation, it is void *ab initio* and still-born and it cannot be revived by an amending Act seeking to remove the vice. It means that the whole Act has to be re-enacted in the modified form.[92]

(a) SEVERABILITY

Reference may be made to the doctrine of severability which has already been discussed earlier.[93] The doctrine is invoked to protect the valid parts of the law and to eliminate only the invalid parts thereof.[94]

If the unconstitutional portion is severable from the constitutional portion, then only the former is affected; the statute is not regarded unconstitutional as a whole; the statute minus the unconstitutional portion stands.[95] For example, since the State has no legislative competence to enact provisions relating to natural gas and liquefied natural gas it is to that extent that the State Act would be *ultra vires* the Constitution.[96]

The doctrine makes it possible that not the entire statute, but only the invalid part thereof, has to go provided the good and the bad parts thereof can be separated.

Severing is thus an attempt on the part of the judiciary to minimize the destructive effect of judicial declaration of constitutional invalidity of some por-

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88. (1997) 5 SCC 201, see, *supra*.
89. *Supra*, Ch. XX, Sec. G, under '*Doctrine of Eclipse*'.
90. AIR 1958 SC 468 : 1958 SCR 1422; *supra*, Ch. XI.
91. *Supra*, Ch. II, Sec. N.
92. *B. Shama Rao v. Union Territory*, AIR 1967 SC 1480 : (1967) 2 SCR 650; *supra*, Ch. XX, Sec. G.
93. *Supra*, Ch. XX, Sec. H.
94. *Ibid.*
95. *D.S. Nakara v. Union of India*, AIR 1983 SC 130, 147 : (1983) 1 SCC 305.
96. Special Reference No. 1 of 2001 In re (2004) 4 SCC 489 : AIR 2004 SC 2647.

tions of a statute. If, however, the constitutional part cannot be separated from the unconstitutional part, then the whole statute is held to be invalid.[1]

(b) LEGISLATIVE VALIDATION OF AN INVALID STATUTE

It is possible that a statute held invalid by the Court may later be sought to be validated by the legislature by passing suitable legislation retrospectively removing the defects and deficiencies in the law which resulted in its being declared invalid. The Legislature cannot directly overrule a Court decision. The legislature cannot seek to override a Court decision by a mere declaration or even by making a statutory provision.[2]

The Supreme Court has enunciated the principle as follows:[3]

> "On the words used in the Act, it is plain that the Legislature attempted to overrule or set-aside the decision of this Court. That, in our judgment, is not open to the Legislature to do under our constitutional scheme. It is open to the legislature within certain limits to amend the provisions of an Act retrospectively and to declare what the law shall be deemed to have been, but it is not open to the legislature to say that a judgment of a Court properly constituted and rendered in exercise of its powers in matters brought before it shall be deemed to be ineffective and the interpretation of the law shall be otherwise than as declared by the Court. That judgment was binding between the parties and also by virtue of Article 141 binding on all courts in the territory of India. The legislature could not say that the declaration of the law was either erroneous, invalid or ineffective either as precedent or between the parties."[4]

Accordingly, in *S.R. Bhagwat v. State of Mysore*,[5] a statutory provision was declared *ultra vires* the powers of the State Legislature "as it encroaches upon the judicial field and tries to overrule the judicial decision…"

What the Legislature can do however is to remove the defect which led to the invalidation of the law in question if the Legislature can do so under the Constitution.[6] What the Legislature can do is to enact a new law, amending the old law so as to remove the base on which the Court decision was founded.

The Court has explained the position thus in *Bola*:[7]

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1. *State of Gujarat v. Raman Lal Keshav Lal Soni*, AIR 1984 SC 161 : (1983) 2 SCC 33; *Motor General Traders v. State of Andhra Pradesh*, AIR 1984 SC 121 : (1984) 1 SCC 222.

2. *I.N. Saxena v. State of Madhya Pradesh*, AIR 1976 SC 2250; *Sundar Dass v. Ram Prakash*, AIR 1977 SC 1201 : (1977) 2 SCC 662; *Madan Mohan Pathak v. Union of India*, AIR 1979 SC 803; *Indra Sawhney v. Union of India*, AIR 2000 SC 498, at 516 : (2000) 1 SCC 168.

3. *Janapada Sabha v. C.P. Syndicate Ltd.*, AIR 1971 SC 57 : (1970) 1 SCC 509.
Also see, *Comorin Match Industries (Pvt.) Ltd. v. State of Tamil Nadu*, AIR 1996 SC 1916 : (1996) 4 SCC 281; *B. Krishna Bhat v. State of Karnataka*, AIR 2001 SC 1885, at 1890.

4. For Art. 141, see, *supra*, Ch. IV, Sec. I(e).

5. AIR 1996 SC 188 : (1995) 6 SCC 16.
Also see, *In re Caurvery Water Disputes Tribunal*, 1992 AIR SCW 1286; *G.C. Kanungo v. Mysore*, 1995 AIR SCW 2596 : (1995) 5 SCC 96; *State of Maharashtra v. Tanuja*, AIR 1999 SC 791 : (1999) 2 SCC 462; *State of Haryana v. Karnal Coop. F.S. Ltd.*, AIR 1994 SC 1 : (1993) 2 SCC 363.

6. *Supra*, Ch. X, Sec. I.
Also see, *Indian Aluminium Ltd. v. State of Kerala*, (1996) 7 SCC 537.
The matter has been discussed in *S.S. Bola v. B.D. Sardana*, AIR 1997 SC 3127, 3172-3173 : (1997) 8 SCC 522, Ch. XXXIV.

7. *Supra*, footnote 6.

> "The consistent thread that runs through all the decisions of this Court is that the legislature cannot directly overrule the decision or make a direction as not binding on it but has power to make the decision ineffective by removing the base on which the decision was rendered, consistent with the law of the Constitution and the legislature must have competence to do the same".

Hence there is no interference with a "judicial Order" passed by a competent Court or a tribunal where a "policy decision" is taken by the State Government to abolish the State Administrative Tribunal allowing aggrieved litigants to approach appropriate authority or forum for ventilating their grievances.[8]

A statute will not be valid unless the defects pointed out are removed. Such removal of the defects must be done keeping in view the principle of legislative competence. Even Parliament could not validate an Act which was enacted without proper legislative competence. As the measure of tax levied led to the declaration of the law as invalid, being in truth and substance to be beyond the competency of the State Legislature by reason of the impugned Acts, the levy cannot be said to have been revalidated. They were required to be re-enacted but suchre-enactment must also be in tune with any or other entries made in List II of the Constitution.[9]

The Supreme Court has pointed out[10] that before the Legislature can validate a tax declared illegal by the Court, the Legislature must remove, if it can, the cause for ineffectiveness or illegality. It is not sufficient to merely declare that the decision of the Court shall not bind for that is tantamount to reversing the decision given in exercise of judicial power which the Legislature does not possess. "Validation of a tax so declared illegal may be done only if the grounds of illegality or invalidity are capable of being removed and are in fact removed and the tax is thus made legal".[11] The legislature can change the basis on which a decision of the Court was rendered. Legislative power could also be exercised even with retrospective effect to render that decision ineffective. Thus the enactment of H.P. Taxation (on Certain Goods Carried by Road) Act, 1991 specifically stating that the levy of tax was compensatory and pointing out the facts relevant thereto in the Statement of Objects and Reasons was held to be within the competence of the State legislature and did not amount to overruling of the decision in which High Court had held the previous Act to be unconstitutional.[12]

If an ordinance invalidated by a Court is reenacted into an Act the same would be liable to be annulled once again. The Supreme Court cannot strike down a legislation which it has on an independent scrutiny held to be within the legislative competence of the enacting legislature merely because the legislature has reenacted the same legal provisions into an Act which, ten years earlier, were incorporated in an Ordinance and were found to be unconstitutional in an errone-

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8. *M.P. High Court Bar Association v. Union of India*, (2004) SCC 11 SCC 766 : AIR 2005 SC 4114.

9. *State of W.B. v. Kesoram Industries Ltd.*, (2004) 10 SCC 201 : AIR 2005 SC 1646.

10. *Shri P.C. Mills v. Broach Municipality*, AIR 1970 SC 192 : (1969) 2 SCC 283; *State of Andhra Pradesh v. Hindustan Machine Tools Ltd.*, AIR 1975 SC 2037 : (1975) 2 SCC 274; *Indira Gandhi Nehru v. Raj Narain*, AIR 1975 SC 2299 : 1975 Supp SCC 1; *Misrilal Jain v. State of Orissa*, AIR 1977 SC 1686 : (1977) 3 SCC 212; See also *P Venugopal v. Union of India*, (2008) 5 SCC 1 : (2008) 7 SCALE 255.

11. *Ibid.*, at 195. Also see, *Ahmedabad Corporation v. New S.S. & Wvg. Co.*, AIR 1970 SC 1292 : (1970) 2 SCC 280.

12. *State of H.P. v. Yash Pal Garg*, (2003) 9 SCC 92 : (2003) 4 JT 413.

ous judgment of the High Court, and, before the error could be corrected in appeal, the Ordinance itself had lapsed. The Court pointed out by the impugned Act Parliament has not overruled the judgment of the High Court nor has it declared the same law to be valid which has been pronounced to be void by the Court and that the impugned Act was not liable to be annulled on the ground of violation of the doctrine of separation of powers.[13]

J. SUPREME COURT NOT BOUND BY ITS OWN DECISIONS

A principle of great significance which avoids stultification of the constitutional law, and helps in its continuous development through the process of judicial interpretation, is that the Supreme Court does not regard itself bound by its own previous decisions and feels free to overrule them if it thinks that to be necessary.

As early as 1955, in *Bengal Immunity Co. v. State of Bihar*,[14] the Court expressed the opinion that it was not bound by its earlier judgments; it could reconsider its own previous decisions; it possessed the freedom to depart from them, or even overrule them whenever it thought fit to do so to keep pace with the needs of changing times. There was nothing in the Constitution against such a course of action. Judicial opinions on constitutional questions are not immutable.

This is the first recorded instance of the Supreme Court considering the question whether it could overrule an earlier decision rendered by it. DAS, ACTING C.J., speaking for the majority on the Bench observed : "There is nothing in our Constitution which prevents us from departing from a previous decision if we are convinced of its error and its baneful effect on the general interests of the public."

The main reason for taking this view is that while errors of ordinary law could be corrected by ordinary legislative process, an error of constitutional law could be set right only by the difficult, dilatory and cumbersome process of constitutional amendment. A perpetuation of mistakes in constitutional matters would be harmful to public interests.

The Court has, however, emphasized that it would exercise its power to reconsider previous decisions with due care and caution and only to advance the public well-being. If on a re-examination of the question, the Court concludes that its previous decision was wrong and erroneous then it would be its duty to say so and not to perpetuate the mistake.

In *Sajjan Singh*,[15] the Court again expressed itself on this point thus: The Court would be prepared to review its earlier decision in the interest of public good; the doctrine of *stare decisis* should not be permitted to perpetuate erroneous decisions pronounced by it to the detriment of the general welfare; but it would depart from its previous decisions only when considerations of a substantial and compelling character make it necessary to do so.

The Supreme Court has several times overruled or modified its earlier views. In *Bengal Immunity*, the Court reconsidered, and departed from its ruling in, the

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13. *Dharam Dutt v. Union of India*, (2004) 1 SCC 712 : AIR 2004 SC 1295.
14. AIR 1955 SC 661 : (1955) 2 SCR 603; *Supra*, Ch. XI, Sec. J(i).
15. *Infra*, Ch XLI.

United Motors case,[16] since this case was having an adverse effect on the consuming public by imposing a tax burden erroneously on the people, giving rise to a consequence "manifestly and wholly unauthorised". The Chief Justice observed further referring to *United Motors*:

> "It is not an ordinary pronouncement declaring the rights of two private individuals *inter se*. It involves an adjudication on the taxing powers of the States as against the consuming public generally. If the decision is erroneous, as indeed we conceive it to be, we owe it to the public to protect them against the illegal tax burdens which the States are seeking to impose on the strength of the erroneous recent decision."

The Court cautioned that "we should not lightly dissent from a previous pronouncement." But if the previous decision was plainly erroneous, the Court is duty-bound to say so and not perpetuate the mistake.

In *Supdt. and Remembrancer of Legal Affairs, West Bengal v. Corp. of Calcutta*,[17] the Court overruled *Director of Rationing v. Calcutta Corp.*,[18] because the proposition laid down therein was inconsistent with the legal philosophy of the Constitution, inconsistent with the republican Indian polity and bristled with anomalies.

In *Kalu Oghad*,[19] the Court modified its view expressed in *Sharma v. Satish*.[20]

In *Golak Nath*,[21] the Court by a majority of 6 : 5 overruled its previous decisions in the *Sajjan Singh* and *Shankari Pd.* cases and, again, in *Kesavananda Bharati* overruled certain aspects of *Golak Nath*.[22]

A shift in judicial view can also be seen in the area of legislative privileges when reference is made to the *Blitz*, the *Searchlight* and the *Keshav Singh* cases.[23]

In *Sambhu Sarkar*, the Court overruled *Gopalan* as regards the interpretation of Art. 22(7)(*a*) saying that in a matter involving the right of personal liberty, the fact that a decision has held the field for long should not be a deterrent against its reconsideration.[24]

In the *Bank Nationalization* case, the Supreme Court changed its views on the inter-relation of Arts. 19(1)(*f*) and 31 and on justiciability of compensation as compared to its previously expressed views.[25]

In *S.N. Sarkar v. State of West Bengal*,[26] the Supreme Court overruled *Gopalan*[27] as regards the interpretation of Art. 22(7).[28] It was argued before the Court

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16. *Bombay v. United Motors (India) Ltd.*, AIR 1953 SC 252 : 1953 SCR 1069; *Supra*, Ch. XI, Sec. J(i).
17. *Supra*, Ch. XXXVII, Sec. G.
18. *Ibid*.
19. *Supra*, Ch. XXV, Sec. C.
20. *Supra*, Ch. XXV, Sec. C.
21. *Infra*, Ch. XLI
22. *Ibid.*
23. *Supra*, Chs. II, Sec. L and VI, Sec. H.
24. *Supra*, Ch. XXVII, Sec. C(i)(a).
25. *Supra*, Ch. XXXI, Sec. C(iii).
26. AIR 1973 SC 1425, at 1435 : (1973) 1 SCC 856.
27. *Supra*, Ch. XXVI, Sec. C.
28. *Supra*, Ch. XXVII, Secs. B(d) and (f).

that "the majority-decision in *Gopalan* has stood for such a long time that it should not be disturbed unless there are strong and manifest reasons to do so." Brushing aside the argument, the Court observed that "this Court would review its earlier decisions if it is satisfied of its error or of the baneful effect such a decision would have on the general interest of the public", or if it "is inconsistent with the legal philosophy of our Constitution", and that in constitutional matters, "this Court would do so more readily than in other branches of law as perpetuation of an error would be harmful to public interests."

More importantly, the Supreme Court overruled *Gopalan* in *Maneka Gandhi* as regards the interpretation of Art. 21.[29] This proved to be a significant turning point in the development of constitutional law as, thereafter, Art. 21 has assumed a totally new complexion and witnessed a great expansion in its range and scope.[30]

The Supreme Court thus acts as a self-correcting agency. The Court does not rigidly bind itself by the doctrine of *stare decisis* in constitutional matters because it recognises that the task of interpretation of the Constitution is not static but dynamic. The Constitution is an organic document and as the shape of problems continuously goes on changing in a progressive and developing society, the Constitution must keep pace with the newly emerging problems. The Court thus has scope for judicial creativity and can adapt the constitutional law to the changing needs of the society.

In the Constituent Assembly, the view was expressed that in order to ensure elasticity, to enable mistakes to be rectified, and to leave room for growth, the Supreme Court should not be bound by its own decisions and that it should be able to amend its own interpretations of law made by it previously to rectify the errors it might have committed earlier.[31]

The Supreme Court does not, however, lightly reconsider its earlier decisions. The Court feels that it is necessary that the nation's Constitution is not kept in constant uncertainty by judicial review every season because it paralyses, by perennial suspense, all legislative and administrative action on vital issues.[32] The Supreme Court has expressed its views on this question as follows:[33]

> "Enlightened litigative policy in the country must accept as final the pronouncements of this Court by a Constitution Bench unless the subject be of such Fundamental importance to national life or the reasoning is so plainly erroneous in the light of later thought that it is wiser to be ultimately right rather than to be consistently wrong. *Stare decisis* is not a ritual convenience but a rule with limited exceptions. Pronouncements by the Constitution Benches should not be treated so cavalierly as to be revised frequently. We cannot devalue the decisions of this Court to brief ephemerality."

The Court realises that, on the one hand, too frequent overruling by it of its past decisions will introduce uncertainty and confusion in the law. On the other

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29. *Supra*, Ch. XXVI, Sec. C.
30. *Supra*, Ch. XVI, Sec. J.
31. VIII CAD 386.
Also see, *Union of India v. Raghubir Singh*, AIR 1989 SC 1933 : (1989) 2 SCC 754.
32. *Ambika Prasad v. State of Uttar Pradesh*, AIR 1980 SC 1762 : (1980) 3 SCC 719.
But see, SEERVAI, THE POSITION OF JUDICIARY, *supra*, at 69-76, where the author says that the Court has changed its views too often on some questions.
33. *Ganga Sugar Corp. v. State of Uttar Pradesh*, AIR 1980 SC 286, 294 : (1980) 1 SCC 223.

hand, the Court feels that it should not hesitate to correct the error by overruling its decision if it is satisfied that it was clearly erroneous.[34]

Some of the circumstances when the Supreme Court can reconsider and overrule its own previous decision are:

(1) When the contextual values giving birth to the earlier view had altered substantially. The Supreme Court has observed in *Maganlal* :[35]

> "Some new aspects may come to light and it may become essential to cover fresh grounds to meet the new situations or to overcome difficulties which did not manifest themselves or were not taken into account, when the earlier view was propounded."

(2) When there were compelling and substantial reasons to do so.[36]

(3) When an earlier relevant statutory provision had not been brought to the notice of the Court.

The Court has stated the relevant considerations to be borne in mind by it when the Court can change its views expressed in an earlier case in *Keshav Mills*:[37]

> "What is the nature of the infirmity or error on which a plea for a review and revision of the earlier view is based? On the earlier occasion, did some patent aspects of the question remain unnoticed, or was the attention of the Court not drawn to any relevant and material statutory provision, or was any previous decision of this Court bearing on the point not noticed? Is the Court hearing such plea fairly unanimous that there is such an error in the earlier view? What would be the impact of the error on the general administration of law or on public good? Has the earlier decision been followed on subsequent occasions either by this Court or by the High Courts? And, would the reversal of the earlier decision lead to public inconvenience, hardship or mischief ?"

The Supreme Court has again considered the question in *S.C. Advocates-on-Record Ass. v. Union of India.*[38] The question before the Court was whether the earlier case *S.P. Gupta v. Union of India*[39] should be overruled on the question of appointment of Judges in the Supreme Court and the High Courts. While the Court realised that frequent overruling of its decisions was not desirable as it would make law uncertain and unpredictable, yet the Court felt that:

> "it is emphatically the province and essential duty of the superior Courts to review or reconsider its earlier decisions, if so warranted under compelling circumstances and even to overrule any questionable decision, either fully or

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34. *Keshav Mill Co. Ltd. v. CIT*, AIR 1965 SC 1636 : (1965) 2 SCR 908; *Maganlal Chhaganlal (P.) Ltd. v. Municipal Corp. of Greater Bombay*, (1974) 2 SCC 402 : AIR 1974 SC 2009; *S. Nagaraj v. State of Karnataka*, (1993) Supp. (4) SCC 595; *Cauvery Water Disputes Tribunal, In re*, (1993) Supp (1) SCC 96 (II); AIR 1992 SC 522; *Union of India v. Raghubir Singh*, (1989) 2 SCC 754 : AIR 1989 SC 1933.
Also see, *supra*, Ch. IV; *Rupa Ashok Hurra v. Ashok Hurra*, (2002) 4 SCC 388.

35. *Maganlal Chagganlal (P.) Ltd. v. Municipal Corporation of Greater Bombay*, AIR 1974 SC 2009 at 2042 : (1974) 2 SCC 402.

36. *Keshav Mills Co. v. Commissioner of Income-tax*, AIR 1965 SC 1636 at 1644 : (1965) 2 SCR 908; *Sajjan Singh v. State of Rajasthan*, AIR 1965 SC 845; see, *infra*, next Chapter : (1965) 1 SCR 933.

37. *Ibid.*

38. AIR 1994 SC 268 : (1993) 4 SCC 441.

39. AIR 1982 SC 149.
Also see, *S. Nagaraj v. State of Karnataka*, (1993) 5 JT (SC) 27 : 1993 Supp (4) SCC 595.

> partly, if it had been erroneously held and that no decision enjoys absolute immunity from judicial review or reconsideration on a fresh outlook of the constitutional or legal interpretation and in the light of the development of innovative ideas, principles and perception along with the passage of time."[40]

The view of the Supreme Court that it has power to reconsider its own previous decisions is in line with the modern judicial thinking in other countries where courts discharge the function of judicial review.

In the U.S.A., a mechanical attitude to *stare decisis* is decried.[41] As Chief Justice HUGHES has warned, one must not expect from the Court "the icy stratosphere of certainty". The reason for this flexibility is that the Supreme Court is primarily a constitutional Court, and amendment of the U.S. Constitution being a very difficult process,[42] the Court reserves to itself the power to correct its own errors. For example, BRANDEIS, J.,[43] has stated : "*Stare decisis* is ordinarily, a wise rule of action. But it is not a universal, inexorable command".

In another case,[44] BRANDEIS, J., has stated :

> "Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled right. This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning recognising that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function."

The High Court of Australia reserves to itself the power to reconsider its own decisions. As BARTON, J., has observed in *Inthe Tramways* case:[45]

> "But the Court can always listen to argument as to whether it ought to review a particular decision, and the strongest reason for an overruling is that a decision is manifestly wrong and its continuance is injurious to the public interest."

Even in Britain, the House of Lords, which until recently regarded itself bound by its own previous decisions, has now changed its views in this matter. The House has now come to recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. Accordingly, while treating its former decisions as normally binding, the House would depart from a previous decision when it appears right to do so.[46]

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40. AIR 1994 SC at 303.

41. MCWHINNEY, JUDICIAL REVIEW, *passim*.
Prof. FREUND states that movement in constitutional law is not to be foreclosed or made difficult by an absolute doctrine of *stare decisis* : A Supreme Court in a Federation, 53. *Col. LR* 614. Schwartz states that the American Supreme Court has now gone to the other extreme: AMERICAN CONST. LAW, 160.

42. *Infra*, next Chapter.

43. *State of Washington v. Dawson and Co.*, (1923) 264 US 646.

44. *David Burnet v. Coronado Oil and Gas Co.*, (1931) 285 US 393.

45. (1914) 18 CLR 54.

46. Practice Statement (Judicial Precedent) issued by the House of Lords, (1966) 1 WLR 1234.
Taking advantage of this newly assumed power, the House of Lords in *Conway v. Rimmer*, (1968) 1 All ER 874, modified the law relating to, and restricted the ambit of, Crown Privilege regarding production of documents before the courts as laid down in *Duncan v. Cammel Laird & Co.*, (1942) AC 624.
Also See, DE SMITH, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION, 600-6 (1968).

In the practice statement issued on July 26, 1966, LORD GARDINER, L.C., stated:

> "Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose therefore to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so."

The House of Lords has thus assumed a more creative and active role in the development of law. The High Court of Australia also reserves to itself the right to reconsider its own decisions.

It may be appreciated that the proposition that the Supreme Court is not bound by its previous decisions enables the Court to play a more creative and dynamic role in shaping and moulding constitutional law. This aspect becomes very evident from a study of the post 1978 constitutional cases.[47]

47. See, *Ex p. Pinochet Ugarte (No. 2)*, [1999] 1 All ER 577.

CHAPTER XLI

AMENDMENT OF THE CONSTITUTION

SYNOPSIS

Times are not static. Times change and, therefore, the life of a nation is not static but dynamic, living and organic; its political, social and economic conditions change continuously. Social mores and ideals change from time to time cre-

ating new problems and altering the complexion of the old ones. It is, therefore, quite possible that a constitution drafted in one era, and in a particular context, may be found inadequate in another era and another context.

The ideas upon which a constitution is based in one generation may be spurned as old fashioned in the next generation. It thus becomes necessary to have some machinery, some process, by which the constitution may be adapted from time to time in accordance with contemporary national needs.

The modes of adapting the constitution from time to time to new circumstances may either be informal or formal. Informal methods are judicial interpretation and conventions; the formal method is the constituent process.

A. INFORMAL METHODS

(a) JUDICIAL INTERPRETATION

In this case, the constitutional text does not change, but its interpretation undergoes a change.[1] The words in the constitution having one meaning in one context may be given somewhat different meaning in another context. "While the language of the constitution does not change, the changing circumstances of a progressive society for which it was designed yield new and fuller import to its meaning."[2]

Judicial interpretation is a process of slow and gradual metamorphosis of constitutional principles, and is somewhat invisible, for the change has to be deciphered by an analysis of a body of judicial precedents. In this process, the courts play a dominant role, for it is their function to interpret the constitution.

The process is slow for it develops from case to case over a length of time and it may take long for a view to crystallise. It is also somewhat haphazard because the courts do not take the initiative; they interpret the constitution only when the question is raised before them and the course of interpretation depends on the nature of cases and constitutional controversies which are presented to the courts for adjudication.

Though the process of judicial interpretation goes on in every constitution to a greater or lesser extent, yet it assumes a crucial importance in a country in which the formal method of constitutional amendment is very tardy and difficult, and the language used in the constitution is general.

The best example where this process has been used effectively for adaptation of the constitution is the United States where the Supreme Court has from time to time given a new meaning to phrases and words in the constitution so as to make the 18th century, *laissez faire era*, document subserve the needs of a vast, expanding and highly industrialized civilization of the twentieth century without many formal amendments being effectuated in its text.

The U.S. Constitution being skeletal and brief and couched in general language, offers a vast scope for judicial creativity. For example, the First Amendment to the U.S. Constitution guarantees freedom of speech in very broad terms.

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1. *Constitutional Interpretation*, Ch. XL, *supra*; WHEARE, MODERN CONSTITUTIONS, 146-77 (1964).

2. Justices BLACK and FRANKFURTER, CONFLICT IN THE COURT, 57.

The Amendment says: "Congress shall make no law… abridging the freedom of speech or of the press". The provision lays down no limits or restrictions on the Fundamental Right to freedom of speech. But there can be no unlimited right. Therefore, the U.S. Supreme Court has taken upon itself to spell out the restrictions on this right.

To a limited extent, in Canada and Australia also, the judiciary has adapted the constitution to the changing circumstances.[3]

The process of judicial interpretation is in progress in India as well.[4] The Supreme Court by holding that it can reconsider its decisions from time to time has kept the way open for adjustments in constitutional interpretation so as to adapt the Indian Constitution to new situations. The Court has on several occasions changed its views about the significance and meaning of several constitutional provisions.[5]

Even though, due to the Indian Constitution being very detailed, and its language being rather specific, and not general, opportunities available to mould the Constitution by the judicial interpretative process are somewhat limited,[6] yet, there have been several outstanding judicial decisions which have had a deep impact on constitutional development. Since 1978, the interpretative process has entered a very dynamic phase because of judicial creativity. This aspect has already been discussed in detail in the last Chapter.[7]

(b) CONVENTIONS AND CONSTITUTIONAL USAGES

The operation of constitutional provisions may be modified by the growth of conventions, practices and observances. This is another process of slow metamorphosis, of imperceptible change, where the constitutional text retains its original form and phraseology, where there is no visible modification on the face, but where, underneath the surface, a change has come about so far as the working and operation of the provision is concerned.

The conventions and usages, though operating within the famework of the provisions of the constitution, nevertheless, do modify their content and effect. One way to distinguish between rules and conventions may be to say that while rules are made, conventions are not made. Conventions evolve out of practices followed over a period of time.[8]

Conventions operate in several ways.

One, a convention may nullify a constitutional provision in practice without formally abolishing it. A well known example of this is to be found in the fact that in some countries, the legal power of the Head of the State to veto a bill passed by the Legislature is never exercised by him except on the advice of the Ministry.

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3. For the working of the judicial process in the area of legislative powers in these countries, see, *supra*. Chs. X and XI.
See also, Ch. XV on Commerce Clause.
4. *Supra*, Ch. XL.
5. *Ibid.*
6. *Ibid.*
7. *Supra*, Ch. XL.
8. *Supra*, Ch. I.

Two, a convention may work by transferring powers granted to one authority in the constitution to another authority. This is what usually happens in a country with a parliamentary form of government where legal powers formally vested in the Head of the State are effectively exercised by the Ministry.

Three, a convention may affect a constitution by supplementing a provision therein.[9]

Britain affords by far the best example of this process where conventions play a very important role in the constitutional process. Conventions have made it possible for a monarchical constitution to work on democratic lines. The prerogative power of the British Crown to veto a bill passed by Houses of Parliament has disappeared through desuetude.

The Indian Constitution is very detailed and comprehensive. Some of the conventions of the British Constitution have been expressly incorporated in the text of the Constitution.[10] Still, there remains scope for the growth of conventions. Reference may be made in this connection to the foregoing discussion on the following topics: Council of Ministers and the Prime Minister;[11] President's position *vis-a-vis* the Council of Ministers;[12] Cabinet;[13] a Minister's responsibility for his subordinates' actions;[14] summoning, prorogation and dissolution of Lok Sabha[15] and State Legislative Assembly;[16] Governor's relations with his Council of Ministers and with the Central Government;[17] assent by the President or the Governor to Bills passed by Parliament or the State Legislature respectively;[18] acceptance of the Finance Commission's recommendations by the Central Government.[19]

Under the stresses of planning, new conventions have arisen in India. To take only two examples: (1) the Planning Commission, an extra-constitutional non-statutory body, has come to have a good deal of control over Central-State policies:[20] (2) the National Development Council is another extra-constitutional body, the powers and functions of which are regulated not by law but by conventions.[21]

Conventions have often been characterised as 'non-legal rules'—'non-legal' because the courts do not apply them: 'rules' because they are regarded as 'binding' and are observed in practice. In this connection, it needs to be pointed out that there are cases where the courts have recognised conventions thus blurring the distinction, to some extent, between 'legal' and 'non-legal' rules.[22]

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9. WHEARE, MODERN CONSTITUTIONS, 178-201 (1964); COLIN R. MUNRO, Laws & Conventions Distinguished, 91 *LQR* 218; K.J. KEITH, Courts & Conventions of the Const., 16 *Int. & Comp LQ* 542 (1967); O. HOOD PHILLIPS, CONSTITUTIONAL LAW, 77-91 (1973); G. MARSHALL, CONSTITUTIONAL CONVENTIONS (1984).
10. *Supra*, Ch. I.
11. *Supra*, Chs. III, Sec. A(iii) and VII, Sec. A(ii).
12. *Supra*, Ch. III, Sec. B.
13. *Ibid;* also, *supra*, Ch. VII, Sec. B.
14. *Supra*, Chs. III, Sec. B(f) and VII.
15. *Supra*, Ch. II, Sec. G.
16. *Supra*, Ch. VI, Sec. C.
17. *Supra*, Ch. VII, Secs. B and C.
18. *Supra*, Chs. II, Sec. J(c) and VI, Sec. F(i).
19. *Supra*, Ch. XI, Sec. L.
20. *Supra*, Ch. XIV, Sec. G.
21. *Ibid.*
22. For example, see : *U.N.R. Rao v. Indira Gandhi*, AIR 1971 SC 1002; *Samsher Singh v. State of Punjab*, AIR 1974 SC 2192. *supra*, Ch. XL.

Some Supreme Court Judges have even gone to the extent of denying that there is any distinction between "constitutional law" and an established "constitutional convention". For example, KULDIP SINGH, J., has observed:[23]

> "We are of the view that there is no distinction between the "constitutional law" and an established "constitutional convention" and both are binding in the field of their operation. Once it is established to the satisfaction of the Court that a particular convention exists and is operating then the convention becomes a part of the "constitutional law of the land and can be enforced in the like manner."

B. FORMAL METHOD

Practically every constitution has some formal method of constitutional amendment. This consists of changing the language of a constitutional provision so as to adapt it to the changed context of social needs.

In some countries, the process may be easier than in others, and, accordingly, the constitutions are sometimes classified into flexible or rigid. A flexible constitution is one in which amendment can be effected rather easily, as easily as enacting an ordinary law. The best example of such a constitution is the British Constitution which can be amended by an ordinary Act of Parliament, and there is, thus, no distinction between ordinary legislative process and constituent process.[24]

A rigid constitution is regarded as the fundamental law of the land in the sense that it lays down the basic principles for the country's governance which are considered to be of a permanent value. It is, therefore, thought that the method of constitutional amendment should ensure that the basic principles are changed only after thorough consideration and deliberation and that hasty and ill-considered changes under political pressures of the day are avoided. Accordingly, in such a constitution, the process of constitutional amendment is more elaborate and difficult than the enactment of ordinary legislation. There thus exists a distinction between legislative and constituent process; the former denotes making of an ordinary law; the latter denotes amendment of the constitution.

If a constitution is amendable easily by passing an ordinary law, then it will lose all permanence and supremacy. A written constitution usually is of the rigid type. A federal constitution has to be rigid, for it seeks to achieve a balance of powers between the Centre and the States, and it ensures that this balance is not disturbed lightly or unilaterally.

The terms 'rigid' or 'flexible' constitutions are somewhat relative, the difference being one of degree, because, in the ultimate analysis, a constitution which is incapable of adjustment and adaptation will fail to endure, and even a constitution of the flexible type may not be lightly amended owing to political repercussions apprehended, and the social values of the people. A constitution which may be *prima facie* rigid may, in practice, prove to be easily changeable, as has been the case in India so far.

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23. *S.C. Advocates on Record Association v. Union of India*, AIR 1994 SC at 405, Ch. IV, Sec. B(d); Ch. VIII, Sec. B(d), *supra*.

24. *Supra*, Ch. I.
Also see, *infra.*

Formal amendment is perhaps the most significant way of adapting the constitution to changing circumstances. The judicial interpretation may help to some extent in this respect but it cannot change the wordings of the basic law and certain desired changes may not be attainable without verbal changes in the constitutional text. Further, the judicial process is slow and a change may be desired early. At times, some principles laid down by the courts may appear to be against public *mores* and political needs and may need to be changed. An example of such a situation is furnished by the several amendments made in India to Art. 31 of the Constitution concerning the Fundamental Right to property to overcome inconvenient judicial interpretation thereof.[25]

Then there may be some constitutional provisions which do not usually figure before the courts and some adjustments therein may be needed and this can be effectuated by a formal amendment only. Similar reasons operate to make formal constitutional amendment a more effective instrument of constitutional change than conventions and constitutional usages.

A formal amending process is as important as the process of constitution-making and so it may rightly be characterised as the 'constituent' process. The amending provision in a constitution is of great importance as it enables the country to develop peacefully, the alternative to which may be stagnation and revolution. In the ultimate analysis, however, the process of constitutional amendment should neither be too rigid nor too easy. In the former case, the constitution may lag behind the societal needs; in the latter case, constitutional safeguards may be weakened by too frequent amendments.

The formal procedures to amend some foreign federal constitutions are as follows:

(a) U.S.A.

The process of constitutional amendment involves two separate stages: initiation and ratification.

An amendment may be proposed or initiated either—(*i*) by vote of two-thirds of each House of Congress; or (*ii*) by a constitutional convention called together by Congress on the application of the legislatures of two-thirds of the States.[26] Hitherto, all amendments have been initiated by the first method and the second method has never been employed.

An amendment proposed as above may be ratified either—(*i*) by vote of the legislatures of three-fourths of the States; or (*ii*) by the constitutional conventions in three-fourths of the States. The choice of the method is wholly within the discretion of the Congress. After ratification, the constitutional amendment becomes effective.

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25. *Supra*, Chs. XXXI and XXXII.

26. Art. V. of the US Constitution reads as follows:

> "The Congress whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the application of the Legislatures of two-thirds of the serveral States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution. When ratified by the Legislatures of three fourths of the several States, or by convention in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress…."

A restriction imposed by the Constitution on the amending process is that no State can be deprived of its equal suffrage in the Senate without its consent.[27]

The procedure of the constitutional amendment in the U.S.A. has proved to be quite difficult. During its tenure of over 200 years, while several thousand constitutional amendments have been mooted, only thirty of them have been formally proposed by the Congress, of which only twenty-five have been actually effectuated. Of these, the first ten amendments, which constitute the Bill of Rights, were adopted within two years of the initiation of the Constitution. These constitutional amendments lay down the Fundamental Rights of the people. Many amendments have been killed because of non-ratification by the States. In the words of Finer: "It was intended to make change difficult; it has made change almost unattainable."[28]

Because of the rigidity of the formal process of constitutional amendment, the courts have had to play the role of adapting it by their interpretative process. On the whole, the courts appear to have discharged the function well. The courts have moulded the rigid U.S. Constitution to the growing and shifting needs of the nation through time. The judicial task has, of course, been facilitated by the fact that the Constitution is expressed in general terms which the courts could construe according to contemporary situations, demands and exigencies.[29]

(b) CANADA

That portion of the British North America Act relating to the Provincial Constitution only (excepting the office of the Lieutenant-Governor) could be amended by the Provincial Legislature itself in the ordinary legislative process. There was no provision in the B.N.A. Act for amendment of the other portion before 1982.

Being a statute of the British Parliament, it could be amended by the British Parliament itself. The Parliament did not, however, act in this behalf *suo motu*; it acted only on the request of the Canadian Government. A convention had grown that the British Parliament would pass an amendment, as a matter of course, if presented to it by a joint address of both Houses of the Canadian Parliament. Another convention which had come into existence was that the Canadian Government consulted the Provinces before requesting the British Parliament to amend the B.N.A. Act.[30]

For long it had been felt in Canada that it was anomalous and incongruous, and an infringement of Canadian sovereignty, that the constitutional amending power should vest in British Parliament and not in an agency within Canada. But it proved to be an intractable problem[31] to evolve an agreed amending formula because of the insistence of Quebec to have a veto on all future constitutional amendments.

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27. *Supra*, Ch. II, Sec. B.

28. THEORY AND PRACTICE OF MODERN GOVT., 128 (1965).
Also see, CORWIN, UNDERSTANDING THE CONSTITUTION, 97 (1967).

29. *Supra*, Ch. XL.

30. E.R. ALEXANDER, A Constitutional Strait Jacket for Canada, 43 *Can. B.R.*, 262.

31. In 1964, the Premiers of the Centre and the Provinces in Canada agreed that unanimous consent of Parliament and the Provincial Legislatures would be required for the most significant amendments to the Canadian Constitution. But this proposal was not effectuated.

In 1949, power was given to Parliament of Canada to amend that portion of the B.N.A. Act which related to matters concerning the Central Government alone, *e.g.*, apportionment of seats in the House of Commons. But, with respect to that portion of the B.N.A. Act which concerned both the Centre and the Provinces, *e.g.*, the distribution of powers, the amending power still vested in the British Parliament as there was no agreement in Canada on the alternative procedure to be followed for the purpose.

In 1982, the British Parliament enacted the Canada Act, 1982, on the request of the Canadian Parliament conferring amending power on the Canadian Parliament and Provincial Assemblies. The federal portions of the B.N.A. Act can now be amended by resolutions of the Senate and House of Commons plus resolutions of 2/3 of the Provincial Legislative Assemblies having at least 50% of the population of all the Provinces. Each and every resolution is to be passed by a majority of members of each House if the amendment derogates from the legislative powers, proprietary rights or any other rights or privileges of the legislature or government of a Province. Where an amendment applies to some but not all Provinces, it can be made by Senate, House of Commons and the Legislative Assembly of each Province to which the amendment applies.[32]

(c) AUSTRALIA

The process of constitutional amendment involves two stages: initiation and ratification.

An amendment to the Constitution may be proposed by an absolute majority of each House of Parliament, or by an absolute majority of one House in two votes taken at an interval of at least three months. Thereafter, the proposed amendment becomes effective on ratification at a referendum by a majority of electors voting both in a majority of States and in the Commonwealth and on receiving the assent of the Governor-General (this, of course, is purely a formal matter).[33]

No amendment diminishing the proportionate representation of a State in either House of the Federal Parliament, or the minimum number of representatives of a State in the Federal Lower House, or altering the limits of the States, can be adopted unless it is also approved by a majority of electors of the State concerned.

The constitution-amending process in Australia has proved to be very rigid in practice. Many amendments deemed essential by the Commonwealth Government have been rejected at the referenda. A learned author has said: "Constitutionally speaking, Australia is the frozen continent."[34]

Since 1900, when the Constitution came into force, only 9 amendments have been effectuated, although 37 referenda involving a number of amendments have been held.[35] The process of popular referendum has proved to be a difficult method to amend the Constitution. Some proposals though approved by a majority of the electorate throughout Australia, have failed to be effective because they

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32. R.I. CHEFFINS, The Constitution Act, 1982 and the Amending formula in BELOBABA AND GERTNER, THE NEW CONSTITUTION AND THE CHARTER OF RIGHTS, 43-54 (1982).
33. Art. 128 of the Commonwealth of Australia Constitution Act, 1900.
34. SAWER, AUSTRALIAN FEDERALISM IN COURTS, 208.
35. COLIN HOWARD, AUSTRALIAN FEDERAL CONSTITUTIONAL LAW, 565 (1985).

could not secure majorities in four of the six States. No proposal has failed so far because it has secured approval in a majority of States but has not secured an over-all majority throughout Australia.[36]

C. FORMAL CONSTITUTIONAL AMENDMENT IN INDIA

Different degress of rigidity attach to different portions of the Constitution, depending on their importance and significance. The Constitution, accordingly, provides for the following three classes of amendments of its provisions:

(1) Constitutional provisions of comparatively less significance can be amended by the simple legislative process as is adopted in passing ordinary legislation in Parliament;

(2) those provisions which are material and vital are made relatively stable as these can be amended only by following the rule of special majority as laid down in Art. 368;

(3) there are certain constitutional provisions relating to the federal character, which may be characterised as the 'entrenched provisions, which need for their amendment, in addition to the passage of the amending Bill by the special majority in the two Houses of Parliament, ratification by half of the State Legislatures. This procedure is also laid down in Art. 368.

The more elaborate procedure of referendum or constitutional convention has been avoided in India. The constitution-makers thus sought to find a *via* media between the two extremes of flexibility and rigidity so that the Constitution may keep pace with social dynamism in the country.

(a) CATEGORY (1)

Several Articles of the Constitution make provisions of a tentative nature, and Parliament has been given power to make laws making provisions different from what these Articles provide for. Such a law can be made by the ordinary legislative process, and is not to be regarded as an amendment of the Constitution and is not subject to the special procedure prescribed in Art. 368. In most of the cases, the constitutional text remains intact but Parliament makes different provisions. These Articles of the Constitution are as follows:

(1) When Parliament admits a new State under Art. 2, it can effect consequential amendments in Schedules I and IV defining territory and allocating seats in the Rajya Sabha amongst the various States respectively.[37]

(2) Under Art. 11, Parliament is empowered to make any provision for acquisition and termination of, and all other matters relating to, citizenship in spite of Arts. 5 to 10.[38]

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36. BOWIE AND FRIEDRICH, STUDIES IN FEDERALISM, 830 (1954); WHEARE, FEDERAL GOVERNMENT, 222-5 (1947); WHEARE, MODERN CONSTITUTIONS, 121-45 (1964).

37. *Supra*, Ch. V, Sec. B.

38. *Supra*, Ch. XVIII, Sec. A.

(3) Article 73(2) retains certain executive powers in the States and their officers until Parliament otherwise provides.[39]

(4) Arts. 59(3),[40] 75(6),[41] 97,[42] 125(2),[43] 148(3),[44] 158(3)[45] and 221(2)[46] permit amendment by Parliament of the Second Schedule dealing with salaries and allowances of certain officers created by the Constitution.

(5) Art. 105(3)[47] prescribes parliamentary privileges until it is defined by Parliament.

(6) Art. 124(1)[48] prescribes that Supreme Court shall have a Chief Justice and seven Judges until Parliament increases the strength of the Judges.

(7) Art. 133(3)[49] prohibits an appeal from the judgment of a single Judge of a High Court to the Supreme Court unless Parliament provides otherwise.

(8) Art. 135[50] confers jurisdiction on the Supreme Court (equivalent to the Federal Court), unless Parliament otherwise provides.

(9) Under Art. 137,[51] Supreme Court's power to review its own judgments is subject to a law made by Parliament.

(10) Art. 171(2)[52] states that the composition of the State Legislative Council as laid down in Art. 170(3) shall endure until Parliament makes a law providing otherwise.

(11) Art. 343(3)[53] provides that Parliament may by law provide for the use of English even after 15 years as prescribed in Art. 343(2).

(12) Art. 348(1)[54] establishes English as the language to be used in the Supreme Court and the High Courts and of legislation until Parliament provides otherwise.

(13) Schedules V and VI deal with administration of the Scheduled Areas and Scheduled Tribes and Tribal Areas in Assam which may be amended by Parliament making a law.[55]

There are certain other Articles in the Constitution which make tentative provisions until a law is made by the Parliament by following the ordinary legislative process, but before Parliament can act, the States have to take some action.

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39. *Supra*, Chs. III, Sec. D(iii) and XII, Sec. A.
40. *Supra*, Ch. III, Sec. A(i).
41. *Supra*, Ch. III, Sec. B.
42. *Supra*, Chs. II, Sec. H and III, Sec. A(i)(f); Sec. A(ii)(b).
43. *Supra*, Ch. IV, Sec. B(i).
44. *Supra*, Ch. II, Sec. J(ii)(s).
45. *Supra*, Ch. VII, Sec. A(i).
46. *Supra*, Ch. VIII, Sec. B(l).
47. *Supra*, Ch. II, Sec. L(v).
48. *Supra*, Ch. IV, Sec. B(a).
49. *Supra*, Ch. IV, Sec. C(iv)(c).
50. *Supra*, Ch. IV, Sec. I(b).
51. *Supra*, Ch. IV, Sec. H.
52. *Supra*, Ch. VI, Sec. B(i).
53. *Supra*, Ch. XVI, Sec. B.
54. *Supra*, Ch. XVI, Sec. B; Sec. C(a).
55. Paras 7 and 21 of the V & VI Schedules respectively; *supra*, Ch. IX, Sec. C.

Thus, Art. 3 provides for the re-organisation of the States. Parliament may pass a law for the purpose and effect consequential amendments in the I and IV Schedules.[56] Before doing so, however, it is necessary to ascertain the views of the States concerned.

Under Art. 169, Parliament may abolish a State Legislative Council, or create one in a State not having it, if the State Legislative Assembly passes a resolution to that effect by a majority of its total membership and by a majority of not less than two-thirds of the members present and voting. The Parliamentary law enacted for the purpose may contain such provisions amending the Constitution as may be necessary to give effect to it, and it is not to be regarded as an amendment of the Constitution for the purposes of Art. 368.[57]

Corresponding to Arts. 75(6) and 105(3), there are Arts. 164(5) and 194(3) which make tentative provisions until a State Legislature makes other provisions. They relate respectively to salaries of Ministers in a State[58] and privileges of the Houses.[59] These are the only Articles in the Constitution which enable a State Legislature to make provisions different from what the Constitution prescribes in the first instance.

(b) CATEGORIES (2) AND (3)

The process to amend and adapt other provisions of the Indian Constitution is contained in Art. 368. The phraseology of Art. 368 has been amended twice since the inauguration of the Constitution. However, the basic features of the amending procedure have remained intact in spite of these changes. These basic features are:

(*i*) An amendment of the Constitution can be initiated only by introducing a Bill for the purpose in either House of Parliament.

(*ii*) After the Bill is passed by each House by a majority of its total membership, and a majority of not less than two-thirds of the members of that House present and voting, and after receiving the assent of the President, the Constitution stands amended in accordance with the terms of the Bill.

(*iii*) To amend certain constitutional provisions relating to its federal character, characterised as the 'entrenched provisions', after the Bill to amend the Constitution is passed by the Houses of Parliament as mentioned above, but before being presented to the President for his assent, it has also to be ratified by the legislatures of not less than one-half of the States by resolutions.

The 'entrenched provisions' which are given this additional safeguard are:

(*a*) The manner of election of the President: Arts. 54 and 55.[60]

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56. *Supra*, Ch. V, Sec. B.
57. *Supra*, Ch. VI.
For discussion on Art. 368, see, *infra*, this Chapter.
58. *Supra*, Ch. VII, Sec. A(ii).
59. *Supra*, Ch. VI, Sec. H.
60. *Supra*, Ch. III, Sec. A(i)(a).

(*b*) Extent of the executive power of the Union and the States: Arts. 73[61] and 162.[62]

(*c*) The Supreme Court[63] and the High Courts:[64] Arts. 124-147 and 214-231.

(*d*) The scheme of distribution of legislative, taxing and administrative powers between the Union and the States: Arts. 245-255.[65]

(*e*) Representation of the States in Parliament.[66]

(*f*) Art. 368 itself.

The procedure to amend the 'entrenched provisions' is in conformity with the federal principle which requires the consent of the State Legislatures also to any amendment which vitally affects federalism in which both the Centre and the States are interested.

A point of some constitutional significance came up before the Mysore Legislature with respect to Art. 368. The Constitution (Third Amendment) Bill was passed by Parliament in October, 1954. Under Article 368, it needed ratification by one-half of the State Legislatures before the President could give his assent. The Bill was circulated to all States and two days before the Mysore Legislative Assembly was to meet, the President gave his assent as one-half of the State Legislatures had ratified the measure. The Mysore Legislature had not discussed the amendment at all by then, as all the papers were not received by the time the last session was adjourned, and the President's assent was given before the Legislature met in the next session.

Now a question was raised whether the President could give his assent to an Amendment Bill even though some of the State Legislatures had not actually discussed the measure. Since the Article says that the Amendment must be ratified by one-half of the State Legislatures before it is presented to the President for assent, it may not, in the strict legal sense, be unconstitutional for the President to give his assent after ratification by one-half of the State Legislatures had been received. But the actual result may be to deprive some State Legislatures of an opportunity to consider the proposed amendment before it becomes effective. To announce the President's assent even while the process of ratification by the State Legislatures is going on, simply because one-half of the State Legislatures have already agreed to the amendment, seems like announcing a decision even while the process of counting of votes is going on. It is suggested that since the President is not obligated to give his assent as soon as one-half of the State Legislatures have ratified the Bill, a convention may be developed to postpone Presidential assent till all the State Legislatures desiring to discuss the measure have had an adequate opportunity to do so.

An unsolved question under Art. 368 is whether the 'special' majority rule applies to every stage, or only at the final stage, of passing a constitution amending bill. Since 1950, a view has been taken that this rule should be applied to all

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61. *Supra*, Chs. III, Sec. D(iii) and XII, Sec. B.
62. *Supra*, Chs. VII and XII.
63. *Supra*, Ch. IV.
64. *Supra*, Ch. VIII.
65. *Supra*, Chs. X, XI and XII.
66. *Supra*, Ch. II, Secs. B and C.

stages. On the other hand, a view may plausibly be taken that the word 'passed' in Art. 368 refers to passing at the final stage only.

When an amendment bill seeks to amend more than one Article of the Constitution, each clause of the bill has to be passed by the special majority. Under Rule 158 of the Lok Sabha Rules, 'total membership' means the total number of members comprising the House irrespective of any vacancies or absentees at any moment.

Originally, the marginal note to Art. 368 read as: "Procedure for amendment of the Constitution". In 1971, this was changed to "Power of Parliament to amend the Constitution and Procedure therefor".[67]

A clause was added to Art. 368 saying that "Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this Article." It was now clarified that after the Bill was passed by Parliament by the prescribed special majority, it would be obligatory on the President to give his assent to it. Finally, a new clause was added to Art. 368 saying that nothing in Art. 13 shall apply to any amendment made under Art. 368. Correspondingly, a clause was added to Art. 13 saying that nothing in Art. 13 shall apply to any amendment of the Constitution made under Art. 368. The rationale of, and the background to, these modifications introduced in Art. 368, and the effect thereof, are explained later.[68]

In 1976, the following two clauses were added to Art. 368 by the Forty-second Amendment of the Constitution:

> "(4) No amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this article whether before or after the commencement of S. 55 of the Constitution (Forty-second) Amendment Act, 1976,[69] shall be called in question in any Court on any ground."
>
> (5) For the removal of doubts it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article."

The rationale of, the background to, and the effect of, these amendments have been explained below.[70]

D. AMENDABILITY OF THE INDIAN CONSTITUTION

Since 1951, questions have been raised about the scope of the constitutional amending process contained in Art. 368.

The basic question raised has been whether the Fundamental Rights were amendable so as to dilute or take away any Fundamental Right through a constitutional amendment? Since 1951, a number of amendments have been effectu-

67. See, *infra*, Sub-Sec. (d).
68. *Infra*, Sub-Sec. (d).
69. S. 55 means this very clause which was being added by the Amendment in question.
70. *Infra*, Sub-Sec. (d).

ated in the Fundamental Rights. The cumulative effect of these amendments has been to curtail, to some extent, the scope of some of these rights.

The worst affected Fundamental Right has been the right to property contained in Art. 31 which has been amended several times. The basic trend of these amendments has been to immunize, to some extent, state interference with property rights from challenge under Arts. 14, 19 and 31 as well as to seek to exclude the question of compensation for acquisition or requisitioning of property by the state from judicial purview.[71] The constitutional validity of these amendments has been challenged a number of times before the Supreme Court.

(a) SHANKARI PRASAD SINGH

In *Shankari Prasad Singh v. Union of India*,[72] the first case on amendability of the Constitution, the validity of the Constitution (First Amendment) Act, 1951, curtailing the right to property guaranteed by Art. 31 was challenged.[73] The argument against the validity of the First Amendment was that Art. 13 prohibits enactment of a law infringing or abrogating the Fundamental Rights,[74] that the word 'law' in Art. 13 would include any law, even a law amending the Constitution and, therefore, the validity of such a law could be judged and scrutinised with reference to the Fundamental Rights which it could not infringe.

Here was thus posed a conflict between Arts. 13 and 368. Adopting the literal interpretation of the Constitution,[75] the Supreme Court upheld the validity of the First Amendment. The Court rejected the contention and limited the scope of Art. 13 by ruling that the word 'law' in Art. 13 would not include within its compass a constitution amending law passed under Art. 368. The Court stated on this point: "We are of the opinion that is the context of Art. 13 law must be taken to mean rules and regulations made in the exercise of ordinary legislative power and not amendments to the Constitution made in the exercise of constituent power with the result that Art. 13(2) does not affect amendments made under Art. 368".

The Court held that the terms of Art. 368 are perfectly general and empower Parliament to amend the Constitution without any exception. The Fundamental Rights are not excluded or immunized from the process of constitutional amendment under Art. 368. These rights could not be invaded by legislative organs by means of laws and rules made in exercise of legislative powers, but they could certainly be curtailed, abridged or even nullified by alterations in the Constitution itself in exercise of the constituent power.

The Court insisted that there is a clear demarcation between ordinary law, which is made in exercise of legislative power, and constitutional law, which is made in exercise of constituent power.

Both Arts. 13 and 368 are widely phrased and conflict in operation with each other. To avoid the conflict, the principle of harmonious construction[76] should be applied. Accordingly, one of these Articles ought to be read as being controlled and qualified by the other. In the context of Art. 13, it must be read subject to

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71. *Supra*, Ch. XXXI, Sec. C..
72. AIR 1951 SC 458.
73. *Infra*, Ch. XLII; *Supra*, Ch. XXXII, Sec. B.
74. *Supra*, Ch. XX, Sec. C.
75. See, *supra*, Ch. XL, Sec. D(a).
76. *Supra*, Ch. XL, Sec. F.

Art. 368. Therefore, the word 'law' in Art. 13 must be taken to refer to rules and regulations made in exercise of ordinary legislative power, and not to constitutional amendments made in the exercise of the constituent power under Art. 368 with the result that Art. 13(2) does not affect amendments made under Art. 368.

The Court, thus, disagreed with the view that the Fundamental Rights are inviolable and beyond the reach of the process of constitutional amendment. The Court, thus, ruled that Art. 13 refers to a 'legislative' law, *i.e.*, an ordinary law made by a legislature,[77] but not to a constituent' law, *i.e.*, a law made to amend the Constitution. The Court thus held that Parliament could by following the 'procedure' laid down in Art. 368 amend any Fundamental Right.

(b) SAJJAN SINGH

For the next 13 years following *Shankari Prasad,* the question of amendability of the Fundamental Rights remained dormant.

The same question was raised again in 1964 in *Sajjan Singh v. Rajasthan,*[78] when the validity of the Constitution (Seventeenth Amendment) Act, 1964,[79] was called in question. This Amendment again adversely affected the right to property. By this amendment, a number of statutes affecting property rights were placed in the Ninth Schedule and were thus immunized from Court review.[80]

In the instant case, the Court was called upon to decide the following questions:

> (1) Whether the amendment of the Constituion insofar as it purported to take away or abridged the Fundamental Rights was within the prohibition of Art. 13(2); and
>
> (2) Whether Articles 31A and 31B (as amended by the XVIIth Amendment) sought to make changes to Arts. 132, 136 and 226, or in any of the Lists in the VIIth Schedule of the Constitution, so that the conditions prescribed in the proviso to Art. 368 had to be satisfied?

One of the arguments was that the amendment in question reduced the area of judicial review (as under the Ninth Schedule, many statutes had been immunized from attack before a Court); it, thus, affected Art. 226 and, therefore, could be made only by following the procedure prescribed in Art. 368 for amending the 'entrenched provisions', that is, the concurrence of at least half of the States ought to have been secured for the amendment to be validly effectuated.[81]

Such an argument had also been raised in the *Shankari Pd.* case but without success. The Supreme Court again rejected the argument by a majority of 3 to 2. The majority ruled that the 'pith and substance'[82] of the Amendment was only to amend the Fundamental Right so as to help the State Legislatures in effectuating the policy of the agrarian reform. If it affected Art. 226 in an insignificant manner, that was only incidental; it was an indirect effect of the Seventeenth

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77. *Supra*, Chs. II, Sec. J(i) and VI, Sec. F(i).
78. AIR 1965 SC 845.
79. *Supra*, Chs. XXXI and XXXII; *infra*, next Chapter.
80. *Supra*, Ch. XXXII, Sec. C.
81. *Supra*, Sec. C(b).
82. *Supra*, Ch. XL, Sec. H.

Amendment and it did not amount to an amendment of Art. 226.[83] The impugned Act did not change Art. 226 in any way.

The conclusion of the Supreme Court in *Shankari Pd*. as regards the relation between Arts. 13 and 368 was reiterated by the majority. It felt no hesitation in holding that the power of amending the Constitution conferred on Parliament under Art. 368 could be exercised over each and every provision of the Constitution. The majority refused to accept the argument that Fundamental Rights were "eternal, inviolate, and beyond the reach of Art. 368."

The Court again drew the distinction between an 'ordinary' law and a 'constitutional' law made in exercise of 'constituent power' and held that only the former, and not the latter, fell under Art. 13.

However, the minority consisting of HIDAYATULLAH and MUDHOLKAR, JJ., in separate judgments, expressed some reservations on the question whether Art. 13 would not control Art. 368. "I would require stronger reasons than those given in *Shankari Prasad's* case", observed HIDAYATULLAH, J., "to make me accept the view that Fundamental Rights were not really fundamental but were intended to be within the powers of amendment in common with the other parts of the Constitution and without concurrence of the States," because, "the Constitution gives so many assurances in Part III that it would be difficult to think that they were play-things of a special majority."

MUDHOLKAR, J., felt reluctant "to express a definite opinion on the question whether the word 'law' in Art. 13(2) of the Constitution excludes an Act of Parliament amending the Constitution and also whether it is competent to Parliament to make any amendment at all to Part III of the Constitution." But MUDHOLKAR, J.'s argument was set in a much broader frame. His basic argument was that every constitution has certain fundamental features which could not be changed.

As will be seen, *Golak Nath*, the next case, was based on HIDAYATULLAH, J.'s argument of non-amendability of Fundamental Rights, but *Kesavananda* was based on MUDHOLKAR, J.'s view of basic features.[84]

(c) GOLAK NATH

Perhaps, encouraged by the above stated remarks of the two Judges, the question whether any of the Fundamental Rights could be abridged or taken away by Parliament in exercise of its power under Art. 368 was raised again in *Golak Nath* in 1967.[85] Again, the constitutional validity of the Constitution (Seventeenth Amendment) Act was challenged[86] in a very vigorous and determined manner. Eleven Judges participated in the decision and they divided 6 to 5.

The majority now held, overruling the earlier cases of *Shankari Prasad* and *Sajjan Singh*, that the Fundamental Rights were non-amendable through the constitutional amending procedure set out in Art. 368, while the minority upheld the line of reasoning adopted by the Court in the two earlier cases.

The majority now took the position that the Fundamental Rights occupy a "transcendental" position in the Constitution, so that no authority functioning

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83. *Supra*, Ch. VIII, Sec. D.
84. *Infra*, Sec. D(e).
85. *L.C. Golak Nath v. State of Punjab*, AIR 1967 SC 1643 : 1967 (2) SCR 762.
86. See, *supra*, Ch. XXXII; *Infra*, next Chapter.

under the Constitution, including Parliament exercising the amending power under Art. 368, would be competent to amend the Fundamental Rights. The majority was worried at the numerous amendments of the Fundamental Rights which had taken place since 1950. It apprehended that if the courts were to hold that Parliament had power to take away or abridge the Fundamental Rights, a time might come when these rights are completely eroded and India would gradually and imperceptibly pass under a totalitarian regime. This fear coloured and conditioned the approach of the majority to the question of amendability of the Fundamental Rights. The majority thus sought to make the Fundamental Rights inviolable by constitutional amendment by ruling that Parliament could not, under Art. 368, amend any Fundamental Right.

SUBBA RAO, C.J., speaking on behalf of himself and four other Judges, equated Fundamental Rights with natural rights and characterised them as "the primordial rights necessary for the development of human personality": He then raised the poser that when Parliament could not affect Fundamental Rights by enacting a Bill in its ordinary legislative process even unanimously, how could it then abrogate a Fundamental Right with only a two-third majority? While Articles of less significance require consent of the majority of the States, can Fundamental Rights be amended without such a consent?

The Chief Justice developed the following line of argumentation to reach the conclusion that the Fundamental Rights could not be amended. Art. 368 (as it existed at that time) merely laid down the procedure for constitutional amendment and did not by itself confer a substantive power to amend. For this argument, the Chief Justice referred to the marginal heading of Art. 368.[87] The power to amend the Constitution was to be found in the residuary legislative power of Parliament contained in Art. 248,[88] because such a power was not expressly conferred by any article or any legislative entry in the Constitution. Accordingly, amendment to the Constitution would be a 'law' for purposes of Art. 13.

Overruling the position adopted by the Court in *Shankari Prasad* and *Sajjan Singh*, it was now ruled that the term 'law' in a comprehensive sense would include constitutional law as well. Art. 13(2) gives an inclusive definition of 'law' which would take in even constitutional law. The Court formulated its position as follows: "an amendment of the Constitution is law within the inclusive definition of law under Article 13(2) of the Constitution and, as the entire scheme of the Constitution postulates the inviolability of Part III thereof, Article 368 shall not be so construed as to destroy the structure of our Constitution".

Under Art. 368, a constitutional amendment is to be enacted by following a procedure which is very similar to the procedure for making laws. The fact that a larger majority, and in case of amendment of some Articles even ratification by State Legislatures, are provided for, would not make the constitutional amendment any the less a 'law'. Therefore, the amendment made under Art. 368 is 'law' and is subject to Art. 13. The Constitution Amendment Act in question was thus held void inasmuch as it abridged the Fundamental Right. Thus, the majority ruled that the Fundamental Rights would fall outside the amendatory process if the amendment sought to abridge or take away any of these rights.

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87. *Supra*, 2318.
88. *Supra*, Ch. X, Sec. I; Ch. XI, Sec. G.

At this stage, the five Judges took recourse to the doctrine of 'prospective overruling' because of two reasons.[89] First, the power of Parliament to amend the Fundamental Rights, and the First and the Seventeenth Amendments specifically,[90] had been upheld previously by the Supreme Court in *Shankari Pd*. and *Sajjan Singh*. Secondly, during 1950 to 1967, a large body of legislation had been enacted bringing about an agrarian revolution in India. This legislation was based on the premise that Parliament had authority to amend Fundamental Rights. If the Supreme Court were now to give effect, to its view of non-amendability of Fundamental Rights with retrospective effect and were to hold the Seventeenth Amendment void, it would affect the constitutional validity of this legislation, introduce chaos and unsettle conditions in the country. Therefore, the present decision was not to invalidate the amendmentsmade so far to the Fundamental Rights. But, in future, Parliament would have no power to take away or abridge any of the Fundamental Rights.

HIDAYATULLAH, J., in a separate judgment, held that because of Art. 13, there was no power to amend Fundamental Rights as there was no difference between legislative and amending processes. He refused to disturb the past amendments because they had stood for long and people had acquiesced in them.

Also, it was argued that the fact that the Fundamental Rights were not mentioned among the entrenched provisions meant that they were regarded as non-amendable. "It would attribute unreasonableness to the makers of the Constitution" if "while articles of less significance would require consent of the majority of States, Fundamental Rights can be dropped without such consent."[91]

To make Fundamental Rights non-amendable, the majority refused to accept the thesis that there is any distinction between 'legislative' and 'constituent' processes. It went even further and asserted that the amending process in Art. 368 is merely 'legislative' and not 'constituent' in nature. This was the crux of the whole argument. If a Constitution Amendment Act could be regarded as just an ordinary law then it could plausibly be caught by Art. 13. To bolster this position, the majority went to the extent of saying that Art. 368 did not confer any amending power but merely laid down the procedure therefor.

The majority located the amending power in Art. 248 which only grants legislative power with a view to annihilate the distinction between 'legislative' and 'constituent' power.[92] The majority found countenance to its argument from one anomalous feature of Art. 368, *viz.*, that the procedure laid down therein is very similar to the ordinary legislative process. The provision for Presidential assent is also similar to that of ordinary legislative process.

The five minority Judges delivered three separate opinions, and upheld the power of Parliament to amend Fundamental Rights. Their fear was that the Constitution would become static if no such powers were conceded to Parliament. The formalistic arguments adopted by these Judges were as follows: Art. 368 itself contains the power to amend the Constitution; such a power is not to be found in Art. 248 which confers only legislative power and that, too, 'subject to the provisions of the Constitution'; the Constitution being the fundamental law,

89. *Supra*, Ch. XL, Sec. G.
90. *Infra*, Ch. XLII.
91. AIR 1967 SC 1643, 1658 : 1967 (2) SCR 762.
92. Art. 248 refers to the residuary power of Parliament. *Supra*, Chs. X, Sec. I and XI, Sec. G.

no law passed under the legislative power could effect a change in the Constitution itself. An amendment to the Constitution is an exercise of constituent power, while passing of an ordinary law constitutes an exercise of ordinary legislative power which is different from the constituent power.

Although the procedure laid down in Art. 368 does very much correspond with legislative process, yet the quality and nature of what is done under Art. 368 is very much different from ordinary legislation. What is done under Art. 368 is amending the Constitution and not the passage of an ordinary law. What Parliament does under Art. 368 is not subject to Art. 13(2); Art. 13 places no limitation on the amending power and, accordingly, any provision of the Constitution, even a Fundamental Right, could be amended under Art. 368. The word 'law' in Art. 13 does not include an amendment of the Constitution. Art. 368 does not use the word 'law' at all; it studiously avoids the use of the word 'law'.

The power of amendment is not subject to any express or implied restrictions. If the constitution-makers had wanted to make the Fundamental Rights unamendable, they could have easily made an express provision in the Constitution to that effect. These Judges also refused to accept the doctrine of prospective overruling as enunciated by SUBBA RAO, C.J., in his judgment.[1]

The following four major propositions can be drawn from the majority opinion in *Golak Nath*:

(1) The substantive power to amend is not to be found in Art. 368, this Article only contains the procedure to amend the Constitution;

(2) A law made under Art. 368 would be subject to Art. 13(2) like any other law;[2]

(3) The word 'amend' envisaged only minor modifications in the existing provisions but not any major alterations therein;

(4) To amend the Fundamental Rights, a Constituent Assembly ought to be convened by Parliament.

The majority opinion in *Golak Nath* emanated from the premise that Fundamental Rights are fundamental and need to be protected. The majority was afraid of a possible erosion of the Fundamental Rights if the process of amendment of these rights continued unabated and was not halted. The majority set up the major premise that these rights are transcendental and must not, therefore, be allowed to be whittled down by Parliament.[3]

It is true that far reaching amendments had been made to some of these rights, and, at times, in a hurry and not always after a cool and mature consideration, and so the majority genuinely apprehended that these rights might be completely eroded in future. Nevertheless, what the Court laid down in *Golak Nath* was unprecedented, and its logic could not stand a close scrutiny.

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1. *Supra*, Ch. XL, Sec. G.
2. *Supra*, Ch. XX, Sec. C.
3. AIR 1967 SC 1643, 1664.
For discussion on this point see: D. CONRAD, Limitation of Amendment Procedures and the Constituent Power, *Indian Year Book of International Affairs* (1966-67), 377-430.

An amending process is a recognised part of every written constitution. Howsoever rigid the amending process may be in a constitution, in no constitution any of its parts is regarded as non-amendable. Even in the U.S.A., it has not been argued that the guaranteed civil rights are beyond the reach of the amending process. In fact, they were added to the U.S. Constitution through such a process. It is difficult to imagine that the constitution-makers were not cognisant of the need to amend the Constitution in course of time and, therefore, it is inconceivable that they would have left the power to amend the constitution to be inferred from the residuary power of Parliament under Art. 248,[4] and not directly from the specific and direct provision like Art. 368. In fact, the historical evidence establishes that the members of the Constituent Assembly wanted neither a too flexible nor a too rigid constitution.[5]

It is also difficult to believe that the constitution-makers would have left such a significant point as the non-amendability of the Fundamental Rights to be inferred by a circuitous process of argumentation. Had they wished for such a result, they could have easily declared in specific terms that these rights would be non-amendable. Then, taking into consideration the totality of the constitutional process, many other portions of the Constitution like adult suffrage, parliamentary form of government, etc., are in no way less significant than the Fundamental Rights , but these parts were not held to be non-amendable in *Golak Nath*.

The apprehension entertained by the Judges regarding the introduction of a totalitarian regime by eliminating all the Fundamental Rights in course of time, could materialize, to some extent, by abolishing Art. 226, or doing away with adult suffrage, etc. Therefore, if the argument of fear were to be taken to its logical end, then not only the Fundamental Rights but many other provisions of the Constitution would have to be declared to be non-amendable. But the majority opinion in *Golak Nath* was an example of judicial creativity and policy-oriented approach by the Judges—the judicial policy being to make Fundamental Rights inviolable so as to avoid the emergence of a totalitarian regime in future. The majority Judges were prompted to adopt such judicial approach in view of the manifold amendments made to the Fundamental Rights by the ruling party since 1950.

It is true that Art. 368 suffers from an anomaly. While for amending certain provisions, characterised as the 'entrenched clauses', consent of at least half of the State Legislatures is stipulated in addition to the special majority in Parliament, it is not so with respect to the Fundamental Rights.

The majority did not assert that these rights were beyond the reach of any amending process whatsoever. What in fact it said was that such a result could not be achieved by following the procedure under Art. 368. The majority suggested the setting up of a constituent assembly to reach that result. Parliament could use its residuary power under Art. 248, to convene a constituent assembly to make a new constitution or radically changing the existing one.[6]

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4. *Supra*, Chs. X, Sec. I and XI, Sec. G.
5. See AUSTIN, THE INDIAN CONSTITUTION, 255-64.
6. For discussion on this point see, *infra*.

An interesting academic question having a bearing on the scope, range, depth and pervasiveness of Art. 368 was raised and discussed in *Golak Nath*. Art. 368 uses the word 'amendment'. Now, can this word be stretched to the point of abrogation of the Constitution, its complete rewriting, or even drastically changing some of its basic tenets like the parliamentary executive, federalism, democratic processes, etc.?

The majority in *Golak Nath* did not give a categorical answer to this poser. It merely said that there was considerable force in the argument that Art. 368 does not confer such a drastic power. Even the minority cast doubts whether such a drastic power as the power of abrogating the Constitution and substituting it by a new one could be read in Art. 368. Short of that, the minority had no doubt that the amending power would include the power to add, alter, substitute, or delete any provision in the Constitution without any limitation.[7] As events showed, this argument assumed crucial significance later in *Kesavananda*.[8]

Commenting on *Golak Nath*, this author had observed in the second edition of this book:

> "What can, therefore, be said with some definiteness is that Art. 368 does not permit an entire rewriting of the Constitution. If ever that is deemed necessary some other method will have to be thought of. What that method will be, is not clear at present. Even calling of a constituent assembly for the purpose, as has been suggested by the majority, has this logical flaw that such a body could be called only by Parliament and if the source, or the parent body, *viz.*, Parliament, cannot do something by itself, can its creature, *i.e.*, the constituent assembly, do the same?[9] A law passed by Parliament authorising the constituent assembly to rewrite the Constitution could plausibly be challenged on the ground of excessive delegation. Also how can the Assembly have a broader basis of franchise than the adult suffrage on which Parliament is elected? Perhaps, a very broad consensus, if achieved, could show the way, if and when it is felt necessary, to undertake the exercise of rewriting the Constitution. Short of that, the power of amendment can be used to effect modifications in the Constitution, subject to the poser as to how far Parliament alone or along with State Legislatures could go in this direction. For, it does appear to remain open to the Supreme Court to interpret the word 'amendment' in Art. 368 narrowly and cry a halt to the amending process if it feels at a particular moment that things are going too far in subverting the basic tenets of the Constitution on the ground that what is being done exceeds the bounds of the word 'amendment' and, thus, of the amending power contained in Art. 368."[10]

Golak Nath raised an acute controversy in the country. One school of thought applauded the majority decision as a vindication of the Fundamental Rights, while the other school criticised it as creating hindrances in the way of enactment

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7. *Ibid.*
8. *Infra*, Sec. D(e).
9. A demand for convening a constituent assembly for rewriting the Constitution was rejected by the Central Government: *Rajya Sabha Debates*, May 15, 1970.
10. JAIN, *Indian Constitutional Law*, at 790.

of socio-economic legislation required to meet the needs of a developing society.[11]

Golak Nath threw a great responsibility on the courts for, if the Fundamental Rights were to be unamendable in a formal manner, then it would be for the courts to so interpret the relevant constitutional provisions as to cause minimum hindrance in the way of enactment of legislation designed to ameliorate the condition of the poor masses. In such a context, the institution of judicial review as a method of adapting and adjusting the constitutional text to the contemporary socio-economic needs of the country would assume a far greater significance than it had ever commanded hitherto when the Fundamental Rights could have been formally amended with ease. That the courts could have coped with such a demand on them is very aptly illustrated by the history of the judicial review in the U.S.A., particularly, in the post New Deal era,[12] as well as in India after the year 1978.

(d) AMENDMENT OF ART. 368 : TWENTY-FOURTH AMENDMENT

To neutralise the effect of *Golak Nath*, Nath Pai, M.P., introduced a private member's bill in the Lok Sabha on April 7, 1967, for amending Art. 368, so as to make it explicit that any constitutional provision could be amended by following the procedure contained in Art. 368. The proposed bill was justified as an assertion of the "Supremacy of Parliament" which principle implied "the right and authority of Parliament to amend even the Fundamental Rights."[13]

Nath Pai's bill did not however make much headway in Parliament. It was criticised as "an effront to the dignity of the Supreme Court" and as placing the Fundamental Rights at the "mercy of a transient majority in Parliament." There was also a feeling that the bill when enacted would itself be subject to a challenge in the courts and could be declared unconstitutional if the Supreme Court were to reiterate its *Golak Nath* ruling.

In the 1971 general election, the Congress Party was returned with a huge majority in the *Lok Sabha* and the party was placed in the position of undoing the effect of *Golak Nath.* Accordingly, in 1971, Parliament enacted the Constitution (Twenty-fourth) Amendment Act introducing certain modifications in Arts. 13 and 368 to get over the *Golak Nath* ruling and to assert the power of Parliament, denied to it in *Golak Nath*, to amend the Fundamental Rights.[14] Thus, an attempt was now made to undo the effect of *Golak Nath*.

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11. For a jurisprudential discussion on these cases see: A.R. BLACKSHIELD, Fundamental Rights and the Economic Viability of the Indian Nation, X *JILI* 1 (1968), and Fundamental Rights and The Institutional Viability of the Indian Supreme Court, 8 *JILI* 139 (1966); UPEN BAXI, The Little Done, the Vast Undone, 9 *JILI* 323 (1967).

For analytical comments on *Golak Nath* see, SEERVAI, THE POSITION OF THE JUDICIARY, 137 *et seq*. and CONSTITUTIONAL LAW OF INDIA, 1095, 1109 (1967); SATHE, FUNDAMENTAL RIGHTS AND AMENDMENT OF THE INDIAN CONST. *(1968)*; *Int of Const. & Parl. Studies*, PARLIAMENT & CONST. AMENDMENT *(1970)*; GAJENDRAGADKAR, THE INDIAN PARLIAMENT AND THE FUNDAMENTAL RIGHTS (1972); D.D. BASU, LIMITED GOVT. AND JUDICIAL REVIEW, 498 *et seq*. (1972); RAJEEV DHAWAN, THE SUPREME COURT OF INDIA AND PARLIAMENTARY SOVEREIGNTY *(1976)*; HARI CHAND, AMENDING PROCESS IN THE INDIAN CONSTITUTION.

12. *Supra*, Ch. XL, Sec. A.

13. Statement of Objects and Reasons appended to the Bill.

14. See, *infra*, Ch. XLII.

The rationale underlying the various clauses enacted by the Twenty-fourth Amendment was as follows.

The majority judgment in *Golak Nath* had taken the view that the word "law" in Art. 13 included a constitutional amendment as well, and, therefore, a Fundamental Right could not be curtailed or diluted.[15] To undo the effect of this pronouncement, the following changes were sought to be made in Arts. 13 and 368:

(*a*) It was now clarified that Art. 13 would not stand in the way of any constitutional amendment made under Art. 368. This was sought to be achieved by adding a clause to Art. 13 declaring that Art. 13 shall not apply to any constitutional amendment made under Art. 368.[16]

(*b*) As a matter of abundant caution, a clause was added to Art. 368 declaring that Art. 13 shall not apply to any constitutional amendment made under Art. 368.

(*c*) The marginal note to Art. 368 was changed from "Procedure for Amendment of the Constitution" to "Power of Parliament to amend the Constitution and Procedure therefor".

The majority in *Golak Nath* had asserted, by reference to the phraseology of the marginal note to Art. 368, that Art. 368 provided only the procedure for constitutional amendment and did not confer the power therefor.[17] The change in the marginal note was now made to clarify that Art. 368 conferred the power of constitutional amendment and did not lay down merely the procedure therefor.

(*d*) A clause was added to Art. 368 saying that "Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this Article".

The addition of the clause was designed to make an express grant of power to Parliament to amend any part of the Constitution including Fundamental Rights. It had been argued by Chief Justice SUBBA RAO in *Golak Nath* that since Art. 368 did not expressly authorise the curtailment of Fundamental Rights, such curtailment must be out of reach of the amending process. The Amendment now excluded such an inference being drawn by expressly including the Fundamental Rights within the scope of the amending process.

(*e*) A view had been expressed in *Golak Nath* that there was no difference between an ordinary law made under legislative process, and constitutional amendment made under constituent power. To prove this point, it had been pointed out that the Presidential power to assent, or not to assent, was similar in both cases—an ordinary law as well as a law passed under Art. 368.[18]

To meet this argument, it was now clarified that once a Constitution Amendment Bill is passed by both Houses of Parliament by the requisite majority in accordance with the procedure laid down in Art. 368, the President would have no option but to give his assent to it.

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15. *Supra*, Sec. D(c).
16. *Supra*, Ch. XX, Sec. C.
17. *Supra*, 2318, 2322.
18. *Supra*, Ch. II, , Sec. J(c).

In case of an ordinary law, the President does enjoy a choice either to give or refuse to give his assent, or to refer it back to Parliament for reconsideration.[19] In case of a bill amending the Constitution, it would be obligatory on the President to give his assent thereto. Thus, a differentiation was now sought to be made between an ordinary law and a law to amend the Constitution.

Along with the Twenty-fourth Amendment was also enacted the Twenty-fifth Amendment of the Constitution, the salient features of which, as discussed earlier,[20] were as follows:

(*i*) The word "amount" was substituted for the word "compensation" in Art. 31(2). This was done to remove any contention that the Government was bound to give adequate compensation for any property acquired by it;

(*ii*) Art. 19(1)(*f*) was delinked from Art. 31(2);

(*iii*) a new provision, Art. 31C, was added to the Constitution[21] saying—

(*i*) that Arts. 14, 19 and 31 would not apply to a law enacted to effectuate the policy underlying Arts. 39(b) and (c), and

(*ii*) that a declaration in the law that it was enacted to give effect to the policy under Arts. 39(b) and (c) would immunize the law from such a challenge in the Court.[22]

A State law could claim immunity from challenge only after receiving the assent of the President.

The effect of this clause was quite far reaching. Hitherto, Directive Principles had been treated as subservient to Fundamental Rights. Now this relationship was sought to be reversed; Directive Principles contained in Arts. 39(b) and (c) were now sought to be given precedence over Fundamental Rights contained in Arts. 14, 19 and 31. The Twenty-fifth Amendment thus further diluted the right to property.

(e) KESAVANANDA BHARATI

As could be expected, the constitutional validity of both the Amendments, *viz.*, XXIV and XXV, was challenged in the Supreme Court through an Art. 32 writ-petition in *Kesavananda Bharati v. State of Kerala*,[23] by Swami Kesavananda Bharati, a mutt chief of Kerala. The matter was heard by a bench consisting of all the 13 Judges of the Court because *Golak Nath*, a decision by a Bench of 11 Judges was under review.

Wide ranging arguments were advanced before the Court for over 60 days both for and against the validity of the Amendments. Eleven opinions were delivered by the Judges on April 24, 1973.

(a) The Court now held that the power to amend the Constitution is to be found in Art. 368 itself. It was emphasized that the "provisions relating to the

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19. *Ibid*.
20. *Supra*, Ch. XXXI, Sec. C(iii).
21. *Supra*, Ch. XXXII, Sec. D.
Also see, *infra*, Ch. XLII.
22. For Arts. 39(b) and (c), see, *supra*, Ch. XXXIV, Secs. D(e) and (f).
23. AIR 1973 SC 1461.

amendment of the Constitution are some of the most important features of any modern Constitution".

HEGDE and MUKHERJEA, JJ., found it difficult to believe that the constitution-makers had left the important power to amend the Constitution hidden in Parliament's residuary power. On this point, therefore, the views expressed in *Shankari Prasad* and *Sajjan Singh* were endorsed and the view expressed in *Golak Nath* that the power to amend the Constitution was not to be found in Art. 368 was overruled.

(b) Further, the Court recognised that there is a distinction between an ordinary law and a constitutional law.

HEGDE and MUKHERJEA, JJ., stated in this connection: "An examination of the various provisions of our Constitution shows that it has made a distinction between 'the Constitution' and 'the laws'."[24] It was asserted that the constitution-makers did not use the expression "law" in Art. 13 as including "constitutional law". This would thus mean that Art. 368 confers power to abridge a Fundamental Right or any other part of the Constitution. To this extent, therefore, *Golak Nath* was now overruled.

(c) But *Kesavananda* did not concede an unlimited amending power to Parliament under Art. 368. The amending power was now subjected to one very significant qualification, *viz.*, that the amending power cannot be exercised in such a manner as to destroy or emasculate the basic or Fundamental Features of the Constitution. A constitutional amendment which offends the basic structure of the Constitution is *ultra vires.*

(d) Some of the features regarded by the Court as fundamental and, thus, non-amendable are:[25]

(*i*) Supremacy of the Constitution:

(*ii*) Republican and democratic form of government;

(*iii*) Secular character of the Constitution;

(*iv*) Separation of powers between legislative, executive and the judiciary;

(*v*) Federal character of the Constitution.

(e) This, therefore, means that while Parliament can amend any constitutional provision by virtue of Art. 368, such a power is not absolute and unlimited and the courts can still go into the question whether or not an amendment destroys a fundamental or basic feature of the Constitution. If an amendment does so, it will be constitutionally invalid.

The justification for this judicial view is that the expression 'amend' in Art. 368 has a restrictive connotation and could not comprise a fundamental change in the Constitution. The words "amendment of the Constitution" in Art. 368 could not have the effect of destroying or abrogating the basic structure of the Constitution". The 2/3rd majority in Parliament may not represent majority of the votes of the people in the country. This means that there are inherent or implied limitations on the power of amendment under Art. 368.

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24. *Ibid.*

25. For further discussion on this point, see, *infra*, Sec. F.

(f) What is a fundamental feature of the Constitution is a moot point. The list given above is not final or exhaustive of such features. It is for the courts to decide as and when a question arises whether a particular amendment of the Constitution affects any 'basic' or "fundamental" feature of the Constitution or not. The question of basic feature has to be considered in each case in the context of the concrete problem.

Kesavananda ruling can be regarded to be an improvement over the formulation in *Golak Nath,* in at least two significant respects:

(i) It has been stated earlier[26] that there are several other parts of the Constitution which are as important, if not more, as the Fundamental Rights, but *Golak Nath* formulation only confined itself to Fundamental Rights and did not cover these parts. This gap has been filled by *Kesavananda* by holding that all 'basic' features of the Constitution are non-amendable.

(ii) *Golak Nath* made all Fundamental Rights as non-amendable. This was too rigid a formulation. *Kesavananda* introduces some flexibility in this respect. Not all Fundamental Rights *en bloc* are now to be regarded as non-amendable but only such of them as may be characterised as constituting the "basic" features of the Constitution.

According to *Kesavananda,* even a Fundamental Right can be amended or altered provided the basic structure of the Constitution is not damaged in any way. It is for the Court to decide from case to case as to which Fundamental Right is to be treated as a 'basic' feature. The right to property has not been treated as such and so the Fundamental Right to property has been abrogated.[27]

Theoretically, *Kesavananda* is, therefore, a more satisfactory formulation as regards the amendability of the Constitution than *Golak Nath* which gave primacy to only one part, and not to other parts, of the Constitution.

(g) *Kesavananda* also answers the question left unanswered in *Golak Nath,* namely, can Parliament, under Art. 368, rewrite the entire Constitution and bring in a new Constitution?[28] The answer to the question is that Parliament can only do that which does not modify the basic features of the Constitution and not go beyond that.

The immediate application of the *Kesavananda* principle as regards the amendability of the Constitution was made to assess the constitutional validity of the Twenty-Fourth and Twenty-Fifth Amendments. The entire Twenty-Fourth Amendment was held valid. From one point of view, overruling of *Golak Nath* restored the *status quo* ante making the amendment unnecessary and restoring the power of amending the Fundamental Rights to the constituent body. As some Judges pointed out, the Twenty-Fourth amendment made explicit what was already implicit in the unamended Art. 368. Parliament could amend a Fundamental Right subject, however, to the over-all restriction of non-amendability of a basic feature of the Constitution.[29]

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26. See, *supra.*
27. *Supra,* Chs. XXXI, Sec. C and XXXII, Sec. E.
Also see, *Raghunath Rao v. Union of India,* AIR 1993 SC 1267, *infra,* Sec. E.
28. *Supra,* Sec. D(c).
29. *Supra.*

As regards the Twenty-Fifth Amendment, it was upheld subject to the following qualifications:

(i) Although 'amount' was not the same concept as 'compensation', and while the courts could not go into the question of adequacy of 'amount' payable for property acquired or requisitioned, yet the 'amount' could not be 'illusory' or 'arbitrary'. The 'amount' need not be the market value of the property acquired, but it should still have some reasonable relationship with the value of the property in question. Thus, a limited judicial review of the amount payable for property acquired was still possible.[30]

(ii) The non-application of Art. 19(1)(f) to a law enacted under Art. 31(2) was held to be constitutionally valid. In a way, the Amendment only restored the *status quo ante* before *Golak Nath* when the Supreme Court had regarded Arts. 31(2) and 19(1)(f) as mutually exclusive.[31]

(iii) The first part of Art. 31C was upheld chiefly on the basis that it identified a limited class of legislation and exempted it from the operation of Arts. 14, 19 and 31. Hence no delegation of amending power was required. But the second part of Art. 31C was held to be invalid. The purport of this ruling is that while a law enacted to implement Arts. 39(*b*) and 39(*c*) may not be challenged under Arts. 14, 19 and 31, nevertheless, the courts shall have the power to go into the question whether the impugned law does in fact achieve the objectives inherent in Arts. 39(*b*) and (*c*) or not.

(iv) A legislative declaration to this effect cannot be conclusive. No legislature by its own declaration can make a law challenge-proof. When a law is challenged, the courts will have the power to consider whether the law in question can reasonably be described as one to give effect to the policy of the state towards the said objectives.[32]

In spite of the fact that it is possible to find some conundrums from the logical point of view on an analysis of the arguments adopted in the various opinions delivered in *Kesavananda*,[33] the end result of the case on the whole was satisfactory, balanced and reasonable. Parliament was now conceded power to amend any part of the Constitution subject to the ultimate restriction that the Fundamental Features of the Constitution should not be abrogated. This formulation gives a lot of leeway to Parliament to make necessary adjustments in the Constitution from time to time in furtherance of the country's socio-economic programme.

The restriction on Parliament that it should not subvert the fundamental features of the Constitution is more notional than real for no Parliament would seek to do that, and the courts will have enough manoueverability to decide whether any fundamental feature of the Constitution has been abrogated or not by a par-

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30. *Supra*, Ch. XXXI, Sec. C(iii).
31. *Supra*, Ch. XXXI, Sec. B.
32. *Supra*, Chs. XXXII, Sec. D and XXXIV.
33. For various analytical comments on the *Kesavananda* case see: JOSEPH MINATTUR, The Ratio in the *Kesavananda Bharati* case, (1974) 1 SCC (JI.) 73; P.K. TRIPATHI, *Kesavananda Bharati v. State of Kerala*: Who Wins? (1974) 1 SCC (JI.) 3; H.M. SEERVAI, The Fundamental Rights Case; At the Cross Roads, 74 *Bom LR* (JI.) 47 (1973); UPEN BAXI, The Constitutional Quicksands: Bharati and the Twenty-fifth Amendment, (1974) 1 SCC (JI.) 45; MORGAN, The Indian Essential Features case, 30 *Int'I and Comp LQ* 307.

ticular amendment. The two phrases 'fundamental features' and 'abrogation' are quite vague furnishing a good deal of scope of interpretation to the Courts.

By upholding the first limb of Art. 31C, legislatures in the country have been given power to implement the socialist socio-economic programme. It is a welcome feature of the judgment that the second limb of Art. 31C was invalidated. This avoided the possibility of the State Legislatures immunizing all sorts of laws from judicial scrutiny. To permit each and every State to enact review-proof legislation in the name of Arts. 39(b) and 39(c), could have led to socio-economic chaos in the country. The Central Government should be thankful to the Supreme Court for saving it from an embarrassment which it would have faced had it said 'no' to an arbitrary State law enacted in the name of furthering the socialist programme.

Kesavananda illustrates judicial creativity and the policy-making role of the Supreme Court of a very high order. The majority judges sought to protect and preserve the basic features of the Constitution against the onslaught of transient majorities in Parliament. An unqualified amending power could mean that a political party with a two-thirds majority in Parliament, for a few years, could make any changes in the Constitution, even to the extent of establishing a totalitarian State,[34] to suit its own political exigencies.

It was a conscious 'policy' decision on the part of the Supreme Court to read implied limitations on the amending power in order to preserve basic, core, constitutional values against the onslaught of a transient majority in Parliament. In *Kesavananda*, several Judges felt convinced that certain values and ideals embedded in the Constitution should be preserved and not destroyed by any process of constitutional amendment. The Constitution deriving its strength and sanction from the national consensus, and enacted in the name of the "People of India"[35] should not be amendable merely by a 2/3 vote in Parliament when the truth is that 2/3 of the *Lok Sabha* does not represent a very broad national consensus, as only nearly 40% of the registered voters cast their votes in the general election, and these votes are divided among several political parties contesting the general election to the Lok Sabha, and Rajya Sabha has no popular mandate as, in effect, it consists of the nominees of the various political parties elected by the various State Legislatures.[36]

The basic philosophy underlying the doctrine of non-amendability of the basic features of the Constitution, evolved by the majority in *Kesavananda* has been beautifully explained by HEDGE and MUKHERJEE, JJ., as follows:[37]

> "Our Constitution is not a mere political document. It is essentially a social document. It is based on a social philosophy and every social philosophy like every religion has two main features, namely, basic and circumstantial. The former remains constant but the latter is subject to change. The core of a religion always remains constant but the practices associated with it may change. Likewise, a constitution like ours contains certain features which are so essential that they cannot be changed or destroyed."

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34. PALKHIVALA characterises *Kesavananda* as "one of the milestones in the history of jurisprudence": PALKHIVALA, OUR CONSTITUTION DEFACED AND DEFILED, 147.
35. See, the Preamble to the Constitution, Chs. I, Sec. E(c) and XXXIV, Sec. A.
36. *Supra*, Ch. II, Sec. B.
37. AIR 1973 SC 1461, at 1624.

In retrospect, it would appear that the Supreme Court adopted the technique of literal interpretation of the Constitution in *Shankari Prasad* and *Sajjan Singh* and, thus, concluded that there was no restriction on the amending power. Things however changed when Chief Justice SUBBA RAO, a great protagonist of the Fundamental Rights, took over the leadership of the Court and had an opportunity to preside over the Bench deciding the *Golaknath* case.

It needs to be emphasized that the decision on the question whether the amending power should be restricted or not involved a high policy-making function on the part of the judiciary. It was not a question which could be decided merely by resorting to logical arguments, as arguments could be found on both sides of the line.

In course of time, the doctrine of basic or fundamental features of the Constitution has become very well entrenched in India. Since *Kesavananda*, the doctrine has been applied by the Supreme Court in quite a few cases. *Kesavananda* constitutes the high water mark of Judicial creativity.[38]

(f) INDIRA NEHRU GANDHI

The next case in which the Supreme Court had occasion to apply the *Kesavananda* ruling regarding the non-amendability of the basic features of the Constitution was *Indira Nehru Gandhi v. Raj Narain*.[39]

Here was involved the question of the validity of Cl. 4 of the Constitution (Thirty-ninth Amendment) Act, 1975. The background to this amendment has been explained earlier.[40]

This Amendment sought to do three things: one, generally, to withdraw the election of the Prime Minister and a few other Union officials from the scope of the ordinary judicial process; two, more specifically, to void the High Court decision declaring Indira Gandhi's election to the Lok Sabha as void; and, three, to exclude the Supreme Court's jurisdiction to hear any appeal.

Cl. 4 of the Amendment was challenged as destroying the basic feature of the Constitution insofar as it constituted a gross interference with the judicial process.[41] The contention was that the clause in question wiped out not merely the High Court's judgment, but even the election petition and the law relating thereto. The constituent power had discharged a judicial function in deciding the election dispute against the Prime Minister and in doing this it had followed no procedure and applied no law. Thus, the *Kesavananda* ruling was directly invoked.

The Supreme Court upheld the contention and declared Cl. 4 as unconstitutional. The first part of Cl. 4 was regarded to violate three "essential features" of the Constitution. According to MATHEW, J., it destroyed an essential democratic feature of the Constitution, *viz.*, the resolution of an election dispute "by ascertaining the adjudicative facts and applying the relevant law for determining the real representative of the people". In the words of MATHEW, J., again: "If Art. 329(*b*) envisages the resolution of an election dispute by judicial process by a

38. See, *supra*, Ch. XL, Sec. D, on "Judicial Creativity".
39. AIR 1975 SC 2299 : 1975 Supp SCC 1; *supra*.
40. *Supra*, Ch. XIX, Sec. F; *infra*, next Chapter.
41. For Cl. 4 see, *infra*, Ch. XLII.

petition presented to an authority as the appropriate legislature may by law provide,[42] a constitutional amendment cannot dispense with the requirement without damaging an essential feature of democracy, *viz.*, the mechanism for determining the real representatives of the people in an election as contemplated by the Constitution". Democracy could function only when there are free and fair elections. This principle was vitiated by the amendment in question.

According to CHANDRACHUD, J., Cl. 4 violated the principle of separation of powers to the extent incorporated in the Constitution, *viz.*, a purely judicial function being exercised by the legislature. CHANDRACHUD, J., also opined that 'equality of status and opportunity' being an "essential feature" of the Constitution, the same was being violated by Cl. 4 as there was no rational reason for creating a privileged regime for the election of the Prime Minister.

The Court took exception to the voiding of a judicial pronouncement and declaring it ineffective by the second part of Cl. 4. While it was possible for Parliament to amend the pre-existing law and thus knock out the basis of the judicial decision in question, a judicial decision by itself could not, however, be voided by Parliament.[43]

A more substantial ground against the proposed Amendment was that the decision of a specific election dispute was a judicial function. When the constituent body declared that the election of the Prime Minister would not be void, it discharged a judicial function. As emphasized by MATHEW, J. ".... the resolution of an election dispute by the amending body could not be regarded as 'law'." It was either "a judicial sentence or a legislative judgment like a Bill of Attainder."

A judicial power has to be exercised according to some procedure and by following some law. In the instant case, in enacting the Amendment in question, the amending body exercised judicial power in violation of the principle of natural justice or *audi alteram partem* as it gave no hearing to the person challenging the Prime Minister's election. It was not clear what norms of law, if any, had been applied by the constituent body to determine the dispute. The election law which had been in existence on the date of the enactment of the Amendment in question was excluded as regards the specific election petition. As emphasized by MATHEW, J.: "If the amending body evolved new norms for adjudging the validity of the particular election, it was the exercise of a despotic power and that would damage the democratic structure of the Constitution."

It was agreed generally that democracy was a basic feature of the Constitution. The amending body, under Art. 368, was not competent to pass an ordinary law with retrospective effect to validate the election. It could only amend the Constitution by passing a law of the same rank as the Constitution. If the amendment were taken to hold that there was no election dispute, and that the election petition in question was *non est*, it would sound the death knell of the democratic structure of the Constitution.

There was nothing on the face of the Amendment to show that the amending body ascertained the facts of the case. Adjudicative facts cannot be gathered by legislative process behind the back of the parties; facts can be gathered only by

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42. *Supra*, Ch. XIX, Sec. F.

43. See, *supra*, Ch. II, on this point, Sec. M.
Also see, *supra*, Ch. XL, Sec. I(b).

judicial process. In the instant case, the constituent body made no attempt to ascertain facts by resorting to judicial process.

RAY, C.J., emphasized that insofar as the validation of the election in the instant case was without applying any law, the principle of rule of law, which was a basic feature of the Constitution, was offended. The constituent body can exercise judicial power but it has to apply some law for the purpose. KHANNA, J., stated: "To put a stamp of validity on the election of a candidate by saying that the challenge to such an election would not be governed by any election law and that the said election in any case would be valid and immune from any challenge runs counter to accepted norms of free and fair elections in all democratic countries."

Another significant point which emerged from the various opinions in the instant case was that the principle of the 'basic features' was applicable only to a constitutional amendment and not to an ordinary legislation. As CHANDRACHUD, J., explained, the amending power and the ordinary law-making power "operate in different fields and are, therefore, subject to different limitations". A constitutional amendment is a law of a higher status and so it cannot damage the basic feature of the Constitution. The amending power under Art. 368 is subject to this over-all restriction but not the ordinary legislative power. An ordinary law has to be tested on the touchstone of competence of the enacting legislature and whether it infringes any other specific constitutional interdiction.

On this point, RAY, C.J., stated: "The theory of basic structures is an exercise in imponderables. Basic structures or basic features are indefinable. The legislative entries are the fields of legislation. The pith and substance doctrine has been applied in order to find out legislative competency, and eliminate encroachment on legislative entries.[44] If the theory of basic structures or basic features is applied to legislative measures it will denude Parliament and State Legislatures of the power of legislation and deprive them of laying down legislative policies. This will be an encroachment on the separation of powers."

But this argument of the Judges seem to be illogical. If an amendment of the Constitution (which is a higher law made in the exercise of the constituent power) cannot affect the basic features of the Constitution, then it stands to reason as to how a simple law (which is of a lower order as made in the exercise of the legislative power) can be allowed to affect the basic features of the Constitution.

It was also stated by several Judges in *Indira Nehru Gandhi* that judicial review was not a basic feature of the Constitution and that a constitutional amendment could exclude judicial review of a matter. The same is true of the principle of equality embodied in Arts. 14, 15 and 16. But these propositions have now been overruled. Both judicial review as well as equality are regarded as the basic features of the Constitution.

(g) AMENDMENT OF ART. 368 *:* 42ND AMENDMENT

The Central Government did not relish the Supreme Court's pronouncement in the *Indira Nehru Gandhi* case declaring Cl. 4 of the Thirty-ninth Amendment invalid. The Government very much desired to ensure that never in future, the

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44. *Supra*, Ch. X, Sec. G(iv).

courts should have the power to pronounce a constitutional amendment invalid. Accordingly, Art. 368 was again amended by the Forty-Second Amendment enacted in 1976.

A major argument advanced by the Law Minister in favour of such an Amendment was that the supremacy of the Parliament must be asserted in the area of constitutional amendment, and that a constitutional amendment should be taken out of judicial purview. Many adverse comments were made by him in the Houses of Parliament during the course of discussion on the Amendment Bill on the Supreme Court pronouncements in *Golak Nath* and *Kesawnanda*. The doctrine laid down by the Supreme Court in *Kesavananda Bharati* that Parliament in the exercise of its constituent power could not amend the basic features of the Constitution was much criticised by the Law Minister. It was asserted by the Law Minister that there was no basic feature of the Constitution which Parliament as the constituent power could not amend.

The Forty-Second Amendment sought to ensure that a constitutional amendment may not be challenged before any Court on any ground whatsoever. To achieve this objective, two new clauses were added to Art. 368.[45]

These clauses were very broadly worded and were designed to make it clear to the judiciary that there should be no limitation whatsoever on Parliament's constituent power under Art. 368.[46] Clause 4, mentioned above, even went to the extent of reviving the constitutional amendments held invalid by the Supreme Court earlier, *viz.*: the second limb of Art. 31C in *Kesavananda*[47] and a few clauses of the Thirty-ninth amendment in *Indira Nehru Gandhi*.[48] Originally, Clause 4 permitted a challenge to a constitutional amendment on the ground that "it has not been made in accordance with the procedure laid down by this article", *viz.*, Art. 368. But that part of the clause was dropped by Parliament and the idea appeared to be that a constitutional amendment should not be challengeable in a Court on any ground whatsoever.

It was however doubtful whether the new Amendment had given quietus to all the controversies regarding the amending power. For example, the question could still arise whether an Amendment of the Constitution made without the two-thirds of votes of the members present and voting in each of the two Houses of Parliament can be regarded as a 'constitutional amendment' under Art. 368, or will it be covered by the words "purporting to have been made" in Clause 4 and thus be non-challengeable. To take the latter view will be to nullify the procedure laid down in Art. 368 for a constitutional amendment.

There also remained the fundamental question whether the Supreme Court will reverse its position in *Kesavananda* and accept an unfettered constituent power in Parliament as constitutional. For, if the Supreme Court were to stick to its views as expressed in *Kesavananda* as regards the scope of Art. 368, then these amendments to Art. 368 made under Art. 368 itself could not be valid. If, however, the amendments to Art. 368 were to be held valid then the only restraint on Parliament in this matter would be political and moral. It meant that Parliament would only be restrained in the matter of constitutional amendment by the exi-

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45. *Supra*, 2318.
46. *Supra.*
47. *Supra*, Ch. XXXII, Sec. D.
48. *Supra*, Sec. D(f).

gencies of periodic elections, the internal composition of the Houses of Parliament, public opinion and the commitment of the members of Parliament to the ideals of democracy and constitutionalism.

In justification of the new Amendments to Art. 368, the Law Minister had claimed that—(*i*) there was no basic feature of the Constitution which needed to be protected from amendment; and (*ii*) the supremacy of Parliament ought to be established in the area of constitutional amendment. The Law Minister was wrong on both these premises.

As regards the first assertion of the Law Minister, it needs to be emphasized that there are certain values inherent in the Constitution which are worth preserving, which ought not be sacrificed even at the altar of the so-called economic development or political expediency, and without which the Constitution will be reduced to merely an empty shell with no substance. Can any one deny that constitutionalism, democracy, secularism, rule of law, Federalism are not values inherently imbibed in the constitution? What is point of having a constitution if it is devoid of all values?

As regards the second assertion, mentioned above, it needs to be pointed out that the argument of parliamentary supremacy is, in effect, only a 'myth' or a 'fiction'. In the context of the practical working of the parliamentary system, supremacy of Parliament actually boils down to supremacy of the executive government of the day, because parliamentary powers are at the disposal of the government of the day which enjoys a majority support in the House. The members in the Houses vote as per the dictates of the government. The result is that a government backed by 2/3rd of the members in the two Houses could carry out any constitutional amendment it desires. When a government shouts from the housetop to uphold "sovereignty of Parliament", what, in effect, it is seeking is to have complete, uncontrolled, freedom of action itself to do what it likes to do as it knows that the majority in Parliament would always support it. The existence of a written constitution by its very nature envisages a restriction on the power of Parliament and in other written constitutions it has been thought advisable not to vest ultimate control over the constitution in the legislature alone. This is the essence of the doctrine of constitutionalism.[49] Can an uninhibited uncontrolled amending power be left with the kind of Parliament which churns out such amendments as XXXIX and XLII without any compunction?

There was a lot of criticism of the majority rulings in *Golak Nath* and *Kesavananda*. Most of this criticism emanated from a literal approach to Art. 368, but the Supreme Court was taking recourse to a purposive, and not a literal, approach. It was argued that the constitution-makers desired a constitution which could be amended. But these critics forgot that the constitution-makers sought to design a 'controlled' constitution and not an 'uncontrolled' constitution, and the Indian Constitution, in effect, became 'uncontrolled' in practice and most of the constitutional amendments were a result not of any broad consensus on a national basis but of brute majority of the ruling party in Parliament. The situation has been described by ex-Justice HEGDE (who participated in the majority decision in *Kesavananda* but then later resigned from the Court) in the following words:

49. See, *supra*, Ch. I, Sec. B.

> "Because of Congress's unbroken dominance at the Centre and in almost all the State Governments, India is for practical purposes a one-party State. Within the Congress Party, democracy is at a premium and power is unduly concentrated. The standard of political morality is low. The press is free only to praise .... the radio is controlled by the government. The vast majority of the people are apathetic and badly informed; the Constitution is certainly too abstract to be on their cognitive maps. In these circumstances, it is up to the Supreme Court to defend it. The Supreme Court is the last bulwark of democracy."

It was this judicial policy which led the majority Judges to rule in favour of a limited power of constitutional amendment.

The decisions of the Supreme Court of India on the question of amendability of the Indian Constitution involve a high policy-making function on the part of the judiciary. It was a conscious decision on the part of the Indian Supreme Court in *Golak Nath* and then in *Kesavananda* to read implied limitations on the amending power in order to preserve what the Court thought to be the basic, central, core of the Constitution against the onslaught of the transient majority in Parliament. Some of the Supreme Court Judges participating in the *Kesavananda* decision felt convinced in their minds that there are certain ideals or values inherent in the Constitution and these ideals or values should be preserved and protected and not destroyed by any process of constitutional amendment.

And, as the life of law is experience and not logic, the Supreme Court's approach was more than vindicated when the 39th and 42nd Amendments[50] were enacted. These Amendments represent an abuse of the amending power and laid bare the dangers of an unlimited and uninhibited power to amend the Constitution. It was then rudely realised that such a power could be misused to usher in an undemocratic regime and denude the people of their rights and many critics of the Supreme Court then became convinced of the sagacity and the rightness of the Court's approach.[51]

The Court had tried in *Kesavananda* to adopt a purposive interpretation of Art. 368 so as to make the Constitution 'controlled' which had become practically 'uncontrolled' because of political vagaries. During the period 1981 to 1984, there were many straws in the wind to amend the Constitution in several directions which might have distorted the Constitution out of recognition, but the Government felt shy of moving these amendments as it was not sure of the response of the Supreme Court. It is a safe assumption that the 'basic features' theory has protected the Constitution from being mutilated out of recognition at the altar of political expediency. The doctrine of 'basic features' has proved to be a shield to protect and preserve certain fundamental values inherent in the Constitution.

In future, amendment of the Constitution on a purely party basis may possibly become more and more difficult unless an amendment represents a broad national consensus, because the ruling party may lose its two-thirds majority in the Houses of Parliament and many State Legislatures may come to have majorities of other political parties. An amendment of the Constitution can then take place only when a national consensus emerges. That is as it should be. A constitution is national heritage and not the property of one single party howsoever mighty it

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50. For provisions of this Amendment see, *infra*, next Chapter.

51. SEERVAI, EMERGENCY, FUTURE SAFEGUARDS, HABEAS CORPUS case, 139 (1978).

may be and no single party has thus a right to institute amendments in the Constitution merely in party interest, rather than in national interest.[52]

E. LATER DEVELOPMENTS

(a) MINERVA MILLS

In *Minerva Mills Ltd. v. Union of India*,[53] the scope and extent of the doctrine of basic structure was again considered by the Supreme Court. The Court again reiterated the doctrine that under Art. 368, Parliament cannot so amend the Constitution as to damage the basic or essential features of the Constitution and destroy its basic structure.

In the instant case, the petition was filed in the Supreme Court challenging the taking over of the management of the mill under the Sick Textile Undertaking (Nationalisation) Act, 1974, and an order made under s. 18-A of the Industrial (Development and Regulation) Act, 1951. The petition challenged the constitutional validity of clauses (4) and (5) of Art. 368, introduced by s. 55 of the 42nd Amendment. If these clauses were held valid then the petitioners could not challenge the validity of the 39th Amendment which had placed the Nationalisation Act, 1974, in the IX Schedule.[54]

As already noted, S. 55 of the Constitution (Forty-second Amendment) Act, 1976, inserted sub-sections (4) and (5) in Art. 368.[55] In *Minerva*, this section was held to be beyond the amending power of the Parliament and void since it sought to remove all limitations on the power of Parliament to amend the Constitution and confer a power on Parliament to amend the Constitution so as to damage or destroy its basic or essential features or its basic structures. The true object of these clauses was to remove the limitations imposed on Parliament's power to amend the Constitution through the *Kesavananda* case.[56]

The newly introduced clause 4 in Art. 368 sought to deprive the courts of their power to call in question any amendment of the Constitution.[57] The Court stated in this connection:

> Our Constitution is founded on a nice balance of power among the three wings of the state, namely, the Executive, the Legislature and the Judiciary. It is the function of the Judges, nay their duty, to pronounce upon the validity of laws.

Depriving the courts of the power of judicial review will mean making Fundamental Rights "a mere adornment," as they will be rights without remedies. A 'controlled' Constitution will become 'uncontrolled'.[58]

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52. It has been declared in the Preamble to the Constitution : "We, the people of India… in our Constituent Assembly… do hereby adopt, enact and give to ourselves this Constitution." See, Ch. I, *supra.*
53. AIR 1980 SC 1789 : (1980) 3 SCC 625.
54. *Supra*, Ch. XXXII, Sec. B.
55. *Supra*, 2318.
56. *Kesavananda Bharati v. State of Kerala, supra,* , Sec. D(e).
57. For the text of this clause, see, *supra*, 2318.
58. AIR 1980 SC 1789 at 1799.

The newly added Cl. 5 of Art. 368 sought to demolish the very pillars on which the preamble rests by empowering the Parliament to exercise its constituent power without any limitation whatever. This clause even empowered Parliament to "repeal the provisions of the Constitution."[59] Parliament can thus abrogate democracy and substitute for it a totally antithetical form of government. That can most effectively be achieved, without calling a democracy by any other name, by a total denial of social, economic and political justice to the people, by emasculating liberty of thought, expression, belief, faith and worship and by abjuring commitment to the magnificent ideal of a society of equals.

"The power to destroy is not a power to amend." The Constitution confers only a limited power on Parliament to amend the Constitution; Parliament cannot therefore by exercising that limited power enlarge that very power into an absolute power. "The donee of a limited power cannot by the exercise of that power convert the limited power into an unlimited one."[60]

A limited amending power is indeed one of the basic features of the Constitution. Therefore, the limitations on that power cannot be destroyed. In other words, Parliament cannot, under Art. 368, expand its amending power so as to acquire for itself the right to repeal or abrogate the Constitution or to destroy its basic and essential features.

The 42nd Amendment also amended the Preamble. By this Amendment, the 'sovereign democractic republic' becomes a 'sovereign socialist secular democratic republic' and the resolution to promote the 'unity of the nation' was elevated into a promise to promote the 'unity and integrity of the nation'.[61] No exception could be taken to this Amendment, as it furnishes "the most eloquent example of how the amending power can be exercised consistently with the creed of the Constitution". This amendment offers "promise of more"; it does not "scuttle a precious heritage."[62]

S. 4 of the 42nd Amendment amended Art. 31C as well. As already stated, the unamended Art. 31C was upheld in *Kasavananda* up to an extent.[63] To that extent, Art. 31C would remain valid. But the new amendment vastly expanded the scope of Art. 31C[64], and this extension was now declared to be invalid as being beyond the amending power of Parliament since it destroyed the basic or essential features of the Constitution, insofar as it totally excluded a challenge in a Court to any law on the ground that it was inconsistent with, or took away or abridged any of the rights conferred by, Art. 14 or 19, if the law was for effectuating any of the Directive Principles.

The majority Judges insisted that Fundamental Rights occupy a unique place in the lives of civilized societies; they constitute the 'ark' of the Constitution. ".... the Indian Constitution is founded on the bedrock of the balance between Parts III and IV.[65] To give absolute primacy to one over the other is to disturb the har-

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59. For the text of this clause, see, *supra*, 2318.
60. AIR 1980 SC 1789 at 1798.
61. *Supra*, Chs. I and XXXIV, Sec. D.
62. AIR 1980 SC 1789 at 1799.
63. *Supra*, Ch. XXXII, Sec. D.
64. For this change see, *supra*, Chs. XXXII, Sec. D(ii)(iii) and XXXIV, Sec. C.
65. Part III of the Constitution contains the Fundamental Rights; Part IV contains the Directive Principles of State Policy.

mony of the Constitution. This harmony and balance between Fundamental Rights and Directive Principles is an essential feature of the basic structure of the Constitution."

The Court pointed out that the goals set out in Part IV of the Constitution (*i.e.*, Directive Principles)[66] must be achieved without the abrogation of the means provided for by Part III *viz*., Fundamental Rights. In this sense, Fundamental Rights and Directive Principles both together constitute the core of the Indian Constitution and combine to form its conscience. "Anything that destroys the balance between the two parts will *ipso facto* destroy an essential element of the basic structure of the Constitution."[67]

The Amendment sought to abrogate Arts. 14 and 19 in regard to laws described in Art. 31C. A bulk of modern legislation can easily be justified as having been passed for effectuating the policy of the State towards securing some principle or the other laid down in the Directive Principles. Such laws will cover an extensive gamut of the relevant legislative activity. In respect of all such laws, Arts. 14[68] and 19[69] would stand wholly withdrawn. Arts. 14 and 19 confer rights which are elementary for the proper and effective functioning of a democracy. They are universal as becomes evident from the Universal Declaration of Human Rights. If Arts. 14 and 19 were put out of operation in regard to bulk of legislation, Art. 32[70] would be drained of much of its life blood. The nature and quality of the amendment were such that "it virtually tears away the heart of basic fundamental freedoms."[71] The State Legislatures were given "an almost unfettered discretion to deprive the people of their civil liberties".

BHAGWATI, J., expressed the minority view. He agreed with the majority in holding amendments to Art. 368 as invalid and unconstitutional on the ground of damaging the basic structure of the Constitution. In his view, Cl. (4) of Art. 368 was unconstitutional as the consequence of excluding judicial review of constitutional amendments would be to enlarge the amending power of Parliament contrary to the decision in *Kesavananda,* and destroy the basic structure of the Constitution. Cl. (5) could not remove the doubt which did not exist, and so it was outside the amending power of Parliament. The two clauses, (4) and (5) were interlinked. BHAGWATI, J., failed to appreciate "how Parliament, which has only a limited power of amendment and which cannot alter the basic structure of the Constitution, can expand the power of amendment so as to confer upon itself the power to repeal or abrogate the Constitution or to damage or destroy its basic structure; or "to convert it into an absolute and unlimited power."

BHAGWATI, J., also commented adversely on the attempt made to exclude judicial review of the Constitutional amendments. He explained:

> "It is a cardinal principle of our Constitution that no one however highly placed and no authority however lofty can claim to be the sole judge of its power under the Constitution or whether its action is within the confines of such power laid down by the Constitution. The judiciary is the interpreter of the

66. *Supra*, Ch. XXXIV.
67. *Supra*, Ch. XXXIV, Sec. C.
68. *Supra*, Ch. XXI.
69. *Supra*, Ch. XXIV.
70. *Supra*, Ch. XXXIII, Sec. A.
71. *Supra*, Chs. XXXIII, Sec. A and XXXIV, Sec. A.

> Constitution and to the judiciary is assigned the delicate task to determine what is the power conferred on each branch of government, whether it is limited, and if so, what are the limits and whether any action of that branch transgresses such limits. It is for the judiciary to uphold the constitutional values and to enforce the constitutional limitations. That is the essence of rule of law…."

But the Amendment to Art. 31C was held valid by BHAGWATI, J., subject to the gloss put by him thereon. He argued that where protection was claimed for a statute under the amended Art. 31C, the Court would first determine whether there is a "real and substantial connection" between the law and a Directive Principle and that the predominant object of the law is to give effect to such Directive Principle. If the answer to this question turns out to be 'yes', the Court would then consider which provisions of the law are basically and essentially necessary for effectuating the directive principles and only such provisions would be protected under Art. 31C. If the Court finds that a particular provision is subsidiary or incidental or not essentially and integrally connected with the implementation of the Directive Principle or is of such a nature that though seemingly a part of the general design of the main provisions of the statute, its dominant objective is to achieve an unauthorised purpose, it would not be protected under Art. 31C. In this formulation, the Court would have discharged a much more overt policy-making role which the courts do not usually relish.

The following observation of BHAGWATI, J., is worth taking note of:

> "It is possible that in a given case, even an abridgement of a fundamental right may involve violation of the basic structure. It would all depend on the nature of the fundamental right, the extent and depth of the infringement, the purpose for which the infringement is made and its impact on the basic value of the Constitution. Take for example, right to life and personal liberty enshrined in Article 21. This stands on an altogether different footing from other fundamental rights. I do not wish to express any definite opinion, but I may point out that if this fundamental right is violated by any legislation, it may be difficult to sustain a Constitutional amendment which seeks to protect such legislation against challenge under Act. 21."

(b) WAMAN RAO

In the instant case, the Supreme Court considered the constitutional validity of the Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961. The Act imposed ceiling on agricultural holdings in the State. As the Act had been placed in the IX Schedule,[72] the constitutional validity of Arts. 31A, 31B and the unamended Art. 31C (as it existed before the 42nd Amendment) was also challenged on the ground of damaging the "basic structure" of the Constitution.

The proposition that Parliament cannot, under Art. 368, so amend the Constitution as to destroy its basic features was again reiterated and applied by the Supreme Court in *Waman Rao v. Union of India*.[73] Accordingly, the Court ruled that the First and the Fourth Amendment Acts introduced in 1951 and 1955 did not damage any basic or essential feature of the Constitution or its basic structure and were thus valid and constitutional being within the constituent power of the

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72. For IX Schedule, see, *supra*, Ch. XXXII, Sec. 31B.
73. AIR 1981 SC 271; *supra*, Sec. E(b).

Parliament. The First Amendment was aimed at removing social and economic disparities in the agricultural sector.[74]

The First Amendment introduced Art. 31A into the Constitution with retrospective effect as well as Art. 31B.[75] The Fourth Amendment amended the First Amendment.[76] Art. 31A(1) obliterates Arts. 14, 19 and 31 totally and completely for the laws falling within its scope.[77] In this connection, the Court stated:

> ".... every case in which the protection of a fundamental right is withdrawn will not necessarily result in damaging or destroying the basic structure of the Constitution. The question as to whether the basic structure is damaged or destroyed in any given case would depend upon which particular Article of Part III is in issue and whether what is withdrawn is quintessential to the basic structure of the Constitution."[78]

About Art. 31A, the Court said:

> ".... if Art. 31A were not enacted, some of the main purposes of the Constitution would have been delayed and eventually defeated and that by the 1st Amendment, the constitutional edifice was not impaired but strengthened."[79]

The First and the Fourth Amendments, according to the Court, "were made so closely on the heels of the Constitution that they ought indeed to be considered as a part and parcel of the Constitution itself."[80] These Amendments were passed to effectuate Art. 39 clauses (b) and (c).[81] The Court concluded that the First and Fourth Amendments strengthened rather than weakened the basic structure of the Constitution. They made the ideal of equal justice a living truth. The First Amendment aimed at removing social and economic disparities and it therefore did not damage or destroy the basic structure of the Constitution.

Article 31B contains a device for saving laws from challenge on the ground of violation of Fundamental Rights. Art. 31B is to be read along with the Ninth Schedule.[82] Art. 13(2) of the Constitution invalidates a law inconsistent with a Fundamental Right. Art. 31B extends a protective umbrella to such a law if it is included in the IX Schedule. Art. 31B is, in substance and reality, a constitutional device employed to protect State laws from being declared void under Art. 13(2). Parliament can insert a State Law in Schedule IX by passing a constitutional amendment under Art. 368.[83]

The Court declared in *Waman Rao* that all Acts and Regulations included in the Ninth Schedule uptil the land-mark case of *Kesavananda* (April 24, 1973) will receive the full protection of Art. 31B. Since the IXth Schedule is a part of the Constitution, no additions or alterations can be made therein without complying with the restrictive provisions governing amendments to the Constitution. Therefore, the Acts and Regulations included in the IXth Schedule after *Kesa-*

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74. *Supra*, Ch. XXXII; *supra*; *infra*, Ch. XLII.
75. *Supra*, Ch. XXXII, Sec. C; *infra*, Ch. XLII.
76. *Ibid.*
77. *Ibid.*
78. AIR 1981 SC at 279.
79. AIR 1981 SC at 283-284.
80. *Ibid*, at 284.
81. *Supra*, Chs. XXXII, Sec. B; XXXIV and XLII.
82. *Ibid.*
83. *Sasanka Sekhar v. Union of India*, AIR 1981 SC 522.

vanand (*i.e.*, on or after April 24, 1973) will not receive the protection of Art. 31B for the plain reason that in the face of the *Kesavananda* judgment, there is no justification for making additions to the IX Schedule with a view to conferring a blanket protection on the laws included therein. "The various constitutional amendments, by which additions were made to the IX Schedule on or after April 24, 1973, will be held valid only if they do not damage or destroy the basic structure of the Constitution."

These laws would not receive the protection of Art. 31B *ipso facto*. Each law has to be examined individually for determining whether the constitutional amendment by which it has been put in the IX Schedule damages or destroys the basic structure of the Constitution in any manner. If however any such Act is protected by Art. 31A or 31C (as it stood prior to the 42nd Amendment) then the Act will be valid.

Article 31C as it stood prior to the 42nd Amendment made in 1976 is valid to the extent its constitutionality has been upheld in the *Kesavananda* case.[84] Laws passed truly and *bona fide* for giving effect to the Directive Principles in Cls. (b) and (c) of Art. 39 "will fortify that structure". The Court expressed a hope that Parliament would utilise to the maximum its potential to pass laws genuinely and truly related to the principles contained in Clauses (b) and (c) of Art. 39.[85]

However, in *Sanjeev*,[86] the Supreme Court has dissented from *Minerva*[87] as regards the validity of Art. 31C. as amended by the 42nd Amendment. But the *Sanjeev* ruling is more in the nature of an *obiter dicta* as the Act in question pertained to Arts. 39(*b*) and (*c*) and could be held valid under the original Art. 31C as held valid in *Kesavananda*.

(c) RAGHUNATH RAO

In *Raghunath Rao v. Union of India*,[88] the Supreme Court has reiterated the proposition that the basic features of the Constitution cannot be amended by following the procedure laid down in Art. 368. The Court has observed that the Constitution is the supreme law of the land and all organs of government—executive, legislative and judiciary derive their powers and authority from the Constitution.

The Courts are entrusted with the important constitutional responsibilities of upholding the supremacy of the Constitution. The amendment of the Constitution is only for the purpose of making the Constitution "more perfect, effective and meaningful." An amendment should not result in "abrogation or destruction of its basic structure or loss of its original identity and character and render the Constitution unworkable."

The Court is not concerned with the wisdom behind or propriety of the constitutional amendment because these are the matters for consideration of those who have the power to make constitutional amendments. All that the Court is concerned with are:—(1) whether the procedure prescribed by Art.

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84. *Supra*, Chs. XXXII, Sec. D and XXXIV, Sec. D(e).
85. AIR 1981 SC at 292.
86. *Sanjeev Coke Mfg. Co. v. Bharat Coking Coal Ltd.*, AIR 1983 SC 239; *Supra*, Chs. XXXII, Sec. C and XXXIV.
87. *Supra*, , Sec. E(a).
88. AIR 1993 SC 1267, 1287 : 1933 (1) JT 374.

368 is strictly complied with; and (2) whether the amendment has destroyed or damaged the basic structure or the essential features of the Constitution.

If an amendment transgresses its limits and impairs and alters the basic structure or essential features of the Constitution then the Court has power to undo that amendment. "An amendment of a Constitution becomes *ultra vires* if the same contravenes or transgresses the limitations put on the amending power because there is no touchstone outside the Constitution by which the validity of the exercise of the said powers conferred by it can be tested."[89]

The Supreme Court has stated that "unity and integrity of India" and the principle of equality contained in Art. 14 constitute the basic structure of the constitution.

(d) APPLICATION OF THE RULE OF SEVERABILITY TO A CONSTITUTION AMENDMENT ACT

The Anti-defection law is contained in the X Schedule to the Constitution[90] which was added to the Constitution by the Constitution (Fifty-second) Amendment Act, 1985.[91] A member of a Legislature defecting form his party to another party becomes disqualified from membership of the Legislature. The question of disqualification because of defection is to be decided by the Chairman/Speaker of the House and "his decision shall be final." There is a privative clause saying that "no Court shall have any jurisdiction in respect of any matter connected with the disqualification of a member of a House under this Schedule."[92] The question of disqualification is to be decided by the Speaker of the House concerned and his decision is final.

The Constitutional validity of the 52nd Amendment was challenged in *Kihota Hollohan v. Zachillu.*[93]

The first question was whether the constitutional amendment disqualifying a member of a Legislature from membership on defection from his original party to another party was valid. The Court maintained that although there is no specific enumerated substantive limitation on the power in Art. 368, but as arising from very limitation on the amending power such that the amendment does not alter the basic structure or destroy the basic features of the Constitution.

The object of the Amendment in question is to curb the evil of political defections motivated by lure of office which endanger the foundations of democracy in India. The Amendment, the Court has held by a majority of 3:2, is salutary as it seeks to strengthen the fabric of Indian parliamentary democracy by curbing unprincipled and unethical political defections. The argument that the amendment violates the basic structure of the Constitution was rejected by the Court.

The second question which was raised in *Kihoto,* was like this: The finality clause does not completely exclude the jurisdiction of the courts but it does have

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89. Also see, *R.C. Poudyal v. Union of India,* AIR 1993 SC 1804; *Supra,* Ch. V; *Infra,* next Chapter.

90. *Supra,* Chs. II, Sec. F and VI, B(iv).
Infra, Ch. XLII.

91. *Ibid.*

92. *Ibid.*

93. AIR 1993 SC 412 : 1992 Supp (2) SCC 651, *supra,* Ch. II, Sec. F(a).

the effect of restricting the power of judicial review conferred on the Supreme Court and the High Courts under Arts. 136, 226 and 227. Accordingly, under Art. 368(2),[1] the constitutional amendment ought to have been approved by one-half of the State Legislatures before being presented to the President for his assent. In the instant case, this essential formality had not been gone through. Therefore, the question raised was whether the whole of the Amendment Act would be invalid, or whether the rule of severability could be applied to the Amendment Act so that the invalid part, *i.e.*, the finality clause could be severed and the rest of the Act held valid as it did not need State ratification.

The Supreme Court divided 3:2 on this issue. The majority took recourse to the rule of severability, discussed earlier,[2] and held the rest of the Amendment Act valid after severing therefrom the invalid finality clause.

The Court stated that the principle of severability can be applied to a composite amendment which contains—(*i*) amendments in provisions which do not require ratification by the States, as well as (*ii*) amendments in provisions which require such ratification. By applying the doctrine of severability, the amendments in category (*i*) can be upheld and amendments falling in category (*ii*) may be struck down failing ratification by the States.

However, the test of severability can be applied if the Legislature would at all have enacted the law if the severed part would not be the part of the law, and whether after severance what survives can stand independently and is workable. In the instant case, the majority ruled, that the constituent body would have still enacted the X Schedule to curb the evil of defection, and the finality clause was only incidental. Even if this clause is found unconstitutional and is thus severed, the rest of the provisions in the X Schedule can stand on their own.

On the other hand, the minority judges [VERMA and SHARMA, JJ.] took a more rigid stand on this issue. They took the view that under Art. 368(2), the Constitution Amendment Bill could not have been presented to the President for his assent unless the Bill had been approved by half of the State Legislatures. Therefore, the Presidential assent given to the Bill without such ratification was *non est* and so the whole Constitution Amendment Act was still born. The rule of severability could not apply as the whole of the Act was unconstitutional.

(e) A.K. ROY

A question of great importance as regards the amending power was considered by the Supreme Court in *A.K. Roy v. Union of India*.[3]

S. 1(2) of the 44th Amendment says: "It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint, and different dates may be appointed for different provisions of this Act."

The 44th Amendment Act has made several modifications in Art. 22[4] liberalising its provisions but the same have not yet been effectuated because the Government has not issued any notification under S. 1(2). In *Roy*, S. 1(2) was chal-

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1. *Supra*, Sec. C(b).
2. *Supra*, Chs. XX, Sec. H and XL.
3. AIR 1982 SC 710 : (1982) 1 SCC 271.
4. *Supra*, Ch. XXVII, Sec. B.
Also, *infra*, Ch. XLII.

lenged on the ground that by conferring an unreasonable, arbitrary and unguided power on the executive, it violated Arts. 14 and 21 which are an integral part of the basic structure of the Constitution. The failure of the Government to issue the notification was also challenged as *mala fide*. It was also argued that the Government was obligated to bring the whole of the 44th Amendment into force within a reasonable time since the executive cannot veto or nullify or negate a constitutional amendment. It was argued that "the executive cannot defer or postpone giving effect to a constitutional amendment for policy reasons of its own which are opposed to the policy of the constituent body as reflected in the constitutional amendment".

By majority of 3 to 2, the Court rejected these arguments and sustained the validity of S. 1(2) of the 44th Amendment arguing that the power to issue a notification for bringing into force the provisions of a constitutional amendment "is not a constituent power of the Parliament because it does not carry with it the power to amend the Constitution in any manner." Parliament can therefore vest in an outside agency the power to bring a constitutional amendment into force. The Supreme Court cannot compel the Government to do that which lies in its discretion to do when it considers it opportune to do. If the Parliament considers that the executive has betrayed its trust by not bringing the amendment into force, it can censure the executive.

GUPTA, J., in a dissenting judgment argued that S. 1(2) could not be construed to mean that Parliament left it to the unfettered discretion of the Central Government when to bring into force the provisions of the 44th Amendment. The Central Government is obligated to bring them into operation within a reasonable time: "The Central Government could not in its discretion keep it in a state of suspended animation for any length of time it pleased". There is no practical or administrative difficulty in effectuating the amendments to Art. 22.

GUPTA, J., was in favour of issuing *mandamus* to the Government directing it to issue a notification under S. 1(2) of the 44th Amendment effectuating the amendments to Art. 22 for S. 1(2) does not empower the executive to scotch an amendment of the Constitution duly enacted. TULZAPURKAR, J., also agreed with GUPTA, J., on this point.It is submitted that the minority view is more sound than the majority view because the executive ought not to be permitted to set at naught the will of the constituent power. The executive cannot annihilate the constitutional amendment by the simple expedient of not bringing it into force. The power given to the executive to bring the amendment into force can only mean within reasonable time needed to make the necessary administrative arrangements to give effect to the law. Delaying the enforcement of the amendment for an long as 22 years goes against the intention of the constituent power. The Court should therefore assess the *bona fides* and reasonableness of the executive action if it unduly delays the bringing into force of a constitutional amendment.

In the opinion of the author, S. 1(2) of the 44th Amendment Act ought to have been held constitutionally invalid as it amounts to delegation of constituent power which Parliament is not authorized to do. The power to issue the notification to bring a constitutional amendment into force cannot but be characterized as the constituent power, for, without such a notification, the Constitutional Amendment in question cannot be effectuated.

The best thing to do will be for the constituent power either to bring the amendment into force straightaway, or fix a ceiling on time-limit within which it should be brought into force and not leave the matter to the unfettered discretion of the executive. Further, the executive should not seek to thwart the wish solemnly expressed by the constituent authority through an amendment of the Constitution giving safeguards to the people against violation of their personal liberty.

(f) THE CONSTITUTION (FORTY-FIFTH) AMENDMENT BILL, 1978

Article 368 relating to the power of Parliament to amend the Constitution was again sought to be amended by the 45th Constitution Amendment Bill (CB 45).[5]

In *Kesavanada*, the Supreme Court, by a majority, had propounded the view that the fundamental or basic features of the Constitution could not be amended by Parliament under Art. 368. But the Court did not lay down conclusively as to what the basic features of the Constitution were. Some illustrations were given by some of the Judges but it was also stated that these were not exhaustive categories.[6] Also, it was not clear as to how these features could be amended if any amendment therein became absolutely necessary at any time.

The 42nd Amendment (CA 42) sought to amend Art. 368 with a view to give Parliament an unrestrained power to amend the Constitution including its basic features.[7] But the constitutional validity of CA 42 in this respect remained a matter of doubt. It remained a moot point whether the Supreme Court would overrule its view expressed in *Kesavananda* and accept the validity of amendments introduced in Art. 368 by CA 42. The odds were that the Court would reiterate its stand and declare Cls. (4) and (5) of Art. 368 (added by CA 42) unconstitutional.[8]

To cope with these various difficulties in the process of amendment of the Constitution, CB 45 proposed to amend Art. 368 so as to introduce therein the procedure of referendum to amend certain features of the Constitution. It was proposed to lay down a few features in Art. 368 and to provide that any amendment of any of these stated features of the Constitution would require approval of the people of India at a referendum. Thus, any amendment having the effect of—(a) impairing the secular or democratic character of the Constitution, or, (b) abridging or taking away the rights of citizens under Part III (*i.e.*, Fundamental Rights), or (c) prejudicing or impeding free and fair elections to the Lok Sabha or the State Legislative Assemblies on the basis of adult suffrage, or, (d) compromising the independence of the judiciary—was required to be approved by the people at a referendum.

Any amendment seeking to modify or omit the requirement as to such referendum was also required to be approved at such a referendum. The referendum was to be through a poll at which all voters for the Lok Sabha election were to be eligible to vote. An amendment was to be deemed to have been approved by the

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5. CB 45 is the abbreviation used in the text for the Constitution (Forty-fifth Amendment) Bill, which later became the Constitution (Forty-fourth Amendment) Act.
For its provisions, see, *infra*, next Chapter.

6. See, *supra*, Sec. D(e).

7. *Supra*; *infra*, Ch. XLII.

8. The Supreme Court ultimately declared this Amendment as unconstitutional in *Minerva Mills*, Sec. D(a).

people if approved by a majority of the voters at such poll at which at least fifty-one per cent eligible voters voted. The management of the referendum was to vest in the Election Commission. The result of the referendum as declared by the Election Commission was not to be called in question in any Court. Subject to these constitutional provisions, Parliament could make provisions with respect to all matters relating to the referendum. CB 45 also proposed to delete Cls. (4) and (5) introduced in Art. 368 through CA 42.[9]

The proposed amendments in Art. 368 were very wholesome. Referendum is a democratic process as it involves people's participation. Any constitutional amendment approved by the people at a referendum would signify approval of the amendment through national consensus. This could have been regarded as reiteration of the declaration in the Preamble that the Constitution of India has been adopted and enacted by the people of India.

For long, the Constitution had been the plaything of political parties having transient majority in Parliament, and amendments had often been introduced because of political expediency at the time. With the proposed amendments in Art. 368, this would have ceased and constitutional amendments would be mooted only when absolutely necessary.

These amendments would have also scotched the heresy that Parliament created by a written constitution was sovereign and could mutilate the Constitution in any way it liked. The proposed amendment would have made it impossible for a transient majority in Parliament to effectuate amendments in certain basic features of the Constitution including the Fundamental Rights. At the same time, no part of the Constitution was to be beyond amendment in theory. The provision for referendum would have deterred amendments being lightly introduced in some of the significant aspects of the Constitution. The role of the courts would have become confined to deciding, if a question were raised, whether a proposed amendment belonged to that category mentioned in Art. 368 which needed the procedure of referendum for being enacted. The Constitution would have come to enjoy that deep emotional respect in the hearts of the people which had been lacking so far because of its too frequent constitutional amendments.

Unfortunately, the *Rajya Sabha* where the Congress Party had a majority did not approve of these proposals although the *Lok Sabha* had passed the same by the requisite majority.

F. BASIC FEATURES OF THE CONSTITUTION

It is necessary to identify the basic features of the Constitution which are non-amendable under Art. 368. The question has been considered by the Court from time to time, and several such features have been identified, but the matter still remains an open one; no exhaustive list of such features has yet emerged and the Court has to decide from case to case whether a constitutional feature can be characterised as basic or not.

In the seminal *Kesavananda* case,[10] SIKRI, C.J., mentioned the following as the "basic foundation and structure" of the Constitution:

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9. *Supra*, Sec. D(g).
10. *Supra*, Sec. D(e).

(1) Supremacy of the Constitution;

(2) Separation of Powers between the legislature, the executive and the judiciary;[11]

(3) Republican and democratic form of Government;

(4) Secular character of the Constitution.

(5) Federal Character of the Constitution.

SIKRI, C.J., maintained that the above features are easily discernible not only from the Preamble but the whole scheme of the Constitution.

Other Judges mentioned in addition to the above three more basic features:

(6) The dignity of the individual secured by the various Fundamental Rights and the mandate to build a welfare state contained in the directive principles;

(7) The unity and integrity of the nation.[12]

(8) Parliamentary system.[13]

The above features have been mentioned as only illustrative and the list is not by any means exhaustive. Whether a feature of the Constitution is 'basic' or not is to be determined from time to time by the Court as and when the question arises.

Since *Kesavananda,* the matter has been considered by the Supreme Court in several cases and the Court has had occasion to declare several features of the Constitution as fundamental features or basic structures of the Constitution.

It is generally agreed that all Fundamental Rights do not constitute basic features. For example, in *Kesavananda* itself it has been held that the right to property does not pertain to the basic structure of the Constitution.[14] Now that Art. 31 has been repealed, and Art. 300A included in the constitution, right to property has ceased to be a Fundamental Right,[15] as well as basic feature of the Constitution. It is merely a constitutional right.[16]

In *Kihoto Hollohon*,[17] the Supreme Court has declared: "Democracy is a basic feature of the Constitution" and Election conducted at regular prescribed intervals is essential to the democratic system envisaged in the Constitution. So is the need to protect and sustain the purity of the electoral process. That may take within it the quality, efficiency and adequacy of the machinery for resolution of electoral disputes."

Again, in the same case, VERMA, J., in his minority opinion has declared: Democracy is a part of the basic structure of our Constitution; and the rule of law, and free and fair elections are basic features of democracy. One of the postulates

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11. Also see, *State of Bihar v. Bal Mukund Shah,* AIR 2000 SC 1296 : (2000) 4 SCC 640.
12. *Raghunath Rao v. Union of India,* AIR 1993 SC 1267; supra, Sec. E(c).
13. AIR 1973 SC at 1535, 1603, 1628 and 1860.
14. Also see, *Jilubhai Nanbhai Khachar v. State of Gujarat,* AIR 1995 SC 142 : (1955) Supp (1) SCC 596.
15. See, Ch. XLII, *infra,* under Forty-fourth Amendment, *supra,* Ch. XXXII, Sec. E.
16. *J.N. Khachar v. State of Gujarat,* AIR 1995 SC 154; *Waman Rao v. Union of India,* AIR 1981 SC 271; supra, Sec. E(b).
17. AIR 1993 SC 412; *supra,* Chs. II, Sec. F, III; VI, Sec. B(iv) and VII.

of free and fair elections is provision for resolution of election disputes as also adjudication of disputes relating to subsequent disqualifications by an independent authority.

In *Bommai*,[18] SAWANT and KULDIP SINGH, JJ., have observed: "Democracy[19] and Federalism are essential features of our Constitution and are part of its basic structure." This view is supported by RAMASWAMI, J., who has observed: "Federalism envisaged in the Constitution of India is a basic feature."[20]

In the same case, the Supreme Court has ruled that secularism is a basic or an essential feature of the Constitution. The concept of secularism is embedded in the Constitution. The concept means that the State is to accord equal treatment to all religions and religious sects and denominations.[21]

Secularism is also regarded as a facet of equality. How can the concept of equality be promoted if the state prefers and promotes one particular religion, race or caste which necessarily means being less favourable to other religious groups, sects or castes.[22]

In *Indira Gandhi v. Rajnarain*,[23] the Supreme Court has unequivocally ruled that the Preamble to the Indian Constitution guarantees equality of status and of opportunity and that the Rule of law is the basic structure of the Constitution.

The concept of equality which is the basic rule of law and that which is regarded as the most fundamental postulate of republicanism are both embedded in Art. 14. The doctrine of equality enshrined in Art. 14 of the Constitution, which is the basis of the Rule of law, is the basic feature of the Constitution.[24] Art. 16(1) is a facet of Art. 14. This point has been re-emphasized by the Court in *Indra Sawhney* (II):[25] "The Preamble to the Constitution of India emphasizes the principle of equality as basic to our Constitution."

In a plethora of cases,[26] the Supreme Court has asserted that independence of judiciary is a basic feature of the Constitution as it is the *sine qua non* of democracy; it is the most essential characteristic of a free society. This means that the judiciary ought to be kept free from the influence of political considerations and, therefore, judicial appointments cannot be left to the absolute discretion of the executive.[27]

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18. AIR 1994 SC 1918, at 1976 : (1994) 3 SCC 1.
19. *Indira Nehru Gandhi v. Raj Narain*, AIR 1975 SC 229 : (1975) 3 SCC 34; *supra*, Ch. XIX; *supra*, this Chapter.
20. AIR 1994 SC 1918 at 2045.
Also see, *Shri Kumar v. Union of India*, (1992) 2 SCC 428 : AIR 1992 SC 1213.
21. See, *supra*, Ch. XXIX, Sec. A, under 'Freedom of Religion'.
22. See, *S.R. Bommai v. Union of India*, *supra*. *M. Ismail Faruqui v. Union of India*, AIR 1995 SC 605 : (1994) 6 SCC.
23. AIR 1975 SC 2299 : 1975 Supp SCC 1.
24. *Nachane, Ashwini Shivram v. State of Maharashtra*, AIR 1998 Bom 1; *Raghunath Rao v. Union of India*, AIR 1993 SC 1267; *supra*, Sec. E(c).
25. *Indra Sawhney v. Union of India (II)*, AIR 2000 SC 498, at 517 : (2000) 1 SCC 168.
26. BHAGWATI, J., in *Union of India v. Sankal Chand Himmatlal* Sheth, AIR 1977 SC 2328 : (1977) 4 SCC 193 and the *Gupta* case, AIR 1982 SC 149 at 197, 198; *supra*, Ch. VIII; *Kumar Padma Prasad v. Union of India*, AIR 1992 SC 1213 : (2000) 4 SCC 640; *supra*, Ch. IV, Sec. K, Ch. VIII, Sec. F; *State of Bihar v. Bal Mukund Shah*, AIR 2000 SC 1296.
27. *Supreme Court Advocates-on-Record Assn. v. Union of India*, AIR 1994 SC 268; *supra*, Chs. IV, Sec. B(d) and VIII, Sec. B(d).

(a) JUDICIAL REVIEW

Several Articles in the Constitution, such as, Arts. 32, 136, 226 and 227, guarantee judicial review of legislation and administrative action.[28] It can be appreciated that protection of the institution of judicial review is crucially interconnected with the protection of Fundamental Rights, for depriving the Court of its power of judicial review would be tantamount to making Fundamental Rights non-enforceable, "a mere adornment", as they will become rights without remedy. In the absence of judicial review, the written constitution will be reduced to a collection of platitudes without any binding force. Accordingly, judicial review has been declared to be a basic feature of the Constitution. KHANNA, J., has emphasized in *Kesavananda*:[29]

> "As long as some fundamental rights exist and are a part of the Constitution, the power of judicial review has also to be exercised with a view to see that the guarantees afforded by those rights are not contravened.…judicial review has thus become an integral part of the constitutional system."

In *Minerva Mills*,[30] CHANDRACHUD, C.J., speaking on behalf of the majority observed:

> "It is the function of the Judges, nay their duty, to pronounce upon the validity of laws. If courts were totally deprived of that power, the fundamental rights conferred on the people will become a mere adornment because rights without remedies are as writ in water. A controlled constitution will then become uncontrolled."

In the same case, BHAGWATI, J., has observed:

> "It is for the judiciary to uphold the constitutional values and to enforce the constitutional limitations. That is the essence of the rule of law, which *inter alia* requires that the exercises of powers by the government whether it be the legislature or the executive or any other authority, be conditioned by the Constitution and the law. The power of judicial review is an integral part of our constitutional system and without it, there will be no Government of laws and the rule of law would become a teasing illusion and a promise of unreality. I am of the view if there is one feature of our Constitution which, more than any other, is basic and fundamental to the maintenance of democracy and the rule of law, it is the power of judicial review and it is unquestionably, to my mind, part of the basic structure of the Constitution."

BHAGWATI, J., however, went on to say that "effective alternative institutional mechanisms or arrangements" for judicial review can be made by Parliament. But he did emphasize that judicial review is a vital principle of the Constitution and if power of judicial review is taken away by a constitutional amendment, "it will be nothing short of subversion of the Constitution." But, according to BHAGWATI, J., it is not necessary to concentrate judicial review in the courts; if alternative tribunals are set up which are as efficacious and independent as the High Courts, then the power of judicial review can be transferred to such tribunals.

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28. See, *supra*, Chs. IV, VIII, Secs. D and E; Sec. C(iv), XX, Sec. C; and XXXIII, Sec. A. Also see, *supra*, XL.
29. *Supra*, Sec. D(e).
30. *Supra*, Sec. D(a).

In *Sampath Kumar*,[31] Bhagwati, C.J., observed : "Judicial review is a basic and essential feature of the Constitution and no law passed by Parliament in exercise of its constituent power can abrogate it or take it away. If the power of judicial review is abrogated or taken away the Constitution will cease to be what it is."

In *Subhesh Sharma v. Union of India*,[32] the Supreme Court has asserted that "judicial review is a part of the basic constitutional structure and one of the basic features of the essential Indian Constitutional policy." This means that the independence of the judiciary ought to be safeguarded. This means that the Chief Justice of India should play the primary role in the appointment of the High Court and Supreme Court Judges and not the executive. The Court has expressed the view that "the primacy of the Chief Justice of India in the process of selection would improve quality of selection." Again, in the case noted below,[33] the Supreme Court has asserted that "the powers conferred on it under Articles 32, 136, 141 and 142 form part of the basic structure of the Constitution."[34]

Article 323A has been added to the Constitution by the 42nd Amendment.[35] The Constitutional provision makes it possible for Parliament to set up tribunals for adjudicating upon service matters pertaining to government servants. Under Art. 323A(d), Parliament may "exclude the jurisdiction of all courts, except the jurisdiction of the Supreme Court under Art. 136, with respect to the disputes or complaints" assigned for decision to the service tribunal.

In pursuance of Art. 323A, Parliament enacted the Central Administrative Tribunal Act to set up a Central Administrative Tribunal to adjudicate upon disputes between the Central Government and its employees in service matters. Originally, the Tribunal was to be subject to the Supreme Court's jurisdiction under Art. 136. The Supreme Court's jurisdiction under Art. 32 and the High Court's jurisdiction under Arts. 226 and 227 were to be excluded. The constitutional validity of Art. 323A as well as that of the Administrative Tribunal Act came to be questioned before the Supreme Court in *S.P. Sampath Kumar v. Union of India*.[36]

The Court upheld both subject to certain modifications being introduced into the Act in question. The Supreme Court however made it clear at the earliest opportunity that it would not accept exclusion of its own jurisdiction under Art. 32 and, accordingly, Parliament suitably amended the Act to restore this jurisdiction of the Supreme Court. The Supreme Court's jurisdiction remaining intact, the basic question which arose for the Supreme Court's consideration was whether the Constitutional Amendment providing for exclusion of the High Court's jurisdiction could be regarded as constitutionally valid in view of what was said in *Minerva*.[37] Did it not affect one of the basic or fundamental features of the Constitution?

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31. *S.P. Sampath Kumar v. Union of India*, (1987) 1 SCC 124 : AIR 1987 SC 386.
32. AIR 1991 SC 631 at 646.
33. *Delhi Judicial Service Association, Tis Hazari Court v. State of Gujarat*, AIR 1991 SC 2176, at 2204 : (1991) 4 SCC 406
34. For these constitutional provisions, see, Chs. IV and XXXIII, *supra*.
35. *Supra*, Ch. VIII, Sec. I..
36. AIR 1986 SC 386 : (1986) 1 SCC 23.
37. *Supra*, Sec. D(a).

RANGANATH MISRA, J., delivering the Court's judgment, pointed out how in the face of mounting pressure of work on the High Courts which resulted in delayed justice, it became necessary to provide some alternative modes of dispute settlement. Even in *Minerva*, it was envisaged that "effective alternative institutional mechanisms or arrangements for judicial review" could be made by Parliament. As, in the instant case, judicial review by the Supreme Court remains intact, "exclusion of the jurisdiction of the High Courts does not totally bar judicial review". It was thus possible to provide an alternative institution to perform judicial review instead of the High Courts. But the condition was that the proposed tribunal should be a "real substitute", a "worthy successor" of the High Courts in all respects. The Court then proceeded to make a few suggestions for amendment of the Act in question for removal of certain deficiencies in the composition of the proposed Administrative Tribunal so as to make it a real and effective substitute for the High Courts. In the words of RANGANATH MISRA, J.:

> "What, however, has to be kept in view is that the Tribunal should be a real substitute of the High Court—not only in form and *de jure* but in content and *de facto*. As was pointed out in *Minerva Mills* the alternative arrangement has to be effective and efficient as also capable of upholding the constitutional limitations."

In a separate but concurring judgment, BHAGWATI, C.J., agreed with the majority view. He observed in this connection:

> "... judicial review is a basic and essential feature of the Constitution and it cannot be abrogated without affecting the basic structure of the Constitution and it is equally clear from the same decision (*Minerva*) that though judicial review cannot be altogether abrogated by Parliament by amending the Constitution in exercise of its constituent power, Parliament can certainly, without in any way violating the basic structure doctrine, set up effective alternative institutional mechanisms or arrangements of judicial review."

And, the Chief Justice went on to state further:

> "The basic and essential feature of judicial review cannot be dispensed with but it would be within the competence of Parliament to amend the Constitution so as to substitute in place of the High Court, another alternative institutional mechanism or arrangement for judicial review, provided it is not less efficacious than the High Court. Then, instead of the High Court, it would be another institutional mechanism or authority, which would be exercising the power of judicial review with a view to enforcing the constitutional limitations and maintaining the Rule of Law."

Therefore, according to *Sampat*, a constitutional amendment transferring from the High Court the power of judicial review in any specific area to any other institution, may not be violative of the basic structure doctrine so long as the essential condition is fulfilled, *viz.*, that the alternative institutional arrangement or mechanism or authority set up by parliamentary amendment is no less effective than the High Court.

Article 371-D was added to the Constitution in 1973 by the Thirty-Second Constitutional Amendment to make special provisions for the State of Andhra Pradesh for providing equitable opportunities and facilities to the people belonging to different parts of the State in such matters as education, public employ-

ment, etc.[38] Clause 3 of the above provision authorises the President to appoint an administrative tribunal to exercise jurisdiction, power and authority, including that exercised by any Court, except the Supreme Court, before the commencement of the 32nd Amendment Act, in respect of matters mentioned in Art. 371-D(3). According to Cl. 5, "the order of the Administrative Tribunal finally disposing of any case shall become effective upon its confirmation by the State Government or on the expiry of three months from the date on which the order was made, whichever was earlier." A proviso to this clause provided further that the State Government might, by a special order in writing and for reasons to be specified therein, "modify or annul" any order made by the Tribunal before it became effective and in such a case the order of the Tribunal would have effect only in such modified form or be of no effect as might be the case.

The constitutional validity of Clause 5 was challenged and in *P. Sambamurthy v. State of Andhra Pradesh*,[39] the Supreme Court struck it down, as being violative of the basic structure of the Constitution. BHAGWATI, C.J., delivering the Court's opinion, took objection to the power of the State Government to modify or nullify a Tribunal decision. The State Government would itself be a party in the dispute on which the Tribunal adjudicated. The Government could set at naught any Tribunal decision given against it. BHAGWATI, C.J., criticised this provision in the following words:

> "Such a provision is, to say the least, shocking and is clearly subversive of the principles of justice. How can a party to the litigation be given the power to override the decision given by the Tribunal in the litigation, without violating the basic concept of justice? It would make a mockery of the entire adjudicative process...We do think that this power conferred on the State Government is clearly violative of the basic concept of justice."

It was also held as "violative of the rule of law which is clearly a basic and essential feature of the Constitution." The Court also pointed out that for the validity of the constitutional provision authorising exclusion of the High Court's jurisdiction and vesting it in the Tribunal, it was necessary that the Tribunal "must be as effective an institutional mechanism or authority for judicial review as the High Court". "If the Administrative Tribunal is less effective and efficacious than the High Court in the matter of judicial review in respect of specified service matters, the constitutional amendment would fall foul of the basic structure doctrine." If the State Government, a party to the litigation before the Administrative Tribunal, had power to override Tribunal decision then the Tribunal would be deprived of its effectiveness and efficacy.

The power of judicial review vested in the High Court under Arts. 226 and 227 does not suffer from any infirmity of the character which the order of the Administrative Tribunal suffered in view of the provisions of Cl. (5) of Art. 371-D in as much as whatever the High Court decides is binding on the State Government and it cannot, for any reason, set at naught the decision of the High Court. But the decision of the Tribunal was, by reason of proviso to Cl. (5) of Art. 371-D, subject to the veto of the State Government. This made the Tribunal a less effective and efficacious institutional mechanism for judicial review. Hence BHAGWATI, C.J., observed:

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38. *Supra*, Ch. IX, Sec. B(e).
39. AIR 1987 SC 663 : (1987) 1 SCC 362.

> "....the conclusion is inescapable that the proviso to Cl. (5) of Art. 371-D by which power has been conferred on the State Government to modify or annul the final order of the Administrative Tribunal is violative of the basic structure doctrine since it is that which makes the Administrative Tribunal a less effective and efficacious institutional mechanism or authority for judicial review."

Therefore, the proviso to Cl. (5) was struck down as being outside the constituent power of Parliament. Not only that, the whole of Cl. 5 was struck down "as unconstitutional as being *ultra vires* the amending power of Parliament for if the proviso goes, Cl. 5 must also fall along with it" since it was closely interrelated with the proviso and could not have any rationale for existence apart from the proviso.[40]

But, then, the Supreme Court has reconsidered the ratio in the above cases and has changed its position in *L. Chandra Kumar v. Union of India*.[41] The Court has now ruled that the power of judicial review which is vested in the High Courts under Arts. 226 and 227 and the Supreme Court under Art. 32 of the Constitution, is an integral and essential feature of the Constitution, constituting part of its basic structure. Ordinarily, therefore, this power of the High Courts and the Supreme Court to test the constitutional validity of the legislation can never be ousted or excluded. Therefore, no constitutional amendment can exclude the power of the High Courts and the Supreme Court to test the constitutional validity of the legislation.

It is the function of the courts "to ensure that the balance of power envisaged by the Constitution is maintained and that the legislature and the executive do not, in the discharge of their functions, transgress constitutional limitations".[42] Accordingly, the Supreme Court has declared unconstitutional Cl. 2(d) of Art. 323A and Cl. 3(d) of Art. 323B,[43] to the extent these clauses exclude jurisdiction of the High Courts under Arts. 226 and 227 and of the Supreme Court under Art. 32. The Court has observed in this connection:[44]

> "The jurisdiction conferred upon the High Courts under Arts. 226/227 and upon the Supreme Court under Art. 32 of the Constitution is part of the inviolable basic structure of the Constitution. While this jurisdiction cannot be ousted, other courts and tribunals may perform a supplemental role in discharging the powers conferred by Articles 226/227 and 32 of the Constitution."

The Supreme Court has thus ruled that the writ jurisdiction vested in a High Court under Art. 226, and in the Supreme Court under Art. 32, as well as the power vested in the High courts to exercise judicial superintendence over the decisions of all courts and tribunals within their respective jurisdictions are all part of the basic structure of the constitution.

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40. The rest of Art. 371(D) has been held to be constitutional : *C. Surekha v. Union of India*, AIR 1989 SC 44; *Fazal Gafoor v. Union of India*, AIR 1989 SC 48 : 1988 Supp SCC 794; *S. Prakash Rao v. Commr. of Commercial Taxes*, AIR 1990 SC 997 : (1990) 2 SCC 259; *B Sudhakar Dr. v. Union of India*, AIR 1995 AP 86.

41. AIR 1997 SC 1125, at 1149-50 : (1997) 3 SCC 261.
Also see, *supra*, Ch. VIII, Sec. I.

42. AIR 1997 SC 1125 at 1150, 1156.
The Supreme Court has observed in *S.S. Bola v. B.D. Sardana*, AIR 1997 SC 3127 at 3167 : "Judicial Review, therefore, is an integral part of the Constitution as its basic structure."

43. For discussion on these provisions, see, *supra*, Ch. VIII, Sec. I.

44. AIR 1997 SC 1125 at 1156.

The Supreme Court has thus ensured that judicial review in an inseparable part of the Constitution, and that it cannot be excluded even by a constitutional amendment. Therefore, the position now is that while tribunals can be created to adjudicate upon various matters, the jurisdiction of the High Courts under Arts. 226/227 and that of the Supreme Court under Art. 32 cannot be excluded even by a constitutional amendment. Subject to these constitutional provisions, the tribunals may perform a supplementary role.

A finality clause in an Article in the Constitution conferring finality on the actions or decisions of an authority does not totally exclude judicial review of the actions and decisions of the concerned authority. A finality clause may however restrict to some extent the scope of judicial review. The broad categorisation is that actions falling within the jurisdiction of the authority are non-reviewable, but those falling outside its jurisdiction are reviewable by the courts. The category of 'outside jurisdiction' is quite broad. An action or decision of the authority falls outside its jurisdiction if—

(*i*) it is in contravention of a provision of law conferring power on the authority;

(*ii*) it is vitiated by *mala fides* or is colourable exercise of power based on extraneous or irrelevant considerations;

(*iii*) there is failure of natural justice;

(*iv*) it is based on no evidence.

This matter falls more appropriately within the realm of Administrative Law. According to modern judicial thinking, the category 'outside jurisdiction' is an expanding category. The above grounds are not exhaustive but rather illustrative.[45]

(b) *NON OBSTANTE CLAUSES*

Some provisions of the Constitution have *non obstante* clauses to the effect: "Notwithstanding anything in the Constitution…." For example, Cl. (2) of Art. 371 says: "Notwithstanding anything in this Constitution the President may by order…" And then, Cl. (10) of Art. 371D says: "The provisions of this Article and of any order made by the President thereunder shall have effect notwithstanding anything in any other provision of this Constitution…"

The question has been raised whether such a *non obstante* clause comes in the way of testing the provision against the touchstone of violation of the basic features of the Constitution. The Supreme Court has answered such a question in the negative. The Court has ruled that in spite of such a clause, the principle that no constitutional amendment can be made so as to damage any basic feature of the Constitution will prevail. Accordingly, in *Sambamurty*,[46] Art. 371D(5) was declared unconstitutional in spite of the presence of Cl. 10 of Art. 371D.[47]

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45. *State of Rajasthan v. Union of India*, AIR 1977 SC 1361 : (1977) 3 SCC 592; *Union of India v. Jyoti Prakash Mitter*, AIR 1971 SC 1093 : (1971) 1 SCC 396; *Kihoto Hollohon v. Zachillu*, AIR 1993 412 at 450-51 : 1992 Supp (2) SCC 651; M.P. JAIN, A TREATISE ON ADMINISTRATIVE LAW, II.

46. See, *supra*, footnote 39.

47. For discussion on these provisions, see, *supra*, Ch. IX, Sec. B(e).

Article 371F opens with the words "Notwithstanding anything in this Constitution…"[48] The validity of Cl. (f) of Art. 371F was questioned. It was argued that since Art. 371F opens with a *non obstante* clause, other provisions of the Constitution cannot limit the power of Parliament to impose conditions under Cl. (f). But the Supreme Court rejected the contention and observed in *R.C. Poudyal v. India*:[49]

> "But Art. 371-F cannot transgress the basic features of the Constitution. The *non obstante* clause cannot be construed as taking Clause (f) of Article 371-F outside the limitations on the amending power itself. The provisions of clause (f) of Article 371-E and Article 2[50] have to be construed harmoniously consistent with the foundational principles and basic features of the Constitution…"

In *Nachane*,[51] the Bombay High Court has held that the *non obstante* clause in Art. 371(2), as mentioned above, cannot come in the way of assessing the constitutionality of an order made by the President under Art. 371, *vis-à-vis* Art. 14. The Court has observed:[52]

> "…. the power of judicial review vested in the High Courts under Art. 226 of the Constitution is a part of the basic and essential feature of the Constitution constituting part of its basic structure. By virtue of the *non obstante* clause appearing at the beginning of Article 371 of the Constitution, this Court is not precluded from considering the validity of a rule made by the State Government…"

To sum up, it may be stated that the Supreme Court has made a very great contribution to the cause of constitutionalism in India by enunciating the doctrine of inviolability of the basic features of the Constitution. The doctrine is the result of a feeling among the judges that certain values and ideals embedded in the Constitution should be preserved and not destroyed by any process of constitutional amendment. The doctrine places an embargo on the erosion of basic features, but a constitutional amendment seeking to promote, strengthen and enlarge a basic feature would be most welcome. Undoubtedly, the doctrine has deterred the ruling party having a majority in both Houses of Parliament from effecting ill considered constitutional amendments, such as, the infamous 39th Amendment. The doctrine seeks to preserve the basic, core, constitutional values against the onslaught of a transient' majority in Parliament. The Constitution is not a party manifesto which can be amended by the party at its will to suit political expediency, but a national heritage which ought to be amended only when there is a broad national consensus favouring a specific amendment.

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48. See, *supra*, Ch. IX, Sec. D.
Also *infra*, Ch. XLII.
49. *Ibid*.
50. For Art. 2, see, *supra*, Ch. V.
51. *Nachane Ashiwni Shivram v. State of Maharashtra*, AIR 1998 Bom 1.
52. *Ibid*, at 22.

CHAPTER XLII

THE CONSTITUTIONAL AMENDMENTS

SYNOPSIS

During its career of nearly fifty years, the Indian Constitution has undergone a number of amendments. It may be helpful to have a brief resume of the salient features of these amendments and to understand the factors and forces which led to their enactment.

FIRST AMENDMENT: 1951

The Constitution (First Amendment) Act, 1951, was enacted within a year of the commencement of the Constitution. The First Amendment made several modifications in a few Fundamental Rights.

It added the following three more heads to Art. 19(2): 'public order', "friendly relations with foreign states', and 'incitement to an offence'. Thus, the legislature became entitled to restrict the freedom of speech and expression in respect of these three heads also in addition to the heads originally mentioned in Art. 19(2)[1].

The phrase 'friendly relations with foreign states' was needed to curb propaganda against Pakistan which was then going on in a rather virulent form.

Addition of the expressions 'public order' and 'incitement to an offence' were deemed necessary as the courts had held that 'security of state' was a restricted concept as compared with 'public order' and 'public safety' so that freedom of speech could not be curtailed merely for maintaining 'public order' and 'public safety' unless the 'security of state' was also threatened. On this basis, several laws were declared *ultra vires* as they restricted the freedom of speech for maintaining 'public order' and not 'security of state'.[2]

The Patna High Court in the *Shailabala* case[3] had ruled that only incitement to commit political assassinations, or murders, or crimes of violence intending to overthrow the state could affect 'security of state', but not incitement to commit any crime, and so the former and not the latter, could be restrained under the rubric 'security of state'. Although, simultaneously, the Madras High Court had decided in *Srinivasa v. State of Madras*[4] that even incitement of a single case of murder, or cognisable offence involving violence, might have a tendency to overthrow the state and thus affect its security, the *Shailabala* verdict had already gone home to the Central Government. Hence, Art. 19(2) was amplified to enable the legislature to make laws to restrict freedom of speech in the interests of 'public order' or put a restraint upon 'incitement to violence'.

In 1952, the Supreme Court overruled the *Shailabala*[5] case and, thus, much of the misunderstanding which the case had generated was cleared, and much of the justification for amending Art. 19(2) was removed, but the Supreme Court's decision came too late as the Amendment had already been effectuated.

In one respect, Art. 19(2) was improved by the First Amendment. Originally, Art. 19(2) did not contain the word 'reasonable' before the word 'restrictions', and so the courts could not assess the reasonableness of the restrictions imposed on the right guaranteed by Art. 19(1)(*a*). Art. 19(2) thus differed from Arts. 19(3) to 19(6) in which the expression 'reasonable restrictions' had been used. The word 'reasonable' was now introduced in Art. 19(2) thus making restrictions on the freedom of speech and expression justiciable.[6] This was a major gain.

The Amending Act added a clarificatory clause to Art. 19(6) to make it clear that the freedom of trade and commerce guaranteed by Art. 19(1)(*g*) was not to invalidate any scheme of nationalisation undertaken by the state. The need for this amendment was felt because of certain remarks made by the Judges of the Allahabad High Court in *Motilal v. State of Uttar Pradesh* which arose out of nationalisation of motor transport.[7]

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1. *Supra*, Ch. XXIV, Secs. C and D.
2. *Romesh Thappar v. State of Madras*, AIR 1950 SC 124 : 1950 SCR 594; *Brij Bhusan v. Delhi*, AIR 1950 SC 129 : 1950 SCR 605; *supra*, Ch. XXIV, Sec. D.
3. AIR 1951 Pat 12.
4. AIR 1951 Mad 70.
5. *Supra*, footnote 3.
6. *Supra*, Ch. XXIV. Also, XII Parl, Deb., II, 9010.
7. AIR 1951 All 257; *supra*, Ch. XXIV, Secs. I and J.

The First Amending Act curtailed the Fundamental Right to property guaranteed by Art. 31 with a view to achieve quick implementation of important measures of agrarian reform passed by the State Legislatures by immunizing the same against attack in the courts. This amendment added two new Articles, 31A and 31B, and the Ninth Schedule, so as to make laws acquiring zemindaris unchallengeable in the courts.[8]

The Patna High Court had declared the Bihar legislation unconstitutional under Art. 14,[9] while the High Courts of Allahabad and Nagpur had held similar laws valid. Before, however, the Supreme Court could give its verdict on the validity or otherwise of this type of legislation, the Central Government under Nehru became restive at the delay being caused by litigation in furthering the programme of agricultural land reform, and thought of short circuiting the judicial process. Nehru was an ardent supporter of agrarian reform which he regarded as a process of social reform and social engineering. The Centre wanted to remove any possibility of such laws being declared invalid by the courts and hence the amendment.

The Ninth Schedule was an interesting innovation in the area of constitutional amendment. A new technique of by-passing judicial review was initiated. Any Act incorporated in the Schedule became fully protected against any challenge in a court of law under any Fundamental Right. Even an act declared invalid by a court becomes valid retrospectively after being incorporated in the Schedule.

To begin with, only Acts abolishing zamindari were included in the Schedule. Thus, only thirteen State Acts named therein were put beyond any challenge in courts for contravention of Fundamental Rights. But Schedule IX has swelled and swelled in course of time as all kinds of statutes have been included therein to protect them from judicial review so much so that to-day the Schedule contains as many as 284 entries.[10]

Art. 15(4) was added to the Constitution under circumstances already explained earlier.[11]

Arts. 85 and 87 were amended so as to do away with the summoning of Parliament twice a year and the requirement of the President addressing the two Houses at the commencement of each session. Now, the provision is that not more than six months are to elapse between the last day of one session and the first day of the following session. The Houses are now prorogued only once a year and the President addresses the Houses of Parliament only at the commencement of the first session each year.[12]

Corresponding amendments were also made in Arts. 174[13] and 176[14] for the State Legislatures.

A few other minor amendments were made by the First Amendment in Arts. 341, 342, 372, which it is not necessary to detail here.[15]

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8. *Supra*, Ch. XXXII, Sec. C.
9. *Kameshwar v. State of Bihar*, AIR 1951 Pat 91; *supra*, Chs. XXI, XXXI and XXXII.
10. *Supra*, Ch. XXXII, Sec. C.
11. *Supra*, Ch. XXII, Sec. C.
12. *Supra*, Ch. II, Sec. G(b).
13. *Supra*, Ch. VI, Sec. C.
14. *Supra*, Ch. VI, Sec. C(b).

As has already been stated earlier, the constitutional validity of the First Amendment was challenged in the Supreme Court. The Court upheld the validity of the amendment in the famous *Shankari Prasad* case.[16]

SECOND AMENDMENT : 1952

The Constitution (Second Amendment) Act was passed in 1952.

Originally, Art. 81(1)(*b*) required that Lok Sabha would have not less than one member for every 7,50,000, and not more than one member for every 5,00,000, of the population. The strength of the Lok Sabha was fixed at 500 and at the rate of one member for every 7.5 lakhs of people, the formula became unworkable the moment the population reached 37.5 crores. The Amending Act, therefore, dropped the minimum requirement of one member for every 7.5 lakhs of people in Art. 81(1)(*b*). Only the maximum requirement was retained.[17]

Corresponding changes were effectuated in Art. 170(2) relating to the State Legislatures.[18]

This Amendment would not have been necessary had the constitution-makers taken into consideration the population trends in the country.

THIRD AMENDMENT : 1954

The Constitution (Third Amendment) Act enacted in 1954 amended the original entry 33 of List III, expanded its scope and gave it its present shape.

The Amendment somewhat changed the federal balance of power in favour of the Centre.

The factors leading to the Amendment and its impact on federalism in India have already been discussed earlier.[19]

FOURTH AMENDMENT : 1955

The Constitution (Fourth Amendment) Act, 1955, again amended Art. 31 in several respects.

In the first place, Art. 31(2) was modified.[20] Secondly, a new Article 31(2)(*A*) was added, the genesis and effect of which have been explained earlier.[21] The purpose of these amendments was to restate more precisely the State's power of compulsory acquisition and requisitioning of private property and to distinguish it from deprivation of property by the operation of regulatory or prohibitory laws. The amendments made it clear that it is only for the former, and not for the latter, that compensation becomes payable.

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15. For Arts. 341 and 342 see, *supra*, Ch. XXXV, Secs. B and C.
Art. 372 being of a temporary nature has exhausted itself: *supra*, Ch. XXXVII, Sec. F.
16. *Supra*, Ch. XLI, Sec. D(a).
17. *Supra*, Ch. II, Sec. C.
18. *Supra*, Ch. VI, Sec. B(ii).
19. *Supra*, Ch. X, Sec. F.
20. *Supra*, Ch. XXXI, Sec. C.
21. *Ibid.*

Another purpose of amending Art. 31(2) was to make the amount of compensation non-justiciable. For this purpose a new clause (2A) was added to Art. 31. This was done to get over the effect of the Supreme Court's decision in *State of West Bengal v. Bella Banerjee*. This point has also been explained earlier.[22]

To justify the necessity of the Fourth Amendment, so far as Art. 31(2) was concerned, an argument advanced by the Central Government was that the judiciary had held that compensation was payable for 'any deprivation of property' even by a purely regulatory law. The actual position, however, was somewhat different from the one this statement sought to make out. What the Supreme Courts had held was that compensation was payable in case of '*substantial* dispossession' or 'serious impairment' of the property right.[23] However, the Centre was not satisfied even with this and wanted to restrict payment of compensation only to a situation when there was acquisition involving transfer of ownership, or requisitioning involving transfer of the right to possession, to the State. The right to private property, therefore, became very much circumscribed by the Fourth Amendment and much came to depend on the goodwill of the Legislature.

Art. 31(2), as it stood prior to the Fourth Amendment, did not in so many words provide that no acquisition of property could be made save for a public purpose. By a verbal amendment of Art. 31(2), the Fourth Amendment now brought out more specifically than before that no private property was to be compulsorily acquired or requisitioned except for a 'public purpose'.

Before the Fourth Amendment, the point was implicit and the Supreme Court had already held in *State of Bihar v. Kameshwar Singh* that according to universal juristic notions, 'public purpose' was a prerequisite of 'eminent domain'.[24] The change therefore did not add much to the already existing legal position, but made explicit what was implicit earlier.

The Constitution (First Amendment) Act had added Art. 31A to protect the zamindari abolition laws from being challenged under Arts. 14, 19 and 31. Art. 31A was now expanded in scope with a view to extend the same immunity to other types of social welfare and regulatory legislation affecting private property.[25]

While sponsoring the Fourth Amendment, the Central Government claimed that the Amendment clarified and brought the Constitution in line with what its makers had intended. Prime Minister Nehru stated in the Lok Sabha (April 11, 1955) that according to the Constitution, as put forward before the Constituent Assembly, and as it emerged from there, it was made quite clear that the quantum of, or the principles governing, compensation were to be decided by the legislature. "It was obvious that those who framed the Constitution failed to give expression to their wishes accurately and precisely and thereby the Supreme Court and some other courts have interpreted it in a different way." The Amendment, it was claimed, was to word the Constitution precisely in accordance with what the framers of the Constitution at that time had envisaged, meant and openly said.

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22. *Supra*, Ch. XXXI, Sec. C.
23. *State of West Bengal v. Subodh Gopal*, AIR 1954 SC 92 : 1954 SCR 587; *Dwarkadas Shrinivas v. Sholapur Spinning Co.*, AIR 1954 SC 119 : 1954 SCR 674; *Saghir Ahmad v. State of Uttar Pradesh*, AIR 1954 SC 728 : (1955) 1 SCR 707; *supra*, Ch. XXXI, Sec. C.
24. *Supra*, Ch. XXXI, Sec. C(iv).
25. *Supra*, Ch. XXXII, Sec. B.

It is correct that Nehru and others in the Constituent Assembly had thought that the original Art. 31(2) made the legislature the final arbiter of the quantum of compensation which could not be challenged in a court except when there was a fraud on the Constitution or a fraudulent exercise of the power so given. To the extent the Fourth Amendment made compensation non-justiciable, it could be said to accord with the intentions of some of the constitution-makers. But the Amendment did not stop at that. It had a much broader coverage. Arts. 31A and 31B were much more extensive in scope than what the framers had ever thought of. The Amendment was made to serve certain purposes which the constitution-makers had not dreamt of. Social welfare legislation and regulatory legislation had only recently been thought of. The Amendment in effect reconstituted original Art. 31 in a every fundamental manner.[26]

The Fourth Amendment also added a few more Acts to the Ninth Schedule thus immunizing these Acts from attacks under Fundamental Rights. These Acts covered a wide canvass as they related to such matters as land acquisition for rehabilitation of refugees, insurance, railway companies, taking over of management of industrial undertakings under the provisions of the Industries (Development and Regulation) Act: land development and planning.

The Fourth Amendment also redrafted Art. 305, the necessity for which has already been explained earlier.[27] The main purpose of this exercise was to protect laws creating State monopolies or nationalising any undertaking from the operation of Art. 301. This Amendment was undertaken to neutralize the impact of *Saghir Ahmad v. State of Uttar Pradesh*[28] in which it was ruled that a law providing for a state monopoly would have to be justified as being in the public interest under Art. 301 or as amounting to a "reasonable restriction under Art. 304(*b*). It was thought to be necessary that Art. 305 should be amended to make this clear.[29]

FIFTH AMENDMENT : 1955

The Constitution (Fifth Amendment) Act enacted in 1955 amended Art. 3.

This Article envisaged that before Parliament passed an Act to re-organise the States, the Bill for the purpose should be referred by the President to the State Legislatures concerned for expression of their views thereon. A defect in the original Art. 3 was that it did not lay down a time-limit within which the States concerned were to express their views. The absence of any such limit could cause delay or even hold up Parliamentary Legislation for the purpose.[30]

The Government of India was anxious to expedite re-organisation of the States on a linguistic basis and it apprehended that an aggrieved State might forestall the passage of the necessary legislation by Parliament merely by non-expression of its views for any length of time. The Amending Act therefore made it possible for the President to set a time-limit within which a State must express

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26. See, H.C.L. Merrillat, Compensation for the Taking of Property : A Historical Footnote to *Bela Banerjee's* case, 1 *JILI* 375.
27. *Supra* Ch. XV, Secs. H and I.
28. *Supra*, Ch. XXIV, Sec. I(b).
29. *Supra* Ch. XV, Sec. I.
30. *Supra*, Ch. V, Sec. B.

its views. On the expiry of the prescribed time-limit, Parliament could proceed with the matter without waiting for the views of the State concerned.

SIXTH AMENDMENT : 1956

The Constitution (Sixth Amendment) Act, 1956, sought to remove some of the difficulties arising in the area of sales taxation by the States. The Amendment was passed to do away with multiple taxation of sale or purchase of goods in interstate trade and commerce by the States on the basis of territorial *nexus*.[31]

The Amendment emanated out of the recommendations of the Taxation Enquiry Commission which can be summarised as follows: while sales tax must continue to be a State source, the power and responsibility of the States must come to an end, and that of the Centre should begin, when the sales tax of one State impinges administratively on the dealers and fiscally on the consumers of another State. Therefore, interstate sales tax should be the concern of the Centre, but the revenue should devolve on the States.

Further, some restrictions should be placed on the State power to tax intrastate sale of raw materials produced therein, otherwise, the cost of the manufactured articles, whether manufactured in the State producing the raw materials, or in another State, would increase. Since manufactured goods are consumed mostly outside the State producing the raw materials, an increase in their cost due to State taxation is of direct concern to the consumers in other States, and, therefore, it is necessary that such intrastate sales be brought under the Central control. The matter had assumed importance after the Supreme Court's decisions in *State of Bombay v. United Motors* and *Bengal Immunity Co. v. State of Bihar*.[32]

The Amending Act made taxation of interstate sales a Central matter by introducing entry 92A in List I,[33] and making entry 54 in List II,[34] regarding sales taxation by the States, subject to entry 92A of List I. This change placed taxes on inter-State sales and purchases under the exclusive domain of the Centre's Legislative and executive power. The revenue thereby was to be distributed among the States.

There was some difficulty in finding out—(i) what was a sale 'outside' a State, or (ii) 'in the course of import and export', or (iii) 'in the course of inter-State trade and commerce' so as to debar a State from taxing any such sale.[35] Therefore, Art. 286 was modified so as to enable Parliament to define these concepts.

The Amending Act also added Art. 286(3) which was designed to enable Parliament to restrict States' power to tax important raw materials.[36]

Art. 269 was also amended by adding clause (g) thereto so as to assign the revenue arising from Central taxation of inter-State sales to the States.[37]

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31. For 'Territorial Nexus', see, *supra*, Ch. X, Sec. A.
For 'Sales Taxation', see, *supra*, Ch. XI, Sec. J(i).
32. *Supra*, Ch. XI, Sec. J(i).
33. *Ibid.*
34. *Supra*, Ch. XI, Sec. C; Sec. J(i)(b).
35. *Supra*, Ch. XI, Sec. J(i)(a).
36. *Supra*, Ch. XI, Sec. J(i)(d).
37. *Supra*, Ch. XI, Sec. K(i).

The cumulative result of the Sixth Amendment of the Constitution was to add to the power of the Centre and to place the States' power to levy sales tax under Central Government's control and regulation in several ways. This was done in the interests of discouraging the creation of trade barriers by the States in the way of, and avoiding multiple taxation of, interstate trade which might affect the emergence of the country into one single economic unit.

Further, the Constitution permits sufficient flexibility by leaving "to Parliament, instead of doing so itself or leaving it to the Courts as hitherto, the defining of such concepts as 'outside sale', 'sale in the course of inter-State trade and commerce.' 'sale in the course of import and export', and 'declaration of goods special importance in inter-State trade".[38] The Centre has passed the Central Sales Tax Act, 1956.

SEVENTH AMENDMENT : 1956

The Constitution (Seventh Amendment) Act, 1956, was necessitated primarily because of the re-organisation of the States on a linguistic basis as a result of the report of the States' Re-organization Commission. The opportunity was however utilised to effect modifications in several provisions of the Constitution.[39]

The scheme of States' re-organisation involved not only changes in the boundaries of several of the existing States, but also the abolition of the pre-existing classification of the States into those of Part A, Part B and Part C. By this Amendment, the States of Part A and Part B were placed on an equal footing while the States of Part C were now designated as Union Territories.[40] These various changes were effectuated by modifying Art. 1, substitution of Schedule I by a new Schedule,[41] and modifying Arts. 239, 240 and to 241 to provide for the administration of the newly formed Union Territories.[42]

Consequential amendments were effected in Art. 80 which were of a formal nature, but Schedule IV,[43] dealing with allocation of seats in the Rajya Sabha, was completely revised.

Arts. 81 and 82[44] dealing with the division of the States into constituencies for the purpose of election of members of the Lok Sabha (which had been modified by the Second Amendment)[45] were also completely revised because provision had to be made for Union Territories and also because the provision in the pre-existing Art. 81 for grouping of States for formation of constituencies for Lok Sabha became redundant as each of the newly formed States was large enough to be divided by itself into a number of constituencies. The stipulation of not more than one member in Lok Sabha for every 5 lakh of population was also dropped.[46]

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38. *Supra*, Ch. XI, Sec. J.
See ILI, *INTER-STATE TRADE BARRIERS AND SALES TAX LAWS IN INDIA* (1962).
39. *Supra*, Ch. V, Sec. B.
40. *Supra*, Ch. IX, Sec. A.
41. *Supra*, Ch. V, Sec. A.
42. *Supra*, Ch. IX, Sec. B.
43. *Supra*, Ch. II, Sec. B.
44. *Supra*, Ch. II, Sec. C.
45. *Supra.*
46. See Amendment II, *supra.*

Art. 131 defining the original jurisdiction of the Supreme Court[47] was revised because the States of Part B had now disappeared.

Art. 153[48] was modified so as to make it possible to appoint one person as the Governor of two or more States and, consequently, Art. 158 was amended so as to provide for the apportionment of salary of the common Governor among the States concerned.

Art. 168 was modified for providing Legislative Councils in a few more States,[49] and Art. 171 was revised so as to increase the strength of the Upper Houses in the States.[50] Art. 170[51] dealing with the composition of State Legislative Assemblies was revised so as to be brought in line with Art. 81 as revised as stated above.

In the case of High Courts, the following amendments were made:

(1) From Art. 216, the proviso requiring the President to fix the maximum strength of the Judges of each High Court was dropped because it was of little practical significance as the number once fixed could be changed by the President whenever he liked.[52]

(2) Art. 224 was modified so as to make provision for appointment of additional and acting Judges in the High Courts and, consequently, Art. 217 was also amended to clarify that the tenure of these Judges would be temporary and not up to 62 years as in case of permanent Judges.[53]

(3) Art. 220 was revised so as to permit a retired High Court Judge to practice in the Supreme Court and in any High Court other than the one in which he was a permanent Judge; this provision was made to attract talent to the High Courts.[54]

(4) Art. 222 was amended so as to make provision for transfer of a Judge from one High Court to another.[55]

(5) Arts. 230 and 231 were completely revised with a view to establishing common High Courts for two or more States and to extend to a Union Territory the jurisdiction of a High Court or exclude it therefrom, and, as a consequence, Art. 232 was omitted.[56]

(6) Salaries of the Judges of all High Courts were equated by amending the Second Schedule and the distinction previously maintained between High Courts of States of Part A and Part B in this respect was now abolished.

Art. 239 was re-drafted so as to provide for the administration of Union Territories.[57]

Art. 258A was added to enable a State to entrust its functions to the Centre.[58]

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47. *Supra*, Ch. IV, Sec. C(iii)(b)(c)(d).
48. *Supra*, Ch. VII, Sec. A(i)(b).
49. *Supra*, Ch. VI, Sec. B(i).
50. *Supra*, Ch. VI, Sec. B(i).
51. *Supra*, Ch. VI, Sec. B(ii).
52. *Supra*, Ch. VIII, Sec. B(a).
53. *Ibid.*
54. *Ibid.*
55. *Supra*, Ch. VIII, Sec. B(m).
56. *Ibid.*
57. *Supra*, Ch. IX, Sec. A.
58. *Supra*, Ch. XII, Sec. B(e).

Art. 298 was revised and amplified to clarify that the executive power of the Centre and the States extended to the carrying on of any business or industry, holding property and entering into contracts.[59]

Arts. 350A and 350B were inserted to implement one of the recommendations of the States' Re-organisation Commission to afford safeguards to the linguistic minorities.[60]

Art. 371 was revised so as to provide for regional committees for Andhra and Punjab.[61]

The pre-existing three entries, 33 of List I, 36 of List II, and 42 of List III, relating essentially to the single subject of acquisition and requisitioning of property by the government, gave rise to unnecessary technical difficulties in legislation. To avoid difficulties and simplify the constitutional provision, entries in List I and List II were omitted and entry 42 in List III was revised.[62]

Some slight modifications were also effected in Art. 49, entry 67, List I, entry 12, List II, entry 40, List III (taken in one group)[63] and in entry 24, List II.[64]

A few other minor amendments made to other Articles are not mentioned here.[65]

EIGHTH AMENDMENT : 1959

The Constitution (Eighth Amendment) Act, 1959, amended Art. 334, so as to extend the duration of the reservation of seats in Lok Sabha and State Legislative Assemblies for the Scheduled Castes, Scheduled Tribes and Anglo-Indians, originally fixed for ten years, to twenty years, from the commencement of the Constitution.[66]

NINTH AMENDMENT : 1960

The Constitution (Ninth Amendment) Act modified the description of boundaries, contained in the First Schedule to the Constitution, of the States of Assam, Punjab, West Bengal and the Union Territory of Tripura.

The Amendment had to be undertaken in the wake of the *Berubari* case.[67] The amendment of the First Schedule was effected to cede some Indian territory to Pakistan as envisaged in the Indo-Pakistan Agreement.

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59. *Supra*, Ch. XII, Sec. C.
60. *Supra*, Chs. XVI, Sec. C(c) and XXXV, Sec. F(a).
61. *Supra*, Ch. IX, Sec. B(e).
62. *Supra*, Ch. X, Sec. F.
63. In entries 67 in List I, 12 in List II, 40 in List III and Art. 49, for the words "declared by Parliament by law", the words "declared by or under law made by Parliament" were substituted: *supra*, Ch. X.
64. *Supra*, Ch. X, Sec. E.
65. Art. 290A was added to charge some money on the Consolidated Funds of Kerala and Madras for payment to a Travancore religious fund, *supra*.
A transitional provision, Art. 372A, was added conferring power on the President to adapt laws in conformity with the newly amended Constitution.
66. *Supra*, Chs. II, , Sec. C; VI, Sec. B(ii) and XXXV, Secs. B, C and D.
67. *Supra*, Ch. V, Sec. C.

TENTH AMENDMENT : 1961

The Constitution (Tenth Amendment) Act, 1961, made Dadra and Nagar Haveli (formerly under the Portuguese possession), a constituent unit of the Indian Union and gave it the status of a Union Territory.[68] Necessary changes were made in Art. 240(1) and the First Schedule.

ELEVENTH AMENDMENT : 1961

The Constitution (Eleventh Amendment) Act, 1961, was enacted to prevent election of the President or the Vice-President from being challenged on the ground of any vacancy existing at the time of election in the appropriate electoral college. The circumstances leading to the amendment have already been discussed.[69]

TWELFTH AMENDMENT : 1962

By this Amendment, the territory of Goa, Daman and Diu, formerly a Portuguese
colony, was integrated into India as a Union Territory.[70]

THIRTEENTH AMENDMENT : 1962

The Constitution (Thirteenth Amendment) Act, 1962, was enacted to effectuate an agreement between the Government of India and the leaders of the Naga Peoples' Convention to constitute a separate State of Nagaland within the Indian Union.

A new provision, Art. 371A, was added to the Constitution so as to make certain special provisions for the governance of the State of Nagaland.[71]

FOURTEENTH AMENDMENT : 1962

The Constitution (Fourteenth Amendment) Act, 1962, integrated the French establishments of Pondicherry, Karikal, Mahe and Yanam formally as a Union Territory of Pondicherry.[72]

Opportunity was taken to effect some changes with respect to the administration of the Union Territories. It was thought advisable to create Legislatures and Council of Ministers in some of the Union Territories, and, for this purpose, necessary legislative power had to be conferred on the Union Parliament. Accordingly, a new provision, Art. 239A, was added to the Constitution.[73]

The regulation-making power of the President under Art. 240 was extended to Pondicherry as well, but a proviso was also added to Art. 240 to make it clear

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68. *Supra*, Chs. V and IX, Sec. A.
69. *Supra*, Ch. III, Sec. A(i) and (ii).
70. *Supra*, Chs. V and IX.
71. For details see, *supra*, Ch. IX, Sec. B(b).
72. *Supra*, Chs. V and IX.
73. *Supra*, Ch. IX, Sec. A.

that the President's regulation-making power would come to an end when a Legislature was established in a Union Territory.[74]

FIFTEENTH AMENDMENT : 1963

The Constitution (Fifteenth Amendment) Act, 1963, was an omnibus constitutional amendment as it effected modifications in several constitutional provisions.

Art. 217(1) was amended to raise the retirement age of the High Court Judges from 60 to 62 years.[75] It partially gave effect to the recommendation of the Law Commission that the retirement age of the High Court Judges be raised to 65 years.

Two factors weighed with the Law Commission in making this recommendation; first, there was a marked rise in the life expectancy in India; secondly, many High Court Judges, after their retirement, were engaged in active work (like practice *etc*.) even at the age of 65. The Central Government did not go as far as the Law Commission had suggested, and stopped at 62 years for the High Court Judges with a view to keep avenues open for younger people. However, Art. 224A was added so as to enable a retired High Court Judge to sit and act as the Judge of the same court.[76]

Art. 128 was modified so as to make it possible for the retired High Court Judges to sit and act as *ad hoc* Judges of the Supreme Court. Previously, only retired Judges of the Supreme Court and the Federal Court could sit as such, but there were not many of such Judges, and, therefore, provision was made for retired High Court Judges as well to act as *ad hoc* Judges of the Supreme Court.[77]

Arts. 124 and 217 were amended so as to make a specific provision empowering the President to determine the correct age of the Judges of the Supreme Court and the High Courts, whenever a question is raised in that regard. This was necessitated by the protracted litigation pursued by Justice Mitter of the Calcutta High Court. There was a discrepancy in the age of Justice Mitter as accepted at the time of his appointment to the High Court and his age as recorded in his matriculation certificate. He was retired in accordance with the age shown in the certificate and this was challenged by Justice Mitter in the courts. It was to avoid such litigation in future that Arts. 124 and 217 were amended. Thus, two new provisions were added for the purpose : Art. 124(2A) to Art. 124 and Art. 217(3).[78]

It was considered desirable in public interest that Judges should be transferred from one High Court to another. Such transfer imposed additional financial burden on the Judge who would be so transferred. In order to provide an incentive to the Judges to accept transfers, Art. 222 was modified so as to pay to such a Judge some compensatory allowance in addition to his salary.[79]

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74. *Ibid.*
75. *Supra*, Ch. VIII, Sec. B(q).
76. *Supra*, Ch. VIII, Sec. B(j).
77. *Ibid.*
78. *Supra*, Chs. IV, Sec. B(l) and VIII, Sec. B(q).
79. *Supra*, Ch. VIII, Sec. B(o).

A significant modification made by the XV Amendment was in respect of Art. 226. Before the Amendment, only the Punjab High Court could issue writs under Art. 226 to the Central Government offices located at New Delhi.[80] This involved considerable hardship to litigantsfrom distant places. Therefore, a new provision, Art. 226(2), was added to Art. 226 to remove this limitation. The scope of the newly added clause has already been explained.[81]

The Calcutta High Court declared in *Paramath Nath v. Chief Justice*[82] that the expression 'organisation' occurring in entry 78 of List I did not include 'vacations'. Accordingly, the entry was amended to clarify that the expression 'organisation' would include 'vacations' as well.[83]

The words 'continental shelf' were added to Art. 297. This was to assert rights of India under International Law over the sea-bed and sub-soil of the continental shelf adjoining its territory and beyond the territorial waters.[84]

The Fifteenth Amendment also made some adjustments in Arts. 316 and 311 concerning public services. Art. 316 originally made no express provision for the appointment of an acting chairman for a public service commission in case of vacancy in the post of the chairman on account of leave or otherwise. The Amending Act removed this lacuna.[85]

The Amending Act substituted a new provision in the place of Art. 311(2) with a view to somewhat circumscribe the second opportunity of hearing given to civil servants in matters of dismissal, removal or reduction in rank. The implications of the new clause have already been stated earlier.[86]

SIXTEENTH AMENDMENT : 1963

The Constitution (Sixteenth Amendment) Act, 1963, was brought forward with a view to give effect to the recommendations made by the Committee on National Integration and Regionalism in November, 1962.

The Committee had recommended that—

(1) Art. 19 be so amended that adequate powers become available for the preservation and maintenance of the integrity and sovereignty of the Union;

(2) every candidate for membership of Parliament or State Legislatures, and every aspirant to, and incumbent of, a public office should pledge himself to uphold the Constitution and to preserve the integrity and sovereignty of the Union; and

(3) forms of oath in the Third Schedule to the Constitution should be suitably amended for the purpose.

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80. Originally, a High Court could not issue a writ against a person or authority residing or located outside its territorial jurisdiction : *Election Commission v. Saka Venkata Rao*, AIR 1953 SC 210; *Khajoor Singh v. Union of India*, AIR 1961 SC 532 : (1961) 2 SCR 828.
81. *Supra*, Ch. VIII, Sec. D(b).
82. AIR 1961 Cal 545.
83. *Supra*, Ch. VIII, Sec. H.
84. *Supra*, Ch. XXXVII, Sec. D.
85. *Supra*, Ch. XXXVI, Sec. K.
86. *Supra*, Ch. XXXVI, Sec. G(a).

These recommendations were effectuated by the Sixteenth Amendment by amending Arts. 19(2), (3) and (4) for enabling the state to make a law imposing reasonable restrictions on the exercise of rights conferred by Arts. 19(1)(*a*), (*b*) and (*c*) in the interests of the sovereignty and integrity of India.[87]

Arts. 84 and 173 and the forms of oath contained in the Third Schedule were modified.[88] Every candidate for membership of Parliament, or a State Legislature, Union and State Ministers, members of Parliament and State Legislatures, Judges of the Supreme Court and, the High Courts and the Comptroller and Auditor-General of India have to take an oath to uphold the sovereignty and integrity of India.

The amendment thus conferred adequate powers on the government to impose restrictions against those individuals or organisations who want to make secession from India or disintegration of India as political issues for the purpose of fighting elections.

SEVENTEENTH AMENDMENT : 1964

The Constitution (Seventeenth Amendment) Act, 1964, again circumscribed property rights guaranteed in Art. 31. This was the third amendment in the series, the earlier ones being the First and the Fourth.

The Kerala Agrarian Relations Act, 1961, was struck down by the Supreme Court in its application to *ryotwari* lands, as well as by the Kerala High Court in relation to lands other than 'estates' in the Malabar area on the ground that it transgressed Arts. 14, 19 and 31, because the protection of Art. 31A was not available to the lands in question as those were not 'estates'. Under Art. 31A, as it stood at the time, protection of Art. 31A was available only in respect of such tenures as were 'estates' on the 26th January, 1950, when the Constitution came into force.

The expression 'estate' bore different meanings in different States, and sometimes in different parts of the same State. Moreover, many of the land reform enactments related to lands which were not included in an estate. It thus became necessary to expand the scope of the word 'estate' so as to protect all this legislation. Accordingly, the Seventeenth Amendment was undertaken. It changed the definition of the word 'estate' by bringing within its scope *ryotwari* lands as well as other lands in respect of which provisions are normally made in land reform enactments. Therefore, Art. 31A(2)(*a*) was redrafted so as to give it its existing form.[89]

As a counterpoise to expanding the concept of 'estate', the same amendment also prohibited the State from acquiring any self-cultivated land within the ceiling fixed by law until compensation not less than the market-value was provided.[90]

The Ninth Schedule was further expanded by including therein forty-four State enactments with a view to immunize them from any attack in a court of law

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87. *Supra*, Ch. XXIV, Secs. D, E and F.
88. *Supra*, Chs. II and VI.
89. *Supra*, Ch. XXXII, Sec. B.
90. *Ibid.*

on the ground of breach of any Fundamental Right.[91] Schedule IX thus came to have 64 Acts inscribed therein which could not be challenged under any Fundamental Right. These Acts covered a very wide field, *e.g.*, ceiling on agricultural holdings, abolition of certain types of tenures, acquisition of land belonging to religious and charitable endowments, fixation of rent, protection of tenants from eviction, etc.

As has already been stated earlier, the constitutional validity of the XVII Amendment was challenged and upheld in *Sajjan Singh v. State of Rajasthan*[92]

EIGHTEENTH AMENDMENT : 1966

The Constitution (Eighteenth Amendment) Act, 1966, added two explanations to Art. 3 clarifying that the term 'State' in that Article would include a Union Territory as well.[93] This facilitated re-organisation of States and Union Territories by Parliament as and when necessary.

The Amendment also clarified that the power under Art. 3(*a*) includes power to form a new State or Union Territory by uniting part of a State or Union Territory to another State or Union Territory.

The Amendment was undertaken to facilitate re-organization of the State of Punjab and the Union Territory of Himachal Pradesh.

NINETEENTH AMENDMENT : 1966

Hitherto, election disputes were settled by election tribunals. The Constitution (Nineteenth Amendment) Act, 1966, modified Art. 324 so as to terminate the jurisdiction of election tribunals to decide election disputes. The Amendment withdrew from the Election Commission the power of setting up election tribunals.[94]

Thus, election tribunals were abolished. Later on, the Representation of the People Act, 1951, provided that election petitions were to be heard by the High Courts.[95]

TWENTIETH AMENDMENT : 1966

The Constitution (Twentieth Amendment) Act, 1966, was enacted to overcome the difficulties created in the functioning of the subordinate judiciary in the State of Uttar Pradesh as a result of the Supreme Court pronouncement in *Chandra Mohan v. State of Uttar Pradesh*.[96]

The case laid down certain norms for the appointment of district judges. This meant that all appointments of district judges made otherwise than according to these norms were illegal.

The Amendment added a new provision, Art. 233A, to the Constitution legalising these appointments. The Amendment also validated the judgments, de

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91. *Ibid.*
92. *Supra*, Ch. XLI, Sec. D(b).
93. *Supra*, Ch. V, Sec. B.
94. *Supra*, Ch. XIX, Sec. F.
95. *Ibid.*
96. AIR 1966 SC 1987 : (1967) 1 SCR 77; *supra*, Ch. VIII, Sec. G(b)(c)(d).

crees, orders and sentences passed or made heretofore by all such district judges whose appointments had been declared to be invalid by the Supreme Court.[1]

TWENTY-FIRST AMENDMENT : 1967

The Constitution (Twenty-first Amendment) Act, 1967, amended the Eighth Schedule to the Constitution by including 'Sindhi' therein.[2]

TWENTY-SECOND AMENDMENT : 1969

The Constitution (Twenty-second Amendment) Act, 1969, conferred legislative power on Parliament for the purpose of creating an autonomous Hill State within the State of Assam. For this purpose, a new provision, Art. 244A, was introduced in the Constitution.

Art. 371B, a new provision, was also added to provide for the constitution of a committee of Assam Legislative Assembly consisting of the members of the Assembly elected from Part A tribal areas and such other members as the President may notify for the purpose.

Accordingly, Parliament passed the Assam Re-organisation (Meghalaya) Act, 1969, to set up the State of Meghalaya within the State of Assam. This was a new experiment to meet regional aspirations within a State.[3]

TWENTY-THIRD AMENDMENT : 1969

The main purpose of the Constitution (Twenty-third Amendment) Act, 1969, was to extend the safeguards granted by the Constitution to the Scheduled Castes and Scheduled Tribes by ten more years. Therefore, the operation of Art. 334 (which had already been amended once earlier by the Eighth Amendment in 1959) was extended by a further period of ten years.[4]

Art. 333 was also amended so as to provide that the Governor of a State could appoint one member of the Anglo-Indian community to the State Assembly. Formerly, there was no such restriction, and the Governor could appoint as many members of the community as he considered appropriate to give it proper representation in the State Legislature.[5]

The State of Nagaland came into being in 1963. More than ninety percent of its population is tribal. It would, therefore, seem anomalous to reserve seats for tribals in the State of Nagaland. Accordingly, Arts. 330 and 332 were amended to discontinue any reservation for the Scheduled Tribes of Nagaland both in the Lok Sabha as well as in the State Legislature.[6]

TWENTY-FOURTH AMENDMENT : 1971

In *Golak Nath*[7], the Supreme Court had ruled that a constitutional amendment under Art. 368 which "takes away or abridges" a Fundamental Right would be void.

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1. *Supra*, Ch. VIII, Sec. G(b)(c)(d).
2. *Supra*, Ch. XVI, Sec. E.
3. *Supra*, Chs. V and IX, Sec. B(c).
4. *Supra*, Chs. II, VI and XXXV, Secs. B and C.
5. *Supra*, Chs. II, VI and XXXV, Sec. D.
6. *Supra*, Chs. II, V, IX, Sec. B(b) and XXXV, Sec. C.
7. *Supra*, Ch. XLI, Sec. D(c).

As a counter to this pronouncement, Parliament enacted the Constitution (Twenty-Forth Amendment) Act, 1971, to claim power to amend any part of the Constitution including the Fundamental Rights. The Amendment added clause (4) to Art. 13 saying that this article would not apply to an amendment of the Constitution made under Art. 368. Article 368 was also amended as discussed earlier.[8]

TWENTY-FIFTH AMENDMENT : 1971

The Constitution (Twenty-Fifth Amendment) Act, 1971, made many changes in Art. 31 following the *Bank Nationalisation* case.[9]

The word 'compensation' was replaced by 'amount'. No law was to be called in question on the ground that the amount fixed for property acquired was not adequate.

A new clause 31C was added declaring that a law giving effect to the state policy towards securing the Directive Principles contained in Arts. 39(*b*) or (*c*) would be held void because of its inconsistency with Arts. 14, 19 and 31. Further, a declaration in the law that it was enacted to give effect to the policy towards securing these Directive Principles would render the law immune from being challenged in any court on the ground that it did not give effect to such policy.[10]

The Amendment was widely criticized at several fora as an attack on the Fundamental Rights guaranteed by the Constitution. The Amendment gave rise to the famous *Kesavananda* case which has already been discussed earlier.[11]

TWENTY-SIXTH AMENDMENT : 1971

To get over the Supreme Court ruling in *Madhav Rao Scindia v. Union of India*,[12] the Constitution (Twenty-sixth Amendment) Act was enacted in 1971.

By this Amendment, the anomaly of having 'rulers' in a democratic set-up was done away with. The Amendment terminated the privileges and privy purses of the ex-rulers of the former Indian States.

Art. 291 providing for the payment of privy purses, and Art. 362 guaranteeing personal rights, privileges and dignities of the princes were omitted.[13] A new provision, Art. 363A, abolishing the institution of rulership and privy purses payable to them, was added to the Constitution. On the commencement of the Amendment, the recognition granted to the rulers of the Indian States was to cease.

Art. 366(22) was now recast. The term 'ruler' was to mean the 'ruler' recognised as such by the President before the enactment of the Amendment in question.

Also see, *infra.*

8. *Supra*, Ch. XX, Sec. C and Ch. XLI, Sec. D(c).
9. *Supra*, Chs XXXI, Sec. C(iii).
10. *Supra*, Chs. XXXII, Sec. D, Ch. XXXIV.
11. *Supra*, Ch. XLI. , Sec. D(e)
12. *Supra*, Ch. XXXVII, Sec. E.
13. *Ibid.*

The constitutional validity of this Amendment was challenged but the Supreme Court upheld the same in *Raghunath Rao v. Union of India*[14]. The Court ruled that Amendment XXVI did not infringe any basic structure or essential feature of the Constitution.

TWENTY-SEVENTH AMENDMENT : 1971

The Constitution (Twenty-seventh Amendment) Act, 1971, was enacted to implement the decision to establish the Union Territory of Mizoram.[15] It empowered Parliament to create a legislature and a council of ministers for the new Territory. This was achieved by adding Mizoram to Art. 239A.

A new Article 239B, was also added so as to confer power on the Administrators of Goa, Daman and Diu, Pondicherry and Mizoram to promulgate ordinances.[16]

TWENTY-EIGHTH AMENDMENT : 1972

Art. 314 guaranteed to the members of the ICS (Indian Civil Service which was in existence before the Independence) the same conditions of service as they were entitled to before the commencement of the Constitution. Art. 314 thus kept intact the privileges of the members of this service.

The Constitution (Twenty-eighth Amendment) Act, 1972, was enacted adding Art. 312A so as to enable Parliament to vary the conditions of service of the members of the Indian Civil Service who continued to serve the Government of India or a State after the commencement of the Constitution. Parliament was also empowered to vary the pension rights of the members of this service who had retired earlier. Art. 314 which gave security to the I.C.S. personnel in some respect was repealed.[17]

TWENTY-NINTH AMENDMENT : 1972

By the Constitution (Twenty-ninth Amendment) Act, 1972, two Kerala Acts dealing with land reforms were included in the IX Schedule to the Constitution.[18] These Acts thus received the protection of Art. 31B.

THIRTIETH AMENDMENT : 1972

Before 1972, under Art. 133, an appeal lay to the Supreme Court in any case involving the subject-matter of Rs. 20,000/- or more. Thus, appeals could be filed in the Supreme Court if the valuation test was satisfied whether it had any merit or not.

By the Constitution (Thirtieth Amendment) Act, 1972, Art. 133 was recast so as to redefine the civil appellate jurisdiction of the Supreme Court. Valuation test

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14. AIR 1993 SC 1267, at 1287; *supra*, Ch. XLI, Sec. E(c).
15. *Supra*, Chs. V and IX, Sec. E.
16. *Supra*, Ch. IX, Sec. A.
17. For Art. 314, see, M.P. JAIN, *INDIAN CONST. LAW* (II ed., 1970), 692.
18. *Supra*, Ch. XXXII, Sec. B.

was now dropped; an appeal now lies to the Supreme Court, if the High Court certifies that the case involves a substantial question of law which needs to be decided by the Supreme Court. This matter has been discussed earlier.[19]

The result of this Amendment is that while any case involving an important question of law can reach the Supreme Court by way of appeal, a case howsoever large the amount involved therein but involving no substantial point of law, would fail to reach the Supreme Court.

THIRTY-FIRST AMENDMENT : 1973

By the Constitution (Thirty-first Amendment) Act, 1973, the strength of the Lok Sabha was increased from 525 to 545 members.[20] This was done to accommodate the increase in population as revealed by the 1971 census. Accordingly, Art. 81(1)(*a*) was suitably amended.

The allocation of Lok Sabha seats among the States and the Union Territories after this Amendment was as follows: Andhra Pradesh, 42; Assam, 14; Bihar, 54; Gujarat, 26; Haryana, 10; Himachal Pradesh, 4; Jammu & Kashmir, 6; Karnataka, 28; Kerala, 20; Madhya Pradesh, 40; Maharashtra, 48; Manipur, 2; Meghalaya, 2; Nagaland, 1; Orissa, 21; Punjab, 13; Rajasthan, 25; Sikkim, 1; Tamil Nadu, 39; Tripura, 2; Uttar Pradesh, 85; West Bengal, 42; Andaman & Nicobar, 1; Arunachal Pradesh, 2; Chandigarh, 1; Dadra & Nagar Haveli, 1; Delhi, 7; Goa, Daman and Diu, 2; Lakshadweep, 1; Mizoram, 1; Pondicherry, 1; Total, 542.

Of these, 78 members belonged to the Scheduled Castes and 38 to the Scheduled Tribes.

THIRTY-SECOND AMENDMENT : 1973

The Constitution (Thirty-second Amendment) Act, 1973, was enacted to make a few special provisions for the State of Andhra Pradesh to satisfy the aspirations of the people of the Telengana region. These provisions have been noted earlier.[21]

THIRTY-THIRD AMENDMENT : 1974

The Constitution (Thirty-third Amendment) Act, 1974, amended Arts. 101 and 190.[22]

Before the Amendment, the resignation of a member of a State Legislature/Parlia-ment became effective the moment it was tendered. The Speaker/Chairman had no option as the element of acceptance of the resignation was absent and the member's seat became automatically vacant even when his

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19. *Supra*, Ch. IV, Sec. C(iv)(c).
20. *Supra*, Ch. II, Sec. C.
21. *Supra*, Ch. IX, Sec. B(e).
22. *Supra*, Chs. II, Sec. E(b) and VI, Sec. B(v)(b).

resignation may not be voluntary and may have even been induced by force or threats.[23]

This position was now changed. A resignation becomes effective only after it has been accepted by the presiding officer of the House concerned. He may refuse to accept the resignation if he is satisfied after making such inquiry as he thinks fit that the resignation is not voluntary or genuine. This precautionary provision appeared to be necessary to avoid the members of Parliament or of State Legislatures being forced to resign.

THIRTY-FOURTH AMENDMENT : 1974

By the Constitution (Thirty-fourth Amendment) Act, 1974, twenty State Acts concerning land ceiling and land tenure reforms were added to the Ninth Schedule to the Constitution, so as to put them under the protection of Art. 31B.[24] These laws have thus been given immunity from challenge in the courts on the ground of violation of Fundamental Rights.

THIRTY-FIFTH AND THIRTY-SIXTH AMENDMENTS : 1974-75

The Constitution (Thirty-fifth Amendment) Act, 1974, introduced an innovation in the Indian Constitution by conferring on Sikkim the status of an associate in the Indian Union. This was done in pursuance of the wishes of the people of Sikkim with a view to strengthen Indo-Sikkim co-operation and inter relationship.

For this purpose, a new schedule (X Schedule) was added to the Constitution setting out the terms and conditions for association of Sikkim with India. The XXXV Amendment also provided for the representation of Sikkim in the Lok Sabha and the Rajya Sabha.

This however proved to be a short-lived experiment. The people of Sikkim desired to be an integral part of India. Accordingly, the Constitution (Thirty-sixth Amendment) Act was enacted in 1975 to confer fullfledged statehood on Sikkim.[25]

A new Article (Art. 371F) has been added to the Constitution making special provisions for Sikkim in regard to such matters as the State Legislative Assembly, High Court, responsibility of the Governor for peace and social and economic advancement of different sections of the population of Sikkim *etc.*

Cl. (f) of Art. 371F runs as follows :

> "Parliament may, for the purpose of protecting the rights and interests of the different sections of the population of Sikkim make provision for the number of seats in the Legislative Assembly of the State of Sikkim which may be filled by candidates belonging to such sections."

The constitutional validity was attacked on the ground that it went against the basic feature of the Constitution as it violated the principle of 'one person one

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23. See, *M. Kunjukrishnan Nadar v. Speaker, Kerala Leg. Ass.*, AIR 1964 Ker. 194; *Surat Singh Yadava v. Sudama Pd.*, AIR 1965 All. 536.
24. *Supra*, Ch. XXXII, Sec. C.
25. *Supra*, Chs. V and IX, Sec. D.

vote'. By majority, the Supreme Court rejected the contention in *R.C. Poudyal v. Union of India*[26] holding that the provision in question did not depart so much as to negate fundamental principles of democracy.

The Court also ruled that Art. 2 which permits accession of new States to the Indian Union does not confer power on Parliament to override the constitutional scheme.[27]

THIRTY-SEVENTH AMENDMENT : 1975

The Constitution (Thirty-seventh Amendment) Act, 1975, upgraded the status of Arunachal Pradesh as a Union Territory.

Arts. 239A and 240 were amended so as to authorise Parliament to create for Arunachal Pradesh a legislature and a council of ministers. After the legislature was established, the President ceased to have power to make regulations for the Union Territory.[28]

THIRTY-EIGHTH AMENDMENT : 1975

The Constitution (Thirty-eighth Amendment) Act, 1975, was enacted during the emergency (1975-1977) to make certain modifications in the emergency provisions.

Amendments were made in Art. 352 with a view to make the proclamation of emergency of 1975 beyond any question although it was issued when the proclamation of emergency on the ground of external aggression had already been in operation since 1971.[29]

The presidential 'satisfaction' to issue a proclamation was declared to be 'final and conclusive'.[30]

The amendment of Art. 352 became necessary because contentions were made in some writ petitions filed in the High Courts to the effect that while one proclamation of emergency under Art. 352 was in operation, another proclamation of emergency could not be made. Art. 352 was thus amended so as to make it clear that the President could issue different proclamations of emergency on different grounds whether or not there was already a proclamation in existence and in operation.

A clarificatory clause was added to Art. 356(1) so as to make presidential 'satisfaction' to issue a proclamation thereunder as 'final and conclusive' which 'shall not be questioned in any court on any ground.'[31]

A new clause was added to Art. 359 to bring its phraseology in line with that of Art. 358. This aspect of the matter has already been explained.[32]

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26. AIR 1993 SC 1804; *supra*, Ch. V, Sec. B; Ch. IX, Sec. D.
27. Also see, *Mangal Singh v. Union of India*, AIR 1967 SC 944 : (1967) 2 SCR 109; *supra*, Ch. V, Sec. B.
28. *Supra*, Chs. V, Sec. A; IX, Sec. A.
29. See, *supra*, Chs. XIII, Sec. B(a) and XXXIII, Sec. F.
30. *Supra*, Ch. XIII, Sec. B(a).
31. *Supra*, Ch. XIII, Sec. E.
32. *Supra*, Ch. XIII, Sec. D(c).

The Presidential 'satisfaction' under Art. 360 was also made 'final and conclusive'.[33]

This Amendment also declared that the 'satisfaction' of the President and a State Governor to issue ordinances [Arts. 123 and 213] would be 'final and conclusive' and 'shall not be questioned in any court on any ground.'[34] These provisions were made as a matter of abundant caution because the courts in several pronouncements had already taken the position that "the necessity of immediate action and of promulgating an ordinance is a matter purely for the subjective satisfaction of the Governor. He is the sole judge as to the existence of the circumstances necessitating the making of an ordinance. His satisfaction is not a justiciable matter. It cannot be questioned on the ground of error of judgment or otherwise in court."[35]

The 'satisfaction' of the Administrator of a Union Territory to issue an ordinance under Art. 239B was also made 'final and conclusive.'[36]

It hardly needs to be pointed out that the 'satisfaction' of the head of the state is only formal; the effective power in this respect lies with the council of ministers.[37]

In *Pran Nath v. Union of India*,[38] the Delhi High Court held the 38th Amendment valid although it excluded judicial review of the 'satisfaction' of the President to declare emergency under Art. 352(1). The court argued that judicial review was not a basic feature of the Constitution and that, in specified fields, lack of judicial review might not affect any basic feature of the Constitution. The Constitution itself from the very beginning recognised certain areas where there might not be judicial review, *e.g.*, election.

As against this reasoning of the High Court, it needs to be mentioned that reading the Constitution as a whole, one will get the impression that judicial review is regarded as an integral part of the total constitutional scheme as a number of Articles in the Constitution provide for judicial review.

KHANNA, J., emphasized upon the importance of judicial review in *Kesavananda*.[39] In *Indira Nehru Gandhi*, the Supreme Court emphasized upon the role of the judiciary as a dispute resolving machinery. [40] The concepts of constitutionalism and Rule of Law cannot be preserved without a robust judicial system.[41]

The fundamental features mentioned by the various Judges in *Kesavananda* involved judicial review. However, in course of time, it has become established

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33. *Ibid.*
34. Art. 123, *supra*, Ch. III, Sec. D(ii)(d); Art. 213, *supra*, Ch. VII, Sec. D(ii)(c).
35. *S.K.G. Sugar v. State of Bihar*, AIR 1974 SC 1533 : (1974) 4 SCC 827; *supra*, Chs. III, Sec. D(ii)(d) and VII, Sec. D(ii)(c).
36. *Supra*, Ch. IX, Sec. A.
37. *Supra*, Chs. III, Sec. B and VII, Sec. B.
38. AIR 1977 Del 167.
39. *Supra*, Ch. XLI, Sec. D(e).
For Judicial Review, see, Ch. XL, Secs. A and C.
40. *Supra*, XLI, Sec. D(f).
41. *Supra*, Ch. I, Secs. B and C.

that judicial review is a basic feature of the Constitution which cannot be eroded by an amendment of the Constitution made under Art. 368.[42]

THIRTY-NINTH AMENDMENT : 1975

The voiding of the election to Lok Sabha of Prime Minister Indira Gandhi by the Allahabad High Court in 1975 on the petition of Raj Narain led to the enactment of the Constitution (Thirty-ninth Amendment) Act, 1975.[43] The Amendment introduced changes in the method of deciding election disputes relating to the four high officials of the Country, *viz.*, President, Vice-President, Prime Minister and the Speaker of Lok Sabha.

As regards the President and Vice-President, the basic change introduced was that jurisdiction was taken away from the Supreme Court to decide any doubts and disputes arising in connection with their election.[44] Under the new Art. 71(2), Parliament by law was to establish some 'authority' or 'body' for deciding such disputes, and its decision was not to be challengeable in any court.[45]

Elections of the Prime Minister and the Speaker to the Parliament were also taken out of the election-dispute settling mechanism envisaged in Art. 329.[46] Art. 329A dealt with election to either House of Parliament of a person who held the office of the Prime Minister at the time of such election, or was appointed as Prime Minister after such election, and to the House of People of a person who held the office of the Speaker at the time of such election, or who was chosen as the Speaker after such election.

The election of any such person was not to be called in question, except before such 'authority' or 'body', and in such manner, as was to be provided for by or under any law made by Parliament. Such an authority would not be the one as was referred to in Art. 329(*b*). The law of Parliament could provide for all other matters relating to doubts and disputes in relation to such election including the grounds on which such election could be questioned.

This law of Parliament was to be subject to clause (1) of Art. 102 except sub-clause (*e*).[47] This meant that parliamentary law could not remove the following disqualifications for election to Parliament as contemplated by sub-clauses (*a*) to (*d*) of Art. 102(1) : holding an office of profit; being of unsound mind; being an undischarged insolvent; not being a citizen of India; voluntarily acquiring the citizenship of a foreign State, or being under any acknoweldgement of allegiance or adherence to a foreign State.

The Parliamentary law would not however be controlled by Art. 102(1)(*e*) which lays down that a person shall be disqualified for being chosen as, and for being a member of, any House of Parliament if he is so disqualified by or under any law made by Parliament. Thus, Parliament could remove the disqualification envisaged in Art. 102(1)(*e*).

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42. *Supra*, XLI, Sec. F(a).
43. *Supra*, Chs. XIX, Sec. F; XLI, Sec. D(f).
44. *Supra*, Chs. III, Sec. A(i)(b) and IV, Sec. C(iii)(a).
45. Ch. IV, *supra.*
46. *Supra*, Ch. XIX, Sec. F.
47. *Supra*, Ch. II, Sec. D.

Under Art. 329A(2), the validity of a parliamentary law envisaged in Art. 329A(1), and the decision of any authority or body under such law could not be called in question in any court.

The effect of clauses (1) and (2) of the new Art. 329A thus was that the election of the Prime Minister and the Speaker to a House of Parliament or Lok Sabha respectively would be governed by one law, while election of the other members of Parliament would be governed by another law.

The Thirty-ninth Amendment did not stop here. It went further and sought to nullify the High Court decision voiding the election of Prime Minister Indira Gandhi and declare it to be valid. The main provision made for this purpose was clause 4 in Art. 329A which consisted of four parts:

1. No law made by Parliament before the commencement of the Constitution (Thirty-Ninth Amendment) Act, 1975, insofar as it related to the election petitions was to apply, or be deemed ever to have applied, to the election of the Prime Minister or the Speaker to Parliament.

2. Such election was not to be deemed to be void, or ever to have become void, on any ground on which such election could be declared to be void, or has been declared to be void under any such law.

3. Notwithstanding any court order declaring such election to be void, it was to continue to be valid in all respects;

4. Any such order and any finding on which such order was based was to be deemed always to have been void and of no effect.

This part of Art. 329A validating an election already held void by the High Court was declared to be unconstitutional by the Supreme Court in *Indira Nehru Gandhi v. Raj Narain.*[48] The Court criticised the 39th Amendment as negation of rule of law, anti-democratic, lawless and one which denied equality before law.

No one can imagine a greater misuse of the power to amend the Constitution than what is represented by the XXXIX Amendment when just to validate the election of one person, the Constitution was drastically amended. The Supreme Court rendered a yeoman service to the Constitution by vetoing such a distorted law.

The case provides sterling testimony to the worth of the doctrine that the fundamental features of the Constitution could not be amended. There always lurks the danger that the ruling party with the help of its majority in the two Houses of Parliament may introduce distortions in the Constitution to suit its own political agenda. It may be remembered that to keep-herself in power, Prime Minister Indira Gandhi even imposed the emergency on the country in 1975.[49]

On merits, however, the Supreme Court accepted the appeal of the Prime Minister against the High Court's judgment and held her election to Lok Sabha to be valid.

The Thirty-ninth Amendment also extended immunity to a number of statutes from judicial purview on the ground of infringement of Fundamental Rights by including them in the Ninth Schedule.[50]

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48. Art. 1975 SC 2299 : 1975 Supp SCC 2; *supra*, Ch. XLI, Sec. D(f).
49. See, *supra*, Ch. XIII, Sec. B, Ch. XXXIII, Sec. F; XLI, Sec. D(f).
50. *Supra*, Ch. XXXII, Sec. C.

FORTIETH AMENDMENT : 1976

The Constitution (Fortieth Amendment) Act, 1976, extended immunity to 64 Central and State statutes by including them in the IX Schedule. These statutes pertained to land reform, urban ceiling, and prevention of publication of objectionable matter.[51]

This Amendment also substituted a new Art. 297 for the old one with a view to enlarge the scope of India's sovereign rights over sea wealth and include therein the concept of exclusive economic zone. All resources in the exclusive economic zone have been vested in the Union. This aspect of the matter has already been explained earlier.[52]

FORTY-FIRST AMENDMENT : 1976

The Constitution (Forty-first Amendment) Act, 1976, raised the age of retirement of the chairman and members of State Public Service Commissions from 60 to 62.[53] This brought the age of retirement of these persons in line with that of the High Court Judges.[54]

FORTY-SECOND AMENDMENT : 1976

The Constitution (Forty-second Amendment) Act, 1976, is the most controversial and debatable piece of constitutional amendment ever undertaken in India since 1950.[55] The Amendment Act was primarily the handiwork of the Congress Party and comprised mostly the proposals made by a Committee of the party headed by *Swaran Singh*. It was an *omibus* measure introducing modifications in a number of constitutional provisions. This Amendment amended the Preamble to the Constitution, 40 Articles and the Seventh Schedule, and added 14 new Articles to the Constitution.

A fundamental objection against this Amendment Act is that it was undertaken during the emergency period when most of the members of the opposition were detained in preventive detention and when a free, frank and fair discussion of the arguments for and against the proposed modifications was not possible. The two Houses of Parliament consisted of an overwhelming majority of the members of the ruling Congress Party and so it became more or less a party affair rather than a product of national consensus.

The Amendment Act introduced a number of changes in the Constitution, some of which happened to be of great significance in so far as they sought to tilt the balance of power in favour of the executive and away from the judiciary and the legislature and, thus, the control-mechanism over the executive was sought to be weakened. The dominant thrust of the Amendment Act in question was to reduce the role of the courts, particularly, that of the High Courts, in the coun-

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51. *Supra*, Ch. XXXII, Sec. C.
52. *Supra*, Ch. XXXVII, Sec. D.
53. *Supra*, Ch. XXXVI.
54. *Supra*, Ch. VIII, Sec. B(q).
55. This Act received the assent of the President on December 18, 1976. Some of the provisions became operative on Jan. 3, 1977, while others were enforced from Feb. 1, 1977.

try's judicial and constitutional process. It also sought to strengthen Parliament in various ways which in effect added to the power of the Central Government. Besides, the powers of the Central Government were enhanced in several other directions.

In the area of federalism, the centralising tendency was further strengthened in several directions at the cost of the States. Above all, the importance of Fundamental Rights was greatly devalued. Thus, the whole complexion of the Constitution was sought to be changed so as to reduce the element of constitutionalism therein. No wonder, then, that with the lifting of the emergency in 1977, there was a strident public demand that the 42nd Amendment be scrapped. The new Janata Government was committed to the removal of the objectionable features of this Amendment, and it did redeem its pledge to a large extent by enacting the 44th Amendment to undo most of the objectionable provisions of the 42nd Amendment.[56]

The main reasons stated by the Law Minister on behalf of the then Central Government in justification of the various modifications being effectuated in the Constitution by the 42nd Amendment Act were: the supremacy of the Parliament should be asserted, especially in respect of its constituent power under Art. 368 which should be uncontrolled and subject to no judicial review; hurdles and obstacles in the way of enactment of socio-economic legislation should be removed so that the pace of improvement of the condition of the masses may be accelerated and this could be achieved by declaring that the Directive Principles override the Fundamental Rights; the sense of confrontation between the judiciary and Parliament should be removed and to achieve this, powers of the courts need to be curtailed somewhat and jurisdiction of the courts redefined with greater precision.

The several amendments made in the Constitution by the 42nd Amendment Act [hereinafter designated as CA 42] are noted below in the order in which the various topics have been discussed in the body of the book.

PREAMBLE

Constitutional Amendment 42 has made two changes in the Preamble.

First, the characterisation of India as "sovereign democratic republic" has been changed to "sovereign socialist secular democratic republic". Thus, the concepts of 'socialism' and 'secularism' which were implicit in the Constitution were now made explicit and India's commitment to these ideals was further underlined and strengthened.[57]

Secondly, the words "unity of the nation" in the clause in the Preamble explaining 'Fraternity' were changed to "unity and integrity of the nation". This change was made to lay emphasis on indivisibility of the country along with the unity of the nation.[58]

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56. *Infra*, *eq. seq.*, Sec. E(c).
57. *Supra*, Ch. I, Sec. E(c) and Ch. XXXIV, Sec. A, for Preamble.
For secularism see, *supra*, Ch. I, Sec. E(f) and Ch. XXIX, Sec. A, for socialism.
58. *Supra*, Ch. I and XXXIV, Sec. A.

PARLIAMENT AND STATE LEGISLATURES

The Constitution provided for readjustment in constituencies for election to *Lok Sabha*,[59] and State Legislative Assemblies,[60] after every census held at an interval of ten years. This process was frozen by CA 42 at the point of 1971 census till the holding of the first census after the year 2000. The idea is to give a fillip to the family planning programme in the country. A State can neither claim an increase in, nor will it lose any, seat in the *Lok Sabha* with the increase or decrease in its population. This is expected to provide a better motivation to the States to intensify family planning programmes.

The fixation of the number of seats for the Scheduled Castes and the Scheduled Tribes in Lok Sabha and State Legislative Assemblies was also frozen by CA 42 at the level of the 1971 census until the first census to be held after the year 2000.[61]

Hitherto, the quorum in a House of Parliament, or a State Legislature, was fixed by the Constitution at 1/10 of the total members of the House, but this could be changed by law.[62] CA 42 changed this position. It left the quorum to be fixed by the rules of each House.[63]

Thus, quorum ceased to be a substantive matter and became merely a procedural matter. A House has power to suspend its rules of procedure and so it can suspend the rule relating to quorum as well any time it likes, and transact any business without a quorum. Because of the principle of internal autonomy of the House, the validity of anything purported to have been done by the House without the requisite quorum would not be challengeable in a court.[64] This becomes all the more evident from the repeal of Arts. 100(4)[65] and 189(4).[66] Under these repealed clauses, the presiding officer of a House was obligated, in the absence of the quorum, to suspend the meeting of the House till there was a quorum.

The life of the *Lok Sabha* and State Legislative Assemblies was extended from five to six years.[67]

A person holding an 'office of profit' is disqualified from membership of Parliament or a State Legislature. Until CA 42, it was for the courts to declare what was an office of profit. The courts had evolved certain indices to decide whether an office was an 'office of profit'. A law could however be made to declare what offices would not disqualify, otherwise the disqualification arose automatically as soon as a member came to hold an office of profit.[68]

CA 42 changed this position. Henceforth, Parliament was to lay down through law what offices would be regarded as 'offices of profit' so as to disqualify their holders from membership of a House of Parliament or a State Legislature. There

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59. *Supra*, Ch. II, Sec. C.
60. *Supra*, Ch. VI, Sec. B(ii).
61. For Arts. 330, 332 and 334, see, *supra*, Ch. XXXV, Secs. B and C; also see, Chs. II, Sec. C and VI, Sec. B(ii).
62. *Supra*, Chs. II, Sec. G(d) and VI, Sec. C(d).
63. *Supra*, Chs. II, Sec. L(c) and VI, Sec. H(c), for rule-making.
64. *Supra*, Chs. II, Sec. L(d) and VI, Sec. H(d).
65. *Supra*, Ch. II, Sec. G(d).
66. *Supra*, Ch. VI, Sec. C(d).
67. *Supra*, Chs. II, Sec. I(c) and V, Sec. E.
68. *Ibid*.

would not be any automatic disqualification on this account and the courts were to lose power to declare whether an office was an office of profit or not. This change brought the position in India in line with that in Britain on this matter.[69] Clause (1)(a) of Article 102 provides that a person shall be disqualified for being chosen as, and for being, a member of either House of Parliament if he holds any office of profit under the Government of India or the Government of any State, other than an office declared by Parliament by law not to disqualify its holder. What is an office of profit has been considered by a 3 Judge Bench of the Supreme Court.[70] Referring to earlier decisions, the Court reiterated the implications of the expression in these words :-

> "It is well settled that where the office carries with it certain emoluments or the order of appointment states that the person appointed is entitled to certain emoluments, then it will be an office of profit, even if the holder of the office chooses not to receive/draw such emoluments. What is relevant is whether pecuniary gain is 'receivable' in regard to the office and not whether pecuniary gain is, in fact, received or received negligibly"

It is worth nothing that prior to CA 42, a State Legislature also had power to declare what offices would not disqualify their holders from its membership.[71] But now the power was vested in Parliament to prescribe what offices would disqualify. So, the power in this area moved away from the State Legislatures and the courts to Parliament.

Until the enactment of CA 42, under Art. 103, the question whether a member of Parliament had become subject to a disqualification or not was to be decided by the President but he was bound in this matter to follow the opinion of the Election Commission.[72] CA 42 changed this position insofar as the President was not to be bound by the opinion of the Election Commission. He was to consult the Commission but, thereafter, he was to be free to take his own decision. This meant that ultimately he was to act on ministerial advice in this area. The final word in respect of disqualification of members of Parliament thus passed from an autonomous impartial body like the Election Commission to a political body like the Council of Ministers which was not desirable.

Before CA 42, a member became automatically disqualified when he was held guilty of committing a corrupt practice at an election to the House.[73] Henceforth, this question was also to be decided by the President in the same way as a question of disqualification arising on other grounds and as mentioned above.

A similar change was effected in Art. 192 applicable to the State Legislatures.[74] The question of disqualification of a member of a State Legislature was to be decided by the President in consultation with the Election Commission as in case of Parliament. Till now, this function was vested in the Governor who was bound in this matter by the advice of the Election Commission. The power in this regard was thus transferred from the State Government to the Central Government. The reason was that formerly the effective decision lay with the Election Commission and the function of the Governor was rather mechanical. But now

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69. *Ibid*.
70. *Jaya Bachchan v. Union of India,* (2006) 5 SCC 266 : AIR 2006 SC 2119.
71. *Ibid*.
72. *Supra*, Ch. II, Sec. D(d).
73. *Supra*, Ch. II, Sec. D(d).
74. *Supra*, Ch. VI, Sec. B(iii)(b).

the effective decision was taken away from the Election Commission and vested in the Central Government, though nominally in the President. This was undesirable as a legal question became a political question. On the whole, the effect of the above changes was to increase the power of the Central Executive *vis-a-vis* Parliament and State Legislatures.

PRIVILEGES OF PARLIAMENT AND STATE LEGISLATURES

Prior to CA 42, under Art. 105(3), privileges of Parliament, and, under Art. 194(3), the privileges of the State Legislatures, were to be the same as those enjoyed by the House of Commons on January 26, 1950,[75] the day the Constitution came into force. These constitutional provisions were amended by CA 42 so as to drop any reference to the House of Commons.

After CA 42, the privileges of a House or its members were to be those as existing at the commencement of CA 42 and as were to be 'evolved' by the House from time to time. This meant that the existing privileges were to continue. Until a House evolved its own privileges, reference to the privileges of the House of Commons was to continue to be made as 'existing' privileges. This means that though there was a verbal change in the relevant constitutional provisions, no change in effect was made.

There was one restriction placed on the State Legislatures in this respect, *viz.* A State Legislative Assembly was to evolve its privileges, "so far as may be", in accordance with those of the *Lok Sabha*; and the Legislative council was to evolve its privileges, "so far as may be", in accordance with those of the *Rajya Sabha.*

However, the word 'evolved' used in Arts. 105(3) and 194(3) was very vague and ambiguous. What would be the evidence of a privilege having been 'evolved' by a House? Over how long a period of time was a privilege to be claimed or exercised by a House before it could be regarded as having been evolved? Was a claim by a House or its Committee of Privileges to be sufficient to concede a privilege to it? Under the amended constitutional provisions, it was possible that each House could evolve its own distinct privileges and, thus, the various Houses of Parliament and of State Legislatures could come to have their own separate privileges. This would have made the situation as regards the law of legislative privileges very confusing. This was a far cry from codification of legislative privileges, the demand for which had been insistently made in the past.[76]

EXECUTIVE

CA 42 clarified that no change would be made in respect of the weightage of votes of members of the State Legislatures for presidential election after the census of 1971 until the first census was held after the year 2000.[77]

CA 42 barred the courts from requiring production of rules of business framed by the Central and State Governments under Arts. 77 and 166 respectively.[78] This was designed to adversely affect judicial review of administrative action to some extent. At times, the courts looked into these rules to ascertain whether the im-

75. *Supra*, Chs. II, Sec. L(ii) and VI, Sec. H.
76. *Supra*, Chs. II, Sec. L(v) and VI, Sec. H(f).
77. *Supra*, Ch. III, Sec. A(i)(a).
78. *Supra*, Chs. III, Secs. B and E and VII, Sec. B.

pugned order was made by an officer having necessary authority under the Business Rules.

In some cases, courts had quashed administrative action when it was found to have been taken by an officer who did not have the requisite authority to do so.[79] CA 42 sought to bar any judicial probe into the question whether the officer making a decision had or had not the requisite authority to do so.

CA 42 amended Art. 74 to state explicitly that the President shall act in accordance with the advice of the Council of Ministers in the discharge of his functions.[80] In a way, this merely restated the position which already had been in existence,[81] and which the courts had already recognised in several cases. Therefore, by and large, the legal position had crystallised before CA 42 that the President was bound by the advice of the Council of Ministers.

It may be noted that no such provision was made by CA 42 as regards the State Governors. Thus, the position of Governors became sharply differentiated from that of the President. A Governor has certain discretionary functions to discharge in respect of which he is not bound by ministerial advice.[82]

JUDICIARY

Before the enactment of CA 42, India's judiciary was unified and the High Courts and the Supreme Court could adjudicate upon the constitutional validity of Central or State legislation without any differentiation.[83] This position was sought to be changed by CA 42 so that the question of constitutional validity of the Central law would fall exclusively within the purview of the Supreme Court, and that of the State law within the purview of the High Courts, though appeals from the High Courts to the Supreme Court were to continue to lie as usual. Thus, a new provision, Art. 32A, was added, after Art. 32, so as to deny to the Supreme Court power to consider the constitutional validity of a State law under Art. 32 unless the constitutional validity of a Central law was also in issue.[84] It meant that the question of constitutional validity of a State law *vis-a-vis* Fundamental Rights was to be raised before the High Court under Art. 226.[85]

Another new provision, Art. 131A, was added saying that henceforth only the Supreme Court, and no other court, would have exclusive jurisdiction to determine questions relating to the constitutional validity of a Central law. A High Court was obligated to refer to the Supreme Court all cases pending before it or the subordinate courts involving questions of constitutional validity of a Central law, or of a Central law and a State law. Besides, on the application of the Attorney-General, the Supreme Court could itself require a High Court to refer to it any case pending before it or a subordinate court involving questions of constitutional validity of a Central law, or of both Central and State laws.[86]

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79. *Fonseca (P) Ltd. v. L.C. Gupta,* AIR 1973 SC 563 : (1973) 1 SCC 480. Also, JAIN, *A TREATISE ON ADM. LAW*, II.
80. *Supra*, Ch. III, Sec. B(a).
81. For a discussion on the constitutional position of the President, see *supra*, Ch. III, Sec. B(a).
82. *Supra*, Ch. VII, Sec. C.
83. *Supra*, Chs. IV and VIII.
84. *Supra*, Ch. XXXIII, Sec. A.
85. *Supra*, Ch. VIII, Sec. D.
86. *Supra*, Ch. IV, for Art. 131, Sec. C(iii)(b).

Art. 226A, a new provision, declared that a High Court would not consider the constitutional validity of a Central law in any proceedings under Art. 226.[87]

Art. 131A extended the original jurisdiction of the Supreme Court because any matter involving constitutionality of a Central law was to be brought straight before the Supreme Court.[88]

Art. 228A declared that a High Court was not to have jurisdiction to declare any Central law to be constitutionally invalid. A High Court (subject to Art. 131A) could determine questions as to the constitutional validity of State laws. The change was justified on the ground that doubts about the constitutional validity of Central laws would now be disposed of expeditiously, and that if before a number of High Courts gave differing judgments as regards the validity of a Central law, its implementation became difficult and such a situation would now be avoided.

The fact however remained that demarcation of functions between the Supreme Court and the High Courts diluted, to some extent, the concept of a unified judiciary and introduced in India some elements of the U.S. model of dual judiciary.[89] However, it may be noted that all questions under the Central legislation, other than the question of its constitutionality, were to continue to be decided by the High Courts as before.

For the purposes of these Articles, 'Central law' meant any law other than a 'State law', but did not include any amendment of the Constitution under Art. 368. A 'State law' meant an Act of the State Legislature, Governor's ordinance, delegated legislation, any order having the force of law and any other law (including any usage or custom having the force of law) with respect to a matter in the State List.

New Articles, 144A and 228A, made further innovations in the area of judicial review of the constitutionality of legislation. Art. 144A required that the minimum number of Judges of the Supreme Court who would sit to decide a question of constitutional validity of a Central or State law was to be seven, and that a law was not to be declared to be constitutionally invalid by the Court unless a majority of not less than two-thirds of the Judges sitting to decide the matter held it to be so. Till now, a Bench of five Judges could decide such a question by a simple majority.[90]

In case of a High Court, under Art. 228A, the minimum number of Judges for deciding the constitutionality of a State law was to be five and the same two-thirds majority rule was to prevail there also.

These provisions were designed to make declaration of legislation constitutionally invalid very difficult for, in the Supreme Court, 5 out of 7 Judges, and in a High Court, 4 out of 5 Judges on the Bench must hold the law to be invalid. Hitherto, a law could be held invalid by a simple majority of Judges sitting on the Bench. Some of the most famous cases in the area of Indian Constitutional Law have been decided in the past by a closely divided court,[91] while there also

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87. *Supra*, Ch. VIII, Sec. D.
88. For original jurisdiction of the Supreme Court see, *supra*, Ch. IV, Sec. C(ii).
89. *Supra*, Chs. I, Sec. E(k) and IV, Sec. A.
90. *Supra*, Ch. IV, Sec. I(h).
91. For example, *Golak Nath and Kesavananda Bharati, supra*, Ch. XLI, Sec. D(c).

have been cases in which laws have been held invalid by a big majority.[1] The former type of decisions were no longer to be effective. This would have affected, to some extent, the character not only of Fundamental Rights but also of Indian Federalism as State laws challenged on the ground of trespassing into Central field could be held invalid with great difficulty. The rules regarding 2/3rd majority led to the absurd result that the effective decision making power was transferred to minority judges. In a Bench of 13 judges, 5 minority judges would have prevailed against the majority of eight judges holding the Act to be unconstitutional.

The rules made for a High Court having less than five Judges were very harsh. Here, all the Judges were to sit to consider the question of constitutional validity of a State law, and all the Judges were to hold it invalid. Thus, only a unanimous decision could hold the law to be constitutionally invalid in case of a High Court with less than five Judges.

However, other questions, apart from those of constitutionality of legislation, were not affected by Arts. 144A and 228A and were to continue to be decided as usual. One can see an anomaly in Arts. 144A and 228A insofar as while five Judges of a High Court could consider a question of constitutionality of a State law, in the Supreme Court, a bench of seven Judges had to sit for the same purpose.

HIGH COURTS

A few significant changes were introduced in the composition of the High Courts.

In future, it was to be possible to appoint a 'distinguished jurist' as a High Court Judge. Till CA 42, while there was such a provision in respect of the Supreme Court, there was no such provision for the High Courts.[2]

Further, it would now be possible to appoint as High Court Judges those advocates who had been members of tribunals, or had held government posts requiring special knowledge of law, for ten years. A defect in this provision was that this would have opened the way for appointment of government servants to high judicial posts in the country.

Another significant change made in the jurisdiction of the High Courts was the repeal of the *proviso* to Art. 225. The result of this was to re-impose on the original jurisdiction of the High Courts restriction regarding matters concerning revenue or acts done in collection thereof. This was to bring back the pre-1950 restriction on the original jurisdiction of the High Courts of Calcutta, Madras and Bombay which had been in abeyance for the last 25 years.[3] This indeed was a retrograde step taking things back to the pre-Constitution age.

A new provision, Art. 139A, provided that—

(*i*) if, on an application made by the Attorney-General, the Supreme Court was satisfied that cases involving substantially the same questions of law were pending before it and one or more High Courts, or

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1. For example, *The Bank Nationalisation* case, *supra*, Ch. XXXI, Sec. C(iii); *Romesh Thappar*, *supra*; *Brij Bhushan*; *Benett Coleman v. Union of India*, *supra*, Ch. XXIV, Sec. C(e).
2. *Supra*, Ch. IV, Sec. B(h).
3. *Supra*, Ch. VIII; JAIN, *INDIAN LEGAL HISTORY*, Ch. XIX.

before two or more High Courts, and if such questions were 'substantial questions of general importance,' then the Supreme Court could transfer those cases to itself;

(*ii*) the Supreme Court could transfer any case from one High Court to another if it deemed expedient to do so for the ends of justice. Art. 139A thus effected some diminution in the powers of the High Courts.

POWER TO ISSUE WRITS

A major change was brought about in the powers of the High Courts to issue writs under Art. 226.[4]

Prior to CA 42, a High Court could issue writs, under Art. 226, for 'enforcement of Fundamental Rights' or 'any other purpose'. While the power of the High Court to enforce Fundamental Rights remained untouched, several restrictions were imposed on its power to issue writs 'for any other purpose'.

The words "for any other purpose" now disappeared from new Art. 226, and the High Court's power to issue writs was spelled out in some detail. Henceforth, a High Court could issue a writ—

(i) for the redress of any *injury of a substantial nature* by reason of the contravention of any other provision of the Constitution, or an enactment or ordinance or any order, rule, regulation, bye-law or other instrument made thereunder; or

(ii) for the redress of *any injury* by reason of any *illegality* in any proceedings by or before any authority under any provision referred to in the above clause where such illegality has resulted in *substantial failure of justice*.

The new Art. 226 introduced two new concepts: "injury of a substantial nature" and "substantial failure of justice". The contours of these concepts were not clear. However, the question whether there was "injury of a substantial nature" or "substantial failure of justice" had to be decided in relation to the aggrieved person; "it must be looked at from the perspective and interests of the aggrieved person."

An injury might appear to some to be of insignificant nature, but the court had to examine whether the injury complained of by a person was substantial to him or not. Even a mere threat to take an action against a person could cause substantial injury to him, depending upon the circumstances of each case.[5] For example, the petitioner was superseded by another employee appointed in breach of statutory rules. The petitioner was held entitled to file a writ petition as he had suffered substantial injury.[6]

The concepts "injury of a substantial nature" or "substantial failure of justice" increased the discretionary element of the courts in the matter of giving a remedy. A court could refuse togive a remedy even if the administrative action was unlawful if it felt that no substantial injury or injustice had resulted.

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4. *Supra*, Ch. VIII, Sec. D.
5. *Ahmedabad Cotton Mfg. Co. v. Union of India*, AIR 1977 Guj 113; *Govt. of India v. National Tobacco Co.*, AIR 1977 AP 250.
6. *Harinath v. State of Bihar*, AIR 1977 Pat 305.

This created uncertainty. It made rule of law a matter of judicial discretion. A cleavage could appear in judicial opinion as to how the judicial discretion ought to be exercised in various factual situations. Another fundamental objection to the new formula was that it changed the principle of legality upon which the Indian Administrative law derived from the English common law was based.

Ordinarily, under (*i*) above, a writ could be issued against a breach of law (constitutional or statutory) or of any order, rule, regulation, bye-law or other instrument made under any provision of the Constitution or statute if there was substantial injury. The words 'other instrument' included schemes, warrants, licences *etc*. made under a constitutional or statutory provision.

The term "illegality in any proceedings" used in (*ii*) above included breach of a mandatory procedural norm. It also included denial of natural justice. There was no reason to interpret the word 'illegality' in this clause in a narrow sense.

Art. 226(3) barred a writ-petition if "any other remedy for such redress was provided for by or under any other law." This bar applied to a writ petition not for enforcement of a Fundamental Right but only in respect of one falling within the above two clauses.

The bar arose only if the 'remedy' was 'real', and not illusory, and was truly and really capable of giving to the aggrieved person similar redress as was contemplated by the above clauses. In the words of the Gujarat High Court commenting on this provision: "... 'any other remedy' has to be for the redress of the injury for which this writ jurisdiction is conferred and, therefore, it must be equally adequate or efficacious so that qualitatively or quantitatively the same relief would be given for redress of the injury to the petitioner."

The High Court also asserted that this alternative remedy could never be the general remedy of a civil suit under the C.P.C., and that where the order was a nullity (*e.g.* when it was *ultra vires*), the question of exhausting alternative remedy could hardly arise as the petitioner could straightaway seek remedy of judicial review.[7]

The Industrial Disputes Act provided a clear remedy for adjudication of labour disputes and, therefore, a writ petition would not lie for this purpose.[8] The Indian Registration Act provided a remedy against refusal of the sub-registrar to register a document. A writ petition was therefore not maintainable for the purpose.[9]

A High Court's power to issue an *interim* order (for enforcement of Fundamental Rights or otherwise) was very much restricted. Such an order (whether by way of injunction or stay or in any other manner) could not be made unless the copies of the petition along with supporting documents were furnished to the opposing party and an opportunity of being heard was given to it.

The High Court could however waive these requirements and issue an interim order as an 'exceptional measure' if it was satisfied, for reasons to be recorded in writing, that it was necessary to do so for preventing any loss being caused to the petitioner which could not be adequately compensated in money.

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7. *National Tobacco*, *supra*.
8. *Ibid*.
9. *Ramautar v. State of Bihar*, AIR 1977 Pat 295.

Such an order was to cease to have effect after 14 days unless the necessary formalities were fulfilled in the meantime and the High Court continued the order in operation.

No interim order could be issued if it was to have the effect of delaying any inquiry into a matter of public importance, or any inquiry into an offence punishable with imprisonment, or any action for the execution of any work or project of public utility, or the acquisition of any property for such execution, by government or any corporation owned or controlled by the government.

The avowed object of the changes effected in Art. 226 was to weaken judicial supervision of administrative action. The scope of new Art. 226 was uncertain as much would have depended on how the expressions 'injury of substantial nature' or 'substantial failure of justice' were interpreted by the courts. Then, if 'any remedy' was available, writ was not to be issued.

Hitherto, the Courts did follow the principle, a kind of self-imposed restriction, that if an 'alternative adequate remedy' was available, a writ would not be issued. But this was a flexible rule.[10]

The question under the new provision would be whether 'any remedy' meant 'an adequate remedy' or just any remedy. The answer to this question would have vitally affected the scope of writ jurisdiction of the High Courts. If the courts were to take the view that the existence of a remedy, howsoever inadequate or inefficacious it could be, would be a bar to the issue of writ, then effective relief in many situations of administrative maladministration could not be possible. However, the words 'any other remedy' were qualified by the words, 'for *such* redress'. This could be interpreted to mean that the remedy available must be effective to give *such* redress as he could get through the writ. This could mean an 'adequate' remedy and not 'any' remedy. The High Courts could have interpreted the new provision in the light of the pre-CA 42 case law on this point.

TRIBUNALS

Another retrograde innovation made by CA 42 was to withdraw 'tribunals' from Art. 227. This meant that the High Courts would no longer have superintendence over tribunals until the law provided for the same.[11]

However, CA 42 also opened the possibility for the proliferation of the tribunal system in the country. Under Art. 323A, Parliament was empowered to establish service tribunals. This matter has already been discussed earlier.[12]

Art. 323B empowered the appropriate legislature to provide, by law, for adjudication or trial by tribunals of any disputes and offences with respect to several matters mentioned therein. Art. 323B has already been discussed earlier.[13]

A notable feature of Art. 323B is that tribunals established under it can authorise to try certain categories of criminal offences and thus impose penal sanctions as distinguished from merely administrative sanctions. This is an innovation which raises several critical issues of which two may be mentioned here:

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10. *Supra*, Ch. VIII, Sec. D(g).
11. *Supra*, Ch. VIII, Sec. C(iv).
12. *Supra*, Ch. VIII, Sec. I.
13. *Supra*, Ch. VIII, Sec. I.

(*i*) in a criminal trial appraising of evidence against the accused and finding facts are very important for which legal training is necessary but the tribunals may not necessarily be manned by lawyers. This thus puts into back gear the trend of separating the executive from the judiciary.[14]

(*ii*) The tribunals do not follow the normal rules of evidence as contained in the Evidence Act. In criminal courts, an accused is presumed to be innocent till he is proved guilty beyond any reasonable doubt. It is not so in case of a tribunal which can convict a person on evidence which may not be of sufficient probative value for a court to convict.

As the Supreme Court has observed: "A finding of fact recorded by the tribunal cannot be challenged on the ground that the relevant and material evidence adduced before the tribunal is insufficient or inadequate to sustain a finding. The adequacy or sufficiency of evidence led on a point and the inference of fact to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal."[15]

The legislature concerned can, if it so likes, free the tribunals established under Arts. 323A and 323B from judicial control except that exercised by the Supreme Court under Art. 136. Much of the success of the tribunal system will depend upon the legislation which may be passed, the type of people who are appointed to sit in these tribunals and the procedure prescribed for them. Although these tribunals can be freed from the control of the High Courts, it is suggested that the legislatures should not do so in every case, especially in case of tribunals imposing penal sanctions, for it will not be possible for many persons to go to the Supreme Court in appeal against tribunal decisions, and that may amount to a denial of justice to them.

The justification for introducing the tribunal system in India was stated as follows in the Statement of Objects and Reasons appended to the Bill:

> "To reduce the mounting arrears in High Courts and to secure the speedy disposal of service matters, revenue matters and certain other matters of special importance in the context of the socio economic development and progress, it is considered expedient to provide for administrative and other tribunals for dealing with such matters while preserving the jurisdiction of the Supreme Court in regard to such matters under article 136 of the Constitution".

It may be pointed out that in *L. Chandrakumar Kumar v. Union of India*,[16] Cl. 2(d) of Art. 323A and Cl. 2(d) of Art. 323B have been declared unconstitutional. These clauses authorised the exclusion of all judicial review of tribunal decisions except that under Art. 136.[17] The Supreme Court has ruled that the power of the High Court under Art. 226/227[18] and of the Supreme Court under Art. 32[19] being

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14. *Supra*, Ch. VIII, Sec. I.
15. *State of Andhra Pradesh v. C.V. Rao*, AIR 1975 SC 2151, 2155 : (1975) 2 SCC 557.
Aslo see, *supra*, Ch. VIII, Sec. D(i) and XXXIII, Sec. A on this point.
16. AIR 1997 SC 1125 : (1997) 3 SCC 261.
17. *Supra*, Ch. IV, Sec. D.
18. *Supra*, Ch. VIII, Secs. C(iv), D.
19. *Supra*, Ch. XXXIII, Sec. A.

"essential features" of the Constitution even an amendment of the Constitution could not abrogate the same.[20]

FEDERALISM

CA 42 introduced several notable changes in the area of Centre-State relationship, the inevitable thrust of which was to strengthen the Centre *vis-a-vis* the States in several respects, and, thus, to make Indian Federalism more centralised.[21]

Art. 257A, a new provision, enabled the Centre to deploy any armed force of the Union, or any other force under its control, for dealing with any grave situation of law and order in any State. Any such force had to act subject to the control and directions of the Centre and not of the concerned State Government.

This provision could be justified in the light of the difficulties described in the body of the book,[22] as well as under Art. 355,[23] which obligates the Centre to protect the States against internal disturbance.

Under Art. 257A, the Centre could act without the concurrence of the concerned State Government. However, the Law Minister gave an assurance in Parliament that the power under Art. 257A would be used only in 'exceptional' situations and in consultation with the concerned State Government.[24]

To give full effect to Art. 257A, a few changes were made in the relevant entries. The following new entry was added to the Union List:

> "2A. Deployment of any armed force of the Union or any other force subject to the control of the Union or any contingent or unit thereof in any State in aid of the civil power; powers, jurisdiction, privileges and liabilities of the members of such forces while on such deployment."[25]

Consequently, entry I in the State List,[26] was redrafted as follows:

> 1. "Public order but including the use of naval, military or air force or armed forces of the Union or of any other force subject to the control of the Union or of any contingent or unit thereof."

And, entry 2 in List II was redrafted as follows:[27]

> "2. Police (including railway and village police) subject to the provisions of entry 2A of List I."

The administration of justice below the High Courts has now been shifted from the exclusive State control to the concurrent area. Therefore, from entry 3, List II, the following words have been eliminated: "Administration of justice; constitution and organisation of all courts, except the Supreme Court and the High Court."

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20. *Supra*, Ch. XLI, Sec. F.
21. *Supra*, Chs. X-XVII.
22. *Supra*, Ch. XII.
23. *Supra*, Ch. XIII, Sec. C.
24. *Rajya Sabha Debates*, Nov. 10, 1976.
For this provision, see, *supra*, Ch. XIII, Sec. C; Ch. X, Sec. G(iii)(f).
25. *Supra*, Ch. X, Sec. D(a).
26. *Supra*, Ch. X, Sec. E(a).
27. *Supra*, Ch. X, Sec. E(a).

To achieve this objective, provision was made for the creation of an all-India judicial service.[28]

The following entries were eliminated from the State List[29]:

(12) Education;

(19) Forests;

(20) Protection of wild animals and birds; and

(29) Weights and measures.

These matters were placed in the Concurrent List.[30] The new entries in List III are:

(11A) Administration of justice : constitution and organisation of all courts, except the Supreme Court and the High Courts;

(17A) Forests;

(17B) Protection of wild animals and birds;

(20A) Population control and family planning;

(33A) Weights and measures except establishment of standards;

(25) Education, including technical education, medical education and universities, subject to the provisions of entries 63, 64, 65 and 66 of List I; vocational and technical training of labour.

The result of shifting the several entries from the State to the Concurrent List is to enable Parliament also to legislate in these areas along with the State Legislatures. The question of transferring 'education' to the Concurrent List had been before the country for quite some time.[31] Wild life, forests and family planning have been placed in the Concurrent List because increasing importance is going to be attached to these programmes in future. For this purpose, Art. 48A adds a new Directive Principle.[32]

EMERGENCY

Prior to CA 42, the President could declare emergency under Art. 352 throughout the country and not only in a part of the country. This lacuna was filled by suitably amending Art. 352.[33]

Another change made in Art. 352 was to authorise the President to vary proclamation of emergency. Hitherto, the President could revoke, but could not vary, a proclamation issued under Art. 352. The proclamation varying an earlier proclamation had to undergo the same process in Parliament (of being laid and approved) as a fresh proclamation under Art. 352.

Consequent upon the change in Art. 352, providing for proclamation of emergency in a part of the country, necessary changes were made in Arts. 353, 358

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28. *Supra*, Ch. XII, Sec. G; Ch. VIII; Sec. G(g).
Also, under Government Services, Ch. XXXVI.
29. *Supra*, Ch. X, Sec. E.
30. *Supra*, Ch. X, Secs. F(c), (e), (f).
31. *Supra*, Ch. X, Sec. G(iii)(d).
32. *Supra*, , Ch. XXXIV, under Directive Principles.
33. *Supra*, Ch. XIII, Sec. B.

and 359.[34] The purpose of these amendments was to clarify that when emergency operated in a part of India, necessary action (by way of legislation or executive action) could be taken in other parts of India as well in so far as the security of India was threatened by activities in or in relation to the area under emergency.

Slight changes were made in Arts. 356 and 357.[35] Before CA 42, the proclamation of emergency under Art. 356 in respect of a State needed parliamentary approval to operate at the end of every six months. This period was now extended to one year. Henceforth, presidential proclamation under Art. 356 was to come before Parliament for approval after a year and not six months.

Another change in Art. 357 ensured that the laws made for a State when it was under Art. 356 emergency was not to come to an end automatically after the emergency was over, but would continue in operation until the State Legislature made changes therein or repealed them.

FUNDAMENTAL RIGHTS

One significant change made by CA 42 was in Art. 31C. An attempt was made to give primacy to all Directive Principles over the Fundamental Rights. This aspect has already been discussed earlier.[36] The Supreme Court declared this amendment unconstitutional [37] and restricted the primacy of Directive Principles as was laid down in Amendment XXV[38] and upheld in *Kesavananda*.[39]

While no verbal changes were made by CA 42 in the text of the various Articles dealing with Fundamental Rights, certain changes were made with a view to dilute the over-all efficacy of these rights.

A new provision, Art. 31D, was added to enable Parliament to make a law to prevent or prohibit 'anti-national activities' or the formation of 'anti-national associations.' The expression 'anti-national activity' was defined broadly. An 'anti-national association' was also defined broadly. No such law was to be void on the ground that it was inconsistent with, or took away or abridged any of the rights conferred by Arts. 14, 19 or 31. The law under Art. 31D was to be made by Parliament. No such law could be made by a State Legislature.

Art. 31D threw a great responsibility on Parliament to see that a law to suppress anti-national activities had proper safeguards so that while such activities were duly suppressed, legitimate activities of individuals or groups were not unduly obstructed.

The expression 'anti-national activity' was to mean any action:

(*i*) which was intended to bring about, on any ground whatsoever, the cession or secession of a part of the Indian territory, or which incited any individual or association to bring about cession or secession;

(*ii*) which questioned or threatened or was intended to threaten or disrupt the sovereignty and integrity of India or the security of the state or the unity of the nation;

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34. *Supra*, Ch. XIII, Sec. B(b).
35. *Supra*, Ch. XIII, Sec. D.
36. *Supra*, Ch. XXXII, Sec. D.
37. *Supra*, Chs. XXXII, Sec. D(ii)(iii); XXXIV, Sec. C and XLI, Sec. E(a).
38. *Supra*, Chs. XXXII, XXXIV, Sec. E(a) and XLI; *supra*, this Chapter.
39. *Supra*, Ch. XLI, Sec. D(e).

(*iii*) which was intended to overthrow by force the government as by law established;

(*iv*) which was intended to create internal disturbance or disruption of public services;

(*v*) which was intended to threaten or disrupt harmony between different religious, racial, language or religious groups or castes or communities.

An 'anti-national association' meant an association:

(*i*) which had for its object any anti-national activity;

(*ii*) which encouraged or aided persons to undertake or engaged in any anti-national activity;

(*iii*) the members of which undertook or engaged in any anti-national activity.

The expression 'anti-national activity' was very broadly defined as was clear from such phrases as 'internal disturbance, 'disrupt harmony' between various groups, 'disruption of public services' *etc*. It was not only an activity which in fact resulted in any of the prohibited results but even an activity which was 'intended' to achieve such a result which was illegal.

In Art. 31D, the word used was 'law' and not 'reasonable law'. Thus, the courts could not adjudge the reasonableness of a law passed to prevent or prohibit anti-national activities or associations. Parliament could thus impose any restrictions it liked on the Fundamental Rights guaranteed by Arts. 14, 19 or 31 through a law made under Art. 31D. If Parliament were to confer an absolute discretion on the Executive to declare unlawful any association which, in its opinion, was engaged in an unlawful activity, the courts could not declare the law to be unreasonable or invalid.

The only role left for the courts under Art. 31D was to adjudicate whether or not a law enacted by Parliament fell within the scope of Art. 31D, for a law falling outside Art. 31D could not claim protection from Arts. 14, 19 or 31. But, in view of the extensive phraseology used in Art. 31D, it was doubtful whether any law could he held to fall outside the scope of Art. 31D.

It may be noted that the Unlawful Activities (Prevention) Act, 1967, seeks to bar an activity which is intended to bring about the secession of a part of the Indian territory or which disclaims or disputes the sovereignty and territorial integrity of India. The Criminal Law (Amendment) Act, 1972, makes illegal any activity inciting disharmony against any religious, racial, language or regional group or caste or community. Under these laws, an association could be declared unlawful if it has for its object the activities declared illegal.

Art. 31D added three more ingredients for declaring activities and associations unlawful which were not to be found in these Acts, *viz*.: (i) overthrowing the government by force; (ii) creating internal disturbance; (iii) disrupting public services. However, the significant point to note is that the two Acts enacted prior to Art. 31D are subject to the Fundamental Rights in Arts. 14, 19 and 31. Thus, under Art. 19(1)(c), the procedure to declare an association unlawful has to be

reasonable.[40] Consequently, under these Acts, the government order declaring an association unlawful is subject to review by a tribunal consisting of a High Court Judge and, under Art. 136, there could be an appeal to the Supreme Court from the tribunal.[41] But, now, under Art. 31D, the power of Parliament was to be free from any such restraints and safeguards.

During the course of parliamentary discussion at the time of enactment of Art. 31D, several members expressed apprehensions at the breadth of the provision, the possibility of misuse of power under it by the bureaucracy, and the possibility of Art. 31D being used to curb legitimate trade union activity, or the democratic activity of the common man, or formation of associations by the minorities. It was suggested that internal disturbance might be caused by a variety of causes but under Art. 31D any kind of internal disturbances might be termed as 'anti-national'. Who was to decide whether an internal disturbance was anti-national or not? It was therefore emphasized that there should be provisions for review by a tribunal or High Court of the question whether an association was engaged in anti-national activity or not. The Law Minister however assured the members that it was not the intention of the Government to prohibit legitimate trade union activity, or formation of associations by the minorities. He stated that Art. 31D only gave power to Parliament to make a law and the question of safeguards should be raised as and when Parliament proceeded to legislate under it. Art. 31D thus placed a great power in the hands of Parliament to affect the rights of the people.

DIRECTIVE PRINCIPLES

CA 42 added a few more Directive Principles, *viz.*, Art. 39A,[42] Art. 43A,[43] Art. 48A.[44]

Art. 39(*f*) was redrafted so as to widen the state obligation towards children.[45] Thus, the range of state obligations towards society had become more extensive through the new Directive Principles.

But a major change that was made by CA 42 was to give primacy to all Directive Principles over the Fundamental Rights contained in Arts. 14, 19 or 31.[46] To achieve this objective, Art. 31C was amended so as to say that no law giving effect to any of the Directive Principles was to be deemed to be void on the ground of its inconsistency with any of the rights conferred by Arts. 14, 19 or 31.[47]

By this amendment, the wheel had turned a full circle. The Directive Principles started as being subservient to the Fundamental Rights.[48] Now, some of the significant Fundamental Rights were made subservient to the Directive Principles.

This change was justified on the ground that the rights of the community must precede over the rights of the individual. But, as already stated, the Supreme

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40. *State of Madras v. Row*, *supra*, Ch. XXIV, Sec. F.
41. For Art. 136, see, *supra*, Ch. IV, Sec. E.
42. *Supra*, Ch. XXXIV, Sec. D(j).
43. *Supra*, Ch. XXXIV, Sec. D(o).
44. *Supra*, Ch. XXXIV, Sec. D(w).
45. *Supra*, Ch. XXXIV, Sec. D(h).
46. *Supra*, Chs. XXI, XXIV, XXXI, XXXII, XXXIV and XLI.
47. *Ibid*.
48. *Supra*, Ch. XXXIV, Sec. C.

Court refused to accept such a drastic change in the mutual relationship between the Directive Principles and the Fundamental Rights.[49]

However, Art. 37 was left untouched. This meant that the Directive Principles were not enforceable in any court.[50] Therefore, there is no legal way in which the state can be compelled to implement the Directive Principles and the sanction underlying these principles still remains mainly political. But, as has been discussed earlier,[51] in course of time, the Supreme Court by reading the Directive Principles along with the Fundamental Rights, has made the Directive Principles enforceable to a large extent.

FUNDAMENTAL DUTIES

CA 42 laid down fundamental duties of the Indian citizens.[52] A new article, Art. 51A, was added to the Constitution for this purpose.

GOVERNMENT SERVICES

Till 1976, under Art. 311(2), a government servant could not be dismissed, removed or reduced in rank without being given a reasonable opportunity of being heard at two stages :

first, at the time of inquiry into the charges against him;

secondly, when after the inquiry, it was proposed to impose any of the aforesaid punishments on him.[53]

CA 42 amended Art. 311(2) so as to eliminate the second stage. Thus, a government servant was denied the opportunity to make a representation at the second stage of inquiry against the punishment proposed to be imposed on him in a disciplinary proceeding.

Art. 312 was amended to enable Parliament to create an all-India judicial service.[54] This service was not to include any post inferior to that of a district judge.[55] The parliamentary law creating such a service could make necessary amendments in Arts. 233 to 237,[56] and such a law would not be regarded as an amendment of the Constitution for purposes of Art. 368. This is a consequence of transferring 'administration of justice' from the exclusive State control to the concurrent area.[57]

AMENDMENT OF THE CONSTITUTION

CA 42 made some modifications in Art. 368. Two new clauses, Arts. 368(4) and (5), were added to the Constitution.

Cl. (4) sought to provide that no amendment to the Constitution "shall be called in question in any Court on any ground". Cl. 5 declared "for removal of

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49. *Minerva Mills Ltd. v. Union of India*, AIR 1980 SC 1789 : (1980) 3 SCC 625; *supra*, Ch. XLI, Sec. E(a).
50. *Supra*, Ch. XXXIV, Sec. B.
51. *Supra*, Chs. XXVI, Sec. J and XXXIV, Sec. C.
52. *Supra*, Ch. XXXIV, Sec. E.
53. *Supra*, Ch. XXXV, Sec. G.
54. *Supra*, Chs. XII, Sec. G and XXXVI, Sec. B.
55. The term has been defined in Art. 236, *supra*, Ch. VIII, Sec. G.
56. *Supra*, Ch. VIII, Sec. G.
57. *Supra*, Ch. X, Sec. F.

doubts", that "there shall be no limitation on the constituent power of Parliament" to amend the Constitution.

These newly added clauses have made no difference to the stance of the Supreme Court that the basic features of the Constitution are inviolable by any constitutional amendment. This position has been reiterated by the Supreme Court in a number of cases after 1975. This matter has been discussed earlier.[58]

FORTY-THIRD AMENDMENT : 1977

The sixth general election to the Lok Sabha took place in March, 1977, after the emergency imposed in 1975 was revoked. As the Indian people were very angry at what had happened during the period of emergency, the Congress Party which had held power for the last nearly 30 years was defeated at the polls and the Janata Party won a decisive majority and formed the government.

The Janata Party had made an election pledge that it would repeal the 42nd Amendment and restore the *status quo ante*. The Constitution (Forty-Third Amendment) Act enacted in December, 1977, partially redeemed this pledge.

Although the Janata Government had the requisite majority in Lok Sabha to enact a constitutional amendment, it lacked the same in Rajya Sabha where the Congress Party still had the majority and, therefore, the Janata Government could not hope to have a constitutional amendment effectuated without the concurrence of the Congress Party. Therefore, only such amendments as were agreed upon between the Janata and the Congress Parties could be enacted.

The 42nd Amendment had inserted a number of provisions in the Constitution to curtail both directly and indirectly the jurisdiction of the Supreme Court and the High Courts to review the constitutionality of legislation. Some of these provisions were now repealed. These provisions were: Arts. 32A, 131A, 144A, 226A, 228A and 31D.[59]

Art. 32A barred the Supreme Court from considering the constitutional validity of any State law in proceedings for enforcement of Fundamental Rights. Art. 131A gave to the Supreme Court exclusive jurisdiction to decide the constitutional validity of a Central law. Art. 144A required a bench of seven Judges in the Supreme Court to consider the Constitutional validity of a law, and also required a special majority of two-thirds for the invalidation of such law. Art. 226A barred the High Courts from considering the constitutional validity of a Central law in their writ jurisdiction. Art. 228A barred the High Courts from declaring a Central law to be constitutionally invalid and also required a bench of at least five Judges and a special majority of two-thirds to hold a state law invalid.

The reasons given for repealing these provisions were as follows.[60] Arts. 32A, 131A and 228A caused hardship to persons living in distant parts of India. Art. 32A would lead to multiplicity of proceedings for the cases relating to the validity of a State law must now be heard first by a High Court and then come before the Supreme Court by way of appeal. The rule requiring a special bench to consider the constitutional validity of a law resulted in valuable judicial time being

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58. *Supra*, Ch. XLI, Sec. F.
59. *Supra*, 1957 *et seq*.
60. See the Statement of Objects and Reasons appended to the Bill.

lost for such a bench must be constituted however unsubstantial the challenge to a law might be.

The Supreme Court itself in *Misrilal Jain v. State of Orissa*[61] had taken occasion to comment adversely on Art. 144A and expressed the hope that Art. 144A would be amended by Parliament so as to leave to the Court itself the duty to decide how large a bench should sit to consider any particular case.

Art. 31D empowered Parliament to enact certain laws in respect of anti-national activities and associations. These powers were of a sweeping nature and were capable of abuse, and so Art. 31D was repealed.[62]

FORTY-FOURTH AMENDMENT : 1978

The 42nd Amendment undertaken during the emergency (1975-77) had been the most controversial amendment in the whole Indian Constitutional History. It had a number of obnoxious features, and had introduced a number of distortions in the Constitution; it was regarded as an attempt to institutionalize emergency in the country for ever.

One of its most debatable features was to curtail the power of the High Courts and the Supreme Court to review legislation and give redress to the individual against administrative excesses. Another feature was dilution of Fundamental Rights. Also, the Central powers *vis-a-vis* those of the States were increased and Art. 368 was sought to be amended to make Parliament's amending power beyond judicial review. There was so much public sentiment against the 42nd Amendment that one of the election issues in the sixth general election was the repeal of the 42nd Amendment. The Janata Party won the election and it redeemed its pledge by enacting the 43rd and the 44th Amendments to the Constitution to undo most of the provisions of the 42nd Amendment.

The Constitution (Forty-Fourth Amendment) Act, passed in 1978, removed most of the aberrations and distortions introduced into the Constitution by the Forty-Second Amendment of the Constitution.[63] Not only this, the 44th Amendment also sought to amend a few other provisions of the Constitution so as to achieve the following major objectives:[64]

(i) to ensure that Fundamental Rights were not restricted or taken away by a transient majority in Parliament, it was necessary to provide adequate safeguards against recurrence of such a contingency in the future and to ensure to the people themselves an effective voice in determining the form of government under which they were to live;

(ii) to take the controversial property right out of the category of Fundamental Rights and make it an ordinary legal right;

(iii) to ensure that the power to proclaim an emergency under Art. 352, which virtually has the effect of amending the Constitution by converting it to a unitary state and suspending the right of the citizen to

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61. AIR 1977 SC 686.
62. For comments on Art. 31D see, *supra*, 2400-2402.
63. *Supra*, 2386-2404.
64. The Statement of Objects and Reasons annexed to the Bill.

enforce Fundamental Rights,[65] was used properly and after due consideration and deliberation and was not misused for personal or partisan ends;

(iv) to ensure that the fundamental and basic features of the Constitution were not lightly interfered with by Parliament in exercise of its power of constitutional amendment under Art. 368.

The salient features of CA 44 are as follows.

PARLIAMENT AND STATE LEGISLATURES

(*i*) CA 42 had extended the life of Lok Sabha and State Legislative Assemblies from five to six years. CA 44 reduced the term again to five years and, thus, restored the *status quo ante*.[66]

(*ii*) *Status quo* was also restored in respect of the quorum in the Houses of Parliament as well as the State Legislatures. CA 42 had reduced the question of quorum from a substantive to a merely procedural matter.[67] Changes made in this area by CA 42 were cancelled and the original Articles 100(3) and (4) and 189(3) and (4) were restored by CA 44.[68]

(*iii*) CA 42 had amended Art. 103 as regards the procedure to decide the question of disqualification of a member of Parliament.[69] CA 44 amended Art. 103 again so as to restore the position to what it was before the passage of CA 42. Henceforth, the question of disqualification of a member of a House of Parliament is to be decided by the President in accordance with the opinion of the Election Commission.[70]

A similar change was introduced in the case of the members of the State Legislatures. Henceforth, the question of disqualification of a member of a State Legislature is to be decided by the Governor in accordance with the opinion of the Election Commission.[71]

(*iv*) CA 44 added a new Article 361A to the Constitution so as to ensure that no one was held liable to any civil or criminal proceedings in a court in respect of the publication in a newspaper of a substantially true report of any proceedings of either House of Parliament or a State Legislature unless the publication was proved to have been made with malice. This immunity would not apply to publication of any report of the secret proceedings of a House. The same immunity would also apply to broadcasts or wireless.[72]

To begin with, this immunity was given under a law of Parliament in respect of publication of parliamentary proceedings.[73] During the 1975 emergency, this

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65. In the discussion which follows, the following abbreviations have been used : CA 42 for the Forty-Second Amendment Act; CB 45 for the Forty-Fifth Amendment Bill and CA 44 for the Constitution (Forty-Fourth Amendment) Act, 1978.
66. *Supra*, also see, Chs. II, Sec. I(c) and VI, Sec. (d) *supra*.
67. *Supra*, 2388.
68. *Supra*, Chs. II, Sec. I(c) and VII, *supra*.
69. *Supra*, Ch. II, Sec. G(d), Ch. VI, Sec. C(d).
70. *Supra*, Ch. II, Sec. D(d).
71. *Supra*, Ch. VI, Sec. B(iii)(b).
72. *Supra*, Ch. II, Sec. L(i)(b).
73. The Parliamentary Proceedings (Protection of Publication) Act, 1956.

law was repealed, but was re-enacted after the emergency.[74] Art. 361A put the immunity on a firmer foundation. It also extended the same immunity to publication of proceedings of a State Legislature.

(*v*) Art. 102(1)(*a*) regarding "office of profit" as it stood originally prior to CA 42 has been restored.[75] The change made therein by CA 42 taking away from the courts the power to declare what was an "office of profit" was cancelled by CA 44.[76] The courts get back the power to decide whether an office is an "office of profit." A similar change was made as regards the State Legislatures.[77]

(*vi*) Arts. 105 and 194 dealing with the privileges of Parliament and of the State Legislatures[78] had been amended by CA 42 so as to drop partially the reference to the House of Commons.[79] CA 44, in the first place, cancelled the amendments made by CA 42 and then amended Articles 105(3) and 194(3) so as to drop completely any reference to the House of Commons in future. The privileges enjoyed by a House of Parliament or State Legislature, or any of its committees of members, would henceforth be the same as existing immediately before the coming into force of CA 44.[80]

EXECUTIVE

(*i*) CA 39 had deprived the Supreme Court of its jurisdiction to decide disputes concerning election of the President and the Vice-President.[81] CA 44 cancelled this amendment and restored to the Supreme Court its original jurisdiction in this respect.[82] CA 44 thus restored the *status quo* obtaining before CA 39.

(*ii*) CA 42 had amended Art. 74 so as to make ministerial advice binding on the President.[83] The President was left with no option except to act in accordance with the ministerial advice. This provision was not changed by CA 44, but to somewhat relax the rigours of this provision, a new *proviso* was added to Art. 74(1) saying that the President could require the Council of Ministers to reconsider its advice given to him, either generally or otherwise, and the President should act in accordance with the advice tendered after such reconsideration. This means that while the President remains bound by ministerial advice, he now gets a limited right to refer the matter back to the Council of Ministers for reconsideration. The provision supplements Art. 78(*c*).[84]

(*iii*) CA 42 barred the courts requiring production of Business Rules made by the Central or a State Government.[85] For this purpose, clause (4) was added to Arts. 77 and 166 of the Constitution. CA 44 repealed the new clause (4) and thus enabled the courts to require the government to produce its Rules of Business, if

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74. The Parliamentary Proceedings (Protection of Publication) Act, 1977.
75. *Supra*, Ch. II, Sec. D(a).
76. *Ibid*.
77. *Supra*, Ch. VI, Sec. B(iii)(a).
78. *Supra*, Chs. II, Sec. L and VI, Sec. H.
79. *Supra*, 2389-2390.
80. *Supra*, Chs. II, Sec. L and IV, Sec. H.
81. *Supra*, 2384.
82. *Supra*, Ch. III, Sec. A(i)(b).
83. *Supra*, 2390.
84. *Supra*, Ch. III, Sec. B.
85. *Supra*, 2390.

necessary, to decide a controversy before them as they could do prior to the enactment of CA 42.[86]

(*iv*) CA 38 had added clause (4) to Articles 132 and 213 so as to make the satisfaction of the President or the Governor to issue ordinances "final and conclusive"[87] CA 44 now repealed the clause. Thus, the position as existing prior to CA38 in this respect was restored.[88] In this way, the discretion/satisfaction of the President/Governor to issue an ordinance was made open to judicial review.

(*v*) Art. 239B(4) added by CA 38 declaring satisfaction of the Administrator of a Union Territory to issue Ordinances "final and conclusive" was also withdrawn by CA 44.[89]

HIGH COURTS AND THE SUPREME COURT

(*i*) CA 42 had added Art. 139A so as to enable the Supreme Court, in certain circumstances, to withdraw cases from the High Courts and decide them itself.[90] CA44 continued this provision subject to some modifications. Previously, the Court could do so only on the application of the Attorney-General. Now, CA 44 enabled the Court to do so additionally either *suo motu* or on the application of a party to any such case.

The Supreme Court would decide the question of law involved in the case withdrawn and thereafter would send the case back to the High Court concerned for disposal.[91]

(ii) CA 44 inserted a new Article 134A and made consequential verbal changes in Arts. 132, 133 and 134(1)(c).

The underlying purpose of these amendments was to cut down any element of delay in the Supreme Court hearing appeals from the High Courts.[92] Art. 134A laid down the procedure for the grant of certificate of fitness by the High Courts for appeal to the Supreme Court. Art. 134A makes it obligatory on the High Court to consider the question of granting certificate immediately on the delivery of the judgement.

(iii) Formerly there was Art. 132(2) authorising the Supreme Court to grant special leave to appeal if the High Court refused to grant the necessary certificate. CA 44 repealed Art. 132(2) as, in such a case, the Supreme Court could consider grant of special leave to appeal under Art. 136.[93]

(*iv*) CA 42 had made provision for appointment of distinguished jurists as Judges of the High Courts.[94] This provision was repealed by CA 44.

(*v*) CA 42 had amended Art. 225 so as to re-impose on the original jurisdiction of the High Courts restrictions regarding matters concerning revenue or acts done

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86. *Supra*, Chs. III, Sec. E and VII, Sec. B.
87. *Supra*, 2383.
88. *Supra*, Chs. III, Sec. D(ii)(d) and VII, Sec. D(ii)(c).
89. *Supra*, Ch. IX, Sec. A.
90. *Supra*, 2394.
91. *Supra*, Ch. VIII.
92. *Supra*, Ch. IV, Sec. I(a).
93. *Supra*, Ch. IV, Sec. E.
94. *Supra*, Ch. VIII, Sec. B(e).

in collection thereof.[1] CA 44 again amended Art. 225 so as to remove this bar on the High Courts' original jurisdiction. Thus, the position as it obtained prior to CA 42 has been restored in this respect.[2]

(*vi*) CA 42 had brought about a major change in the jurisdiction of the High Courts to issue writs under Art. 226.[3] The avowed purpose of this change was to curtail the writ jurisdiction of these courts and to curtail judicial review of administrative action. This constituted a serious encroachment of individual's right to seek redress against the administration in case he was adversely affected by its action.

CA 44 amended Art. 226 again so as to restore the position as it obtained prior to CA 42.[4]

(*vii*) The provisions as to the issue of interim orders introduced by CA 42 in Art. 226 were also repealed. Instead, a simple new provision, Art. 226(3), was introduced. It seeks to provide that where an interim order is passed against a party without giving him an opportunity of being heard, that party may apply to the Court for the vacation of such an order and that such an application should be disposed of by the High Court within two weeks. If not so disposed of, the *interim* order will lapse automatically after two weeks.[5]

(*viii*) CA 42 had amended Art. 227 so as to divest the High Courts of their power of superintendence over the tribunals. [6] Art. 227 was amended again by CA 44 so as to restore it to the form in which it stood prior to CA 42. [7] The High Courts thus got back their power of superintendence over the tribunals existing within their territorial jurisdiction.

FEDERALISM

Art. 257A was omitted.[8]

EMERGENCY

Art. 352 was amended by CA 44 so as to introduce a number of safeguards therein against abuse of power regarding proclamation of emergency.[9] The idea underlying these amendments was to make practically impossible the repetition of the 1975 situation when an emergency was declared without adequate cause on the ground of "internal disturbance".[10] These amendments made in Art. 352 have been mentioned earlier.[11]

(*i*) Clause 5 of Art. 352, which had been inserted by CA 38,[12] and which made the 'satisfaction' of the President as to the existence of a grave emergency neces-

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1. *Supra*, 2393.
2. *Supra*, Ch. VIII, Sec. C(ii).
3. *Supra*, 2394-2396.
4. *Supra*, Ch. VIII, Sec. D.
5. *Supra*, Ch. VIII, Sec. D(r).
6. *Supra*, 2396.
7. *Supra*, Ch. VIII, Sec. C(iv).
8. *Supra*, Ch. X.
9. *Supra*, Ch. XIII, Sec. B.
10. The Shah Commission held that there was no evidence of circumstances which could warrant the declaration of an emergency in 1975. There was no unusual event or even a tendency in that direction to justify the imposition of emergency. There was no threat to the well-being of the nation from sources external or internal.
11. *Supra*, Ch. XIII, Sec. B.
12. *Supra*, 2383.

sitating the issue of a proclamation of emergency 'final', was withdrawn by CA 44.

(*ii*) As a further check against misuse of the emergency provisions, and to put the right to life and liberty on a secure footing, Art. 359[13] was now amended so as to provide that the presidential power to suspend the right to move the court for the enforcement of a Fundamental Right cannot be exercised in respect of the Fundamental Rights guaranteed by Arts. 20 and 21.[14] Thus, it will no longer be possible to suspend the right to life and personal liberty guaranteed by Art. 21, and the right to protection in respect of conviction for offences guaranteed by Art. 20.

This amendment will obviate in future the situation which arose in the *Shukla* case.[15]

Making Art. 20 inviolate during an emergency means that the government could not harass people during an emergency by making acts punishable retroactively.[16]

It has also been provided further that the suspension of the enforcement of any Fundamental Right under Art. 359 shall not apply in relation to any law which does not contain a recital to the effect that such law is 'in relation to' the proclamation of emergency in operation when it is made, or to any executive action taken otherwise than under a law containing such a recital. Thus, law other than those passed for the specific purpose of the emergency will no longer be protected by the presidential order issued under Art. 359.[17]

(*iii*) The scope of Art. 358 was also restricted.[18]

First, under Art. 358, Art. 19 can be suspended in future only in case of a proclamation of emergency issued on the ground of war or external aggression, and not in the case of a proclamation of emergency issued on the ground of armed rebellion.

Secondly, a new clause has been added to Art. 358 laying down that Art. 358 will not apply to any law which does not contain a recital saying that it is a law in relation to the proclamation of emergency in operation when it is made, or to any executive action taken otherwise than under a law containing such a recital. This makes it clear that only a law enacted in relation to the emergency, but no other law, would be immune from being challenged under Art. 358 during an emergency.

(*iv*) Changes were made in Art. 356 so as to make its scope somewhat restrictive.[19] Henceforth, the proclamation would remain in force for six months (instead of one year)[20] from the date of its approval by the Houses of Parliament. This change restored the position as it obtained prior to CA 42.

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13. *Supra*, Ch. XIII, Sec. B(b).
14. *Supra*, Chs. XXV and XXVI.
15. *Supra*, Ch. XXXIII, Sec. F.
16. *Supra*, Ch. XXV, Sec. A.
17. *Supra*, Ch. XIII, Sec. B(b).
18. *Ibid.*
19. *Supra*, Ch. XIII, Sec. E.
20. The period of one year was substituted for six months by CA42, *supra*, 2399.

Art. 356(5) added by CA 38 making satisfaction of the President under Art. 356(1) 'final and conclusive' was now withdrawn.[21] Instead, a new clause was added imposing certain conditions on the Parliament seeking to pass a resolution approving continuance of the emergency beyond one year.[22]

(*v*) Art. 360 concerning financial emergency was also amended so as to include some more safeguards therein. For this purpose, Art. 360(2) was replaced by a new clause. The new Art. 360(2) has been mentioned earlier.[23]

Further, Art. 360(5), which was inserted by CA 38, and which made presidential 'satisfaction' as to the matter mentioned in Art. 360(1) 'final and conclusive', was dropped.[24]

PREVENTIVE DETENTION

Art. 22 containing provisions regarding preventive detention[25] was amended so as to introduce a few more safeguards therein as follows:

(*i*) The maximum period for which a person may be detained without obtaining the opinion of the advisory board has been reduced from 3 to 2 months. In all cases of preventive detention beyond two months, advisory board is to be consulted. There will be no preventive detention beyond two months unless the advisory board reports that there is in its opinion sufficient cause for such detention.

(*ii*) In future, an advisory board is to consist of a chairman and not less than two other members, the chairman being a serving Judge of the appropriate High Court and the other two members being the serving or retired High Court Judges.

The board is to be constituted in accordance with the recommendations of the Chief Justice of the appropriate High Court. These changes in the composition of the advisory board are designed to make it independent of the executive so that it may be able to look at a case of preventive detention objectively.

(*iii*) No person is to be kept in preventive detention beyond the maximum period prescribed by any law made by Parliament.

These changes have not yet been notified and so have not been effectuated so far. The old Art. 22 still operates. Reference may be made in this connection to *A.K. Roy v. India*, mentioned earlier.[26]

FUNDAMENTAL RIGHTS

CA 44 removed the right to property from the category of Fundamental Rights and made it a right which can be regulated by ordinary law.[27] With a view to achieve this objective, the following changes were introduced in the Constitution.

(*i*) Art. 19(1)(f) was deleted.[28]

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21. *Supra*, 2383.
22. *Supra*, Ch. XIII, Secs. D and E.
23. *Supra*, Ch. XIII, Sec. F.
24. *Infra.*
25. *Supra*, Ch. XXVII, Sec. B.
26. *Supra*, Chs. XXVII, Sec. B and XLI, Sec. E(e).
27. *Supra*, Chs. XXXI and XXXII.
28. *Supra*, Ch. XXXI, Sec. B.

(*ii*) Art. 31 was omitted.[29]

(*iii*) Art. 31(1) became Art. 300A saying that no person shall be deprived of his property save by authority of law.[30]

(*iv*) The safeguard contained in Art. 31(2) relating to acquisition of property of an educational institution established and administered by a minority is now sought to be incorporated in Art. 30. Thus, a new clause (1A) has been added after Art. 30(1).[31]

Art. 31D was repealed by CA 44.[32]

DIRECTIVE PRINCIPLES

A new Directive Principle was inserted by adding a new clause to Art. 38 to the effect that the state shall strive to minimise inequalities in income and endeavour to eliminate inequalities in status, facilities and opportunities not only amongst individuals but groups of people residing in different areas or engaged in different vocations.[33]

ELECTIONS

Art. 329A inserted by CA 39 making special provisions regarding elections to Parliament of the Prime Minister and the Speaker was now omitted.[34]

CONCLUDING REMARKS

CA 44 thus negatived most of the distortions introduced into the Constitution by CA 42. However, CA 44 did not go so far as CB 45[35] ("the Bill which on enactment became CA 44) proposed to go.

CB 45 contained a few more significant provisions but which were absent from CA 44. The reason was this: the Janata Government had a large majority in the Lok Sabha but it was in a minority in the Rajya Sabha. While the Lok Sabha passed CB 45 as a whole, a few clauses had to be omitted therefrom in the Rajya Sabha which were voted down by the Congress Party. The following provisions in CB 45 were finally dropped before CA 44 could be passed by the two Houses.

(*i*) CA 42 had introduced into the Preamble to the Constitution the terms 'secular' and 'socialist' without however defining or explaining the significance of these terms. [36]

CB45 sought to define these two terms. "Secular republic" was defined to mean a "republic in which there is equal respect for all religions". "Socialist republic" was to mean "a republic in which there is freedom from all forms of exploitation, social, political and economic". This definition clause did not appear in CA 44.

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29. *Supra*, Ch. XXXI, Sec. C.
30. For comments on Art. 300A, see, *supra*, Ch. XXXII, Sec. E.
31. *Supra*, Ch. XXX, Sec. C(k).
32. For Art. 31D see, *supra*.
33. *Supra*, Ch. XXXIV, Sec. D(b).
34. *Supra*, 2384-2386.
35. The Constitution (Forty-fifth) Amendment Bill.
36. On preamble to the Constitutions, *supra*, Chs. I, Sec. E(c) and XXXIV, Sec. A.

(*ii*) CA 42 had added two new Articles 323A and 323B for purposes of establishing some new tribunals in India.[37] CB45 proposed to eliminate the new Articles, but this proposal did not succeed in the Rajya Sabha with the result that Arts. 323A and 323B continue to stay in the Constitution.[38]

(*iii*) CA 42 had introduced a number of changes in the area of federalism in the Constitution, the inevitable result of which was to tilt the balance somewhat in favour of the Centre. For example, Education and Forests were transferred from the State List to the Concurrent List.[39] CB45 sought to restore the *status quo ante* by retransferring these two entries back to the State List, but the proposal failed in the Rajya Sabha.[40]

(*iv*) CB 45 sought to amend Art. 31C so as to restrict its scope to what it was before CA 42.[41] It was thus proposed that in future only a law effectuating the policy of the state towards securing Art. 39(*b*) and (*c*) would be subservient to Arts. 14 and 19. However, the Rajya Sabha did not accept this proposal. Art. 31C stays in the Constitution as amended by CA 42. Ultimately, the Supreme Court restricted the scope of Art. 31C to what it was prior to the enactment of CA 42.[42]

(*v*) CB 45 sought to eliminate the last portion of Art. 31C, *viz*. "no law containing a declaration that it is for giving effect to such policy shall be called into question in any court on the ground that it does not give effect to such policy."[43] The clause had been declared unconstitutional by the Supreme Court in *Kesavananda Bharati*.[44] This proposal did not get through in the *Rajya Sabha*. But the clause cannot be effective in view of the Supreme Court's ruling in *Kesavananda*.

(*vi*) Finally, the proposal made in CB 45 to introduce referendum as a part of the constitutent process failed in the *Rajya Sabha*. This has already been explained earlier.[45]

The proposal was that changes in the Constitution impairing its democratic or secular character, abridging or taking away Fundamental Rights, prejudicing or impeding free and fair elections on the basis of adult suffrage and compromising the independence of judiciary, can be made only if they are approved by the people of India by a majority of votes at a referendum in which at least 51% of the electorate participate. The proposal fell because of the opposition of the Congress Party.

FORTY-FIFTH AMENDMENT : 1980

The Constitution (Forty-Fifth) Amendment Act, 1980, was enacted with the purpose of continuing reservation of seats for Scheduled Castes and Scheduled Tribes in the Lok Sabha and the State Assemblies for another ten years. Accord-

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37. *Supra*, 2396.
38. *Supra*, Ch. VIII, Sec. I.
39. *Supra*, 2398-2399.
40. *Supra*, Ch. X, Sec. E.
41. *Supra*, Ch. XXXII, Sec. D.
42. See, *supra*, Ch. XLI., Sec. E(a), *Minerva Mills.*
43. *Supra*, Ch. XXXII, Sec. D(ii) and (iii).
44. *Supra*, Ch. XLI, Sec. D(e).
45. *Supra*, Ch. XLI, Sec. E(f).

ingly, in Art. 334, for the words "thirty years", the words "forty years" were substituted.

The same concession was extended to the Anglo-Indians who could have representation by nomination in these chambers.

Thus, reservation for these classes in Parliament and State Legislatures was extended upto the year 1990.[46]

FORTY-SIXTH AMENDMENT : 1982

Before the enactment of this Amendment, tax on the mere consignment of goods in the course of interstate trade and commerce fell outside entry 54, List II. The matter thus fell outside the legislative competence of the States, but fell within the area of legislative competence of the Centre because of Art. 248 and the residuary Entry 97, List I.[47]

The Constitution (Forty-sixth Amendment) Act was passed in 1982. This Amendment was designed to improve the financial position of the States. The purpose of the Amendment was to enable Parliament to levy and collect tax on the consignment of goods taking place in the course of inter-State trade or commerce. The proceeds of the tax so levied were to be assigned to the States. The new tax was complimentary to the tax on inter-State sales.

Accordingly, to achieve the purpose, a new Entry 92B was added to List I in the Seventh Schedule; Art. 269 and the Union List were amended and Art. 366 was amended by adding a clause (29A) after clause (29) to expand and clarify the meaning of the phrase "tax on the sale or purchase of goods".[48]

As a result of these amendments, the field of taxation on the consignments in course of inter-state trade and commerce falls within the legislative competence of Parliament.

The Amendment also empowers the States to levy a tax on the supply of food and drink.[49]

Many controversies had arisen in connection with the levy of sales tax by the States. For example, hire-purchase transactions could not be subject to sales tax as there was no transfer of property in goods. The idea underlying the Forty-Sixth Amendment was to put an end to all these controversies by defining the expression "tax on sale or purchase of goods" in a comprehensive manner.

The Amendment was undertaken on the basis of the recommendations made by the Law Commission in its 61st report. The whole matter has been explained earlier.[50] The Commission had pointed out that the provisions of the existing Central Sales Tax Act were insufficient to tax the consignment transfers from one branch to another as it was not a sale.

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46. *Supra*, Chs. II, Sec. C; VI, Sec. B(ii) and XXXV, Secs. B, C, D.
47. *Supra*, Ch. XI, Sec. C.
48. *Ibid*, Sec. K(i).
49. *K. Damodarasamy Naidu & Sons v. State of Tamil Nadu*, (2000) 1 SCC 521 : AIR 1999 SC 3909.
50. *Supra*, Ch. XI, Sec. J.

FORTY-SEVENTH AMENDMENT : 1984

The Constitution (Forty-seventh Amendment) Act was passed in 1984. This Amendment adds 14 State Acts dealing with land to the IX Schedule.[51]

FORTY-EIGHTH AMENDMENT : 1984

The Constitution (Forty-eighth Amendment) Act was passed in 1984. It dealt with the situation prevailing in Punjab at the time.

The purpose of the Amendment was to extend the President's rule under Art. 356 in Punjab to two years. The proclamation under Art. 356 was issued by the President on the 6th October, 1983. Under Art. 356(5), President's rule could last in a State for a maximum period of one year.[52] But the conditions in Punjab were not conducive to holding of fresh elections and, accordingly, extension of the President's rule became imperative. Art. 356(5) was accordingly amended to make this possible.

FORTY-NINTH AMENDMENT : 1984

The Constitution (Forty-ninth Amendment) Act was passed in 1984. The purpose of this Amendment is to take out the Tribal areas of Tripura from Schedule V and put them in Schedule VI.[53]

FIFTIETH AMENDMENT : 1984

The Constitution (Fiftieth Amendment) Act, was passed in 1984. This Amendment
substitutes an expanded Art. 33 for the old Article.

The old Art. 33 applied only to the members of the armed forces or the forces charged with the maintenance of public order. The new Article 33 applies to two more categories of services.

By the new Art. 33, Parliament is authorised to curtail the Fundamental Rights of the members of the armed forces, forces charged with the maintenance of public order, intelligence organisations, or telecommunication systems set up for any force or intelligence bureau, with a view to ensure the proper discharge of duties by, and maintenance of discipline among, these persons in the interest of country's security.[54]

FIFTY-FIRST AMENDMENT : 1984

The Constitution (Fifty-first Amendment) Act, 1984, effectuates some changes in Arts. 330 and 332 with a view to provide for reservation of seats in the Lok Sabha for Scheduled Tribes in Meghalaya, Arunachal Pradesh, Nagaland and Mizoram, as well as in the Legislative Assemblies of Nagaland and Meghalaya.[55]

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51. *Supra*, Ch. XXXII, Sec. C.
52. *Supra*, Ch. XIII, Sec. D.
53. *Supra*, Ch. IX, Sec. C.
54. *Supra*, Ch. XXXIII, Sec. E.
55. *Supra*, Ch. IX.
Also see, *supra*, Ch. XXXV, for Arts. 330 and 332.

The Amendment was undertaken to satisfy the aspirations of the local tribal population. Even though these States are predominantly tribal areas, the purpose of the Fifty-first Amendment is to ensure that the members of the Scheduled Tribes in these areas do not fail to secure a minimal representation because of their inability to compete with the advanced sections of the society.

FIFTY-SECOND AMENDMENT : 1985

The Constitution (Fifty-second Amendment) Act, passed in 1985, popularly known as the 'Anti-Defection' Law, is designed to prevent the scourge of defection of members of Parliament and State Legislatures from one political party to another, and destabilizing governments in the process.[56]

It was stated in the Statement of Objects and Reasons: "The evil of political defections has been a matter of national concern. If it is not combated, it is likely to undermine the very foundations of our democracy and the principles which sustain it."

In Art. 102, which lays down disqualifications for membership of Parliament,[57] the following new clause has been added:

"A person shall be disqualified for being a member of either House of Parliament if he is so disqualified under the Tenth Schedule."

A similar clause has been added to Art. 191 which lays down disqualifications for membership of the Houses of State Legislature.[58]

A new Schedule (X Schedule) has been added to the Constitution containing the following provisions:

(*i*) A member of a House belonging to any political party becomes disqualified for being a member of the House—

(a) if he voluntarily gives up his membership of such political party; or

(b) if he votes or abstains from voting in such House contrary to any direction issued by the political party to which he belongs without obtaining prior permission of such party, and such act has not been condoned by the concerned political party within 15 days from the date of such voting.

(*ii*) An elected member of a House belongs to the political party by which he was set up as a candidate for election. An independent member of a House (elected without being set up as a candidate by any political party) shall become disqualified to remain a member of the House if he joins any political party.

(*iii*) The disqualification on the ground of defection does not apply when there is a split in the concerned political party and he belongs to a faction arising out of such split and such group consists of not less than 1/3 members of the party.

(*iv*) Similarly, no disqualification arises when his party merges with another political party.

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56. *Supra*, Ch. II, Sec. F; Ch. VI, Sec. B(iv).
57. *Ibid;* Ch. II, Sec. D.
58. *Supra*, Ch. VI, Sec. B(iii).

(*v*) Any question regarding disqualification arising out of defection is to be decided by the Chairman or the Speaker of the House as the case may be, and his decision shall be final.

(*vi*) The courts do not have any jurisdiction in such a matter.

The underlying idea is that if a member of Parliament or a State Legislature seeks to quit the party on whose ticket he was elected then he will have to resign his seat and recontest. This will put an effective curb on the propensity of members to change parties with a view to get some immediate political gain. This phenomenon was causing unstability in the body politic.[59]

Till recently, the Constitution had not expressly referred to the existence of political parties. By the 52nd Amendment, for the first time, there is a clear recognition of the political parties by the Constitution. The Schedule now acknowledges the existence of political parties.

FIFTY-THIRD AMENDMENT: 1986

The Constitution (Fifty-third Amendment) Act enacted in 1986, inserts a new provision in the Constitution, Art. 371-G, making special provisions regarding the State of Mizoram.[60]

The Amendment provides that notwithstanding anything contained in the Constitution, no Act of Parliament in respect of the following matters—

(a) religious or social practices of the Mizos;

(b) Mizo customary law and procedure;

(c) administration of civil and criminal justice involving decisions according to Mizo customary law; and

(d) ownership and transfer of land

shall apply to the State of Mizoram unless the State Legislative Assembly so decides by passing a resolution.

This restriction would not apply to any Central law which may be in force in the State at the commencement of the 53rd Amendment. Further, the Amendment fixes the strength of the State Legislative Assembly at a minimum of forty members.

The special provisions made by the Amendment emerged as a result of an agreement between the Central Government and the leaders of Mizoram.

FIFTY-FOURTH AMENDMENT: 1986

The purpose underlying the Constitution (Fifty-fourth Amendment) Act, 1986, is to increase the salaries of the Supreme Court and High Court Judges. The salaries of these Judges had remained static since 1950 despite high inflation. This Amendment practically doubles the salaries of the Judges.

The Amendment makes changes in Arts. 125 and 221 as well as in the Second Schedule.

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59. For an essay on defection see: *Mian Bashir Ahmad v. J & K*, AIR 1982 J & K 26.
60. *Supra*, Ch. IX, Sec. E.

Formerly the salaries for these Judges were mentioned in the Second Schedule which could be amended only by following the procedure prescribed for a constitutional amendment. Things have changed now. While the increased salaries are still mentioned in the Second Schedule, provision has been made now for amending this Schedule by Parliament by passing an ordinary law. Thus, Art. 125(2) has now been amended so as to provide that Parliament may determine the salaries of the Supreme Court Judges by law and until it so determines, the salaries of these Judges shall be those as specified in Schedule II.

Art. 221(1) concerning the salaries of the Judges of the High Court has also been amended on similar lines.[61]

The increase in the salaries of the Judges was long over due and the Constitutional Amendment now meets the long felt need.

FIFTY-FIFTH AMENDMENT : 1986

The Constitution (Fifty-fifth Amendment) Act, 1986, has been enacted to confer statehood on Arunachal Pradesh.[62]

Because of the sensitive location of the State, the State Governor has been given special responsibility with respect to law and order in the State. The Amendment adds a new provision, Art. 371-H, to the Constitution. It provides that in the discharge of the special responsibility, the Governor, after consulting the Council of Ministers, ultimately exercises his own individual judgment. If any question arises with respect to a matter whether it is or it is not one falling within the Governor's special responsibility, the decision of the Governor is final. The validity of anything done by him cannot be called in question on the ground that he ought or ought not to have acted in the exercise of his individual judgment.

It is further provided that if the President either on receipt of a report from the Governor or otherwise is satisfied that it is no longer necessary for the Governor to have any such special responsibility with respect to law and order in the State, he may by order direct that the Governor shall cease to have any such responsibility with effect from such date as may be specified by him in the order.

The strength of the State Legislative Assembly has been fixed at a minimum of thirty members.

FIFTY-SIXTH AMENDMENT : 1987

The Constitution (Fifty-sixth Amendment) Act, 1987, inserts a new constitutional provision, Art. 371-I, which contains a special provision regarding the State of Goa. The strength of the Goa State Legislative Assembly has been fixed at a minimum of 30 members.[63]

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61. *Supra*, Chs. IV, Sec. B(i) and VIII, Sec. B(l).
62. *Supra*, Ch. IX, Sec. F.
63. *Supra*, Ch. IX.

FIFTY-SEVENTH AMENDMENT : 1987

The Constitution (Fifty-seventh Amendment) Act, 1987, seeks to reserve seats for the Scheduled Tribes in the Legislative Assemblies of the States of Arunachal Pradesh, Meghalaya, Mizoram and Nagaland. This Amendment adds Clause 3A to Art. 332.[64]

The Amendment now provides that in the Legislative Assemblies of these four States, seats shall be reserved for the Scheduled Tribes on the following basis:

(a) if all the seats in the State Legislative Assembly in existence on the date of the coming into force of this Amendment are held by members of the Scheduled Tribes, all the seats except one;

(b) in any other case, such number of seats as bears to the total number of seats, a proportion not less than the number of members belonging to the Scheduled Tribes in the existing Assembly.

It is further clarified that these amendments to Art. 332 shall not affect any representation in any of these Legislative Assemblies until dissolution.

Amendment Fifty-Seventh was enacted to implement the Fifty-first Amendment passed earlier. Amendment Fifty-first could not be fully implemented unless paralled action was taken to determine the seats which were to be reserved for the Scheduled Tribes in these States.

FIFTY-EIGHTH AMENDMENT : 1987

The Constitution (Fifty-eighth Amendment) Act, 1987, has inserted the words "Authoritative Text in Hindi" in the heading of Part XXII. The Amendment adds a new Article 394A, saying that the President shall cause to be published under his authority—

(a) the translation of the Constitution of India in the Hindi language signed by the members of the Constituent Assembly, with such modifications as may be necessary to bring it in conformity with the language, style and terminology adopted in the authoritative texts of Central Acts in the Hindi language, and incorporating therein all the amendments of the Constitution made before such publication; and

(b) the translation in the Hindi language of every constitutional amendment made in the English language.

Cl. (2) of Art. 394A provides that the translation of the Constitution and its amendments as published under cl. (1) shall be construed to have the same meaning as the original thereof and if any difficulty arises in so construing any part of such translation, the President shall cause the same to be revised suitably.

Under cl. (3), the translation of the Constitution and of every amendment thereof published under this Article "shall be deemed to be, for all purposes, the authoritative text thereof in the Hindi language".[65]

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64. *Supra*, Ch. IX.
Also see, *supra*, Ch. XXXV, Sec. C.

65. *Supra*, Ch. XVI.

The reason for passing this Amendment is as follows: The Constituent Assembly adopted the English text of the Constitution. A Hindi version of the Constitution, signed by the members of the Constituent Assembly was published in 1950 under the authority of the President of the Constituent Assembly. It had become necessary to update this Hindi version of the Constitution by incorporating therein all the subsequent amendments, and to have an authoritative text of the Constitution in Hindi.

This Amendment gives constitutional recognition to the authoritative text of the Constitution in Hindi.

FIFTY-NINTH AMENDMENT : 1988

The principal *raison d'etre* for enacting the Constitution (Fifty-ninth Amendment) Act, 1988, was to control the terrorist escalation in Punjab. The Amendment made a number of changes in the emergency provisions in the Constitution by introducing Art. 359A in the Constitution. The application of this Article was limited to Punjab.

Art. 359A empowered the President, if satisfied that a grave emergency exists whereby the integrity of India is threatened by *internal disturbance* in the whole or any part of Punjab, to declare emergency in Punjab.

It may be noted that under the existing Art. 352, an emergency can be declared in India only when there is war, or external aggression or armed rebellion in any part of the country. Thus, Art. 359A brought back the old Art. 352 (as it existed before the 44th Amendment) which authorised declaration of emergency on the ground of internal disturbance; but the old provision was resurrected only in relation to Punjab and not for the rest of India.

Art. 359 was also amended by Art. 359A. The President was authorised, on a proclamation of emergency having been made, by order to declare that the right to move any court for the enforcement of all or any of the Fundamental Rights (except Art. 20),[66] as might be mentioned in the order, would remain suspended. The access to court was thus barred even when the right to life and personal liberty guaranteed by Art. 21 was suspended.

Art. 358 was also amended by Art. 359A. It was now provided that Art. 19 would remain suspended when emergency was declared in Punjab on the ground of internal disturbance.

By a new proviso to Art. 356, the operation of Art. 356(5) was excluded in relation to the proclamation issued on 11th May, 1978, for Presidential take-over of the Punjab Government. Thus, the proclamation could remain in force for three years, as provided for in the first proviso to Art. 356(4), without being controlled by Art. 356(5).[67]

Undoubtedly, Art. 359A brought back the draconian law of emergency in Punjab as it prevailed in India before the 44th Amendment which led to the now infamous case of *A.D.M., Jabalpore v. Shivkant Shukla*.[68]

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66. *Supra*, Chs. XIII and XXXIII, Sec. F.
67. *Supra*, Ch. XIII, Sec. D; see, 63rd Amendment, Sec. F *infra.*
68. *Supra*, Ch. XXXIII, Sec. F.

SIXTIETH AMENDMENT : 1988

The Constitution (Sixtieth Amendment) Act, 1988, amends Art. 276(2) of the Constitution.[69]

The States are now permitted to levy tax on profession, trades or callings and employments up to Rs. 2,500/- instead of Rs. 250/- as hitherto. This is to enable the States to collect more revenue under this head. Also, the maximum ceiling of Rs. 250/- had made the profession tax regressive in effect as even people with high salaries had to pay only Rs. 250/- per annum. The higher ceiling now fixed will enable the States to levy the tax on a progressive basis.

SIXTY-FIRST AMENDMENT : 1988

The Constitution (Sixty-first Amendment) Act, 1988, amends Art. 326 to lower the age for voting in elections to Parliament and State Legislatures from 21 to 18 years.[70]

The Amendment thus makes democracy in India much more pervasive. The present-day youth are literate, enlightened and politically conscious, and the lowering of the voting age enables them to participate in the political process in the country.

SIXTY-SECOND AMENDMENT : 1989

The Constitution (Sixty-second Amendment) Act, 1989, amends Art. 334 and extends reservation of seats for Scheduled Castes and Scheduled Tribes, and representation of the Anglo-Indian community in Lok Sabha and State Legislative Assemblies by ten more years, *i.e.*, up to January 25, 2000.[71]

SIXTY-THIRD AMENDMENT : 1989

The Constitution (Sixty-third Amendment) Act, 1989, repeals the changes made in Art. 356 by the 59th Constitutional Amendment in relation to Punjab. Thus, the proviso to Art. 356(5) has now been repealed as well as Art. 359A is omitted from the Constitution.

Punjab was thus brought at par with the other States as the Central Government felt that there was no longer any need for any special powers in regard to the proclamation of emergency in Punjab as was envisaged in the 59th Amendment.

SIXTY-FOURTH AMENDMENT : 1990

The Constitution (Sixty-fourth Amendment) Act, 1990, amended Clauses (4) and (5) of Art. 356 so as to enable the Central Government to extend the proclamation of emergency issued for Punjab on May 11, 1987, for some time more.[72]

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69. *Supra*, Ch. XI, Sec. D.
70. For Art. 326, see, *supra*, Ch. XIX, Sec. B.
71. For Art. 334, see, *supra*, Chs. II, VI and XXXV.
Also see, Forty-fifth Amendment, 1980, *supra.*
72. For Art. 356, see, *supra*, Ch. XIII, Sec. D.

Ordinarily, the proclamation would have come to an end in three years, *i.e*, May 10, 1990. But the Central Government took the view that the conditions in Punjab were not conducive to holding elections to the State Legislative Assembly. Consequently, in Art. 356(4), after the second proviso, another proviso was added making it possible to keep the said proclamation in force in Punjab for three years and six months instead of three years as provided for in the second proviso for all other States. In Art. 356(5), a proviso was added to exclude the operation of cl. 5 in relation to the proclamation mentioned above in relation to Punjab.

By the Sixty-seventh Amendment enacted in 1990, the period of three and half years was increased to four years for the validity of the same proclamation. The reason was that the situation in Punjab was still not conducive to revoking the proclamation and holding free and peaceful elections in the State.

SIXTY-FIFTH AMENDMENT : 1990

This Amendment enlarges the scope of Art. 338 which deals with constitutional safeguards for Scheduled Castes and Scheduled Tribes.[73]

Prior to this Amendment, Art. 338 provided for the appointment of a Special Officer for the Scheduled Castes and Scheduled Tribes to investigate all matters in relation to safeguards provided for these sections of the population. It was felt that instead of the Special Officer, a more effective arrangement for the purpose would be to have a high level multi-member Commission to guarantee constitutional safeguards for these people. Accordingly, Art. 338 has been amended to provide for the appointment of a Commission consisting of a chairperson, vice-chairperson and five other members. Subject to any law made by Parliament, the conditions of service and tenure of office of these persons will be determined by rules made by the President of India.

The Commission shall investigate all matters relating to the safeguards provided for the Scheduled Castes and Scheduled Tribes, and also inquire into specific complaints with respect to deprivation of any rights and safeguards to these people, *etc*.

The Commission is to make recommendations as to the measures to be taken by the various Governments for the effective implementation of these safeguards and other measures for the protection, welfare and socio economic development of the Scheduled Castes and Scheduled Tribes.

The Commission is to make an annual report to the President. It can also make a report as and when it thinks necessary. These reports are to be placed before each House of Parliament along with a memorandum by the Government as to the action taken or proposed to be taken on the recommendations made by the Commission.

Any report of the Commission pertaining to a State Government is to be forwarded to the State Governor and is to be placed before the State Legislature with a Government memorandum explaining the action taken or proposed to be taken on these recommendations.

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73. *Supra*, Ch. XXXV, Sec. G(a).

The Commission has been given power of a civil court to summon witnesses *etc*., while investigating any matter as mentioned above.

SIXTY-SIXTH AMENDMENT : 1990

The Constitution (Sixty-sixth Amendment) Act, 1990, was enacted to put a number of statutes passed by the State Legislatures, mostly in relation to land reforms, in the IX Schedule.[74]

The total number of statutes now included in this Schedule stands at 257. All these statutes stand immunized from being challenged on the ground of infringement of any Fundamental Right.

SIXTY-SEVENTH AMENDMENT : 1990

See above under the 64th Amendment. The Constitution (Sixty-seventh Amendment) Act was enacted in 1990 in relation to Punjab as stated above.

SIXTY-EIGHTH AMENDMENT : 1991

The Constitution (Sixty-eighth Amendment) Act, 1991, was enacted to keep in force the proclamation issued under Art. 356 in relation to Punjab on May 11, 1987, and which was due to end on May, 1991, under Amendment 67th, for sometime more beyond four years as had been provided by the 67th Amendment as stated above. The terrorist violence was still continuing in Punjab, and free, fair and peaceful elections to the Punjab Legislature were not yet possible.

Accordingly, Art. 356(4) was again amended to keep the said proclamation in force for five years from the date of its issue, *i.e.*, until May 10, 1992.

SIXTY-NINTH AMENDMENT : 1991

The Constitution (Sixty-ninth Amendment) Act, 1991, has added two Articles to the Constitution, *viz*., 239AA and 239AB after Art. 239A. The purpose of the Amendment is to give a special status to the National Capital of Delhi—a Union Territory.[75]

According to Art. 239AA, the Union Territory of Delhi is henceforth to be called as the National Capital Territory (NCT). The Administrator of the Territory is to be designated as the Lt. Governor. There shall be a Legislative Assembly for the NCT, the members of which are to be elected directly by the people from territorial constituencies.

Barring a few entries, the Legislature shall have power to make laws with respect to all matters enumerated in the State and the Concurrent Lists.[76] But this is not to derogate from the powers of Parliament to make a law with respect to any matter for a Union Territory. In case of repugnancy between a Central law and a law made by the Legislative Assembly, the former shall prevail.

There shall also be a Council of Ministers but in case of difference of opinion between the Lt. Governor and the Ministers, the matter is to be referred to the Presi-

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74. See, *supra*, Ch. XXXII, Sec. C, for the Ninth Schedule.
75. See, *Supra*, Ch. IX, Sec. A(f).
76. *Supra*, Ch. X, Secs. D and E.

dent. The Chief Minister and other Ministers are to be appointed by the President and are to hold office during the pleasure of the President. The Council of Ministers is to be collectively responsible to the Assembly.

According to Art. 239AB, in case of breakdown of the constitutional machinery in the NCT, the President may suspend the operation of any or all provisions of Art. 239AA.

SEVENTIETH AMENDMENT : 1992

The Constitution (Seventieth Amendment) Act, 1992, provides for the inclusion of the members of the Legislatures of National Capital Territory and the Union Territory of Pondicherry in the electoral college for the election of the President.[77]

Hitherto, Art. 54 provided for an electoral college for election of the President consisting only of the elected members of Parliament as well as of the State Legislative Assemblies and not of the Union Territories. To this effect, Art. 54 has been suitably amended.

Also, according to newly added Art. 239AA,[78] Parliament has to make provisions for giving effect to the provisions of Art. 239AA regarding the establishment of a democratic system in the National Capital Territory. It is now clarified that any law made by Parliament for the purpose would not be treated as an amendment of the Constitution for the purpose of Art. 368.[79]

SEVENTY-FIRST AMENDMENT : 1992

The Constitution (Seventy-first Amendment) Act, 1992, adds Konkani, Manipuri and Nepali to the list of languages in the VIII Schedule.[80]

SEVENTY-SECOND AMENDMENT : 1992

The Constitution (Seventy-second Amendment) Act, 1992, has been enacted to provide for reservation of seats for Scheduled Tribes in the Legislative Assembly of Tripura.[81]

The constitutional validity of the Constitutional Amendment has been upheld by the Supreme Court in *Subrata Acharjee v. Union of India.*[82]

SEVENTY-THIRD AMENDMENT : 1993

The Constitution (Seventy-third Amendment) Act, 1992, came into effect after having been passed by both Houses of Parliament and ratified by the State Legislatures as required by Art. 368.[83]

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77. *Supra*, Ch. III, Sec. A(i)(a).
78. See 69th Amendment, *supra.*
79. For Art. 368, see, *supra*, Ch. XLI, Sec. C.
80. *Supra*, Ch. XVI, Sec. E.
81. *Supra*, Ch. IX, Sec. G.
82. (2002) 2 SCC 725.
See, *supra*, Ch. IX, Sec. G, for details.
83. *Supra*, Ch. XLI, Sec. C.

The main feature of the Amendment is to introduce *panchayat* system at the grass roots level. Hitherto, the *panchayat* system had been based purely on State Legislation and its functioning had been very sporadic. The Amendment seeks to strengthen the *panchayat* system by giving it a constitutional base.

A new Part, Part IX, has been added to the Constitution consisting of Arts. 243 to 243-O. A new Schedule, *viz*. Eleventh Schedule, has also been added. *Panchayats* are proposed to be established at the village, intermediate and district levels and will be directly elected by electorate from territorial constituencies in the respective *panchayat* area. The detailed provisions are to be made by the States subject to the constitutional provisions contained in Part IX.

The underlying idea is to make *panchayats* as vibrant units of local administration in the rural area. The Amendment is regarded as historic as it is designed to establish strong, effective and democratic local administration which may lead to rapid implementation of rural development programmes.[84]

The Amendment has been passed in pursuance of the Directive Principle contained in Art. 40, which lays down that the State shall take steps to organise village *panchayats* and endow them with such powers as may enable them to function as units of self-government.[85]

Following its earlier decision[86] it has been held that Part IX of the Constitution or Article 243 makes no change in the essential feature of the Panchayat Organization. It was pointed out that what was sought to be done by the Seventy-third Amendment which inserted Part IX was to confer constitutional status on District Panchayat, Taluka Panchayat and Village Panchayats as instruments of local self government.[87]

In *Kishan Singh*[88] a Constitution Bench of the Supreme Court considered object and purpose of insertion of Part IXA in the Constitution. It noted that the object of introducing part IXA was the improper working of the local bodies in many states, timely election not being held and nominated bodies were continued for long period, elected bodies had been superseded or suspended without adequate justification. The insertions was made with a view to restore rightful place of the local bodies in political governance. The considerations made it necessary to provide a constitutional status to such bodies and to ensure regular and fair Conduct of elections.[89]

SEVENTY-FOURTH AMENDMENT : 1992

The Constitution (Seventy-fourth Amendment) Act, 1992, seeks to strengthen the system of municipal bodies in the urban areas. The idea is to place the local self-government in urban areas on a sound and effective footing. Both this and the Seventy-third Amendments represent measures for decentralization of power and greater participation of people in self-rule.

A *nagar panchayat* is to be established in a place in transition from rural to urban area. A municipal council is to be established for a smaller urban area and a municipal corporation for a larger urban area.

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84. *Supra*, Ch. IX, Sec. H.
85. *Supra*, Ch. XXXIV, Sec. C(k).
86. *Kishansingh Tomar v. Municipal Corporation of City of Ahmedabad,* (2006) 8 SCC 352 : AIR 2007 SC 269.
87. *Gujarat Pradesh Panchayat Parishadn v. State of Gujarat,* (2007) 7 SCC 718 : (2007) 9 JT 503.
88. (2006) 8 SCC 352 : AIR 2007 SC 269.
89. *Gujarat Pradesh Panchayat Parishad v. State of Gujarat,* (2007) 7 SCC 718 : (2007) 9 JT 503.

These bodies are to be directly elected. The Amendment adds a new Part IXA to the Constitution after Part IX. Part IXA contains Arts. 243P to 243ZG. A new Schedule XII is also added to the Constitution. This Schedule lists the functions which a State Legislature may by law assign to the municipalities.

Provision is also made for the appointment of a finance commission by a State to review the financial position of the municipalities and to recommend division of financial resources between the States and the municipalities within the State.

Hitherto, the institution of municipal bodies has not been functioning very effectively in the States. The 74th Constitutional Amendment seeks to make these institutions as effective instruments of administration.[90] Art. 243 (q) cannot be applied where the area of one description (such as Municipal Council) is converted into an area of another description (such as Municipal Corporation).[91]

Both the 73rd and 74th Amendments seek to decentralise decision-making power from top to bottom and thus strengthen democracy at the grass roots level. The Supreme Court had the occasion to consider the 74th amendment in a case from Haryana. The Haryana Municipal Act, 1973 faithfully adopted the constitutional mandate enshrined in Part IX-A, for carrying out the purpose of the Constitution (Seventy-fourth Amendment) Act, 1992. The Rules there-under were made for carrying out the purposes of the enactment and the purpose of the Act was to ensure that at least minimum number of persons belonging to the specified categories got elected. Accordingly, Part IX-A came to be inserted by the Constitution (Seventy-fourth Amendment) Act, 1992 w.e.f. 1-6-1993. It specifically provides for devolution by the State Legislature of powers and responsibilities upon municipalities with respect to preparation of plans for economic development and social justice, and for the implementation of development schemes as may be required to enable them to function as institutions of self-government. It was felt that economic development and implementation of schemes securing social justice may not be possible without providing for adequate representation to the weaker sections of the society. Its paramount objective was to empower the vulnerable sections of the society who were hitherto precluded from participating in the local self-government institutions for various historical reasons due to which the constitutional objective of securing social justice remained unfulfilled.[92]

SEVENTY-FIFTH AMENDMENT : 1994

The Constitution (Seventy-fifth Amendment) Act, 1994, sought to amend Art. 323B. The Amendment introduces sub-clauses (*h*), (*i*) and (*j*) in cl. (2) of Art. 323B. Thus, the Legislature has been authorised to set up tribunals for deciding disputes relating to—

(*h*) rent, its regulation and control and tenancy issues including the right, title and interest of landlords and tenants;

(*i*) offences against laws with respect to any of the matters specified in sub-clauses (*a*) to (*h*) and fees in respect of any of those matters.

(*j*) any matter incidental to any of the matters specified in sub-clauses (*a*) to (*i*).

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90. See, Ch. IX, Sec. I, *supra.*
91. *State of Maharashtra v. Jalgaon Municipal Council,* (2003) 9 SCC 731 : AIR 2003 SC 1659.
92. *Bihari Lal Rada v. Anil Jain (Tinu),* (2009) 4 SCC 1 : (2009) 2 JT 455.

An avowed objective underlying the Amendment is to expedite decision of cases relating to rent control legislation.[93]

SEVENTY-SIXTH AMENDMENT : 1994

The Constitution (Seventy-sixth Amendment) Act, 1994, added the Tamil Nadu Backward Classes, Scheduled Castes, and Scheduled Tribes (Reservation of Seats in Educational Institutions and or appointments or posts in Services under the State) Act, 1993, enacted by the Tamil Nadu Legislature, to the IX Schedule so as to give protection to the State Act under Art. 31B.[94]

This followed the decision of the Supreme Court in *Indra Sawhney* case fixing total reservations under Art. 16(4) to not more than 50%. The State forwarded the Act to the Centre under Art. 31C.[95]

SEVENTY-SEVENTH AMENDMENT : 1995

In *Indra Sawhney v. Union of India*,[96] the Supreme Court interpreting Art. 16 ruled that the word 'employment' would not include 'promotion' and reservation in promotion upheld in *Rangachari*[97] and followed in other subsequent cases was not valid. Reservation in promotion was declared unconstitutional and those cases were thus overruled. The Court, however, made the suggestion to enact a suitable law. Accordingly, the Constitution (77th Amendment) Act, 1995, has been enacted.

The Amendment introduces Art. 16(4A). This Article expressly empowers the state to make any provision for reservation in matters of promotion in any class or classes of posts in the service under the state in favour of S/Cs and S/Ts which, in the opinion of the state, are not adequately represented in the services under the state.[98]

SEVENTY-EIGHTH AMENDMENT : 1995

The Constitution (Seventy-eight Amendment) Act, 1995, adds a few State Acts to the IX Schedule.[99] To day the Schedule contains 284 statutes.

SEVENTY-NINTH AMENDMENT : 1999

The Constitution (Seventy-ninth Amendment) Act, 1999, has come into force on the 25th January, 2000.

By virtue of this Amendment, reservation of seats and special representation for S/Ts and S/Cs in the House of People and State Legislative Assemblies have been extended for another 10 years. Thus, the words "fifty years" used in Art. 334 have been changed to 'sixty years' from the commencement of the Constitution.

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93. For detailed discussion on Art. 323B, see, *supra*, Ch. VIII, Sec. I.
94. *Supra*, Ch. XXXII, Sec. C.
95. For discussion on these various constitutional provisions and *Indra Sawhney*, see, *supra*, Chs. XXIII, Sec. G, XXXII, Sec. D and XXXV.
96. *Supra*, Chs. XXIII, Secs. G and H and XXXV.
97. *Supra*, Ch. XXIII, Sec. D(c).
98. *Supra*, Ch. XXIII, Sec. H.
Also see, Ch. XXXV, *supra*.
99. For discussion on the IX Schedule, see, *supra*, Chs. XXXII, Sec. C and XLI, Sec. E(b).
Also see, the Amendments adding State statues to the IX Schedule.

Similarly the representation of the Anglo-Indian community in the Lok Sabha and in the Legislative Assemblies of the States by nomination has been extended for another ten years.[1]

These reservations would not now end on January 25, 2001, but would now last upto January 25, 2011.[2]

EIGHTIETH AMENDMENT : 2000

The Constitution (Eightieth Amendment) Act, 2000, seeks to restructure the financial relationship between the Centre and the States following the recommendations of the Finance Commission.[3]

In the first place, Art. 269 has been amended. Clauses (1) and (2) thereof have been substituted by new clauses, the purport of these clauses being to—

(1) empower the Centre to levy taxes on the sale or purchase of goods in inter-State trade or commerce and on the consignment of goods in inter-State trade or commerce;

(2) to assign the revenue arising from these taxes to the States after 1st April, 1996.

The principles for distribution of the revenue among the States are to be formulated by Parliament.

In the second place, Art. 270 has been replaced by a new Article with effect from 1st April, 1996. The new Article seeks to achieve the following:

(1) A percentage of all Central taxes and duties shall be distributed among the States.

(2) The following levies are exempted from the divisible pool—

(*a*) Duties and taxes referred to in Arts. 268 and 269;

(*b*) surcharge on taxes and duties referred to in Art. 271; and

(*c*) any cess levied for specific purposes under any law made by Parliament.

(3) The percentage, manner and form of distribution are to be prescribed by the President after considering the recommendations of the Finance Commission.[4]

(4) Art. 272 has been omitted.[5]

EIGHTY-FIRST AMENDMENT : 2000

The Constitution (Eighty-first Amendment) Act, 2000, adds the following clause as cl. (4B) after cl. (4A) in Art. 16:

> "(4B) Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under cl. (4) or clause

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1. See, *supra*, Chs. II, VI and XXXV, Sec. D.
2. *Ibid.*
3. For discussion on Centre-State Financial Relationship, see, *supra*, Ch. XI, Sec. K(i)(c).
4. For Finance Commission, see, *supra*, Chs. XI, Sec. L and XIV, Sec. G.
5. The genesis and effect of this Amendment have been discussed earlier, see, *supra*, Ch. XI, Sec. K(c).

(4A) as a separate class of vacancies to be filled up in any succeeding year or years and each class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent reservation on total number of vacancies of that year."[6]

EIGHTY-SECOND AMENDMENT : 2000

The Constitution (Eighty-second Amendment) Act, 2000, adds a proviso to Art. 335.

According to the newly added proviso, it becomes possible for the government to make any provision in favour of S/Cs and S/Ts for relaxation in qualifying marks in any examination or lowering the standards of evaluation, for reservation in matters of promotion to any class or classes of services or posts in connection with the affairs of the Union or of a State.[7]

EIGHTY-THIRD AMENDMENT : 2000

The Constitution (Eighty-third Amendment) Act, 2000, adds the following clause after Art. 243M(3):

> "(3A) Nothing in article 243D, relating to reservation of seats for the Scheduled Castes, shall apply to the State of Arunachal Pradesh."[8]

EIGHTY-FOURTH AMENDMENT : 2001

The Constitution originally envisaged allocation of seats in Lok Sabha for the States on population basis as ascertained at the census after every ten years. [Arts. 81 and 82]. The Forty-second Amendment in 1976 made a change in this scheme, *viz.* No fresh adjustment of seats in Lok Sabha as fixed on the basis of the Census figures of 1971 was to be made till after the year 2001. This meant that the number of seats for each State of Lok Sabha fixed on the basis of the Census of 1971 was frozen till 2001. By the Eighty-fourth Amendment of the Constitution 2001, this freeze is to last till 2026. No change in the number of seats for each State in Lok Sabha is to be made till after the first Census held after 2026.

The underlying reason for this provision made by the 83rd Amendment is this: some States have implemented the family planning programme more vigorously than others. Accordingly, the population in these States has stabilised while in the other States the population has increased. If now seats in Lok Sabha were to be reallocated among the States on population basis, the States implementing the family planning programme would lose some seats. This may cause set back to the family control programme. Hence it has been decided to extend the freeze on Lok Sabha seats till the year 2026 as a motivational measure to enable the State Governments to pursue the programme of population stabilisation.[9]

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6. For discussion on Art. 16(4B), see, *supra*, Ch. XXIII, Sec. H(c).
7. For discussion on the implications of this Amendment, see, *supra*, Chs. XXIII, Sec. H(b) and XXXV, Sec. C(c).
8. For discussion on these various Articles, see, *supra*, Ch. IX, Sec. F.
9. See, Ch. II, Sec. C, *supra.*

But, the readjustment of territorial constituencies within a State for purposes of election to Lok Sabha is a different matter. This has to be undertaken by the Delimitation Commission on the basis of population figures of the Census of 1991. [see, Art. 81 Proviso; Art. 82 Proviso]

The Eighty-fourth Amendment also effects some changes in Art. 170 dealing with the composition of the State Legislative Assemblies. Art. 81 has been amended so as to provide that each State is to be divided into territorial constituencies for election to the State Legislature on the basis of the population figures of the 1991 Census. This arrangement would continue until the Census is held after the year 2026.[10]

Arts. 330 and 332 has been amended so as to provide that the number of seats reserved for the Scheduled Castes and the Scheduled Tribes in Lok Sabha and in each State Legislative Assembly has to be fixed on the basis of the 1991 Census figures and that no change is to be effectuated therein till the Census is taken after the year 2026.[11]

EIGHTY-FIFTH AMENDMENT : 2001

The Constitution (Eighty-fifth Amendment) Act, 2001, modifies Cl. 4A of Art. 16. It now reads as follows:

> "Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion *with consequential seniority* of any class or classes of posts in the services of the State in favour of the Scheduled Castes and the Scheduled Tribes which in the opinion of the State are not adequately represented in the services under the State."[12]

Clause 4A in Art. 16 was introduced in the Constitution by the 77th Amendment. Now the words italicized have been introduced by the 85th Amendment. In effect, the purport of both the Amendments is to undo the effect of the rulings of the Supreme Court in *Indra Sawhney* and later cases on the question of reservations in promotions and the seniority of the promotees on the basis of reservation.[13]

EIGHTY-SIXTH AMENDMENT : 2002

The Constitution (Eighty-sixth Amendment Act 2002) inserted three amendments to provide for the education and welfare of children.

First, Article 21A casts obligation upon the State to provide free and compulsory education to all children of the age of 6 to 14 years in such manner as the State may, by law, determine. This amendment was inspired by the Directive Principles contained in Article 45 of the Constitution which provided that the "State shall endeavour to provide childhood care and education for all children until they complete the age of 6 years". To achieve this objective in

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10. Ch. VI, Sec. B(ii), *supra.*
11. Ch. XXXV, Secs. B and C, *supra.*
12. *Supra*, Ch. XXIII, Sec. H(a).
13. For discussion on this aspect, see, Ch. XXIII, Sec. G, *supra.*

the Directive Principles the statement of objects and reasons of this amendment acknowledge that in spite of strenuous efforts made to fulfill this objective, the ultimate goal of providing universal and quality education remain unfulfilled. The amendment bill was introduced in Parliament in 1997. It was scrutinized by the Parliamentary Standing Committee on Human Resources Development and this subject was also dealt with by the Law Commission of India (165th Report).

Secondly, the 86th amendment also substituted a new article for Article 45 which provides that the State shall endeavour to provide early childhood care and education for all children until they complete the age of 6 years.

Thirdly, the amendment also added a further clause in Article 51A which enjoins a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of 6 and 14 years.

The 86th amendment received the assent of the President on 12th December, 2002 and was published in the gazette of India dated 13th December, 2002.

THE CONSTITUTION (EIGHTY-SEVENTH AMENDMENT) ACT, 2003

An Act to amend the Constitution of India

Be it enacted by Parliament in the Fifty-fourth Year of the Republic of India as follows:—

S. 1. Short title.—This Act may be called the Constitution (Eighty-seventh Amendment) Act, 2003.

S. 2. Amendment of Article 81.—In article 81 of the Constitution, in clause (3), in the proviso, in clause (ii), for the figures "1991", the figures "2001" shall be substituted.

S. 3. Amendment of Article 82.—In article 82 of the Constitution, in the third proviso, in clause (ii), for the figures "1991", the figures "2001" shall be substituted.

S. 4. Amendment of Article 170.—In article 170 of the Constitution,—

(i) in clause (2), in the Explanation, in the proviso, for the figures "1991", the figures "2001" shall be substituted;

(ii) in clause (3), in the third proviso, in clause (ii), for the figures "1991", the figures "2001" shall be substituted.

S. 5. Amendment of Article 330.—In article 330 of the Constitution, in the Explanation, in the proviso, for the figures "1991", the figures "2001" shall be substituted.

THE CONSTITUTION (EIGHTY-EIGHTH AMENDMENT) ACT, 2003

[*15th January, 2004*]

An Act further to amend the Constitution of India.

BE it enacted by Parliament in the Fifty-fourth Year of the Republic of India as follows:—

S. 1. Short Title and Commencement.—(1) This Act may be called the Constitution (Eighty-eighth Amendment) Act, 2003.

(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

S. 2. Insertion of new Article 268A.—After article 268 of the Constitution, the following article shall be inserted, namely:—

"268A. Service tax levied by Union and collected and appropriated by the Union and the States.—(1) Taxes on services shall be levied by the Government of India and such tax shall be collected and appropriated by the Government of India and the States in the manner provided in clause (2).

(2) The proceeds in any financial year of any such tax levied in accordance with the provisions of clause (1) shall be—

(a) collected by the Government of India and the States;

(b) appropriated by the Government of India and the States,

in accordance with such principles of collection and appropriation as may be formulated by Parliament by law".

S. 3. Amendment of Article 270.—In article 270 of the Constitution, in clause (1), for the words and figures "articles 268 and 269", the words, figures and letter "articles 268, 268A and 269" shall be substituted.

S. 4. Amendment of Seventh Schedule.—In the Seventh Schedule to the Constitution, in List I—Union List, after entry 92B, the following entry shall be inserted, namely:—

"92C. Taxes on services.".

NOTES

The Constitution (88th Amendment of 2003) was made after extensive study and consultation between the Central Government and the States. The purpose was to give effect to the unanimous decision of the States to replace their existing sales tax system with the system of Value Added Tax (VAT) from 1st April, 2003. The States, with a view to widening their tax base, suggested that they should be enabled to collect the appropriate tax on services. Tax on services was not a specific legislative field in the 7th Schedule—although the Parliament took recourse to the residual field in Entry 97 and periodical tax on certain services. Parliament was of the view that the 88th amendment would pave the way for eventual inclusion of services within the purview of State level VAT. To give effect to this felt necessity the 88th amendment inserted Article 268A as above and also the 7th Schedule by providing that after 92B, the following entry shall be inserted viz.—"92C: Taxes on services". It will be noticed that Article 268A empowered the Government of India to levy such tax but to collect and appropriate by the Government of India and the States in the manner provided.

THE CONSTITUTION (EIGHTY-NINTH AMENDMENT) ACT, 2003

[*28th September, 2003*]

An Act further to amend the Constitution of India.

BE it enacted by Parliament in the Fifty-fourth Year of the Republic of India as follows:—

S. 1. Short title and commencement.—(1) This Act may be called the Constitution (Eighty-ninth Amendment) Act, 2003.

(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

S. 2. Amendment of article 338.—In article 338 of the Constitution,—

(a) for the marginal heading, the following marginal heading shall be substituted, namely:—

"National Commission for Scheduled Castes.";

(b) for clauses (1) and (2), the following clauses shall be substituted, namely :—

"(1) There shall be a Commission for the Scheduled Castes to be known as the National Commission for the Scheduled Castes.

(2) Subject to the provisions of any law made in this behalf by Parliament, the Commission shall consist of a Chairperson, Vice-Chairperson and three other Members and the conditions of service and tenure of office of the Chairperson, Vice-Chairperson and other Members so appointed shall be such as the President may by rule determine.";

(c) in clauses (5), (9) and (10), the words "and Scheduled Tribes" wherever they occur, shall be omitted.

S. 3. Insertion of new Article 338A.—After article 338 of the Constitution, the following article shall be inserted, namely:—

"338A. National Commission for Scheduled Tribes.—(1) There shall be a Commission for the Scheduled Tribes to be known as the National Commission for the Scheduled Tribes.

(2) Subject to the provisions of any law made in this behalf by Parliament, the Commission shall consist of a Chairperson, Vice-Chairperson and three other Members and the conditions of service and tenure of office of the Chairperson, Vice-Chairperson and other Members so appointed shall be such as the President may by rule determine.

(3) The Chairperson, Vice-Chairperson and other Members of the Commission shall be appointed by the President by warrant under his hand and seal.

(4) The Commission shall have the power to regulate its own procedure.

(5) It shall be the duty of the Commission—

(a) to investigate and monitor all matters relating to the safeguards provided for the Scheduled Tribes under this Constitution or under any other law for the time being in force or under any order of the Government and to evaluate the working of such safeguards;

(b) to inquire into specific complaints with respect to the deprivation of rights and safeguards of the Scheduled Tribes;

(c) to participate and advise on the planning process of socio-economic development of the Scheduled Tribes and to evaluate the progress of their development under the Union and any State;

(d) to present to the President, annually and at such other times as the Commission may deem fit, reports upon the working of those safeguards;

(e) to make in such reports recommendations as to the measures that should be taken by the Union or any State for the effective implementation of those safeguards and other measures for the protection, welfare and socio-economic development of the Scheduled Tribes; and

(f) to discharge such other functions in relation to the protection, welfare and development and advancement of the Scheduled Tribes as the President may, subject to the provisions of any law made by Parliament, by rule specify.

(6) The President shall cause all such reports to be laid before each House of Parliament along with a memorandum explaining the action taken or proposed to be taken on the recommendations relating to the Union and the reasons for the non-acceptance, if any, of any of such recommendations.

(7) Where any such report, or any part thereof, relates to any matter with which any State Government is concerned, a copy of such report shall be forwarded to the Governor of the State who shall cause it to be laid before the Legislature of the State along with a memorandum explaining the action taken or proposed to be taken on the recommendations relating to the State and the reasons for the non-acceptance, if any, of any of such recommendations.

(8) The Commission shall, while investigating any matter referred to in sub-clause (a) or inquiring into any complaint referred to in sub-clause (b) of clause (5), have all the powers of a civil court trying a suit and in particular in respect of the following matters, namely:—

(a) summoning and enforcing the attendance of any person from any part of India and examining him on oath;

(b) requiring the discovery and production of any document;

(c) receiving evidence on affidavits;

(d) requisitioning any public record or copy thereof from any court or office;

(e) issuing commissions for the examination of witnesses and documents;

(f) any other matter which the President may, by rule, determine.

(9) The Union and every State Government shall consult the Commission on all major policy matters affecting Scheduled Tribes.".

NOTES

The 89th amendment of 2003 deals with the establishment and constitution of a commission for the Scheduled Castes to be known as "The National Commission for Scheduled Castes as well as a National Commission for Scheduled Tribes". Article 338A enumerates the duties of the Commission and among the most important being its duty to investigate and monitor all matters relating to the safeguarding of the Constitutional provisions or the Statutory provisions relating to such safeguarding and to evaluate the working of such safeguards and to inquire into specific complaints with respect to the deprivation of rights and safeguards of the Scheduled Tribes.

CONSTITUTION (NINETIETH AMENDMENT) ACT, 2003

[*28th September, 2003*]

An Act further to amend the Constitution of India.

BE it enacted by Parliament in the Fifty-fourth Year of the Republic of India as follows:—

S. 1. Short title.—This Act may be called the Constitution (Ninetieth Amend-ment) Act, 2003.

S. 2. Amendment of article 332.—In Article 332 of the Constitution, in clause (6), the following proviso shall be inserted, namely:—

"*Provided* that for elections to the Legislative Assembly of the State of Assam, the representation of the Scheduled Tribes and non-Scheduled Tribes in the constituencies included in the Bodoland Territorial Areas District, so notified, and existing prior to the constitution of the Bodoland Territorial Areas District, shall be maintained.".

CONSTITUTION (NINETY-FIRST AMENDMENT) ACT, 2003

[*1st January, 2004*]

An Act further to amend the Constitution of India.

BE it enacted by Parliament in the Fifty-fourth Year of the Republic of India as follows:—

S. 1. Short title.—This Act may be called the Constitution (Ninety-first Amendment) Act, 2003.

S. 2. Amendment of Article 75.—In article 75 of the Constitution, after clause (1), the following clauses shall be inserted, namely:—

"(1A) The total number of Ministers, including the Prime Minister, in the Council of Ministers shall not exceed fifteen per cent. of the total number of members of the House of the People.

(1B) A member of either House of Parliament belonging to any political party who is disqualified for being a member of that House under paragraph 2 of the Tenth Schedule shall also be disqualified to be appointed as a Minister under clause (1) for duration of the period commencing from the date of his disqualification till the date on which the term of his office as such member would expire or where he contests any election to either House of Parliament before the expiry of such period, till the date on which he is declared elected, whichever is earlier.".

S. 3. Amendment of Article 164.—In article 164 of the Constitution, after clause (1), the following clauses shall be inserted, namely:—

"(1A) The total number of Ministers, including the Chief Minister, in the Council of Ministers in a State shall not exceed fifteen per cent. of the total number of members of the Legislative Assembly of that State:

Provided that the number of Ministers, including the Chief Minister, in a State shall not be less than twelve:

Provided further that where the total number of Ministers, including the Chief Minister, in the Council of Ministers in any State at the commencement of the Constitution (Ninety-first Amendment) Act, 2003 exceeds the said fifteen per cent. or the number specified in the first proviso, as the case may be, then, the total number of Ministers in that State shall be brought in conformity with the provisions of this clause within six months from such date as the President may by public notification appoint.

(1B) A member of the Legislative Assembly of a State or either House of the Legislature of a State having Legislative Council belonging to any political party who is disqualified for being a member of that House under paragraph 2 of the Tenth Schedule shall also be disqualified to be appointed as a Minister under clause (1) for duration of the period commencing from the date of his disqualification till the date on which the term of his office as such member would expire or where he contests any election to the Legislative Assembly of a State or either House of the Legislature of a State having Legislative Council, as the case may be, before the expiry of such period, till the date on which he is declared elected, whichever is earlier.".

S. 4. Insertion of new Article 361B.—After article 361A of the Constitution, the following article shall be inserted, namely:—

'361B. Disqualification for appointment on remunerative political post. A member of a House belonging to any political party who is disqualified for being a member of the House under paragraph 2 of the Tenth Schedule shall also be disqualified to hold

any remunerative political post for duration of the period commencing from the date of his disqualification till the date on which the term of his office as such member would expire or till the date on which he contests an election to a House and is declared elected, whichever is earlier.

Explanation.—For the purposes of this article,—

(a) the expression "House" has the meaning assigned to it in clause (a) of paragraph 1 of the Tenth Schedule;

(b) the expression "remunerative political post" means any office—

(i) under the Government of India or the Government of a State where the salary or remuneration for such office is paid out of the public revenue of the Government of India or the Government of the State, as the case may be; or

(ii) under a body, whether incorporated or not, which is wholly or partially owned by the Government of India or the Government of a State and the salary or remuneration for such office is paid by such body,

except where such salary or remuneration paid is compensatory in nature.'.

S. 5. Amendment of the Tenth Schedule.—In the Tenth Schedule to the Constitution,—

(a) in paragraph 1, in clause (b), the words and figure "paragraph 3 or, as the case may be," shall be omitted;

(b) in paragraph 2, in sub-paragraph (1), for the words and figures "paragraphs 3, 4 and 5", the words and figures "paragraphs 4 and 5" shall be substituted;

(c) paragraph 3 shall be omitted.

NOTES

The 10th Schedule of the Constitution (commonly known as Anti-Defection Law) came in for intensive criticism to the effect that although the Schedule contained provisions for individual defections as illegal, it did not do so in the case of bulk defections. It was also noticed that there were abnormally larger Councils of Ministers being constituted by various governments at the Centre as well as the States. The amendment addressed the problem in relation to the 10th Schedule by inserting Article 361B dealing with the problem of the 10th Schedule and also amending articles 75 and 164 by restricting the sizes of the Councils of Ministers both at the Central and State levels respectively.

CONSTITUTION (NINETY-SECOND AMENDMENT) ACT, 2003

[*7th January, 2004*]

An Act further to amend the Constitution of India.

BE it enacted by Parliament in the Fifty-fourth Year of the Republic of India as follows:—

S. 1. Short title.—This Act may be called the Constitution (Ninety-second Amendment) Act, 2003

S. 2. Amendment of Eighth Schedule.—In the Eighth Schedule to the Constitution,—

(a) existing entry 3 shall be re-numbered as entry 5, and before entry 5 as so re-numbered, the following entries shall be inserted, namely:—

"3. Bodo.

4. Dogri.";

(b) existing entries 4 to 7 shall respectively be re-numbered as entries 6 to 9;

(c) existing entry 8 shall be re-numbered as entry 11 and before entry 11 as so renumbered, the following entry shall be inserted, namely:—

"10. Maithili.";

(d) existing entries 9 to 14 shall respectively be re-numbered as entries 12 to 17;

(e) existing entry 15 shall be re-numbered as entry 19 and before entry 19 as so renumbered, the following entry shall be inserted, namely:—

"18. Santhali.";

(f) existing entries 16 to 18 shall respectively be re-numbered as entries 20 to 22.

CONSTITUTION (NINETY-THIRD AMENDMENT) ACT, 2005

[*20, Januanry 2006*]

An Act further to amend the Constitution of India.

BE it enacted by Parliament in the Fifty-sixth Year of the Republic of India as follows:—

S. 1. Short title and commencement.—(1) This Act may be called the Constitution (Ninety-third Amendment) Act, 2005.

(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

S. 2. Amendment of article 15.—In article 15 of the Constitution, after clause (4), the following clause shall be inserted, namely:—

"(5) Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30.".

CONSTITUTION (NINETY-FOURTH AMENDMENT) ACT, 2006

[*12th June, 2006*]

An Act further to amend the Constitution of India.

BE it enacted by Parliament in the Fifty-seventh Year of the Republic of India as follows:—

S. 1. Short title.—This Act may be called the Constitution (Ninety-fourth Amendment) Act, 2006.

S. 2. Amendment of article 164.—In article 164 of the Constitution, in clause (1), in the proviso, for the word "Bihar", the words "Chhattisgarh, Jharkhand" shall be substituted.

NOTES

The 90th (2003), 92nd (2003), 93rd (2005) and 94th (2006) amendments speak for themselves and no separate commentary is called for.

CHAPTER XLIIA

CONCLUDING REMARKS

SYNOPSIS

Some of the Constitutional Amendments have been of minor significance.[1] Some of the amendments have been rather major and of an omnibus character, as one amending Act may make a number of changes in a large number of constitutional provisions. As for example, the 7th Amendment, the 42nd Amendment and the 44th Amendment affected several provisions of the Constitution rather drastically.

The cumulative general effect of the various amendments of the Constitution has mainly been:

(1) to restrict the scope and ambit of some of the Fundamental Rights, particularly, the right to property;[2]

(2) to give greater safeguards to the Minorities and Scheduled Castes and Scheduled Tribes;[3]

(3) to create new States and to admit certain foreign possessions into the Indian Union;[4]

(4) In the area of Federalism, the amendments have achieved the following results—

(i) to give greater powers to the Centre *vis-à-vis* the States;

(ii) to remove distinctions among the States and place them all on the same footing;

(iii) to reorganise the States on linguistic basis;

(iv) to strengthen safeguards in emergency provisions.[5]

So many amendments made to the Constitution in a short span of 59 years cannot be regarded as a happy situation. While some of the amendments can be regarded as inevitable, *e.g.*, amendments changing some details which needed to

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1. For example, II, V, XI, XIII Amendments.
2. For example I, IV, XVII, XI, XLII and XLIV.
3. I, VII, VIII, XXI, XXII, XXIII, XXVII, XXXII, LIII, LVII, LXXXII.
4. X, XII, XIV, LV, LVI.
5. Amendment XXXXIV.

be changed with the lapse of time, some were not necessary at all as they were an attempt to change the balances originally incorporated into the Constitution by its framers.

It needs to be emphasized that the Constitution should be treated with great respect and not made into a play thing by political parties. A stable constitution gives stability to the country's constitutional process. For example, in the U.S.A., during nearly over 200 years, only 30 amendments have been made and the U.S.A. has progressed tremendously under an old Constitution.

The purpose of the constitution is to regulate administrative and political processes in the country and it is not proper to change the constitution to suit transient political expediency. Majority in Parliament in a democracy is only transient; it is not permanent, but constitution is more permanent in nature. Parliament under a written constitution ought not to regard itself as omnipotent and seek to mutilate the Constitution in any way it likes. If one party in majority changes the Constitution today, another party in majority will change it tomorrow and the Constitution will then cease to claim respect of the people on which it depends for its efficacy and survival.

The procedure to amend the Constitution as laid down in Art. 368, though different from the ordinary legislative process (where the rule of only simple majority operates), has, in practice, been found to be not so rigid as in America or Australia. This is evident from the fact that since its inception in 1950, the Constitution has been amended so many times.

A major factor contributing to the facile way in which the Constitution could be amended so far has been that the Congress Party has enjoyed an overwhelming majority in both the chambers of Parliament at the Centre as well as in the State Legislatures. Therefore, when once the Central leadership of the Party has made up its mind to effect an amendment, it has not found it difficult to muster the requisite majority in the two Houses of Parliament as well as in the State Legislatures whenever their ratification was required.

But the political life in India has now become fragmented; political parties have proliferated and the Congress Party has lost its predominant position. No single political party now enjoys 2/3rd majority in the two Houses of Parliament. Therefore, it may no longer be possible to predicate with any certainty whether a particular proposal to amend the Constitution would get the necessary votes in both Houses of Parliament as well as in the States to become effective. For example, in 1970, the bill to abolish privy purses of the erstwhile rulers failed to get the requisite votes in the Rajya Sabha in spite of the fact that it had got the requisite majority in the Lok Sabha and received a wide measure of support from several sections of Parliament as well as the government. This is one example of the failure of a constitutional amendment initiated by the government.[6] Another

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6. *Supra*, Ch. XXXVII, Sec. E.

The Bill received 339 out of 493 votes in Lok Sabha. In Rajya Sabha, it received 149 out of 224 votes which was less than 2/3rd votes by a fraction. A joint session of the two Houses of Parliament is not envisaged to break an inter-House deadlock in case of a Constitution Amendment Bill. Under Art. 368, such a Bill has to be passed by a special majority in each House. The use of the phrase 'each House' rules out the technique of a joint session when such a Bill has been passed by one House by the requisite majority but not by the other, as the rule of special majority in 'each House' cannot possibly be fulfilled at a joint session.

[Footnote 6 Contd.]

example is that certain provisions of the Forty- fifth Constitution Amendment Bill though passed by Lok Sabha were not passed by Rajya Sabha.[7]

Quite a few Amendments, such as VII, VIII, X, XII, XIV, XXI, XXII, XXIII, *etc*. had a wide measure of consensus behind them. Quite a number of other Amendments, such as, those admitting foreign possessions to the Union, or ceding Berubari to Pakistan (Amendment IX) were rather inevitable. Some of the amendments, such as, II, a part of XIV, *etc*., had to be undertaken because the Constitution contains too many details which need to be modified from time to time to meet the changing situation. Some amendments, such as, II, V, XI, XII, are of minor significance.

Most of the Amendments did not raise any sharp reaction but Amendments I, IV, XVII, XXIV, XXV and XLII raised quite a good deal of controversy in the country. These Amendments were criticised not only on the ground that they adversely affected the Fundamental Rights, but also that they constituted ostensible attempts to negative some of the tenets of the judicial pronouncements on the Constitution which the ruling political party regarded as coming in the way of enacting its projected socio-economic legislation or which gave a wide ambit to a Fundamental Right.

Nevertheless, there is no denying the fact that the Amendments regarding property rights can be justified, to some extent, except Schedule IX,[8] on the ground that the views of the judiciary regarding payment of compensation for agricultural property acquired could not just be fully implemented in the Indian context.[9] But the addition of Schedule IX immunizing as many as 284 State Acts from judicial scrutiny does not seem to be warranted. To begin with, it was envisaged that Schedule IX would be used to give immunity only to land laws, but, in course of time, all kinds of State Laws have been added to the Schedule and granted immunity from judicial review. A significant question to be considered in this regard is : How far the concept of IX Schedule is compatible with the thesis that Judicial review is an essential feature of the Constitution? *Prima facie*, there

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[Footnote 6 Contd.]

The idea to have a joint session in such a situation may find support from some observations made by the majority of the Judges of the Supreme Court in *Golak Nath* refusing to distinguish between the legislative process and the constituent process. But these observations were made with reference to Art. 13 only and cannot be taken to obliterate entirely, for all purposes, the difference between the two processes. An ordinary Bill is passed by a simple majority in a House where the quorum is very small.

Thus, an ordinary Bill can be passed in a House by merely a few members present at a sitting. That cannot be done with respect to a Constitution Amendment Bill which must have at least 272 votes in its favour in the Lok Sabha, as the strength of the House is 542. In addition, 2/3 of the members present and voting should also support such a Bill. There is thus an essential difference between legislative and constituent processes. Since *Kesavananda*, such a difference has been judicially recognised. Also the XXIV Amendment amended Art. 368 in such a manner as to underline the distinction between legislative and constituent processes.

7. *Supra*, Ch. XLI, Sec. E(f).

8. *Supra*, Ch. XXXII, Sec. C.

9. Blackshield in his article, Fundamental Rights and the Economic Viability of the Indian Nation, 10., *JILI.*, 183 (1968), makes the point that these amendments were not really necessary and the purpose in view could have been achieved by proper legislative drafting. Also see, *Ramaswami,* the Indian Constitutional Amendments, (1963) *Indian Yr. Book of Int. Affairs*, 161.

is no compatibility between the two as Schedule IX has been conceived primarily to keep Judicial review of the protected laws at bay.

The most controversial Amendments in the whole constitutional history of India have been the 39th and the 42nd Amendments because of their content as well as the manner and the circumstances in which these Amendments were carried out. These Amendments very much alienated public opinion which resulted in a change of government after the election. The 39th Amendment was declared to be invalid by the Supreme Court.

The 42nd Amendment had a number of the obnoxious features and sought to make the Central Executive very potent and the courts comparatively weaker. It was an attempt to drastically re-write the Constitution and denude it of its many liberal and democratic features. In fact, critics have asserted that this Amendment sought to institutionalise the emergency for good in India. It proved to be the most ill-advised and controversial constitutional Amendment ever undertaken in the country. It was inevitable that with the change in government, CA 42 should undergo a drastic change sooner than later and the *status quo ante* restored to a large extent. Accordingly, most of the controversial provisions of the 42nd Amendment were neutralised by the 43rd and the 44th Amendments.[10]

Because of the fact that inconvenient judicial pronouncements touching upon the Fundamental Rights could be nullified rather easily through the process of constitutional amendment, the institution of judicial review has not been able to play that pervasively creative role in shaping and moulding the Indian Constitution as it has been able to play in the U.S.A. But, if formal amendments of the Constitution become difficult to accomplish under Art. 368, in course of time, the judiciary may be able to make its impact felt more and more on the development of the Constitution to meet the contemporary socio-economic exigencies. Such a development has already taken place, to some extent, from 1978 onwards when the Judiciary has been able to play a very creative role in shaping and moulding constitutional process in the country. The most outstanding examples of judicial creativity have been the expansion of the scope and range of Art. 21,[11] and the enunciation of the doctrine of non-amendability of the basic structures and fundamental features of the Constitution.[12]

Lastly, it needs to be said that the facile way in which it has been possible to amend the Constitution so far has not promoted in the minds and hearts of the people a deep emotional respect for the Constitution as a symbol having sanctity and permanence. Such a sentiment can take root only when the Constitution is not tampered with whenever the government encounters the least difficulty in putting through its programme. It is extremely important for the endurance of the Constitution and promotion of constitutionalism in the country that people respect it and have confidence in it. Such a sentiment can be promoted only when the Constitution is regarded as something sacrosanct and not to be tinkered or trifled with lightly but only as a last resort when there is no other viable alternative available to meet a national situation.

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10. *Supra*, 2404, 2405-2413.
11. *Supra*, Ch. XXVI, Sec. J.
Also see, *supra*, Ch. XLI, Sec. C.
12. *Supra*, Ch. XLI, Sec. D(e).

To achieve this laudable objective, it seems absolutely necessary that the constitutional amending process be rigidified and made more difficult so that an Amendment can be made to the Constitution only when there is broad national consensus favouring the same. The truth remains that 2/3 of Lok Sabha hardly represents a broad national consensus as it is common knowledge that not more than 45% of the eligible voters cast their votes at the general election for the House. Rajya Sabha has no popular mandate whatsoever. It also needs to be realised that the basic purpose of the constitution is to control power—legislative as well as executive. This is the idea inherent in the term "constitutionalism".[13] Therefore, the government cannot rush to amend the constitution the moment it feels any constitutional difficulty in executing its policies. If that is done too often, then, all constitutional restraints on the government will come to an end and we shall be left with an uncontrolled, arbitrary, government.

The Janata Government through CB 45 had proposed to lay down the process of referendum to amend certain specified features of the Constitution.[14] This was a very wholesome proposal and although approved by Lok Sabha, unfortunately, it could not get the requisite votes in Rajya Sabha because of the intransigence of certain political groups, especially, the Congress Party.

If referendum appears to be too complicated a procedure in a country like India, another alternative to consider may be to require ratification of all constitutional amendments by 2/3 of all the State legislative assemblies, each assembly passing the requisite resolution by the same voting rule as prevails in Parliament for a constitutional Amendment. After all, it is illogical that while many constitutional provisions need State ratification to amend, Fundamental Rights which affect the individual so vitally can be amended by Parliament alone. The proposed procedure will ensure a broad public participation on national level in the constitutional amending process.

13. See, *supra*, Ch. I, Sec. B.
14. *Supra*, Ch. XLI, Sec. E(f).