KLE LAW ACADEMY BELAGAVI

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STUDY MATERIAL

for

CONSTITUTIONAL LAW II

Prepared as per the syllabus prescribed by Karnataka State Law University (KSLU), Hubballi

Compiled by

Vinuta Kulkarni, Asst. Prof.

Preeti Kasturi, Lecturer

Swapna Somayaji, Lecturer

Reviewed by

Dr. Sharada G. Patil, Principal

G.K. Law College, Hubballi

Sl. No.	Units	Topics
1	Unit I	**Federal system**: Organisation of State. Relationship between the Centre and the State : Legislative, Financial and Administrative Co-operative Federalism Recommendation of Commission. Freedom of Trade and Commerce, Official Language, Local self- government with special emphasis on 73rd and 74th Amendment. Constitutional provisions of Jammu and Kashmir (Art 370) Special provisions relating to specific states (Article 371-A to 371-J)
2	Unit II	**Executive :** Centre – President, powers and functions State – Governor, powers and functions Parliament and State Legislature: Bicameralism, Composition, powers and function **Councils of ministers** : collective responsibility, position of Prime Minister and Chief Minister
3	Unit III	**Speaker :** Parliament and State Legislature, Powers and Functions, Privileges, Anti-Defection Law **Judiciary :** Union and States, Appointment, Powers, Jurisdiction, Transfer of Judges
4	Unit IV	Subordinate Judiciary**,** Administrative Tribunals **Public Service Commission :** Services under the Centre and the State, Constitutional protection to Civil Servants. **Election Commission:** Powers and functions, State liability for Torts and Contract.
5	Unit V	**Emergency :** Types, Effects and effects on fundamental rights for Torts and Contracts

UNIT- I

1. Federal System:

Indian Constitution establishes a unitary state with subsidiary federal features whereas these views are strictly based on the theoretical considerations of the Indian constitution. K.C. Wheare opines Indian constitution as a quasi-federal. On the contrary it is misleading to refer to India as a quasi-federation, because there is no such thing as a quasi-federal system and that a system is either a federation or it is not a federation. India is legally a complete federation, because all the basic features of federal system are present in the Indian constitution. Taking into account the legal or institutional structure of a federal system, one finds that features of federalism such as- supremacy of the constitution, distribution of powers and an independent federal judiciary are there in the constitution.

The minor features are also there such as participation of the constituent units in the amendment process of the constitution and federal character of the second chamber. However, inspite of the tendency of centralisation, the legal formal structure of our Constitution incorporates all these elements. Apart from this discussion on the nature of Indian constitution scholars have discussed the federal nature of Indian constitution from different angles. W.H. Morris Jones has studied Indian federal system in its political and dynamic perspectives. He talks of federalism in India as an example of the concept of bargaining federalism. He says that federalism in India is a form of co-operative federalism but according to him this phrase should be understood to include hard competitive bargaining. He further says, "whereas the emphasis in the constitution is on demarcation, that of practical relations, in on co-operative bargaining. The center has encouraged different modes of relations with the different states and hence a varied mode of federalism is perceivable" A large number of scholarly studies have been published on the dynamic aspect of India's federal system.

They reveal the impact of the dynamics of political dimensions such as the party alliances, the ideological movements, national and regional political leadership, effectiveness of pressure groups and peoples demands. Besides socio-economic conditions are also determining the emerging framework of the center-

state relations. Each state of the union has its distinctive socio-economic and political problems. It therefore, evolves different types of relations with the center. This shows that the Indian federal system has evolved a dynamic character and this dynamic nature changes according to compelling reasons, pressures and circumstances.

The real nature of a society cannot be understood merely by an analysis of the institutions. Its nature can be examined only by observing how the institutions work in the context of that society. It is the operation and not the form that is important. The essential nature of federalism is to be sought for not in the shadings of legal and constitutional terminology but in the forces-economic, social, political and cultural that has made the outward form of federalism necessary. There are three models of federalism in India. There is a distinction of degrees rather than kinds in this model. Sometime these models are visible in a political system in comparison to each other.

Unitary Federalism: A historical study of the growth of federal systems brings home the political truth that what has happened during the last few decades is that the central governments have developed their powers more and more intensively at the expense of the areas originally allotted to the regional governments, it is due to this that the national governments have grown in importance in comparison with the regional governments. The main forces that have contributed to the growing strength of national government at the expense of regional government seem to have been six fold - war politics, depression politics, welfare politics, techno-politics, grant-in-aid politics and party politics. The horrible conditions of war and economic depression demand unitary control for the effective protection of national interests. The ideal of social welfare state has enjoined upon the national government to increase its scope of activity more and more to eradicate gigantic evils of property, unemployment, disease, starvation, ignorance etc. Techno-politics means the study of political institutions in the light of scientific and technological developments having their Impact upon the working of governmental machinery. It means government by experts and technocrats and not the leaders chosen by the people. The experts and technocrats stress goals of development and lay down politics and programmes. As these specialized services are mostly provided by the national government, the regional governments have to carry out the plans, programmes and instructions prepared by the technocrats working behind the rulers of the central administration. The regional governments live in a perpetual condition of financial difficulties. They not only have meager resources but they are forced to collect money that they cannot spend and also forced to spend in a particular way the money that they do not collect. In many cases the provincial governments have to stand like "baggars" at the door of the center. Though a federal system in all respects, the very system is reduced to a Unitarian model when political parties run the machinery of general and regional

governments without federalizing their own character. In this context, the case of Congress Party in India is a striking example, the High Command of this party is the final authority in matters of distribution of tickets, composition of the union and state ministries, selection of the Prime Minister and Chief Minister etc. The result is that both the Union and State Governments in India are virtually controlled by the all-powerful party in a way that our federal pattern has become a matter of form while its spirit has become unitary under the rule of the Congress Party. Almost all the national parties who have come to govern the central government have shown the same tendency. Carl J.Friedrich envisages "if the government is federally structured, parties must adapt themselves to such a structure".

Co-operative Federalism: A federal system not only stands for the distribution of powers between the two sets of political organizations in order to ensure that the ideal of co-ordination and complete administration of the divided spheres is attained as effectively as possible. It is needed for the obvious reason that there is the area of inter-regional relationships disallowing any component unit to keep itself completely off from others in the interest of administrative efficiency and nationalist sentiments. K.C.Whare rightly visualizes that if each regional government "keeps completely to itself many matters will suffer from diversity of regulation and government itself be less efficient because the experience of other states will have been neglected. Hence some agencies of inter-governmental co-operation have been devised in various federal systems of the world. Taking the case of the Australian Federal System, we find Inter-Provincial Conference and Premiers Conference. The Governor's Conference in United States and Dominion Provincial Conference in Canada are other cases of similar institutions for federal co-operation, Granville Austin is of the view that the Constituent Assembly of India was the first assembly which adopted from the very start what is called as the concept of Co-operative Federalism. This concept is distinct from Wheare's concept of federalism who says that "the general and regional governments of a country shall be independent of each other within its sphere." As against this, the concept of Co-operative Federalism implies a strong central government.

This does not mean that the provincial governments are weak. According to Austin, provincial governments are largely administrative agencies for central policies. He quotes AH.Birch, wlio defines Co-operative Federalism as the practice of administrative co-operation between general and regional governments, the practical dependence of the regional governments upon payments from the general governments and the fact that the general governments by the use of conditional grants, frequently promote developments in matters which are constitutionally assigned to the regions. Inter-level co-operation in different fields has been the most significant aspect of Indian federalism. Many of the state legislatures through formal resolutions agreed to empower the Parliament to legislate in regard to levy of

succession duty on agricultural lands which under the constitution is a state subject. Administrative co-operation on a large scale is a remarkable development in the operation of Indian federalism.

- For example, the execution of land reclamation and development schemes under the plans the central and state sector organizations function in close co-operation.
- The central inspectors help the state inspectors in enforcing the provisions of the Drug Act.
- Planning in India is a co-operative enterprise in which the basic norms of development are set by center in discussion with the states, a large amount of finance is provided by the center and the main administrative machinery is supplied by the states.
- Another fruitful line of co-operation in India has been in the direction of utilization of the water resources of the country. For instance the Damodar Valley Scheme is a joint endeavour in which the center and the states of West Bengal and Bihar are involved.

  The Indian federation has also involved conference techniques facilitating smooth union state relation and inter-level co-operation. Periodic Conference between the representative of the Union and the States have become a regular feature of the operative machinery of Indian federalism. Conferences of the state Governors, meetings of the state Chief Ministers, State Ministers conferences and meetings of union and state officials. The value of these meetings lies in adoption of an integrated an co-operative approach towards the solution of the numerous problems which arise under India's federal structure.

  Bargaining federalism: We all are familiar that the bargaining process was found after the fourth, sixth, ninth and tenth Lok Sabha elections in India, when the non-congress and regional parties came to power in the states. Morris Jones talks of federalism in India as an example of the concept of competitive bargaining, one illustration may be given from procedures on legislation. The constitution prescribes that bills passed by state legislatures may on submission to the Governor be refused assent or returned for reconsideration or reserved for the consideration of the President and further that bills dealing with public acquisition of property must be so reserved. By convention, however, states send such hills to the center for examination and comment in advance, so that the reservation procedure when reached is merely formal; some states go further and submit in this way most bills which deal with subject on the concurrent list. Bargaining federalism is also traceable in existence, formal as well as tacit, in operation of various institutional agencies such as the Planning Commission National Development Council, Finance Commission, Inter-State Council, Zonal Councils and a host of statutory bodies for the adjudication of disputes with respect to use, distribution and control of inter-state rivers etc. In other words we can say that the Indian Constitution envisages the appointment of a number of high level commissions both

permanent and ad-hoc for the specific purpose of reconciling diverse and conflicting interests with the co-operation of Union and State Government.

Dual federalism: is based on the relatively optimistic belief that a clear division between federal and state authority can, and does, exist. This theory states that authority between the two levels of U.S. government, national and state, could be treated equally, live together equally, and hold roughly equal authority. After all, the Constitution includes this very clever mechanism: the reserved powers clause, which seems to set a line between the two levels of U.S. government. Dual federalism has been nicknamed **'layer-cake federalism'**, since it imagines an obvious separation between state and federal duties.

2. Organisation of States:

Federalism is a widely accepted form of government in the world today due to its accommodative or adaptive nature. It emerged as a strong counter device against the British colonial monarchism that existed across the world during that time. As a result, USA came with the first modern written democratic constitution by overthrowing the colonial monarchism. Subsequently the US constitution adopted the democratic means of governance by limiting the governmental power by vertical separation of powers and horizontal division of powers. This is because federalism emerges out of the balanced forces of nationalism and regionalism. On the contrary, UK developed another form of government, in which there was struggle for supremacy between the crown and the parliament. This experience taught to rest of the countries of the world to choose a federal democratic republican constitution.

In the case of India, the constitutional maker's choice was for federalism due to its sub-continental expanse and; socio-cultural and regional diversities. Historically, India has been a plural society as well as multicultural with all the characteristics of diversity. India had not only cultural diversities and differences but also threat of external aggression. After British left the India, it was open to threats from China, Russia and Afghanistan on the one hand and the newly created Pakistan on the other hand. The Cripps and Cabinet Mission Plans advocated for a relatively weak Centre due to various communal problems but, it was not accepted by the Constituent Assembly. However, the passing of the India Independence Act and the eventual partition of India and Pakistan led the constituent assembly to adopt the unitary form of federalism. After independence, Jawaharlal Nehru, like other congress leaders of that time, was very ambivalent and uncertain about the reorganization of states, owing to the fact that he worried about disintegrative consequences. He also had the fear of the viability and durability of the

monolingual states, which would not have long term sustainability. During the constitutional debate, Nehru supported administrative efficiency and a multi-cultural and multi-lingual political order. In contrast, Ambedkar supported the demand for the reorganization of Indian states on linguistic basis. He thought it would ensure the functioning of the democratic polity by enhancing the equitable survival of all languages, cultures; regions within an inclusive developmental polity. He also emphasized on administrative efficiency, specific needs of particular areas and proportion between majority and minority communities within a state. Thus, the reorganization of states would help countries maximize growth and political strength as well as allow expressions of regional characteristics. The federation was accepted as a useful and working system of government in conflict situations (issues of separation, division of large regions, diverse culture etc.) related to a federal structure(Watts, 1966). Within this federal framework, inter-state boundaries among Indian states since 1950 have continuously been reorganized and the process is not yet complete. In the 1950s, the reorganization of south India took place followed by the reorganization of states of western and northern India in the 1960s. Later, the northeastern states were reorganized in the 1970s. Three new states (Uttarakhand, Chhattisgarh and Jharkhand) were created in 2000. Among the linguistic states, Andhra Pradesh was the first state to be formed based on the Telugu speaking population in south India. In subsequent years, the rest of the Indian states started demanding for separation based on the linguistic identities. There are still some demands for creating new states and the finalizing of boundaries of the states. The post-independent Indian federal structure has weathered many linguistic, religious, ethnic, regional, cultural and politico-ideological challenges. In order to overcome these challenges, the Indian Constituent Assembly in 1948 appointed the Dar Commission followed by the Jawaharlal Nehru, Vallabhai Patel, PattabhiSitaramayya Committee (JVPC) to reorganize the states. Both the committees expressed concern regarding the new forms of inequalities and hierarchies based on the disproportionate spread of linguistic majority and minority groups in the reorganized provinces. In addition, seven other committees were constituted with regard to the federal structure in Indian polity. In 1953, the States Reorganization Committee (SRC) was established to look after the issues of reorganization of states in India. It is recommended some basic principles of reorganizing of the states as preservation and strengthening of unity and security of India, linguistic and cultural homogeneity, financial and administrative efficiency and the successful working of the 5-Year Plans. Later, as per the State Reorganization Committee 1956, the states were reorganized in terms of linguistic, cultural homogeneity and geographical contiguity. From 1947 to 1950, many princely states were integrated with neighboring provinces and some integrated with centrally administered units. On that basis, demands came from Orissa, Andhra, Maharashtra, Gujarat and later Haryana, Himachal Pradesh, Punjab and Assam for separation. These demands were raised continuously due to their economic

backwardness and for becoming sub-regions within larger states. The movement for separation of the Hyderabad-Karnataka region in Karnataka was due to its cultural distinctiveness and economic neglect. Similarly, in West Bengal, the Nepalese have been demanding a separate state of Gorkhaland due to their cultural distinctiveness and economic marginalization. Thus, as many as 30 such demands are there before the Indian Government at present. All these issues gave space for more demands to focus on better governance, equitable economic growth, increase in participative political order and development at the sub-regional level. Based on new state demands, several regional and sub-regional issues/challenges are also emerging such as the preservation of forests, welfare of tribal communities, emergence of new regional elites, rise of other backward castes and increase in the number regional political parties within a state. This is evident from the several demands for smaller states of Vidharba (Maharashtra), Saurashtra (Gujarat), Bodoland (Assam), Coorg (Karnataka), Harit Pradesh (Uttar Pradesh) and others. The issue of state formation has become a part of Indian political system today due to the emergence of coalition politics in India. The party that does not get the majority always depends on the support of regional parties to form the government at the Centre. The political parties do not want to lose their vote banks in terms of political power and they use the issue of state formation as their political agenda to obtain political positions. However, the Indian political system has started its journey towards cooperative federalism. It could be a significant tool or instrument for creating opportunities for national as well as regional development. Nevertheless, it is evident from the Karnataka and Andhra Pradesh Human Development Report that the two study areas have suffered discrimination many grounds. If this situation continues, then the objective of cooperative federalism and the growth of the nation generally and regionally, in particular, will not be realized. Hence, the issue of state formation has been a core area within the Indian political system.

3. Relationship between Centre and State

Our Constitution is one of the very few that has gone into details regarding the relationship between the Union and the States. A total of 56 Articles from Article 245 to 300 in Part XI and XII are devoted to the State-Centre relations. Part XI (Articles 245-263) contains the legislative and administrative relations and Part XII (Articles 246-300) the financial relations. By going into great details of the relations, the Constitution framers hope to minimize the conflicts between the centre and the states. By and large, the confrontations between the two have been minimal.

I. Legislative Relations (Articles 245-255):

From point of view of the territory over which the legislation can have effect, the jurisdiction of a State Legislature is limited to the territory of that State. But in the case of Parliament, it has power to legislate for the whole or any part of the territory of India i.e.States, Union Territories or any other areas included for the time being in the territory of India. Parliament has the power of 'extraterritorial legislation' which means that laws made by the Union Parliament will govern not only persons and property within the territory of India, but also Indian subjects resident and their property situated anywhere in the world. Only some provisions for scheduled areas, to some extent, limit the territorial jurisdiction of Parliament.
Legislative Methods of the Union to Control over States:

(i) Previous sanction to introduce legislation in the State Legislature (Article 304).
(ii) Assent to specified legislation which must be reserved for consideration [Article 31 A (1)].
(iii) Instruction of President required for the Governor to make Ordinance relating to specified matters [Article 213(1)].
(iv) Veto power in respect of other State Bills reserved by the Governor (Article 200).

As for the subjects of legislation the Constitution has adopted, as if directly from the Government of India Act, 1935, a three-fold distribution of legislative powers between the Union and the States, a procedure which is not very common with federal constitutions elsewhere.

The Constitutions of the United States and Australia provided a single enumeration of powers power of the Federal Legislature and placed the residuary powers in the hands of the States.

Canada provides for a double enumeration, dividing the legislative powers between the Federal and State legislatures. The Indian Constitution introduces a scheme of three-fold enumeration, namely, Federal, State and Concurrent.

List I includes all those subjects which are in the exclusive jurisdiction of Parliament.

List II consist of all the subjects which are under exclusive jurisdiction of the State Legislature, and

List III which is called the Concurrent List, consists of subjects on which both Parliament and the State legislatures can pass laws.

(i) Union List:

List I, or the Union List, includes 99 items, including residuary powers, most of them related to matters which are exclusively within the jurisdiction of the Union. Subjects of national importance requiring uniform legislation for the country as a whole are inducted in the Union List.

The more important examples are defence, armed forces, arms and ammunition, atomic energy, foreign affairs, coinage, banking and insurance. Most of them are matters in which the State legislatures have no jurisdiction at all. But, there are also items dealing with inter-state matters like inter-state trade and commerce regulation and development of inter-state rivers and river valleys, and inter-state migration, which have been placed under the jurisdiction of the Union Parliament.

Certain items in the Union List are of such a nature that they enable Parliament to assume a role in certain spheres in regard to subjects which are normally intended to be within the jurisdiction of the States; one such example is that of industries. While assigned primarily to the State List; industries, the control of which by the Union is declared by a law of Parliament, to be expedient in the public interest' are to be dealt with by parliamentary legislation alone. Parliament, by a mere declaration, can take over as many industries as it thinks fit.

It is under this provision that most of the big industries, like iron, steel and coal, have been taken over by Parliament under its jurisdiction. Similarly, while museums, public health, agriculture etc. come under State subject, certain institutions like the National Library and National Museum at New Delhi and the Victoria Memorial in Calcutta have been placed under the jurisdiction of Parliament on the basis of a plea that they are financed by the Government of India wholly or in part and declared by a law of Parliament to be institutions of national importance.

The university is a State subject but a number of universities have been declared as Central Universities and placed under the exclusive jurisdiction of Parliament. Elections and Audit, even at the State level, were considered matters of national importance. The Extensive nature of the Union List thus places enormous powers of legislation even over affairs exclusively under the control of the States in the hands of Parliament.

(ii) State List:

List II or the State List, comprises 61 items or entries over which the State Legislature has exclusive power of legislation. The subject of local importance, where variations in law in response to local situations may be necessary, has been included in the State List.

Some subjects of vital importance in the list are State taxes and duties, police, administration of justice, local self-government, public health, agriculture, forests, fisheries, industries and minerals. But, in spite of the exclusive legislative jurisdiction over these items having been given to the States, the Constitution, through certain reservations made in the Union List has given power to Parliament to take some of these items under its control. Subject to these restrictions, one might say, the States have full jurisdiction over items included in the State list.

(iii) Concurrent List:

The inclusion of List III or the Concurrent List, in the Constitution gives a particular significance to the distribution of legislative power in the Indian federal scheme. The Concurrent List consists of 52 items, such as criminal law and procedure, civil procedure, mar-riage, contracts, port trusts, welfare of labour, economic and social planning.

These subjects are obviously such as may at some time require legislations by Parliament and at other by a State Legislature. The provision of a Concurrent List has two distinct advantages.

In certain matters in which Parliament may not find it necessary or expedient to make laws, a State can take the initiative, and if other States follow and the matter assumes national importance, Parliament can intervene and bring about a uniform piece of legislation to cover the entire Union Territory. Similarly, if a State finds it necessary to amplify a law enacted by Parliament on an item included in the Concurrent List in order to make it of a greater use of its own people, it can do so by making supplementary laws.

The items included in the Concurrent List can be broadly divided into two groups-those dealing with general laws and legal procedure, like criminal law, criminal procedure, marriage, divorce, property law, contracts etc, and those dealing with social welfare such as trade unions, social security, vocational and technical training of labour, legal, medical and other professions etc.; while the items coming under the first group are of primary importance to the Union Government, they have been left, by convention, to Parliament. In matters of social welfare, it is open to the State legislatures either to take the initiative in making laws or to enact laws which are supple-mentary to the Parliamentary laws.

Predominance of Union Law:

In case of over-lapping of a matter between the three Lists, predominance has been given to the Union Legislature. Thus, the power of the State Legislature to legislate with respect to matters enumerated in the State List has been made subject to the power of the Union Parliament to legislate in respect of matters enumerated in the Union and Concurrent Lists, and the entries in the State List have to be interpreted accordingly.

In the Concurrent sphere, in case of repugnancy between a Union and a State law relating to the same subject, the former prevails. If however, the State law was reserved for the assent of the President and has received such assent, the State law may prevail notwithstanding such repugnance. But it would still be competent for Parliament to override such State law by subsequent legislation.

Residuary Powers: The Constitution vests the residuary power, i.e., the power to legislate with respect to any matter not enumerated in any one of the three Lists in the Union Legislature (Art. 248). It has been left to the courts to determine finally as to whether a particular matter falls under the residuary power or not. It may be noted, however, that since the three lists attempt an exhaustive enumeration of all possible subjects of legislation, and courts generally have interpreted the sphere of the powers to be enumerated in a liberal way, the scope for the application of the residuary powers has remained considerably restricted.

Expansion of the Legislative Powers of the Union under Different Circumstances:

(a) In the National Interest: Parliament shall have the power to make laws with respect to any matter included in the State List for a temporary period, if the Council of States declares by a resolution of 2/ 3 of its members present and voting, that it is necessary in the national interest.

(b) Under the Proclamation of National or Financial Emergency: In this circumstance, Parliament shall have similar power to legislate with respect to State Subjects.

(c) By Agreement between States: If the Legislatures of two or more States resolve that it shall be lawful for Parliament to make laws with respect to any matters included in the State List relating to those States, Parliament shall have such power.

It shall also be open to any other State to adopt such Union legislation in relation to itself by a resolution passed on behalf of the State legislature. In short, this is an extension of the jurisdiction of the Union Parliament by consent of the Legislatures.

(d) To implement treaties: Parliament shall have the power to legislate with respect to any subject for the purpose of implementing treaties or international agreements and conventions.

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

II. Administrative Relations (Articles 256-263)

The distribution of executive powers between the Union and the States follows, in general, the pattern of distribution of the legislative powers. The executive power of a State is treated as coextensive with its legislative powers, which means that the executive power of a State extends only to its territory and with respect to those subjects over which it has legislative competence.

Looking at from the point of view of the Union Government, we can say that the Indian Constitution provides exclusive executive power to the Union over matters with respect to which Parliament has exclusive powers to make laws, (under List I of Schedule VII) and over the exercise of powers conferred upon it, under Article 73, by any treaty or agreement at the international level. On the other hand, the States have exclusive executive powers over matters included in List II.

In matters included in the Concurrent List (List III) the executive function ordinarily remains with the States, but in case the provisions of the Constitution or any law of Parliament confer such functions expressly upon the Union, the Union Government is empowered to go beyond giving directions to the State executive to execute a Central law relating to a Concurrent subject and take up the direct administration of Union law relating to any Concurrent subject.

In the result, the executive power relating to Concurrent subjects remains with the States, except in two cases-(a) Where a law of Parliament relating to such subject vests some executive functions specifically

in the Union, e.g., the Land Acquisition Act, 1894; the Industrial Disputes Act, 1947 [Provision to Art. 73(1)].

So far as these functions specified in such Union Law are concerned, it is the Union and not the States which shall have the executive power while the rest of the executive power relating to the subjects shall remain with the States, (b) where the provisions of the Constitution itself vest some executive functions upon the Union.

Thus, (i) the executive power to implement any treaty or international agreement belongs exclusively to the Union; (ii) the Union has the power to give directions to the State Governments as regards the exercise of their executive power in certain matters.

The Constitution has devised techniques of control over the States by the Union to ensure that the State governments do not interfere with the legislative and executive of the Union. Some of these administrative avenues of control are as under:

(i) The power to appoint and dismiss the Governor (Article 155-156)

(ii) The power to appoint other dignitaries in the State such as judges of the High Court, members of the State Public Service Commission (Article 217, 317).

There are some other specified agencies for Union Control

(i) Directions to the State Government: The Constitution prescribes a Coercive Sanction for the enforcement of the directions issued under any of the foregoing powers, namely the power of the President to make a Proclamation under Article 356.

(ii) Delegation of Union Functions: While Legislating on a Union Subject, Parliament may delegate powers to the State Governments and their officers in so far as the Statute is applicable in the respective States [Article 258 (2)].

(iii) All-India Services: Besides the person serving under the Union and the States, there are certain services which are ‘common to the Union and the States’. There are called ‘All-India Services’ of which

the Indian Administrative service and the Indian Police Service are the existing examples [Article 312 (2)].

The Indian Constitution has provision for the Organisation of certain all-India services, recruited and controlled by the Union Government as far as their general administration is concerned. The British Government had instituted the Indian Civil Services (ICS) in order to establish a kind of direct control over the provincial administration.

The idea was adopted by the Constituent Assembly and under Article 312, power has been given to the Council of States, by a resolution sup-ported by not less than a two-thirds majority of the members present and voting, to constitute all- India service common to the Union and the States.

It was further provided that the Indian Administrative Service (IAS) and the Indian Police Service (IPS), which had been constituted before the Constitution came into force, would be deemed to have been constituted under this Article. The Union Government is able to penetrate quite deep into the administrative affairs of the States through these all India services.

The IAS and the IPS are not the only all-India services. Serial new services, governed by the same conditions, have been added, like the Indian Engineering Service, the Indian Economic Service, the Indian Statistical Service, the Indian Agriculture Ser-vice and the Indian Education Service.

(iv) Grant-in-Aid: The Parliament is given such powers to make such grants as it may deem neces-sary to give financial assistance to any State which is in need of such assistance (Article 275).

Besides this, the Constitution provides for specific grants on the following two matters:
(a) For schemes of development;
(b) For welfare of scheduled tribes;
(c) For raising the level of administration of scheduled areas.
(d) To the State of Assam, for the development of the tribal areas in that State [Article 275 (1)]

(v) Inter-state Council: Article 263 says that the President is empowered to establish an inter-State Council. The Constitution assigned three fold duties to this body.

(a) To investigate and discuss subjects of common interest between the Union and the States or between two or more States;

(b) Research in such matters as agriculture, forestry, public health etc., and

(c) To make recommendations for co-ordination of policy and action relating to such subjects.

The Sarkaria Commission has recommended the Constitution of a permanent inter-State Council. Such a council, consisting of six Union Cabinet Ministers and the Chief Ministers of all the States, has been created in April 1990.

(vi) Inter-State Commerce Council: For the purpose of enforcing the provisions of the Constitution, relating to the freedom of trade, commerce and intercourse throughout the territory of India (Article 301-305), Parliament is empowered to constitute as authority similar to the Inter-State Commerce Commission in the U.S.A. and to confer on such authority such powers and duties as it may deem fit (Article 307).

(vii) Extra-Constitutional Bodies: Apart from the above Constitutional agencies for Union Control, there are some advisory bodies and conferences which held at the Union level which further the co-ordination of State policy and eliminate differences as between the States.

(viii) Planning Commission: This extra-Constitutional and non-statutory body was set up by a reso-lution (1950) of the Union Cabinet and its main objective was to formulate an integrated Five Year Plan for economic and social development and to act as an advisory body to the Union Government.

(ix) National Development Council (NDC):

This council was formed in 1952 as an adjunct to the Planning Commission to associate the States in the formulation of the Plans. The main functions of this council are:

(a) To strengthen and mobilize the efforts and resources of the nation in support of the plans;

(b) To promote common economic policies in all vital spheres; and

(c) To ensure the balanced and rapid development of all parts of the country.

(x) National Integration Council (NIC): Another non-constitutional body was created in 1986 to deal with the welfare measures for the minorities on an all India basis. Some of the burning issues before it were communal harmony, increased violence by secessionists, the problems in respect of Punjab, Kashmir, and Ram Janambhoomi-Babri Masjid.

During 'Emergencies' the government under the Indian Constitution will work as if it were a unitary government.

Some of the important Provisions during 'Emergency' are as under:

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

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

During a Proclamation of Financial Emergency: (a) To observe canons of financial propriety, as may be specified in the directions [Article 360(3)].

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

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

III. **Financial Relations Related to the Distribution of Revenue (Article 264-281)**:

All feasible sources of taxation have been listed and allocated either to the Centre or to the States. These are as follows:

(i) There are certain items of revenue in the State List which are levied, collected and appropriated by the States. For example, naval revenue etc.;

(ii) There are certain items of revenue in the Union List which are levied, collected and appropriated by the Union, e.g. Customs duties etc.;

(iii) There are certain duties levied by the Union but collected and appropriated by the States. For example, stamp duties etc.;

(iv) There are certain taxes levied and collected by the Union but assigned to the States e.g. succes-sion and estate duties, taxes on railway fares and freights, etc;

(v) There are certain taxes levied and collected by the Union and distributed between the Union and the States, e.g. excise duties etc.

Consolidated Funds and Public Accounts of India and of the States:

Subject to the provisions of Article 267 and to the provisions of this Chapter with respect to the assignment of the whole or part of the net proceeds of certain taxes and duties to States, all revenues received by the Government of India, all loans raised by that Government by the issue of treasury bills, loans or ways and means advances and all moneys received by that Government in repayment of loans shall form one Consolidated Fund to be entitled “the Consolidated Fund of India”, and all revenues re-ceived by the Government of a State, all loans raised by that Government by the issue of treasury bills, loans or ways and means advances and all moneys received by that Government in repayment of loans shall form one consolidated fund to be entitled “the Consolidated Fund of the State” [Article 266(1)].

All other public money received by or on behalf of the Government of India or the Government of a State shall be credited to the Public Account of India or the Public Account of the State, as the case may be (Article 266(2)).

No money out of the Consolidated Fund of India or the Consolidated Fund of a State shall be appropriated except in accordance with law and for the purposes and in the manner provided in this Constitution [Article 266(3)].

Contingency Fund: Parliament may by law establish a Contingency Fund in the nature of an impress to be entitled "the Contingency Fund of India" into which shall be paid, from time to time, such sums as may be determined by such law, and the said Fund shall be placed at the disposal of the President to enable advances to be made by him out of such Fund for the purposes of meeting unforeseen expenditure pending authorisation of such expenditure by Parliament by law under Ar-ticle 115 or Article 116 [Article 267(1)].

The Legislature of a State may by law establish a Contingency Fund in the nature of an impress to be entitled "the Contingency Fund of the State" into which shall be paid from time to time such sums as may be determined by such law, and the said Fund shall be placed at the disposal of the Governor of the State to enable advances to be made by him out of such Fund for the purposes of meeting unforeseen expenditure pending authorisation of such expenditure by the Legislature of the State by law under Article 205 or Article 206 [Article 267(2)].
Finance Commission:

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

The Constitution of the Finance Commission is laid down in Art. 280, which has to be read with the Finance Commission (Miscellaneous Provisions) Act of 1951, which has supplemented the provisions of the Constitution. Briefly speaking, the Commission has to be reconstituted by the President, every five years.

The Chairman must be a person having 'experience in public affairs', and the other four members must be appointed from amongst the following

a) A High Court Judge or one qualified to be appointed as such;

(b) a person having special knowledge of the finances and ac-counts of the Government;

(c) a person having wide experience in financial matters, and administra-tion;

(d) a person having special knowledge of economics,

(e) a person familiar with treasures needed to augment the consolidated fund of a State to supplement the resources of the Panchayat, in the State.

It shall be the duty of the Commission to make recommendations to the President as to:

(a) the distribution between the Union and the States of the net proceeds of taxes which are to be or may be, divided between them under this Chapter and the allocation between the States of the respective shares of such proceeds; (b) the principles which should govern the grants-in-aid of revenues of the States out of the Consolidated Fund of India; (c) any other matter referred to the Commission by the President in the interests of sound finance.

The Constitution has left it to the discretion of Parliament to decide by law whether any of the union duties of excise should be shared with the States, how these are to be shared, and how the shares are to be distributed to the States, (iv) Taxes which are to be levied and collected by the Centre, but to be distributed entirely (except for those proceeds which are attributable to the Union territories) to the States in accordance with such principles of distribution as may be laid down by Parliament by law.

These taxes consist of succession and estate duties; termi-nal taxes on passengers and goods carried by rail, sea or air taxes on railway fares and freights; taxes on the sale or purchase of newspapers; sale or purchase taxes on inter-State trade, (v) Taxes levied by the Centre but collected by the States and appropriated by them for their own use.

Grants and Loans: Besides the devolution of revenues the Union meets the financial needs of the State in two other ways: (i) by making grants-in-aid of State revenues and other grants, and (ii) by giving loans. According to the Constitution, both the Union and the States are empowered to make grants.

But by virtue of the sums at its disposal, the Union's power is greater. The Union can make grants for purposes outside its legislative jurisdiction, and it is under this provision that many of the large capital grants for national development schemes are made.

Grant-in-aid may be made to a State to defray its budgetary deficits, or it may make grant-in-aid on the basis of budgetary need, and to aid States whose revenues, even after devolution fall short of their expenditures.

Efforts are generally made to keep these grants-in-aid to a minimum by making devolution adequate. Other grants are generally unconditional, but in certain cases, as in Assam, grants have been made for the development of backward areas and tribes.

Besides grants-in-aid, States also sometimes depend heavily on the Union for loans. The Union government has unlimited power to borrow either within India or outside, and may exercise this power subject only to such limits as might be fixed by Parliament from time to time.

In the case of the States, however, their borrowing power is subject to a number of Constitutional limitations. A State cannot borrow outside India. The State executive has the power to borrow within the territory of India, subject to many conditions.

Role of the Planning Commissions: The institution which is sometimes held responsible for giving the maximum strength to the forces of centralisation in the country and yet has continued to remain an extra-statutory and extra-constitutional body is the Planning Commission.

A Planning Commission was set up under Nehru's Chairmanship by the Indian National Congress more than ten years before the country became independent to draw up a national plan. It had produced some voluminous reports.

A Planning and Development Department was set up and a Development Board was organised by the British Government during the Second World War but these were, comparatively, minor efforts. One might, therefore, say that real planning began with the setting up of the Planning Commission in 1950.

No attempt was, however, made to take resort to legislation or to an amendment of the Constitution. It was set up by a simple resolution of the Union Cabinet put forward by Prime Minister Nehru with himself as its Chairman, to formulate an integrated five-year plan for the economic and social development of the country and to act as an advisory board to the Union Government in this sphere.

But, even though the Planning Commission was set up without legislation or constitutional amendment, it has been growing in strength from year to year. Consisting of the Prime Minister, some important Cabinet Ministers of the Union and some non-officials, it has grown over the years as a heavy bureaucratic organisation.

The function of the Planning Commission, in theory, is to prepare a plan for the most effective and balanced utilisation of the country's resources, with a view to initiate "a process of development which will raise living standards and open out to the people new opportunities for a richer and more varied life". Its function, in other words, is to formulate a plan.

Development being related mostly to State subjects, the implementation of the plan rests with the States. The role that the Commission plays with regard to the States is merely advisory. Once the advice has been tendered by the Planning Commission, it has no direct means of securing the implementation of the plan. The practice, however, is different.

The States have to depend on the Centre for financial assistance without which the plans cannot be implemented. Since the States cannot implement the plans without financial assistance from-the Centre, and the Union would like different States to follow a more or less uniform policy the Centre comes to exercise an immense control over the implementation part of the plans in the States.

National Development Council (NDC): Constituted as the another part of the Planning Commission, it works in close cooperation with the Government of India. In order to promote coordination with the States, a National Development Council, consisting of all the Cabinet Ministers of the Government of India, the Members of the Planning Commission and the Chief Ministers of all the States, was set up. Having no statutory or constitutional basis, the National Development Council is an ad hoc improvised body, but, thanks to a convention, its decisions are regarded as binding on the Centre as well as on the State government.

It is interesting to note that there is no body analogous to the Planning Commission at the State level, though generally there are Planning Departments and sometimes Development Commission-ers in the States. All planning is done at the Union level and it is the responsibility of the States to implement the plans.

Part XI Articles 245-293: A Combination of Conflicts and Cooperation:

The relationship between the Centre and the States covers a wide range and embraces a very large part of the functions and activities in the administrative, social and economic spheres. Since 1950, many events have occurred which have a direct or indirect bearing on the Centre-State relations.

For instance, the Planning Commission was set up by a resolution of the Government of India in March, 1950 with the object of accelerating the economic growth of the country and to meet the social urge for the extension of social services.

Though not a creation of the Constitution, not even endowed with a statutory sanction, the Planning Commission assumed the role of the architect of India's destiny. There were widespread complaints and it was contended that Five-Year Plans had reduced the federal structure to almost a unitary system.

The reorganisation of the States in 1956 and there-after, especially with the emergence of non-Congress Governments in some States after the 1967 gave the issue of Centre-State relations a new dimension and importance.

Grievance of States in General against the Centre:

(i) The States regard as inadequate the resources placed at their disposal and demand transfer of more financial resources. The tight control exercised by the Centre over the financial institutions of India restricts the action of States.

The States have, consequently, to look to the Centre for funds in case of unforeseen calamities or to carry out various schemes. They do not see eye to eye with the Centre on the issue of overdraft facilities and debt and repayment liabilities of State governments.

(ii) The Centre has the prerogative to decide finally the location of various industries and projects. Undue delays in clearance of projects have adversely affected the interests of the States.

(iii) The States resent the Centre's encroachment into their sphere, evidence in the transfer of subjects from the State List to the Concurrent List. It may be noted that even the Congress-ruled States have objected to this. Nor do the States like the persistence of the Centre in the matter of getting sales tax abolished.

(iv) The States disapprove of the Centre's practice of unilaterally increasing the wages and salaries of its staff, as this creates problems for the State governments vis-a-vis their own staff. The administered prices are controlled by the Centre, and arbitrary and drastic increase in the prices upset State budgets.

(v) Resentment is also caused because of conflicting interests in location of new and important projects and industries.

Grievances of 'Opposition-Ruled' States against the Centre:

Besides the general grievances stated above, there are some specially felt by the States ruled by parties different from that of ruling at the Centre.

(i) They are critical of the role of the Governors; the manner of their appointment, transfers and dismissals. They feel that party considerations outweigh constitutional conventions in the matter Of Governors' appointment. They see the Governor as the Centre's agent.

(ii) They resent the frequent (and sometimes arbitrary) imposition of President's Rule and dismissal of State governments. This is seen as unwarranted and unconstitutional action on the Centre's part.

(iii) The State governments resent deployment of paramilitary forces such as CRPF, RPF, Central Industrial Security Force, etc. in the States without requisition from the States.

(iv) The States allege that the Centre shows little respect for the views expressed by State Chief Ministers or Ministers at conferences convened by the Centre. The Centre is alleged to expect unquestioned submission by the State governments like the appointment of Commission of inquiry by the Centre

against the governments and ministries, invariably, of those States ruled by parties other than that at the Centre.

Centre's Grievances against States:

The Centre, for its part, feels displeased at the attitude of the States over various issues. Its aim is to achieve equitable development of the country. It feels perturbed at the objections of the more advanced States over its special concessions and measures to develop the backward areas.

The Centre also alleges that State governments tend to divert funds allocated for a particular scheme to other purpose. The Centre also resents the States' claiming credit for the successful implementation of Centrally-sponsored projects.

Reforming Centre-State Relations:

Some of the major recommendations made by different committees and teams are as under:

1. The Setalvad Study Team:

The Setalvad Study Team had recommended the Constitution of an inter- State Council composed of the Prime Minister and other central ministers holding key portfolios, Chief Ministers and others, invited or co-opted. It suggested measures to rationalize the relationship between the Finance Commission and the Planning Commission.

Besides, it recommended that the office of Governor be filled by a person having ability, objectivity and independence and the incumbent must regard himself as a creation of the Constitution and not as an errand boy of the Central Government

2. The Administrative Reforms Commission:

The Administrative Reforms Commission noticed that the Central Government had even moved into the fields earmarked for the States under the Constitution and asked it to withdraw from such areas.

It recommended the setting up of an inter-State Council but made a novel suggestion about its composition. Instead of giving seats in this body to all the Chief Ministers, it wanted to have five representatives one each from the five zonal councils.

Much more importantly, the ARC highlighted the need for formulation of guidelines for governors in the exercise of their discretionary powers. This would ensure uniformity of action and eliminate all suspicions of partnership or arbitrariness.

The question whether a Chief Minister enjoys majority support or not should be tested on the floor of the Legislature and for this he should summon the Assembly when-ever a doubt arises.

It also opined that when a ministry suffers a defeat in the Legislative Assembly on major policy issues and the outgoing chief minister advises the governor to dissolve the Assembly with a view to obtaining the verdict of the electorate, the governor should normally accept the advice.

3. Rajamannar Committee Report:

The DMK government of Tamil Nadu appointed a Commission with a direction to suggest changes in the existing level of Union-State relations. Their terms of reference were to examine the entire question regarding the relationship that should exist between the Centre and the States in a federal set-up and to suggest amendments to the Constitution so as to "secure utmost autonomy to the States."

The Committee headed by P.V. Rajamannar, a retired Chief Justice of Madras High Court, presented its report on May 27, 1971. Some of the important recommendations of the Committee were:

(i) The Committee recommended the transfer of several subjects from the Union and Concurrent Lists to the State List. It recommended that the 'residuary power of legislation and taxation' should be vested in the State Legislatures.

(ii) An Inter-State Council comprising Chief Ministers of all the States or their nominees with the Prime Minister as its Chairman should be set up immediately.

(iii) The Committee recommended the abolition of the existing Planning Commission and that its place must be taken by a statutory body, consisting of scientific, technical, agricultural and economic experts, to advise the States which should have their own Planning Boards.

(iv) The Committee advocated deletion of those articles of the Constitution empowering the Centre to issue directives to the States and to take over the administration in a State. The Committee was also opposed to the emergency powers of the Central Government and recommended the deletion of Articles 356, 357 and 360.

(v) The Committee recommended that every State should have equal representation in the RajyaSabha, irrespective of population.

(vi) The Governor should be appointed by the President in consultation with the State Cabinet or some other high power body that might be set up for the purpose and once a person had held this office, he should not be appointed to any other office under the Government.

(vii) On recruitment to the services, the Committee recommended that Article 312 should be so amended as to omit the provision of the creation of any new All-India cadre in future.

(viii) The High Courts of States should be the highest courts for all matters falling within the jurisdic-tion of States.

(ix) The Committee said that 'territorial integrity' of a State should not be interfered with in any manner except with the consent of the State concerned.

(x) It recommended that the States should also get a share of the tax revenues from corporation tax, customs and export duties and tax on the capital value of assets and also excise duties.

4. Sarkaria Commission Report:

In view of the various problems which impeded the growth of healthy relations between the Centre and the States, the Central Government set up a Commission in June 1983, under the Chairmanship of Justice R.S. Sarkaria mainly to suggest reforms for an equitable distribution of powers between the Union and the States. The Commission submitted its report in 1988.

Major Recommendations:

(i) Though the general recommendations tilt towards the Centre – advocating the unity and integrity of the nation, the Commission suggested that Article 258 (e.g. the Centre's right to confer authority to the States in certain matters) should be used liberally.

(ii) Minimal use of Article 356 should be made and all the possibilities of formation of an alternative government must be explored before imposing President's Rule in the State. The State Assem-bly should not be dissolved unless the proclamation is approved by the Parliament.

(iii) It favoured the formation of an Inter-Government Council consisting of the Prime Minister and the Chief Ministers of States to decide collectively on various issues that cause friction be-tween the Centre and the States.

(iv) It rejected the demand for the abolition of the office of Governor as well as his selection from a panel of names given by the State Governments. However, it suggested that active politicians should not be appointed Governors.

When the State and the Centre are ruled by different political parties, the Governor should not belong to the ruling party at the Centre. Moreover, the retiring Governors should be debarred from accepting any office of profit.

(v) It did not favour disbanding of All India Services in the interest of the country's integrity. Instead, it favoured addition of new All India Services.

(vi) The three-language formula should be implemented in its true spirit in all the States in the interest of unity and integrity of the country.

(vii) It made a strong plea for Inter-State Councils.

(viii) The Judges of the High Courts should not be transferred without their consent.

(ix) It did not favour any drastic changes in the basic scheme of division of taxes, but favoured the sharing of corporation tax and 'every of consignment tax.

(x) It found the present division of functions between the Finance Commission and the Planning Commission as reasonable and favoured the continuance of the existing arrangement.

4. Recommendations of Commissions

The Administrative Reforms Commission (1968) recommended that the report of the Governor regarding President's Rule has to objective and also the Governor should exercise his own Judgement in this regard. The Commission recommended, "In all such cases the Governor's report has to be objective, according to the facts as he sees and interprets them and not as his ministers or the Centre interpret them. Briefly, therefore, in reporting to the President, whether in routine or in unusual circumstances warranting Presidential intervention, the Governor is expected to exercise his own Judgement." The Administrative Reforms Commission (1968) recommended that where President's Rule is imposed the Governor of the State should responsibly act under the direction of the Union Government. The Commission recommended that "Where Presidential Rule is imposed the Governor may be entrusted by the Centre with the task of actively carrying on the administration for which he then becomes directly responsible under the overall direction of the Union Government." These recommendations are an important restraint m the exercise of the Presidential powers under Article 356. But these recommendations were not implemented due to lack of will power. President, Y.V. Giri, established Governors' Committee headed by the then Jammu & Kashmir Governor, Bhagwan Sahay, to review the issues relating to Governors. Gopal Reddy, Aliyaver Jung and S.S. Dhawan were the members of this Committee. The Committee gave its recommendations in 1971. The Governors· Committee (1971) laid down the responsibility on the Governor to see that the administration of the State does not breakdown due to political instability and he must send regular report about the political situation of the State. The Governor should also report to the President about any serious internal disturbance or external aggression in the State concerned and about action to be taken under Article 356. The Committee recommended that "As Head of the State, the Governor has a duty to see that the administration of the State does not break down due to political instability. He has equally to take care that responsible Government in the State is not lightly disturbed or superseded. It is not in the event of political instability alone that a Governor may report to the President under Article 356. Reference has been made elsewhere in this report to the President about any serious internal disturbances in the States, or, more especially of the existence or possibility of a danger of external aggression. In such situations also it may become necessary for the Governor to report to the President for action pursuant to Article 356. The Governors' Committee also recommended that the

guiding principles for the Governors to act according to his best judgement should be maintained. The Committee also recommended that "The Governor has to act on each occasion according to his best Judgement, the guiding principle being, as far as possible, maintained" The Governors' Conference discussed this report on November 26, 1971 at New Delhi, but the idea of instructions to Governors was withdrawn, although these recommendations were very useful.

THE CENTRE-STATE RELATIONS INQUIRY COMMITTEE (RAJAMANNAR COMMITTEE) REPORT, 1971. The DMK government in Tamil Nadu headed by M. Karunanidhi established a Centre-State relations Inquiry Committee headed by P.V. Rajamannar, former Chief Justice of Madras High Court, on September 2, 1969. The Committee gave its recommendations in 1971. The recommendations of Rajamannar Committee are analysed as follows. 1. The Rajamannar Committee (1971) recommended the deletion of Articles 356 and 357 from the Constitution of India. The necessary provisions for safeguards against arbitrary action of the ruling party at the Centre under Article 356 should be incorporated in the Constitution. The Committee recommended, "Articles 356 and 357 may be entirely repealed. The only other alternative is to provide safeguards to secure the interests of the States against the arbitrary and unilateral action of a party commanding overwhelming majority, which happens to be in power at the Centre."2. Tile Rajamannar Committee emphasised that the Governor of the State should not consider himself as an agent of the Centre but play his role as the constitutional head of the State. The Committee emphasised the fact that "The Governor should not deem himself to be a mere agent of the Centre and that the emphasis should be on his role as the constitutional head of the State." The Rajamanna Committee recommended that the Ministry of the State concerned should not depend on the pleasure of the Governor and the Ministry should continue its function till it commands majority in the State Legislative Assembly. The Committee also recommended that the tenure of office of a Ministry in any State should not be dependent on the pleasure of the Governor and that the Ministry should continue to function and perform its allotted duties so long as it is able to command a majority in the Legislative Assembly. If Article 356 is to be retained, the words 'or otherwise' occurring in clause of the article may be omitted. The Committee recommended that before recommending the President's Rule in the State, the Governor should ensure a Ministry which would enjoy the confidence of the Legislature after observing all the possibilities. The justification of the President's Rule is possible only when there is complete breakdown of law and order in the State. The Committee has also recommended that the Governor, before recommending President's Rule, should explore all possible avenues open to him to secure a Ministry which, would command the confidence of the Legislature. The only other contingency which would justify the imposition of President's Rule is the complete breakdown of law and order in the

State. The only forum which could decide the question whether a Ministry could continue in office is the Legislative Assembly. The Committee recommended that before sending his recommendation for the President's Rule, the Governor should refer the report to the Legislative Assembly within a specified period to know the Assembly's views. The Committee suggested that "the addition of a proviso of clause (1) of Article 356 requiring the President, before issuing the Proclamation, to refer the report of the Governor to the Legislative Assembly for expressing its views thereon within such period as may be specified in the reference. The Committee further recommended that the President's Rule should be imposed in the State if the State Government concerned fails to implement the direction issued by the Union Government. The Committee have also recommended that any contravention of, or failure to implement, a direction issued by the Union to the State should, under no circumstances, be made a ground for the imposition of President's Rule. It follows that Article 365 has to be repealed."10 It is obvious that recommendations of Rajamanna Committee 1971 are very important for autonomy of States and it also suggests some checks upon the misuse of provision relating the President's Rule, but the suggestion of deletion of Articles 356 and 357 was not reasonable and possible for unity and integrity of the country and for proper functioning of constitutional machinery in the States. These recommendations, however, were rejected by the Union Government. Rajeev Dhavan and GeetanjaliGoel observed, "These suggestions, some eminently sensible, were not accepted as a package because they were found to be too extreme. But the issues raised by 'Rajamannar' have resurfaced and remained."

The Commission on Centre-State Relations (Sarkaria Commission) Report, 1988: The Government of India established a Commission on March 24, 1983, headed by Justice R.S. Sarkaria, to review the Centre-State relations and to suggest measures for reforming these relations. B. Shivraman and S.R. Sen were also the members of this Commission. The Commission submitted its report on June 30, 1988. The Commission received valuable suggestions from the State Governments and many eminent persons and some suggested that Article 356 may be deleted from the Constitution of India. Unless there is a will and commitment to work for a united country, there are real dangers that regionalism, linguistic, chauvinism, communalism, casteism, etc. may foul the atmosphere to a point where secessionist thoughts start pervading the body politic. It is, necessary to preserve the overriding powers of the Union to enable it to deal with such situations and ensure that the government in the State is carried on in accordance with the provisions of the Constitution. Some seek to restrict the scope of Article 356 only to a serious breakdown of law and order paralysing the State administration and where the State Government lacks the will and capability to meet the situation. Some others are of the view that action under Article 356 may also be taken where there is a complete failure to induct a government which can command a majority in the State Legislature. Some State Governments and others have suggested that the Inter-State Council should

be consulted before a proclamation under Article 356 is issued. One State Government has suggested that Article 356 should be amended to provide for prior approval of the Inter-State Council or its Standing Committees. They have also suggested that, in case elections cannot be held within six months after proclamation of President's Rule, the Inter-State Council should be consulted again and its option placed before Parliament. It has been suggested that principles of natural justice should be followed before a State Government is dismissed and President's Rule imposed. It is suggested that, before sending his report, the Governor should communicate it to the State Government and obtain its comments. Again, before issue of a proclamation, the President should convey the reasons for the action contemplated and take into consideration the clarifications of the State Government before taking a final decision to impose President's Rule. Yet another suggestion is that, in keeping with the principles of fair-play and justice, warning should be given. It has been argued that in keeping in view the alleged misuse of the provisions of Article 356 in the past, there is need for severe restrictions in respect of any extension beyond one year of the Proclamation. While several State Governments consider that the existing provisions or appropriate, two have suggested that the position as was obtaining prior to the 44th Amendment should be restored. Two other State Governments have suggested that a little more flexibility could be introduced without detracting from the present limitations by substituting the word 'or' for the word 'and' between Sub-Clauses (a) and (b) of Clause (5) of Article 356. The recommendations of Sarkaria Commission are analysed as follows:

1. The Sarkaria Commission (1988) recommended that Article 356 should be used in very rare cases when it becomes unavoidable to restore the breakdown of constitutional machinery in the State. The Commission recommended that "Article 356 should be used very sparingly, in extreme cases, as a measure of last resort, when all available alternatives fail to prevent or rectify a breakdown of constitutional machinery in the State."

2. The Commission recommended that before taking action under Article 356, a warning should be issued to the State Government that it is not functioning according to the Constitution. However, the explanation submitted by the State Government should not be taken into account if there is an urgency of taking immediate action to prevent disastrous consequences. The Commission recommended that "A warning should be issued to the errant State, in specific terms that it is not carrying on the Government of the State in accordance with the Constitution. However, this ·may not be possible in a situation when not taking immediate action would lead to disastrous consequences."

3. The Commission recommended that the Union Government should make use of Article 355 in case an 'external aggression' or 'internal disturbance' collapses the constitutional machinery of the State

concerned. The Commission recommended that "When an 'external aggression' or 'internal disturbance' paralyses the State administration creating a situation drifting towards a potential breakdown of the Constitutional machinery of the State, all alternative courses available to the Union for discharging its paramount responsibility under Article 355 should be exhausted to contain the situation."

4. The Commission recommended that in case of political breakdown, the Governor should allow a government to function in the State which enjoys the majority in the State Assembly. If it is not possible and there is urgency of fresh elections then the outgoing Ministry-will function as a caretaker government. The Commission recommended that "If' a situation of political · breakdown, the Governor should explore all possibilities of having a government enjoying majority support in the Assembly. If it is not possible for such a government to be installed and if fresh elections can be held without avoidable delay, he should ask the outgoing Ministry, if there is one, to continue as a caretaker government... The Governor should recommend proclamation of President's Rule without dissolving the Assembly."

5. The Commission also recommended that the Proclamation of the President's Rule should be placed before each House of Parliament before the expiry of two months' period specified for its approval. The Commission recommended that, "Every Proclamation should be placed before each House of Parliament at the earliest, in any case before the expiry of the two month period contemplated in clause (3) of Article 356."

6. The Commission recommended that the Governor or the President should not dissolve the State Assembly before the approval of the Proclamation by each House of the Parliament. The Commission recommended that "The State Legislative Assembly should not be dissolved, either by the Governor or by the President before the Proclamation issued under Article 356(I) has been laid before Parliament and it has had an opportunity to consider it. Article 356 should be suitably amended to ensure this."

7. The Commission recommended that the safeguards in clauses (7) and (8) of Article 352 should be incorporated in Article 356 to enable the Parliament to review continuance in force of a Proclamation. The Commission recommended that "Safeguards corresponding, in principle; to clauses (7) and (8) of Article 352 should be incorporated in Article 356 to enable Parliament to review continuance in force of a Proclamation."

8. The Commission recommended that the material facts and grounds on which Article 356 is invoked should be made an integral part of the Proclamation of that Article. The Commission recommended that "Notwithstanding anything in clause (2) of Article 74 of the Constitution, the material facts and grounds

on which Article 356(1) is invoked should be made an integral part of the Proclamation issued under that Article."

9. The Commission recommended that the report of the Governor regarding Article 356 should be placed before each House of Parliament and it should be a 'speaking document'. The Commission recommended that "Normally, the President is moved to action under Article 356 on the report of the Governor. The report of the Governor is placed before each House of Parliament. Such a report should be a 'speaking document' containing a precise and clear statement of all material facts and grounds on the basis of which the President may satisfy himself as to the existence or otherwise of the situation contemplated in Article 356."

10. The Commission recommended that the report of the Governor regarding imposition of President's Rule should be given wide publicity in the media. The Commission recommended that "The Governor's report, on the basis of which a Proclamation under Article 356 is issued, should be given wide publicity in all the media and in full." The Commission recommended that the President's Rule in a state should be proclaimed on the basis of the Governor's report in normal situation. The Commission recommended that "Normally, President's Rule in a State should be proclaimed on the basis of the Governor's report under Article 356.

11. The Commission recommended that the word 'and' occurring between sub-clauses (a) and (b) should be substituted by 'or', in Clause (5) of Article 356. The Commission recommended that "In clause (5) of Article 356, the word 'and' occurring between sub-clauses (a) and (b) should be substituted by 'or' it is obvious that Sarkaria Commission's suggestions are useful to check upon the misuse of provisions relating to President's Rule and it promotes a constitutional structure that promotes co-operative and federal institutions. It will also be helpful in promoting healthy Centre-State relations and federal setup. Owing to lack of political will power suggestions have not been implemented so far. S. Saraswathi observed, "The Sarkaria Commission has taken great efforts to examine Union-State relationships but the end product reveals the existence of certain diametrically opposite views that cannot meet. As long as such views exist, the problems of relationship will continue and any suggestion for betterment of relations are bound to have temporary effect only." Court, was the Chairperson of this Commission. Justice R.S. Sarkaria was the chairperson of emergency provisions review committee and Justice B.P. Jeevan Reddy presented the paper on Article 356.

The Commission submitted its report in 2002. The analysis as in the recommendations of the Commission is as follows:

1.TheVenkatachaliah Commission (2002) recommended that the Article 356 must be used sparingly and only as a remedy of the last resort after exhausting all actions under Articles 256, 257 and 355. The Commission recommended that "In the spirit of the framers of the Constitution, that Article 356 must be used sparingly and only as a remedy of the last resort and after exhausting action under other Articles like 256, 257 and 355."

2. The Commission recommended that in case of political breakdown, the State concerned should be given an opportunity to explain its position and redress the situation before issuing a proclamation under Article 356. The Commission recommended that "Before issuing a proclamation under Article 356 the concerned State should be given an opportunity to explain its position and redress the situation, unless the situation is such that following the above course would not be in the interest of security of State, or defence of the country, or for other reasons necessitating urgent action."

3. The Commission recommended that the question whether the Council of Ministers in a State has lost the confidence of the State Assembly or not, should be decided only on the floor of the House and not anywhere else. So far as the political breakdown of the State, the Governor should explore all possibilities of formation of a Government enjoying majority support in the State Assembly. If an alternative Government can not to be formed and if a fresh election is to be held without delay, the Governor should ask the outgoing Ministry to continue as a caretaker government. The Commission recommended that "The question whether the Ministry in a State has lost the confidence of the Legislative Assembly or not, should be decided only on the floor of the Assembly and nowhere else. The Governor should not be allowed to dismiss the Ministry, so long as it enjoys the confidence of the House. It is only where a Chief Minister refuses to resign, after his Ministry is defeated on a motion of no-confidence, that the Governor can dismiss the State Government. In a situation of political breakdown, the Governor should explore all possibilities of having a Government enjoying majority support in the Assembly. If it is not possible for such a Government to be installed and if fresh elections can be held without avoidable delay, he should ask the outgoing Ministry, (if there is one), to continue as a caretaker government, provided the Ministry was defeated solely on issue, unconnected with any allegations of maladministration or corruption and is agreeable to continue. The Governor should then dissolve the Legislative Assembly, leaving the resolution of the constitutional crisis to the electorate."

4. The Commission recommended that with regard to the election of the new leader of the State Assembly (Chief Minister) and the removal of the previous Government, a constructive vote of no-confidence is to be accepted and implemented. The Commission recommended that "In regard to the

election of the leader of the House (Chief Minister) and the removal of the Government only by a constructive vote of no-confidence are accepted and implemented."

5. The Commission recommended that the President's Rule in a State should be proclaimed on the basis of the Governor's report in all normal circumstances. The report of the Governor under Article 356 should be a 'speaking document'. The Commission recommended that "Normally President's Rule in a State should be proclaimed on the basis of Governor's report under Article 356(1). The Governor's report should be a 'speaking document,' containing a precise and clear statement of all material facts and grounds, on the basis of which the President may satisfy himself, as to the existence or otherwise of the situation contemplated in Article 356."

6. The Commission recommended that in clause (5) of Article 356, in sub-clause (a) the word "and" occurring at the end should be substituted by "or" so that President's Rule may be continued if elections of the State Assembly cannot be held. The Commission recommended that "In clause (5) of Article 356 of the Constitution, in sub-clause (a) the word 'and' occurring at the end should be substituted by 'or' so that even without the State being under a proclamation of Emergency, President's Rule may be continued if elections cannot be held."

7. The Commission recommended that clauses (6) and (7) under Article 356 may be added to the following lines: (6) The President shall revoke a proclamation issued under clause (I) or a proclamation, varying such proclamation if the Lok Sabha passes a resolution disapproving or disapproving the continuance in force of such proclamation, where a notice in writing signed by not less than of the total number of members of the Lok Sabha has been given, of intention to move a resolution for disapproving a special sitting of the House shall be held within fourteen days from the date on which such a notice is received by the Speaker or by the President, for the propose of considering such resolution. The Commission recommended that "clauses (6) and (7) under Article 356 may be added on the following lines (6) Notwithstanding anything contained in the foregoing clauses, the President shall revoke a proclamation issued under clause(1) or a proclamation varying such proclamation if the House of the People passes a resolution disapproving, or, as the case may be, disapproving the continuance in force of, such proclamation. (7) Where a notice in writing signed by not less than one-tenth of the total number of members of the House of the People has been given, of their intention to move a resolution for disapproving, or, as the case may be, for disapproving the continuance in force of, a proclamation issued under clause (I) or a proclamation varying such proclamation : (a) to the Speaker, if the House is in session; or (b) to the President, if the House is not in session, a special sitting of the House shall be held

within fourteen days from the date on which such a notice is received by the Speaker, or, as the case may be, by the President, for the purpose of considering such resolution."

8. The Commission recommended that Article 356 should be amended to ensure that the State Legislative Assembly should not be dissolved by the Governor or the President before the proclamation of President's Rule has been laid before Parliament and it has had an opportunity to consider it. The Commission recommended that "Article 356 should be amended to ensure that the Legislative Assembly should not be dissolved either by the Governor or the President before the proclamation issued under Article 356 has been laid before Parliament and it has had an opportunity to consider it." The suggestions of the Constitution Review Commission (2002) have also been useful to check upon the misuse of the provisions regarding President's Rule. It is submitted that the Inter-State Council should discuss on these suggestions and these suggestions should be implemented in consultations with the State governments. M.P. Singh observed that the constitutional reforms the NCRWC offers are very relevant today. Their urgency can hardly be exaggerated. Out of the 230 recommendations of the Sarkaria Commission on which Inter-State Council took decision, altogether 8 recommendations have so far been in various stages of implemented, 35 have been rejected and 87 are under implementation. The remaining 17 recommendations regarding the imposition of President's Rule (Article 356), the deployment of CRPF in the States, compliance with Union's directions under Articles 256 and 257 and effect of the failure to comply therewith, or to give effect to directions given by the Union Government, etc., have been considered by the subcommittee of the Council. The Council has rejected 6 recommendations pertaining to the role of Governor and 18 on All India Services. Although divergence of views still prevail on issues like Article 356, role of Governor, etc.

5. Freedom of Trade and Commerce

The framers of the Indian constitution, instead of leaving the idea of 'intercourse' to be implied by the process of judicial pronouncements, expressly incorporated the same in Article 301. The words trade and commerce have been broadly interpreted. In most of the cases, the accent has been on the movement aspect. For example, in the ***Atiabari Tea Co. v. State ofAssam*** case, the court emphasized : "whatever else it (Art.301) may or may not include, it certainly includes movement of trade which is of the very essence of all trade is its integral part," and, further, that "primarily it is the movement part of the trade" which Article 301 has in its mind, that "the movement or the transport of the trade must be free," and that "it is the free movement or the transport of goods from one part of the country to the other that is intended to be saved."

Again, in ***State of Madras v. NatarajaMudaliar***, the court stated that "all restrictions which directly and immediately affect the movement of trade are declared by Article 301 to be ineffective." Nevertheless cases are not wanting where movement has not been involved but other aspects of trade and commerce have been involved. The view now appears to be fairly settled that the sweep of the concept 'trade, commerce and intercourse' is very wide and that the word trade alone, even in its narrow sense, would include all activities in relation to buying and selling, or the interchange or exchange of commodities and that movement from place to place is the very soul of such trading activities.

In ***Koteswar v. K.R.B. & Co***, a restriction on forward contracts was held to be violative of Article 301.The Supreme Court held that a power conferred on the state government to make an order providing for regulating or prohibiting any class of commercial or financial transactions relating to any essential Article, clearly permits restrictions on freedom of trade and commerce and, therefore, its validity has to be assessed with reference to Article 304(b).

In ***District Collector, Hyderabad v. Ibrahim***, the Supreme Court has invalidated under Article 301 an attempt by a state to create by an administrative order a monopoly to deal in sugar in favor of cooperative societies. The order was issued while the proclamation of emergency was operative and so Article 19 (1)(g) could not be invoked. The court therefore took recourse to Article 301.

In ***Fatehchand Himmatlal v. State of Maharashtra***, the Supreme Court considered the question that whether the Maharashtra debt relief act, 1976, was constitutionally valid vis-à-vis Article 301. This depended on the further question that whether money-lending to poor villagers which was sought to be prohibited by the Act could be regarded as trade, commerce and intercourse. The court answered in the negative although it recognised that the money-lending amongst the commercial community is integral to trade and therefore is trade.

Certain activities may not be regarded as trade, commerce and intercourse although the usual forms and instruments are employed therein, as for example, gambling, and thus an Act restricting betting and gambling is not bad under Article 301. In this case, the Supreme Court had expressed some sentiments of suggesting that unlawful activities opposed to public morality and safety would not be regarded as trade and commerce. But the court then resiled from this broad proposition saying that the wide proposition that a dealing against morals would not be business, involves the position that the meaning of the expression 'trade or business' would depend upon, and vary with, the general standards of morality accepted at a particular point of time in the country.

After an elaborate study of the scope of the meaning of these words, it can be said that the word "trade" cannot be confined to the movement of goods but extends to transactions linked with merchandise or flow of goods, the promotion of buying and selling, advances, borrowings, discounting bills and mercantile documents, banking and other forums of supply of funds. Money lending and trade financing also constitutes trade.

The word 'free' in Article 301 cannot mean an absolute freedom or that each and every restriction on trade and commerce is invalid. The Supreme Court has held in *Atiabari* that freedom of trade and commerce guaranteed by Article 301 is freedom from such restrictions as directly and immediately restrict or impede the free flow or movement of trade. Therefore Article 301 would not be attracted if a law creates an indirect or inconsequential impediment on trade, commerce and intercourse which may be regarded as remote. The word 'free' in Article 301 does not mean freedom from regulation. As has been observed by the Supreme Court: "there is a clear distinction between laws interfering with freedom to carry out the activities constituting trade and laws imposing on those engaged therein rules of proper conduct or other restraints directed to the due and orderly manner of carrying out the activities." Regulation of hours, equipment, weight, size of load, lights, traffic laws are some examples of regulatory laws which are not hit by Article 301.

Regulations like rules of traffic facilitate freedom of trade and commerce whereas restrictions impede that freedom. In ***State of Mysore v. Sanjeeviah***, A rule banning movement of forest produce within the state between 10 p.m; and sunrise was held to be void under Art. 301 as it was not 'regulatory' but 'restrictive. Tax laws are not excluded from the scope of Art. 301. A tax which directly and immediately restricts trade would fall within the purview of Art. 301. From the trend of the case-law it appears that there is a greater readiness on the part of the courts to characterize an impediment on movement of commerce as 'direct' and so hold it bad under Art. 301, than the one not on movement which is usually held to be indirect or remote and so valid, e.g., octroi, sales tax, purchase tax, etc. But sales tax discriminating between goods of one state from those of another may affect free flow of trade and so offend Art. 301. A tax levied by Parliament on interstate sale would have offended Art. 301 as such a tax, in its essence, encumber movement of trade or commerce because by its very definition an interstate sale is one which occasions movement of goods from one state to another. Nevertheless, it was held valid because of Art. 302.

The view is definitely held now that Article 301 applies not only to interstate but also to intrastate trade and commerce, i.e. trade within the state. Therefore, it means freedom of trade commerce and intercourse is there within the state and/or outside the state and/or any part within the territory of India.

Regulatory and Compensatory Tax

To smoothen the movement of interstate trade and commerce, the state has to provide many facilities by way of roads etc. The concept of regulatory and compensatory taxation has been evolved with a view to reconcile the freedom of trade and commerce guaranteed by Art. 301 with the need to tax such trade at least to the extent of making it pay for the facilities provided to it by the state, e.g., a road net-work. If a charge is imposed not for the purpose of obtaining a proper contribution to the maintenance and upkeep of the road, but for the purpose of adversely affecting trade or commerce, then it would amount to, a restriction on the freedom of trade, commerce and intercourse.

The concept of regulatory and compensatory taxation has been applied by the Indian courts to the state taxation under entries 56 and 57 of List II.

The Supreme Court in ***Automobile Transport v. Rajasthan.***

Facts: The State of Rajasthan had levied a tax on motor vehicles (Rs. 60 on a motor car and Rs. 2000 on a goods vehicle per year) used within the state in any public place or kept for use in the state. The validity of the tax was challenged.

Taking the view that freedom of trade and commerce under Art. 301 should not unduly cripple state autonomy, and that it should be consistent with an orderly society, the Supreme Court now ruled that regulatory measures and compensatory taxes for the use of trading facilities were not hit by Art. 301 as these did not hamper, .but rather facilitated, trade, commerce and intercourse.

Issue: A working test to decide whether a tax is compensatory or not would be to enquire whether the trades people are having the use of certain facilities for the better conduct of their business and paying not patently much more than what is required for providing the facilities? A tax does not cease to be compensatory because the precise or specific amount collected is not actually used in providing facilities.

The concept of compensatory tax evolved in this case was something new as in ***Atiabari***, the court had dismissed the argument that the money realized through the tax would be used to improve roads and waterways rather curtly by saying that there were other ways, apart from the tax in question, to realize the money, and that if the said object was intended to be achieved by levying a tax on the carriage of goods, the same could be done only by satisfying Art. 304(b).

Decision: The court ruled that the tax was not hit by Art. 301, as it was a compensatory tax having been levied for use of the roads provided for and maintained by the state.

Thus, to this extent, the majority view in ***Atiabari*** was now overruled by ***Automobile***. Since then the concept of regulatory and compensatory taxes has become established in India with reference to entries 56 and 57, List II, and the concept has been applied in several cases, and progressively the courts have liberalised the concept so as to permit state taxation at a higher level.

Bolani Iron Ores v. State of Orissa

A compensatory tax is levied to raise revenue to meet the expenditure for making roads, maintaining them and for facilitating the movement and regulation of traffic. The Supreme Court held that taxation under entry 57, List II, cannot exceed the compensatory nature which must have some nexus with the vehicles using the roads. The regulatory and compensatory nature of the tax is that taxing power should be used to impose taxes on motor vehicles which use the roads in the state or are kept for use thereon.

G.K. Krishnan v. State of Tamil Nadu

Facts: The State of Tamil Nadu increased the motor vehicles tax from Rs. 30 to 100 per seat per quarter and this was challenged as being violative of Art. 301.

Issue: whether a non-discriminatory tax levied by a state should be regarded as a restriction on trade and commerce because of the feeling that this would curtail state autonomy to levy taxes falling in the state legislative sphere?

But the Supreme Court upheld the tax. The court stated, "A compensatory tax is not a restriction upon the movement part of trade and commerce." The tax should not go beyond "a proper recompense to the State for the actual use made of the physical facilities provided in the shape of a road." In the instant case, the tax collections amounted to over Rs. 16 crores while the expenditure for the year amounted to Rs. 19.51 crores and this amount did not include the grants to local governments for the repair and maintenance of roads within their jurisdiction. The tax was thus held to be compensatory and hence valid.

The Supreme Court further liberalised the state taxing power by upholding a state tax on passengers and goods carried on national highways.

International Tourist Corporation v. State of Haryana

Facts: The state of Haryana levied a tax on transporters plying motor vehicles between Delhi and Jammu & Kashmir. They use national highway, pass through Haryana without picking up or setting down any passenger in the state. The responsibility for constructing and maintaining of national highways rests on

the Centre. It was therefore argued by the transporters that the tax could hardly be regarded as compensatory, but the court rejected the contention.

The Supreme Court said that what is necessary to uphold such a tax is the existence of a specific, 'identifiable' object behind the levy and a 'sufficient nexus' between the 'subject and the object of the levy.' The court further said that a state incurs considerable expenditure for maintenance of roads and providing facilities for transport of goods and passengers. Even in connection with national highways, a state incurs considerable expenditure not directly by constructing or maintaining them but by facilitating the transport of goods and passengers along with them in various ways such as lighting, traffic control, amenities for passengers, halting places for buses and trucks. That part of a national highway which lies within municipal limits is to be developed and maintained by the state. There is thus sufficient nexus between the tax and the passengers and goods carried on the national highways to justify the imposition of the said tax.

Decision: the tax was held to be valid.

Malwa Bus Service v. State of Punjab

Facts: In this case, in the year 1981, the State of Punjab substantially increased the rate of tax on every stage carriage plying for hire and transport of passengers. The rates adopted were Rs. 500 per seat per year subject to a maximum of Rs. 35,000 per bus irrespective of the distance over which it operated daily. According to the budget figures for 1981-82, the revenue receipts of the government from motor vehicles tax was Rs. 50 crores as against the expenditure of Rs. 34 crores. The tax was challenged on the ground that it was not compensatory as the government was using it for augmenting its general revenues, but the court upheld the tax as compensatory.

In the instant case, the budget expenditure on the roads and bridges did not include the expenditure incurred by the state on other heads connected with road transport, such as, the directorate of transport, transport authorities, provision for bus stands, lighting, traffic police, grants to local authorities. Taking all this expenditure into account, it became clear that a substantial part of the levy on motor vehicles was being spent annually on providing facilities to motor vehicles operators. The court also pointed out that in later years, the government expenditure on roads and bridges had substantially increased. It also said that the figures of income and expenditure for only one year might present a distorted picture. In this case, cumulative figures of receipts and expenditure for nine years (1973-1982) presented a different picture. Describing the principle underlying such a tax, the court said: "what is essential is that the burden should not disproportionately exceed the cost of the facilities provided by the state."

Decision: Therefore the tax imposed by the state of Punjab was held to be valid.

Direct and immediate restrictions

The restrictions which will attract Article 301 must be those which directly and immediately restrict or impede the free flow or movement of trade. Only those taxes which directly and immediately restrict trade would fall within the purview of Article 301. the rational and workable test to apply would be: does the impugned restrictions operate directly or immediately on trade or its movement? what is prohibited is a tax whose direct effect is to hinder the movement of trade.

Restriction on freedom of trade, commerce and intercourse throughout the territory of India cannot be justified unless they fall within Article 304.

Inter-relation between Articles 301 and 19(1)(g)

Article 19(1)(g), a fundamental right, confers on the citizens the right to practice any profession or carry on any occupation, trade or business. The question of inter-relationship between Articles 19(1)(g) and 301 is somewhat uncertain.

One view is that while Article 19(1)(g) deals with the right of the individuals, Article 301 provides safeguards for the carrying on trade as a whole distinguished from an individuals right to do the same. This view is hardly tenable. Article 301 is based on section 92 of the Australian constitution which has been held to compromise rights of the individual as well, and the same should be the position in India. In actual practice, the view has never been enforced and individuals have challenged legislation on the ground of its effect on their right to carry on trade and commerce. The supreme court has denounced the theory that Article 301 guarantees freedom "in abstract and not of the individuals."

A difference between Arts. 19(1)(g) and 301, it has been said, is that Art. 301 could be invoked only when an individual, is prevented from sending his goods across the state, or from one point to another in the same state, while Art. 19(1)(g) can be invoked when the complaint is with regard to the right of an individual to carryon business unrelated to, or irrespective of, the movement of goods, i.e., while Art. 301 contemplates the right of trade in motion, Art. 19(1)(g) secures the right at rest.

Art. 301 covers many interferences with trade and commerce which may not ordinarily come within Art. 19(1)(g),

Freedom of trade and commerce is a wider concept than that of an individual's freedom to trade guaranteed by Art. 19(1)(g).

Art. 19(1)(g) can be taken advantage of by a citizen, while Art. 301 can be invoked by a citizen as well as a non-citizen. Also, while Art. 19(1)(g) is not available to a corporate person, Art.301 may be invoked by a corporation and even by a state on complaints of discrimination or preference which are outlawed by Art. 303, discussed below.

In emergency, Art. 19(1)(g) is suspended and so courts may take recourse to Art. 301 to adjudge the validity of a restriction on commerce.

In certain situations, only one of the two may be relevant, as for example when there is no direct burden on a trade but it may be a restriction in terms of Art. 19(1)(g) read with Art. 19(6). In some other situations, both provisions may become applicable and it may be possible to invoke them both.

Art. 301 is a mandatory provision and a law contravening the same is ultra vires, but it is not a fundamental right and hence is not enforceable under Article 32 . But if the right under Article 19(1)(g) is also infringed, then Article 32 petition may lie.

Is this freedom an absolute one?

A question arises here that whether the freedom of trade, commerce and intercourse is an absolute freedom or does it having any restrictions on it? For an absolute freedom of trade, commerce and intercourse may lead to economic confusion and misuse of the same. Therefore the wide amplitude of the freedom granted by Article 301 is limited by Articles 302-305. the exceptions to Article 301 are:

a. Parliament is given power to regulate trade and commerce in public interest under Article 302 subject to Article 303.
b. Article 302 empowers parliament to impose restrictions on the freedom of trade, commerce and intercourse between one state and another, or within any part of the territory of India, in the public interest. The reference of Article 302 to restriction on the freedom of trade within any part of the territory of India as distinct from freedom of trade between one state and another clearly indicates that the freedom granted by Article 301 covers both interstate and intra state trade and commerce, as Article 302 is in the very nature of an exception to Article 301.
c. The Essential Commodities Act has been held to impose reasonable restrictions on the right to carry on trade and commerce as guaranteed by Articles 19(1)(g) and 301.
   In ***Prag Ice & Oil Mills v. India***, the Supreme Court said that Article 302 does not speak of 'reasonable restrictions' yet the court further held that 'it is evident that restrictions contemplated by it must bear a reasonable nexus with the need to serve the public interest.'

d. The state legislatures are given power to regulate trade and commerce under Article 304 subject to Article 303.

Article 304 , which consists of two clauses, empowers the states to make laws to regulate and restrict the freedom of trade and commerce to some extent. According to 304 (a), a state legislature may by law impose on goods imported from other states any tax to which similar goods manufactured or produced within that state are subject, so, however, as not to discriminate between goods so imported and goods so manufactured or produced.

* Article 304(a) thus says that state legislature may impose taxes but one condition is there, it shall not be discriminatory.

In ***Kalyani Stores v. State of Orrisa***, The state of Orrisa levied a duty on foreign liquor. No such liquor was produced within the state and the whole of it was imported from other states. The Supreme Court ruled that if the goods of a particular description were not produced within a state, the power to legislate under Article 304(a) would not available to it. In the instant case as no liquor was produced within the state, the state could not use its legislative power under Article 304(a).

Basically the concept of equality in Article 304 (a) and 14 are, somehow, same. In ***Video Electronics Pvt Ltd. v. State of Punjab***, the Supreme Court held that Article 304(a) enjoins the state not to discriminate with respect to imposition of tax on imported goods and locally made goods.

In***ShriMahavir Oil Mills Ltd. v. State of J&K***, the Supreme Court further said that this clause bars states from creating tax barriers/fiscal barriers and/or insulating themselves by creating tariff walls.

Article 304(b) authorizes a state legislature to impose by law such reasonable restrictions on the freedom of trade, commerce and intercourse with or within that state as may be required in public interest, provided that the bill or amendment for this purpose has received the previous sanction of the president before it is introduced or moved in the state legislature.

There is also a provision in this Article and that is "provided no bill or amendment for the purposes of clause (b) shall be introduced or moved in the legislature of a state without the previous sanction of the president."

In ***State of Karnataka v. Hansa Corporation,*** the Supreme Court said that:
Though Article 304(b) requires the prior assent of the president before the bill is introduced in the legislature yet, due to Article 255, if prior assent is not secured, the infirmity can be cured by subsequent assent of the president after the bill has been passed by the state legislature.

In ***Atiabari* case**, a state law imposing a tax on movement of goods in interstate commerce was held invalid because of the lack of presidential assent.

In***Saghir Ahmed v. State of U.P***, it was held that subsequent sanction is of no effect. But in other cases it was held that proviso has to be read in a harmonious manner with Article 255, which says that if the Act receives the assent of the president, the non-compliance of the previous sanction to the introduction of the bill is cured.
Article 305 protects existing laws from the operation of Articles 301 and 303. it also saves nationalization laws from the operation of Article 301.

Restrictions and regulations

The contrast between "freedom under Article 301 and "restrictions " under Article 302 and 304 clearly appears: "that which in reality facilitates trade and commerce is not a restriction and that which in reality hampers or burdens trade and commerce is a restriction." it is the reality or the substance that has to be looked into and determined. If Article 301 is interpreted to cover all regulation, it will mean that the state legislature cannot control trade, commerce and intercourse even if it is to facilitate free movement. It must yet proceed to make a law under Article 304(b) and no such bill can be introduced or moved in the legislature of a state without the previous sanction of the president.

6. Official Language

India is a multi-lingual country having numerous languages. This creates a lot of problem & tension in the country. India has two linguistic families Indo-Aryans & Dravidians. The Indo-Aryan languages are eleven in number, & derived from Sanskrit & it is spoken by nearly 75% of the population in the country of whom Hindi s spoken by 42% of the people.
The Dravidian language is spoken 25% of the population prevailing in the South India & of these Telegu is spoken by large group some of the Indian languages are very old & have a rich culture & literal heritage. All these languages are prevalent in fairly compact area. None of these languages occupied any

important place during the British rule as English had been accepted as the language of administration, instruction examination for the whole of the country. It was the sole language for communication among the elite on the all-Indi level.

Due to low rate of literacy level in the country English could be spoken by only a minority of the people. Hence when India became independent & adopted a democratic way of government based on the adult sufferage, retention of the English language for the purpose of administration appears to be incongruous.

At the time of making the constitution, the language controversy came to the fore front. The debates of constitutient assembly reveals that there was a substantial amount of consensus on two basic points,

At some stage the English language should be displaced from its permanent position &Its place should be taken by Hindi.

343. Official language of the Union

(1) The official language of the Union shall be Hindi in Devanagari script The form of numerals to be used for the official purposes of the Union shall be the international form of Indian numerals

(2) Notwithstanding anything in clause (1), for a period of fifteen years from the commencement of this Constitution, the English language shall continue to be used for all the official purposes of the Union for which it was being used immediately before such commencement: Provided that the president may, during the said period, by order authorise the use of the Hindi language in addition to the English language and of the Devanagari form of numerals in addition to the international form of Indian numerals for any of the official purposes of the Union

(3) Notwithstanding anything in this article, Parliament may by law provide for the use, after the said period of fifteen years, of

(a) the English language, or

(b) theDevanagari form of numerals, for such purposes as may be specified in the law

344. Commission and Committee of Parliament on official language

(1) The President shall, at the expiration of five years from the commencement of this Constitution and thereafter at the expiration of ten years from such commencement, by order constitute a Commission which shall consist of a Chairman and such other members representing the different languages specified in the English Schedule as the President may appoint, and the order shall define the procedure to be followed by the Commission

(2) It shall be the duty of the Commission to make recommendations to the President as to

(a) the progressive use of the Hindi language for the official purposes of the Union;

(b) restrictions on the use of the English language for all or any of the official purposes of the Union;

(c) the language to be used for all or any of the purposes mentioned in Article 348;

(d) the form of numerals to be used for any one or more specified purposes of the Union;

(e) any other matter referred to the Commission by the President as regards the official language of the Union and the language for communication between the Union and a State or between one State and another and their use

(3) In making their recommendations under clause (2), the Commission shall have due regard to the industrial, cultural and scientific advancement of India, and the jut claims and the interests of persons belonging to the non Hindi speaking areas in regard to the public services

(4) There shall be constituted a Committee consisting of thirty members, of whom twenty shall be members of the House of the People and ten shall be members of the Council of States to be elected respectively by the members of the House of the People and the members of the council of States in accordance with the system of proportional representation by means of the single transferable vote

(5) It shall be the duty of the Committee to examine the recommendations of the Commission constituted under clause (1) and to report to the President their opinion thereon

(6) Notwithstanding anything in Article 343, the President may, after consideration of the report referred to in clause (5), issue directions in accordance with the whole or any part of that report.

7. Local Self Government with special emphasis on 73rd& 74th Amendment.

In India there is a government at the Center and State levels. But there is another important system for local governance. The foundation of the present local self-government in India was laid by the Panchayati Raj System (1992). But the history of Panchayati Raj starts from the self-sufficient and self-governing village communities. In the time of the Rig-Veda (1700 BC), evidence suggests that self-governing village bodies called ‘sabhas’ existed. With the passage of time, these bodies became panchayats (council of five persons).

Panchayats were functional institutions of grassroots governance in almost every village. They endured the rise and fall of empires in the past, to the current highly structured systemLocal self-government implies the transference of the power to rule to the lowest rungs of the political order. It is a form of

democratic decentralization where the participation of even the grass root level of the society is ensured in the process of administration.

Definition of Gram Sabha:

Gram Sabha is described as a legal general assembly of all adult persons residing in a village or a group of villages. The roles, powers and functions of the Sabha are decided by the State Legislature, as per the 73rd amendment.

Gram Sabha reviews annual budget, accounts of the Panchayat and also discusses its audit and administrative reports and tax proposal. Further, it approves development schemes formulated by the Panchayat. It also plans and organizes various resources for community development programs.

Two meeting of the Gram Sabha, are organised every year, wherein the first meeting is to consider the budget of the Gram Panchayat and the second meeting is held to take into account the reports of the Panchayat. The members of the Sabha elect their representatives at the Village Panchayat, i.e. its members and the Chairperson, through voting by a secret ballot.

Constitution And composition of Panchayaths:

The Three-Tier System of Panchayati Raj in India:

1. Village Panchayat: In the structure of the Panchayati Raj, the Village Panchayat is the lowest unit. There is a Panchayat for each village or a group of villages in case the population of these villages happens to be too small. The Panchayat chiefly consists of representatives elected by the people of the village. Only the persons who are registered as voters and do not hold any office of profit under the government are eligible for election to the Panchayat. The persons convicted by the court for criminal offences are disqualified from election of the Panchayat.

There is also provision for co-option of two women and one member of the Scheduled Castes and Scheduled Tribes, if they do not get adequate representation in the normal course.

The Panchayat as a body is accountable to the general body of the village known as Gram Sabha which meets at least twice a year. The Gram Panchayat must present its budget, accounts of the previous year and annual administrative report before the Gram Sabha.

The Sarpanch occupies a pivotal position in Gram Panchayat system. He supervises and coordinates the various activities of the Panchayat.

He is an ex-officio member of the PanchayatSamiti and participates in its decision-making as well as in the election of the Pradhan and of the members of various Standing Committees. He acts as the executive

head of the Panchayat, represents it in the PanchayatSamiti as its spokesman and coordinates its activities and those of other local institutions like cooperatives.

The Panchayat Secretary and the Village Level Worker are the two officers at the Panchayat level to assist the Sarpanch in administration.

2. Panchayat Samiti: The Panchayat Samiti is the second on join tier of the Panchayati Raj. The BalwantRai Mehta Committee report has envisaged the Samiti as a single representative and vigorous democratic institution to take charge of all aspects of development in rural areas. The Samiti, according to the Committee, offers "an area large enough for functions which the Village Panchayat cannot perform and yet small enough to attract the interest and services of residents."

Usually a Panchayat Samiti consists of 20 to 60 villages depending on area and population. The average population under a Samiti is about 80,000 but the range is from 35,000 to 1, 00,000. The Panchayat Samiti generally consists of- (1) about twenty members elected by and from the Panchas of all the Panchayats falling in the block area; (2) two women members and one member each from the Scheduled Castes and Scheduled Tribes to be co- opted, provided they do not get adequate representation otherwise; (3) two local persons possessing experience of public life and administration, which may be beneficial for the rural development; (4) representatives of the Co-operatives working within the jurisdiction of the block; (5) one representative elected by and from the members of each small municipality lying within the geographical limits of a block; (6) the members of the State and Union legislatures representing the area are to be taken as associate members.

The President of the Panchayat Samiti is the Pradhan, who is elected by an electoral college consist of all members of the Panchayat Samiti and all the Panchas of the Gram Panchayat falling within the areas. Besides the Pradhan, the Up-pradhan is also elected. The Pradhan convenes and presides over the PanchayatSamiti meetings. He guides the Panchayats in making plans and carrying out production programmes.

The principal function of the Panchayat Samiti is to co-ordinate the activities of the various Panchayats within its jurisdiction. The Panchayat Samiti supervises the work of the Panchayats and scrutinises their budgets.

3. Zilla Parishad: The Zilla Parishad stands at the apex of the three-tier structure of the Panchayati Raj system. Generally, the ZillaParishad consists of representatives of the Panchayat Samiti; all the members of the State Legislature and the Parliament representing a part or whole of the district; all district level

officers of the Medical, Public Health, Public Works, Engineering, Agriculture, Veterinary, Education and other development departments.

There is also a provision for special representation of women, members of Scheduled Castes and Scheduled Tribes provided they are not adequately represented in the normal course. The Collector is also a member of the Zilla Parishad.

The Chairman of the Zilla Parishad is elected from among its members. There is a Chief Executive Officer in the Zilla Parishad. He is deputed to the Zilla Parishad by the State Government. There are subject matter specialists or officers at the district level in all the states for various development programmes.

The Zilla Parishad, for the most part, performs co-ordinating and supervisory functions. It coordinates the activities of the Panchayat Samitis falling within its jurisdiction. In certain states the ZillaParishad also approves the budgets of the Panchayat Samitis.

Powers, authority and responsibilities of Panchayats:

State Legislatures have power, to confer on the Panchayats such powers and authority as may be necessary to enable them to function as institutions of self-government [Arts. 243G-243H]. They may be entrusted with the responsibility of (a) preparing plans for economic development and social justice,(b) implementation of schemes for economic development and social justice, and

(c) in regard to matters listed in the Eleventh Schedule (inserted by the 73rd Amendment). The list contains 29 items, e.g., land improvement, minor irrigation, animal husbandry, fisheries, education, women and child development etc. The 11th Schedule thus distributes powers between the State Legislature and the Panchayat just as the 7th Schedule distributes powers between the Union and the State Legislature.

Obligatory functions:

Every Panchayat is required under the statute to make 'reasonable provision' for meeting the requirements of the village with regard to the construction, repair and maintenance of all public roads, bridges, causeways, lighting of public roads, and places, construction of drains, and public latrines, cleaning of streets and other improvements of sanitory condition, improvement of cattle, promotion of cottage industries, development of co-operatives, welfare of backward castes, preventive and remedical measures against epidemics, promotion of agriculture and other development programmes at the village level.

Discretionary Functions

Discretionary functions of the village panchayat depend upon the resources available and the income at their disposal to meet the requirements. These include items such as constitution and maintenance of slaughter houses, establishment of granaries, village library and reading rooms, layout and maintenance of play grounds and promotion improvement and encouragement of cottage industries, establishment and maintenance of markets, dispensaries and maternity and child welfare centres, veterinary relief and organizing voluntary labour for community work.

Other functions

Under section 44 of the Act, the Taluk Board can transfer the maintenance of the institutions like minor muzrai institutions or Dharmashala and execution of any other works. According to section 46 of the Act, the government can assign some more functions to the village panchayat. For example, the management and maintenance of forest adjacent to the village, make over to the panchayat the management of waste lands, pasture lands or vacant lands belonging to the Government situate within the village, entrust the panchayat with the collection of land revenue on behalf of the Government and the maintanence of such records as are connected therewith. Besides the Government has power to give new functions to panchayat in consultation with the Taluk Board and subject to such conditions as may be imposed by it.

Local government has deep roots in Indian history. The local bodies organized life of stability at the local levels. The grass roots system had shown a peculiar identity and stability despite frequent changes ofpower occurred at the super structural level. Keeping in view the importance of the village in the economy of India, the makers of the Indian Constitution inserted Article 40 into the Constitution. The 73rd Constitutional Amendment Act, 1993 was a land mark in the history of rural local self-government. It uniformly introduced a three-tier Panchayati Raj system throughout the country.

8. Constitutional provision of Jammu & Kashmir(Article 370)

Historical Background

Jammu & Kashmir has the contrast of being the only state in the Indian Union that negotiated in terms of accession. The then ruler (Maharaja Hari Singh) of Jammu & Kashmir at the time of independence from the British rule decided not to join either India or Pakistan and thereby remain independent. But then after 2 months on 6th October 1947, the border areas (some of which is now called PoK) of Jammu & Kashmir were attacked by the Azad Kashmir Forces supported by the Pak Army. Subsequently, after the attack,

the ruler decided to join India because of their own lack of Army and Weapons. So in October 1947, accession was made by the ruler considering certain promises made by Pt. JawaharLal Nehru(The then Prime Minister of India). It was the after effect of these promises that Article 370 was included in the constitution of India. And only matters related to Defense, Foreign relations, Communication and Finance of Jammu & Kashmir comes under the jurisdiction of Constitution of India.

Special Status

A State is said to have special status if all the provisions of a Union don't apply to that state. Different states may have different provisions. Article 370[1] of the constitution of India gives such special status to the state of Jammu and Kashmir. Article 371 of the Indian Constitution provides special status to 10 other states which are Assam, Nagaland, Sikkim, Manipur, Mizoram, Goa, Andhra Pradesh, Arunachal Pradesh, Maharashtra and Gujarat.

Fundamental Rights, DPSP & Fundamental Duties

- Part IV Principles of State Policy (DPSP) and Part IVA i.e. Fundamental Duties are not applicable to the State of Jammu & Kashmir where on the other hand it is applicable to other states. DPSP actually means that the states are required to do some things for the welfare of the community.
- Fundamental Right to Property is still guaranteed in J&K i.e. Articles 19(1)(f) and 31(2) of the Indian Constitution are applicable in this state.
- The only Fundamental Right which has been added in the history of Indian Constitution which Right to Education is not extended to the State of J&K.
- A special constituent assembly set up by the State has framed a separate constitution of this state and it is the only Indian State that has its own official flag.
- It is the only state which does not have to provide a detailed record of money flowing in the state and where and how is it used.
- Land or Property of this state cannot be purchased by the Indians of other states.

Without the consent of state legislature, Parliament cannot make any law relating to:

- Modification of name or territories of the state.
- The international agreement affecting the final settlement of any part of the territory of the state.

-In respect of J&K, the residuary power is with the state government and not with the Union of India.

-The permanent residents of the J&K state have been granted with some special provisions with respect to employment under state; settlement of the state; attaining of immovable property in state etc.

-Any amendment in the Constitution of India cannot extend to J&K unless it is extended under Article 370(1) by the order of the president.

Emergency Provision

- President cannot declare an emergency under Article 352 of the constitution of India for the state of Jammu & Kashmir without the consultation of the State Governor.
- Financial emergency (allowances reduction & salaries) under Article 360 cannot be declared by the Union of India in relation to J&K. Only in a situation of War and External Aggression, the Union can declare an emergency.
- Governor's rule has to be imposed for breaking down the constitution of the state of Jammu & Kashmir. Thus on the ground of failure to comply with the directions, the Union has no power to suspend the constitution of the State

High Court of J&K

Limited power rests with the High Court of J&K as compared to other High Courts within India. It doesn't have the power to declare any law unconstitutional and also it can issue writs only for the enforcement of fundamental rights, unlike other High Courts which can issue writs under Article 226 in relation to other matters also.

Procedure for Amendment of State Constitution

The provisions of the Constitution of the State can be amended by the Legislative Assembly Act of the state passed by not less than two-thirds of the total members. President's approval is needed to come into effect if an amendment seeks to affect the Governor or Election Commission. Extension of Amendment to the State of J&K can only be done by an order of the President under Article 370(1). Whether Article 370 can be amended when the constituent assembly of the State no longer exists is still a debatable question.

Conclusion

As per what constitutional experts say Article 370 should not be repealed or abolished. Rather it should be extended to the remaining states of India. Extension of such a provision to other states would provide greater freedom to them for making laws. And such an Autonomy will give greater scope for development. But for doing this centre should continue to support backward states which are ponderously dependent on Central Government Aid.

Also, Armed Forces Special Powers Act (AFSPA) has been enforced in Jammu & Kashmir since 1990, which gives provides special power to Indian security forces. Therefore a special status should be there if such a rule is implemented as it cannot be denied that it is a disturbed zone. Also, this rule is not helping the state as it doesn't permit any person living outside the territory of J&K to buy any property here which eventually hampers the development scene of the state and that is why the state lags behind in Industrial growth. There are lesser job opportunities for people and as no outside companies can set up here, therefore it leaves a blank in the infrastructure scene.

9. Special Provisions relating to specific states(Article 371A to 371J)

With the formation of Gujarat & Maharashtra the president was authorized to provide special provisions for any special responsibility of the Governor for, the establishment of separate development board for Vidharba, Maharatwada, & rest of Maharashtra, Saurashtra, Kutch & the rest of Gujarat with the provision on each of these boards will be placed each year before the state legislative assembly.

The equitable development of funds for development expenditure over the areas subject to requirement of the state as a whole.

Adequate facility for training & education & vocational training & adequate opportunity for employment in services under the control of the state govt, in respect of the areas, subject to the requirement of the state as a whole. The object of Art 371(20 is to enable the president to lay special responsibility on the governors of Maharashtra & Gujarat for development of certain areas. Nagaland, Art 371 (2) is to enable the president to lay special provisions for the state of Nagaland partly because of the disturbed law & other conditions there, & partly because of the prevalence of strong feeling regarding the customs etc among the people of the state. Naga-Hills, Tuensang Area had been administered as a scheduled area under the provision of the scheduled area. According to Art 371 A the parliament concerning any of the following matters would apply to Nagaland unless the state legislative assembly decides by a resolution; religious, or special practices of Nagas, Nagas customary laws & procedures, Administration of Civil & Criminal justice involving decision according to Naga customary law, ownership & transfer of land & it

resources . so long as there occur internal disturbances in the state the Governor of Nagaland shall have special responsibility with respect to law & order, & in discharge of his functions, the Governor after consulting with the council of ministers exercise his individual judgment as to the action to be taken.
The Governor is also to see that the money provided by the central Govt for any specific or purpose is included in the demand for the grant relating to that service or purpose is included in the demand for that services or purpose & not in any other demand moved in the state legislature. A regional council is to be established for the state. The Governor is to make rules for the composition of the council manner of choosing its members. Their terms of office, salaries etc, the procedure of the council appointment of officers of council & their condition of services.

For the period of 10 yrs or for further period as the governor may specify on the recommendation of the regional council, the following provisions operate for this district,
The administration of the Tuensang district is to be carried on by the governor. The governor shall in his discretion arrange for equitable distribution between Tuensangdist& the rest of the state of money provided by the Govt of India to meet the requirements of the state. No law of Nagaland district applies to Tuensang district unless the governor to directs on the recommendation of the regional council. The governor may also introduce such modification in the Act as the regional council may recommend. The governor may make regulations for Tuensang district & any such regulation may repeal or amend any law prevailing there. There shall be a minister for Tuensang affairs in the council of ministers from among the members representing Tuensang in the legislature. The members of the Nagaland Legislative Assembly from Tuensang are not elected directly by the people as in other states but by the regional council, members from the district of Kohima&Mokokechung are elected in the territorial constituencies.

UNIT - II

The Executive

Union government

Introduction

The Union government is composed of three wings, the executive, the legislature and the judiciary. The division of power into separate branches of government is central to the republican idea of the separation of powers.

The executive of government has the sole authority and responsibility for the daily administration of the state bureaucracy. The executive executes and enforces law as written by the legislature and interpreted by the judiciary. The Union executive consists of the President, the Vice-President and the Council of Ministers with the Prime Minister as the head to aid and advise the President.

President

Article 52: The President of India - There shall be a President of India.

This Article mandates the office of a President in the constitutional scheme and political structure of India which is a parliamentary form of Government. The President of India is the republican and constitutional head of India. The President represents the Union as well as the States. In case of any vacancy in the office of the President by reason of his death, resignation, removal or otherwise, the Vice President shall be the acting President and the vacancy shall be filled with a period of six months.

Article 53: Executive Power Of The Union

(1) The executive power of the Union shall be vested in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution.

(2) Without prejudice to the generality of the foregoing provision, the supreme command of the Defence Forces of the Union Shall be vested in the President and the exercise thereof shall be regulated by law.

(3) Nothing in this article shall –

(a) be deemed to transfer to the President any functions conferred by any existing law on the Government of any State or other authority; or

(b) prevent Parliament from conferring by law functions on authorities other than the President.

The executive authority of the Union is vested in the President. The President may exercise his powers either directly or indirectly through his subordinate officers according to the mandates of the Constitution. The executive function of the President comprises not merely the determination of the policy but also carrying it into execution. It has a wider connotation and includes the general administration of the State which includes the initiation of legislation, the maintenance of order, the promotion of social and economic welfare, the direction of foreign policy, regulation of social services like public health, housing, employment, welfare, education transport, defence, finance etc. The executive function of President also extends to exercising the powers of subordinate legislation and administrative justice. The executive power vested in the President is directed to be exercised in accordance with the Constitution.

It was observed in ***Jayantilal Amrutlal Shodhan*** **v.** ***F.N. Rama.*** The Constitution has not made an absolute or rigid division of functions between the three agencies of the State. To the executive, exercise of functions legislative or judicial are often entrusted.

Article 53(2) vests the supreme command of the defense forces in the President. The clause lays down certain limitations. The military power of the President is subject to the general executive power of the President vested in him in accordance with the Constitution. And the supreme command of the President can be exercised only under the regulation s of laws made by Parliament.

Article 53(3) lays down that the executive power of the Unions shall vest in the President. However it will not prevent the Parliament from conferring functions on authorities other than the President. But the powers which are expressly conferred on the President by the Constitution cannot be transferred by the Parliament to any other authority.

ARTICLE 54 : Election Of President:

The President shall be elected by the members of an electoral college consisting of –

(a) the elected members of both Houses of Parliament; and

(b) the elected members of the Legislative Assemblies of the States. Explanation: In this article and in article 55, “State” includes the National Capital Territory of Delhi and the Union territory of Pondicherry.

The President of India is indirectly elected by a body of electors comprising of the elected members of both Houses of Parliament and the elected members of the legislative assemblies of the

States. The method of indirect election of the President is in harmony with the Cabinet form of government envisaged in the Constitution wherein the Chief Executive is the nominal head and the real powers vest in the Cabinet. It is pertinent to note that in situations where there are no elected members in the times of dissolution of the State legislative assembly, the same shall not prevent the holding of election for the vacancy of President.

ARTICLE 55: Manner of Election Of President

(1) As far as practicable, there shall be uniformity in the scale of representation of the different States at the election of the President.

(2) For the purpose of securing such uniformity among the States inter se as well as parity between the States as a whole and the Union, the number of votes which each elected member of Parliament and of the legislative Assembly of each state is entitled to cast at such election shall be determined in the following manner;–

(a) every elected member of the Legislative Assembly of a State shall have as many votes as there are multiples of one thousand in the quotient obtained by dividing the population of the State by the total number of the elected members of the Assembly;

(b) if, after taking the said multiples of one thousand, the remainder is not less than five hundred, then the vote of each member referred to in sub-clause (a) shall be further increased by one;

(c) each elected member of either House of Parliament shall have such number of votes as may be obtained by dividing the total number of votes assigned to the members of the Legislative Assemblies of the States under sub-clauses (a) and (b) by the total number of the elected members of both Houses of Parliament, fractions exceeding one-half being counted as one and other fractions being disregarded.

(3) The election of the President shall be held in accordance with the system of proportional representation by means of the single transferable vote and the voting at such election shall be by secret ballot.

The Article provides for the election of the President by the members of an electoral college. The electoral college consists of the elected members of the Legislative assemblies of all the States and the Union. The election of the President shall be held in accordance with the system of proportional representation by means of single vote and the voting at such election shall be by secret ballot. The total number of votes commanded by the two Houses of Parliament in the electoral college is equal to that commanded by the members of the State legislative assemblies.

Article 56 : Term of Office of the President:

(1) The President shall hold office for a term of five years from the date on which he enters upon his office:

Provided that – (a) the President may, by writing under his hand addressed to the Vice-President, resign his office;

(b) The President may, for violation of the Constitution, be removed from office by impeachment in the manner provided in article 61.

(c) The President shall, notwithstanding the expiration of his term, continue to hold office until his successor enters upon his office.

(2) Any resignation addressed to the Vice-President under clause (a) of the proviso to clause (1) shall forthwith be communicated by him to the Speaker of the House of the People.

Article 56 envisages that the President shall hold office for a term of five years from the date on which he enters upon his office. He shall after the expiry of five years nominate himself for re-election. He shall continue to hold office even after the expiration of his term until his successor takes over. The office of the President shall be terminated earlier than five years on his resignation or removal on impeachment for the violation of the Constitution. The President shall address his resignation to the Vice-President, who shall communicate the same to the Speaker of the House of the People.

Article 57: Eligibility For Re-Election

A person who holds, or who has held, office as President shall, subject to the other provisions of this Constitution be eligible for re-election to that office.

The same person may be elected to the office of the President for any number of times. There is no bar provided in the Constitution for the re-election of the same person.

Article 58 : Qualifications For Election As President

(1) No person shall be eligible for election as President unless he –

(a) is a citizen of India;

(b) has completed the age of thirty-five years, and

(c) is qualified for election as a member of the House of the People.

(2) A person shall not be eligible for election as President if he holds any office of profit under the Government of India or the Government of any State or under any local or other authority subject to the control of any of the said Governments.

Article 58 lays down the qualifications which a person must possess for being elected to the office of the President of India. The person must be a citizen of India and completed 35 years of age. And also he must be qualified for election as a member of the House of the People.

Clause (2) of the Article lays down a disqualification that the person to be elected as President must not hold office of profit or employment under Central Government, State Government or any local or other authority. Thus, persons holding employment under the State shall not be entitled to seek election to the President's office.

However, the President and the Vice-President of the Union, the Governor of any State and Ministers either of the Union or of any State are exempt from being disqualified.

Article 59 : Conditions Of President's Office

(1) The President shall not be a member of either House of Parliament or of a House of the Legislature of any State, and if a member of either House of Parliament or of a House of the Legislature of any State be elected President, he shall be deemed to have vacated his seat in that House on the date on which he enters upon his office as President.

(2) The President shall not hold any other office of profit.

(3) The President shall be entitled without payment of rent to the use of his official residences and shall be also entitled to such emoluments, allowances and privileges as may be determined by Parliament by law and until provision in that behalf is so made, such emoluments, allowances and privileges as are specified in the Second Schedule.

(4) The emoluments and allowances of the President shall not be diminished during his term of office.

As per Article 59 the President will not be a member of any legislature in the country and he will not hold any other salaried appointment either under the State or under any other non-governmental authority. The President shall get an official resident free of rent. He is entitled to such emoluments and allowances as may be determined by Parliament. The emoluments and allowances of the President shall not be diminished during the term of office of the President

Article 60 : Oath Or Affirmation By The President

Every President and every person acting as President or discharging the functions of the President shall, before entering upon his office, make and subscribe in the presence of the Chief Justice of India or, in his absence, the senior most Judge of the Supreme Court available, an oath or affirmation in the following form, that is to say – "I, A.B., do swear in the name of God / solemnly affirm that I will faithfully execute the office of President (or discharge the function of the President) of India and will to the best of my ability preserve, protect and defend the Constitution and the law and that I will devote myself to the service and well-being of the people of India."

The President before entering upon his office has to make and swear on affirmation in the prescribed form in the presence of the Chief Justice of India. In the absence of Chief Justice of India the President shall swear his oath in the presence of the senior most Judge of Supreme Court available. In his oath the President shall undertake to protect and defend the Constitution and the law and to devote himself to the service and welfare of the people.

Article 61 : Procedure For Impeachment Of The President

(1) When a President is to be impeached for violation of the Constitution, the charge shall be preferred by either House of Parliament.

(2) No such charge shall be preferred unless –

(a) the proposal to prefer such charge is contained in a resolution which has been moved after at least fourteen days' notice in writing signed by not less than one-fourth of the total number of members of the House has been given of their intention to move the resolution, and

(b) such resolution has been passed by a majority of not less than two-thirds of the total membership of the House.

(3) When a charge has been so preferred by either House of Parliament, the other House shall investigate the charge or cause the charge to be investigated and the President shall have the right to appear and to be represented at such investigation.

(4) If as a result of the investigation a resolution is passed by a majority of not less than two-thirds of the total membership of the House by which the charge was investigated or caused to be investigated,

declaring that the charge preferred against the President has been sustained, such resolution shall have the effect of removing the President from his office as from the date on which the resolution is so passed.

The President can be removed from his office for violation of the Constitution by impeachment. Article 61 lays down the procedure for impeachment. If a President violates the Constitution a motion to prefer a charge against him may be initiated in either of the House of Parliament. However fourteen days prior notice should be given and also the motion must be supported by not less than one-fourth of the total number of members of the House. The motion must be passed by a majority of not less than two-thirds of the membership of the House. Further the House which passes the motion to prefer a charge against the President shall not be entitled to investigate the charge because the charge shall be investigated by the other House. Finally if the House which has investigated the charge finds the President guilty, it shall pass a resolution to that effect by a majority of two-thirds of the total membership of the House. The resolution shall have the effect of removing the President from his office from the date on which the resolution is passed.

Article 62 : Time Of Holding Election

To fill Vacancy In The Office Of President And The Term Of Office Or Person Elected To Fill Casual Vacancy

(1) An election to fill a vacancy caused by the expiration of the term of office of President shall be completed before the expiration of the term.

(2) An election to fill a vacancy in the office of President occurring by reason of his death, resignation or removal, or otherwise shall be held as soon as possible after, and in no case later than six months from, the date of occurrence of the vacancy; and the person elected to fill the vacancy shall, subject to the provisions of article 56, be entitled to hold office for the full term of five years from the date on which he enters upon his office.

The fixed term to hold the office of the President is five years. Article lays down that an election must be conducted to fill up the vacancy of the President before the expiration of the President's term of office. However the President whose term has expired can continue to hold office until his successor enters upon his office as enumerated under article 56(1)(c). If the vacancy occurs by cause of death, resignation, removal or for any other reason, the election to fill up the vacancy must be held at the earliest and not later than six months from the date of occurrence of the vacancy. Under these circumstances the Vice-President shall act as a President till the election of a new President.

Article 72: Power of President to grant pardons, etc., and to suspend, remit or commute sentences in certain cases

(1) The President shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any persons convicted of any offence – (a) in all cases where the punishment of sentence is by a Court Martial;

(b) in all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union extends;

(c) in all cases where the sentence is a sentence of death.

(2) Nothing in sub-clause (a) of clause (1) shall affect the power conferred by law on any officer of the Armed Forces of the Union to suspend, remit or commute a sentence passed by a Court martial.

(3) Nothing in sub-clause (c) of clause (1) shall affect the power to suspend, remit or commute a sentence of death exercisable by the Governor of a State under any law for the time being in force.

This article defines the power of the President to grant pardons, reprieves etc. for offences in certain cases. A pardon is an act of grace and it cannot be claimed as a right. A pardon places the offender in an innocent position in the eyes of laws it releases the punishment imposed upon him. All his civil rights are restored to him. A pardon may be granted before conviction or after conviction. The pardoning power may be exercised at any time after the commission of an offence, either before legal proceedings are taken or during the pendency or either before or after conviction. A pardon may be absolute or conditional. In conditional pardoning, the pardon becomes effective only after the grantee has performed some specified act. The power to grant pardons is an executive function.

The President can also grant reprieves i.e. a temporary suspension of the punishment fixed by law; respites i.e. postponement to the future the execution of a sentence; commutation i.e. changing a punishment to one of a different sort than that originally proposed; and remission i.e. reduce the amount of punishment without changing the character of punishment.

Further the President can grant pardons and reprieves in cases of offences against Union laws; in all cases where the punishment or sentence is by a Court Martial; and in all cases of sentence of death. Article 72 depends upon the facts and circumstance of each case. Also the power can be exercised only

to reduce and not to enhance the sentence. However in Manu Ram case the Supreme Court stated that the power of pardon, commutation and release under Article 72 cannot run riot and must keep sensibly to a steady course and that public power shall never be exercisable arbitrarily or malafide and, ordinarily, guidelines for fair and equal execution are guarantors of the valid play of power. Also in Kehar Singh v. Union of India, the court stated observed that the area of the President's power falls within the judicial domain and it can be examined by the court by way of judicial review.

State Government

GOVERNOR

Introduction

Part VI of the Constitution deals with the structure of government in the States specified in the First Schedule to the Constitution. The State shall be headed by a Governor. The primary function of the governor is to preserve, protect and defend the constitution and the law as incorporated in his oath of office under the Indian constitution in the administration of the State affairs. All his actions, recommendations and supervisory powers over the executive and legislative entities of a State shall be used to implement the provisions of the Constitution. The Governor is vested with the executive powers related to administration, appointments and removals; the Legislative powers related to lawmaking concerning the state legislature i.e. State Legislative Assembly (Vidhan Sabha) or State Legislative Council (Vidhan Parishad), and the Discretionary powers to be carried out according to the discretion of the Governor. Article 153 to 162 lays down the provisions relating to Governor.

Article 153 - Governors of States

There shall be a Governor for each State:

Provided that nothing in this article shall prevent the appointment of the same person as Governor for two or more States.

Article 153 mandates that there shall be a Governor appointed for every State of the Union of India. The same person can be appointed as a Governor for two or more States. Nothing in the said Article shall prohibit the same person from being a Governor over two or more States.

Article 154 - Executive power of State

(1) The executive power of the State shall be vested in the Governor and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution

(2) Nothing in this article shall

(a) Be deemed to transfer to the Governor any functions conferred by any existing law on any other authority; or

(b) prevent Parliament or the Legislature of the State from conferring by law functions on any authority subordinate to the Governor

Clause (1) of Article 154 states that the Governor will be vested with all the executive powers pertaining to the States over which he is appointed as the Head. The Governor shall exercise his powers either directly or indirectly with the aid of the subordinate officers who are subordinate to him. The powers will be exercised according to the provisions of the Constitution.

Clause (2) of Article 154 enumerates that any functions which is conferred by any existing law or any other authority shall be deemed to be transferred to the Governor. Further the Parliament and the Legislature of the State are vested with the powers to confer any of the functions on the authorities sub-ordinate to the Governor. The same shall be according to the provisions of law.

In ***Ram Jawaya Kapur*** v. ***State of Punjab***, the Supreme Court said, The Governor occupies the position of the Head of the executive in the State but it is virtually the Council of Ministers in each State that carried on the executive Government.

In ***Samsher Singh*** v. ***State of Punjab***, the Supreme Court stated that except in spheres where the Governor is to act in his discretion, the Governor acts on the aid and advice of the Council of Ministers in the exercise of his powers and functions, and is not required to act personally without the aid and advice of the Council of Ministers or against the aid and advice of the Council of Ministers. The Governor exercises his discretion in harmony with his Council of Ministers.

Article 155 - Appointment of Governor

The Governor of a State shall be appointed by the President by warrant under his hand and seal.

The President by warrant under his hand and seal shall appoint the Governor of the State.

Article 156 - Term of office of Governor

(1) The Governor shall hold office during the pleasure of the President

(2) The Governor may, by writing under his hand addressed to the President, resign his office

(3) Subject to the foregoing provisions of this article, a Governor shall hold for a term of five years from the date on which he enters upon his office

(4) Provided that a Governor shall, notwithstanding the expiration of his term, continue to hold office until his successor enters upon his office

Article 156 enumerates that the President is vested with the powers to appoint and remove the Governor of a State. The Governor according to the provisions shall hold the office for a fixed term of five years provided he is not removed from his office prior to the completion of his tenure by the President. Further the Governor has the right to submit his resignation for his office. It shall be addressed to the President for acceptance. The Constitution permits the appointment of same person as Governor for two or more States. In case the office of the Governor is not filled up with the new nominee, the out-going Governor shall continue to hold the office until his successor enters upon his office.

Article 157 - Qualifications for appointment as Governor

No person shall be eligible for appointment as Governor unless he is a citizen of India and has completed the age of thirty five years.

Article 157 states that the eligibility criteria for a person to be appointed as a Governor. He should be a citizen of India and must have completed the age of thirty five years.

Article 158 - Conditions of Governor's office

(1) The Governor shall not be a member of either House of Parliament or of a House of the Legislature of any State specified in the First Schedule, and if a member of either House of Parliament or of a House of the Legislature of any such State be appointed Governor, he shall be deemed to have vacated his seat in that House on the date on which he enters upon his office as Governor

(2) The Governor shall not hold any other office of profit

(3) The Governor shall be entitled without payment of rent to the use of his official residences and shall be also entitled to such emoluments, allowances and privileges as may be determined by Parliament by law and, until provision in that behalf is so made, such emoluments, allowances and privileges as are specified in Second Schedule

(3A) Where the same person is appointed as Governor of two or more States, the emoluments and allowances payable to the Governor shall be allocated among the States in such proportion as the President may by order determine

(4) The emoluments and allowances of the Governor shall not be diminished during his term of office

Article 158 lays down conditions to hold the office of Governor. The Governor should not be a member of either House of Parliament or of a House of the Legislature of any State which is specified in First Schedule to the Constitution. If peradventure he is holding membership of either House of Parliament or of a House of the Legislature of any State, then he shall vacate from the membership and it shall be deemed that he has vacated his seat in that House on the date on which he enters upon his office as a Governor.

Further the Governor shall not hold any other office of profit. His salary shall be fixed by the Constitution which can be varied time to time by the Union Parliament. However the emoluments and allowances of the Governor cannot be reduced during the term of his office. The Governor is entitled without payment of rent to the use of his official residence and is also entitled to various other allowances and privileges.

Article 159 - Oath or affirmation by Governor –

Every Governor and every person discharging the functions of the Governor shall, before entering upon his office, make and subscribe in the presence of the chief Justice of the High Court exercising jurisdiction in relation to the State, or, in his absence, the senior most Judge of that court available, an oath or affirmation in the following form, that is to say,

"I, execute the office of Governor (or discharge the functions of the Governor) of (name of the State) and will to the best of my ability preserve, protect and defend the Constitution and the law and that I will devote myself to the service and well being of the people of (name of the State)."

Every Governor and every person discharging the functions of the Governor shall before entering upon his office, make and subscribe, in the presence of the Chief Justice of the State High Court or in his absence, the senior most judge of that court available, an oath or affirmation in the prescribed form.

Article 160 - Discharge of the functions of the Governor in certain contingencies –

The President may make such provision as he thinks fit for the discharge of the functions of the Governor of a State in any contingency not provided for in this Chapter.

In case of contingencies or emergency the President is vested with a wide discretionary power to make any such necessary provisions which are not provided in this chapter, to enable the Governor to discharge his functions as situations requires of him.

Section 161 - Power of Governor to grant pardons, etc, and to suspend, remit or commute sentences in certain cases.

The Governor of a State shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends.

Under this Article it can be gathered that the executive power of the State extends to matters with respect to which the legislature of the State has power to make laws. The Governor has the power to grant pardons etc., reprieve, respite or remit the punishment. He is also vested with the power to suspend, remit or commute the sentence of any person who has been convicted of any offence against any law. Provided that the executive power of the State shall extend to such matter.

Further there is no obligation to hear the parties concerned before rejecting or granting a mercy petition. If an appeal is pending and the matter is sub judice in the Supreme Court, the Governor has no right to suspend the sentence under Article 161. A full pardon even during the pendency of a case is permissible.

Although the power of Governor under this article is very wide, it is not free from judicial review on certain limited grounds. In Satpal v. State of Haryana – The Court invalidated the remission of the sentence by the Governor based on wrong information and incomplete facts.

PARLIAMENT

Introduction

The Parliament of India is the supreme legislative body of the Republic of India. Also known as the bicameral legislature of the Union, which is called Parliament it is composed of two Houses, known as Council of States (Rajya Sabha) and House of the People (Lok Sabha). The President plays his role as the head of the legislature and is vested with all powers to summon and prorogue either House of Parliament and also to dissolve the House of the People. The President can exercise these powers only upon the advice of the Prime Minister and his Union Council of Ministers. Each House has to meet within six months of its previous sitting. A joint sitting of two Houses can be held in certain cases.

Article 79 - There shall be a Parliament for the Union which shall consist of the President and two Houses to be known respectively as the council of States and the House of the People.

According to Article 79 of the Constitution of India, the Parliament consists of President of India and the two Houses of Parliament known as Council of States (Rajya Sabha) and House of the People (Lok Sabha).

Article 80 - Composition of the Council of States

(1) The Council of States shall consist of

(a) twelve members to be nominated by the President in accordance with the provisions of clause (3); and

(b) not more than two hundred and thirty eight representatives of the States and of the Union territories

(2) The allocation of seats in the Council of States to be filled by representatives of the States and of the Union territories shall be in accordance with the provisions in that behalf contained in the fourth Schedule

(3) The members to be nominated by the President under sub clause (a) of clause (1) shall consist of persons having special knowledge or practical experience in respect of such matters as the following, namely: Literature, science, art and social service

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

(5) The representatives of the Union Territories in the council of States shall be chosen in such manner as Parliament may by law prescribe

Council of States

The Council of States consists of two classes of members

1) Representatives of the States

2) The President's nominees

The maximum representatives of the States are fixed at 238. The Fourth Schedule to the Constitution enlists the details concerning the allotment of seats among the States. The representatives are elected by the members of the legislative assembly of the State in accordance with the system of proportional representation. The mode of election shall be by means of single transferable vote. The Parliament shall prescribe the necessary laws to elect the representatives of the Union Territories. The President shall nominate twelve members to the Council of States. They shall be persons having special knowledge and expertise in the field of literature, science, art and social service. The Council of States is a permanent body with one-third of its members retiring every second year. The Vice-President is the ex-officio chairman of the Council of States.

Article 81 : Composition of the House of the People

(1) Subject to the provisions of Article 331 the House of the People shall consist of

(a) not more than five hundred and thirty members chosen by direct election from territorial constituencies in the States, and

(b) not more than twenty members to represent the Union territories, chosen in such manner as parliament may by law provide

(2) For the purposes of sub clause (a) of clause (1) (a) there shall be allotted to each State a number of seats in the House of the People in such manner that the ratio between that number and the population of the State is, so far as practicable, the same for all States; and

(b) each State shall be divided into territorial constituencies in such manner that the ratio between the population of each constituency and th number of seats allotted to it is, so far as practicable, the same throughout the State: Provided that the provisions of sub clause (a) of this clause shall not be applicable for the purpose of allotment of seats in the House of the People to any State so long as the population of that State does not exceed six millions

(3) In this article, the expression population means the population as ascertained at the last preceding census of which the relevant figures have been published: Provided that the reference in this clause to the last preceding census of which the relevant figures have been published shall, until the relevant figures for the first census taken after the year 2000 have been published, be construed as a reference to the 1971 census

Article 81 describes the composition of the House of the People. The House consists of

– Not more than 530 members who are directly elected by the voters or the States;

-Not more than 20 members representating the Union Territories who shall be chosen in such manner as Parliament may by law provide;

- Not more than 2 members belonging to the Anglo-Indian community appointed by the President under Article 331.

The Representation in the House of the People is based on population and is allotted to the States. The population of States shall be taken to be the same as ascertained at the last census. The seats shall be allotted to each State shall be in the ratio between number of seats and the population of the State. For the purpose of election, the States shall be divided into territorial constituencies.

Article 82 - Readjustment after each census

Upon the completion of each census, the allocation of seats in the House of the People to the States and the division of each State into territorial constituencies shall be readjusted by such authority and in such manner as Parliament may by law determine:

Provided that such readjustment shall not affect representation in the House of the People until the dissolution of the then existing House:

Provided further that such readjustment shall take effect from such date as President may, by order, specify and until such readjustment takes effect, any election to the House may be held on the basis of the territorial constituencies existing before such readjustment:

Provided also that until the relevant figures for the first census taken after the year 2000 have been published, it shall not be necessary to readjust the allocation of seats in the House of the People to the States and the division of each State into territorial constituencies under this article.

The Constitution ensures uniformity of representation in (a) between the different States and (b) between the different constituencies in the same State. Population is ascertained at the preceding census. The ratio between the number of seats in Lok Sabha and the population of each State is the same for all States. Each State is divided into territorial constituencies in a manner that the ratio between the population of each constituency and the number of seats allotted to it is the same throughout the State.

Article 82 states that the Parliament shall lay down the rules regarding the readjustment of allocation of seats in the House of the People to the States and the constituencies. Readjustment shall be done after the completion of each census. After every census, a readjustment is to be made in division of each state into territorial constituencies, and allocation of seats in the Lok Sabha to the States. The power of Parliament to make such readjustment is laid down under Article 327. Also under Article 82 the Parliament by law enacts a Delimitation Act after every census. The main objective of this provision is to empower the government to undertake readjustment and rationalisation of territorial constituencies in the states on the basis of census. Further, delimitation ensures uniformity of representation between the different states and between the different constituencies in the same state. It also ensures that each constituency represent equal number of voters on the basis of principle of 'one vote and one value'.

Article 83 : Duration of Houses of Parliament

(1) The council of States shall not be subject to dissolution, but as nearly as possible one third of the members thereof shall retire as soon as may be on the expiration of every second year in accordance with the provisions made in that behalf by Parliament by law

(2) The House of the People, unless sooner dissolved, shall continue for five years from the date appointed for its first meeting and no longer and the expiration of the said period of five years shall operate as a dissolution of the House: Provided that the said period may, while a Proclamation of Emergency is in operation, be extended by Parliament by law for a period not exceeding one year as a time and not extending in any case beyond a period of six months after s the Proclamation has ceased to operate

The Council of States is a permanent body. One-third of its members shall retire every second year. The term of House of the People shall be for five years unless it is sooner dissolved by the President. Only in case of proclaimed emergency the term of the House of the People can be extended by the Parliament. The maximum prolonging of the term may be by a year at a time. A Parliament whose life has been extended cannot continue beyond a period of six months after the ceasing of the operation of the proclamation of emergency.

Article 84 - Qualification for membership of Parliament

A person shall not be qualified to be chosen to fill a seat in Parliament unless he

(a) is a citizen of India, and makes and subscribes before some person authorized in that behalf by the Election Commission an oath or affirmation according to the form set out for the purpose in the Third Schedule;

(b) is, in the case of a seat in the Council of States, not less than thirty years of age and, in the case of a seat in the House of the People, not less than twenty five years of age; and

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

Article 84 prescribes qualifications for a person who desires to be a candidate at an election.

The qualifications for a Member of Parliament are that he should

-Be a citizen of India

-Make and subscribe an oath or affirmation expressing his true faith and allegiance to the Constitution and for upholding the sovereignty and integrity of India

-Be not less than 30 years of age in the case of the Council of States and not less than 25 years of age in the case of the House of the People

-Be possessing such other qualifications as may be laid down by the Parliament

Article 85 - Sessions of Parliament, prorogation and dissolution

(1) The President shall form time to time summon each House of Parliament to meet at such time and place as he thinks fit, but six months shall not intervene between its last sitting in one session and the date appointed for its first sitting in the next session

(2) The President may from time to time

(a) prorogue the Houses or either House;

(b) dissolve the House of the People

Article 85 states that the President shall summon each House of Parliament to meet. The summoning of the House means its convocation or the period during which the House meets to conduct its business. A session of the House commences from the day the President summons it to meet. However there should not be more than six months intervention between two sessions. Hence the Parliament must meet at least twice a year.

The President may also end a session by prorogation. Prorogation is the act of terminating a parliamentary session. Prorogation implies the end of the sitting as well as the session and not the dissolution. The Rajya Sabha is not dissolved as it is a permanent House, only the Lok Sabha is dissolved. The President may prorogue the House while in session also.

Further the President is empowered to dissolve the House. Dissolution means terminating the life of the House. A dissolution ends the existing House and a new House is constituted after general elections are held. Rajya Sabha being a permanent House, is not subject to dissolution. Only the Lok Sabha is subject to dissolution. Dissolution may take place on the expiry of its tenure i.e. five years, or on the expiry of the term as extended during a national emergency. Dissolution may take place even before the expiry of the term on the motion of the President in circumstances wherein Council of Ministers loses confidence and no party is able to form the government. Dissolution of the House of the People takes place on the advice of the Prime Minister. When the Lok Sabha is dissolved, all business including bills, motions, resolutions, notices, petitions pending before it shall lapse.

The State Legislature

Introduction

Executive power is divided between the Union government and State governments. The Union government deals with the military, external affairs etc. The State government deals with internal security and other State issues. Each State has a legislative assembly. A State legislature that has one house i.e. State Legislative Assembly (Vidhan Sabha) is a unicameral legislature. It is the lower house and corresponds to the Lok Sabha. A State legislature that has two houses known as State Legislative Assembly (Vidhan Sabha) and State Legislative Council (Vidhan Parishad) is a bicameral legislature. It is the upper house and corresponds to the Rajya Sabha of the Indian Parliament. The Parliament by law may either provide for abolition of an existing legislative council or for creation of a new Legislative Council. However the proposal must be supported by a resolution of the concerned Legislative Assembly.

Article 168 - Constitution of Legislatures in States

(1) For every State there shall be a Legislature which shall consist of the Governor, and

(a) in the States of Andhra Pradesh, Bihar, Madhya Pradesh, Madhya Pradesh, Maharashtra, Karnataka, Tamil Nadu and Uttar Pradesh, two houses:

(b) in other States, one House

(2) Where there are two Houses of the Legislature of a State, one shall be known as the Legislative Council and the other as the Legislative Assembly, and where there is only one House, it shall be known as the Legislative Assembly

Article 168 mandates that there shall be Legislature and a Governor to every State. The legislature is bicameral in six States as specified in Article 168(1)(a). In other States, the legislature is unicameral. In bicameral legislature the Houses are known as Legislative Council and Legislative Assembly respectively. In unicameral legislature the House shall be known as the Legislative Assembly.

Article 169 - Abolition or creation of Legislative Councils in States

(1) Notwithstanding anything in Article 168, Parliament may by law provide for the abolition of the Legislative Council of a State having such a Council or for the creation of such a Council in a State having no such Council, if the Legislative Assembly of the State passes a resolution to that effect by a majority of the total membership of the Assembly and by a majority of not less than two thirds of the members of the Assembly present and voting

(2) Any law referred to in clause (1) shall contain such provisions for the amendment of this Constitution as may be necessary to give effect to the provisions of the law and may also contain such supplemental, incidental and consequential provisions as Parliament may deem necessary

(3) No such law as aforesaid shall be deemed to be an amendment of this Constitution for the purposes of Article 368.

Article 168 states that there shall be Legislature and a Governor to every State. The legislature is bicameral i.e. there are both Legislative Council and Legislative Assembly, in the States of Andhra Pradesh, Telangana, Uttar Pradesh, Bihar, Maharashtra, Karnataka and Jammu and Kashmir. In other States, the legislature is unicameral i.e there is only the Legislative Assembly.

But Article 169 empowers to the States having a second chamber (bicameral legislature) the right to abolish the Legislative Councils in States. And the States having no second chamber (bicameral legislature) then they are conferred with the right to create a Legislative Council. The Legislative Assembly of the State should pass a resolution for the abolition or creation of such Legislative Council.

There should be voting and a majority of not less than two-thirds of the members present. The creation and abolition of the Legislative Council is left to the Lower House of the State. The Lower House by a resolution may recommend either for the abolition or creation of the Legislative Council.

In order to give effect to the provisions of the law, any supplemental, incidental and consequential provision may be inculcated in Clause (1) of Article 169 as the Parliament may deem necessary. But such laws shall not be deemed to be an amendment under Article 368 which deals with the power of Parliament to amend the Constitution and procedure thereof.

Article 170 : Composition of the Legislative Assemblies

(1) Subject to the provisions of Article 333, the Legislative Assembly of each State shall consist of not more than five hundred, and not less than sixty, members chosen by direct election from territorial constituencies in the State

(2) For the purposes of clause (1), each State shall be divided into territorial constituencies in such manner that the ratio between the population of each constituency and the number of seats allotted to it shall, so far as practicable, be the same throughout the State

Explanation In this clause, the expression population means the population as ascertained at the last preceding census of which the relevant figures have been published: Provided that the reference in this Explanation to the last preceding census of which the relevant figures have been published shall, until the relevant figures for the first census taken after the year 2000 have been published, be construed as a reference to the 1971 census

(3) Upon the completion of each census, the total number of seats in the Legislative Assembly of each State and the division of each State into territorial constituencies shall be readjusted by such authority and in such manner as Parliament may by law determine:

Provided that such readjustment shall not affect representation in the Legislative Assembly until the dissolution of the then existing Assembly:

Provided further that such readjustment shall take effect from such date as the President may, by order, specify and until such readjustment takes effect, any election to the Legislative Assembly may be held on the basis of the territorial constituencies existing before such readjustment:

Provided also that until the relevant figures for the first census taken after the year 2000 have been published, it shall not be necessary to readjust the total number of seats in the Legislative Assembly of each State and the division of such State into territorial constituencies under this clause

The Legislative Assembly of a State consists of not more than five hundred and not less than sixty members. These members are chosen from the territorial constituencies in the State by direct election. Demarcation of territorial constituencies shall done in such a manner that the ratio between the population of each constituency and number of seats allotted to it is the same throughout the State as far as practicable. The readjustment of allocation of seats shall be done after the completion of each census. After every census, a readjustment is to be made in territorial constituencies, and allocation of seats.. The main objective of this provision is to empower the government to undertake readjustment and rationalisation of territorial constituencies in the states on the basis of census.

Article 171 : Composition of the Legislative Councils

(1) The total number of members in the Legislative Council of a State having such a Council shall not exceed one third of the total number of members in the Legislative Assembly of that State: Provided that the total number of members in the Legislative Council of a State shall in no case be less than forty

(2) Until Parliament by law otherwise provides, the composition of the Legislative Council of a State shall be as provided in clause (3)

(3) Of the total number of members of the Legislative council of a State

(a) as nearly as may be, one third shall be elected by electorates consisting of members of municipalities, district boards and such other local authorities in the State as Parliament may by law specify;

(b) as nearly as may be, one twelfth shall be elected by electorates consisting of persons residing in the State who have been for at least three years graduates of any university in the territory of India or have been for at least three years in possession of qualifications prescribed by or under any law made by Parliament as equivalent to that of a graduate of any such university;

(c) as nearly as may be, one twelfth shall be elected by electorates consisting of persons who have been for at least three years engaged in teaching in such educational institutions within the State, not lower in standard than that of a secondary school, as may be prescribed by or under any law made by Parliament;

(d) as nearly as may be, one third shall be elected by the members of the Legislative Assembly of the State from amongst persons who are not members of the Assembly;

(e) the remainder shall be nominated by the Governor in accordance with the provisions of clause (5)

(4) The members to be elected under sub clauses (a), (b) and (c) of clause (3) shall be chosen in such territorial constituencies as may be prescribed by or under any law made by Parliament, and the election under the said sub clauses and under sub clause (d) of the said clause shall be held in accordance with the system of proportional representation by means of the single transferable vote

(5) The members to be nominated by the Governor under sub clause (e) of clause (3) shall consist of persons having special knowledge or practical experience in respect of such matters as the following, namely: Literature, science, art, co operative movement and social service

The article describes the composition of the Legislative Councils. The total number of members in the Legislative Council of a State shall not exceed one-third of the total number of members in the Legislative Assembly of that State. However the total number of members shall not be less than forty. The maximum and minimum limits of the total number of the members fixed cannot be varied unless the Constitution itself is amended. The total composition of the Legislative Council as enumerated under Clause (3) can be varied by a law of Parliament. It may be by nomination, indirect election or by election from teachers and graduates constituencies. Of the total number of members of the Legislative Council of a State, one third are to be elected by electorates consisting of members of municipalities, district boards, and other local authorities in the State, one-twelfth are to be elected by electorates consisting of persons residing in the State who have been for at least three years graduates of any university in Inida or possess equivalent qualifications, one-twelfth are to be elected by electorates consisting of persons who have been engaged in teaching in educational institutions within the State, one-third are to be elected by the members of the Legislative Assembly of the State from amongst the persons who are not members of the Assembly and the remainder are to be nominated by the Governor in accordance with the provisions of clause(5).

Article 172 - Duration of State Legislatures.—(1) Every Legislative Assembly of every State, unless sooner dissolved, shall continue for *[five years] from the date appointed for its first meeting and no longer and the expiration of the said period of *[five years] shall operate as a dissolution of the Assembly:

Provided that the said period may, while a Proclamation of Emergency is in operation, be extended by Parliament by law for a period not exceeding one year at a time and not extending in any case beyond a period of six months after the Proclamation has ceased to operate.

(2) The Legislative Council of a State shall not be subject to dissolution, but as nearly as possible one-third of the members thereof shall retire as soon as may be on the expiration of every second year in accordance with the provisions made in that behalf by Parliament by law.

Article 172 lays down the term for the Legislative Assemblies and Legislative Councils of the States. The term of the Legislative Assembly shall be five years. The Council shall be a continuing House not subject to dissolution but one third of its members shall retire every two years. While the Legislative Assembly shall stand dissolved on the completion of its term of five years, it can be dissolved earlier. In fact, the term is five years only unless it is dissolved earlier. Also the period of five years is to be counted from the date of the first sitting of the House and not from the date of the constitution of the House which is usually earlier and immediately on the notification of election results.

Where the State Legislature is bicameral the Legislative Council is not subject to dissolution. In States with bicameral legislature, only the Legislative Assembly can be dissolved but not the Legislative Council. The constitution of the Assembly shall be in accordance to the provisions of issue of notification as laid down under Section 73 of Representation of People Act, 1951. But the duration fixed is distinct in the Constitution.

The duration however may be extended to a period of one year at a time during proclamation of Emergency. But once the proclamation has ceased to operate it cannot exceed beyond a period of six months from such ceasing.

There is no provision in the Article for the dissolution of the Legislative Council of a State. However on the expiration of every second year one-third of the members shall retire from their office. The retirement shall be carried on in accordance with the provisions made by Parliament by law.

Article 173 - Qualification for membership of the State Legislature.—A person shall not be qualified to be chosen to fill a seat in the Legislature of a State unless he—

*[(a) is a citizen of India, and makes and subscribes before some person authorised in that behalf by the Election Commission an oath or affirmation according to the form set out for the purpose in the Third Schedule;]

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

(c) Possesses such other qualifications as may be prescribed in that behalf by or under any law made by Parliament.

Article 173 corresponds to article 84 for the Union Parliament. In order to be eligible for membership of a State Legislature, a person (a) must be a citizen of India, (b) must take an oath to the Constitution, (c) must not be less than 25 years of age in case of Assembly and not less than 30 years in case of the Council, as on the date of nomination, and (d) must possess other qualifications prescribed by law.

The Constitution (Sixteenth Amendment) Act, 1963 substituted sub clause (a) of article 173, by the following:

"(a) is a citizen of India, and makes and subscribes before some person authorised in that behalf by the Election Commission an oath or affirmation according to the form set out for the purpose in the Third Schedule;"

The amendment in articles 84 and 173 and forms of oath in the Third Schedule to the Constitution was made so as to provide that every candidate for the membership of Parliament or State Legislature, Union and State Ministers, Members of Parliament and State Legislatures, Judges of the Supreme Court and High Courts and the Comptroller and Auditor-General of India should take an oath to uphold the sovereignty and integrity of India.

Oath or affirmation: The words "having been nominated" in the form of oath or affirmation to be made by a candidate for election to the legislature of a State clearly show that the oath or affirmation cannot be taken or made by a candidate before he has been nominated as a candidate.

The oath under 173(a) must be taken in accordance with the provisions of the Representation of People Act, 1951 prior to the date of scrutiny of nomination papers. If oath is not taken or taken only at the time of scrutiny of nomination papers, the nomination papers may be rejected.

The oath or affirmation must be before the date fixed for scrutiny, so that the candidate possesses the qualification under article 173(a) of the Constitution on the whole of the day on which the scrutiny of nomination has to take place.

The purpose of article 173(a) of the Constitution is to ensure that any person, who wants to be a member of Legislature of a State, must bear true faith and allegiance to the Constitution of India as by law established and undertake to uphold the sovereignty and integrity of India, and, to ensure this, he must make an oath or affirmation. Once such an oath or affirmation is made before a competent authority in respect of one constituency, he becomes bound by that oath or affirmation, even if he gets elected to the legislature from a different constituency, in case of his being nominated from more than one

constituency. All that article 173(a) requires is one oath or affirmation in accordance with the form set out in the Third Schedule to the Constitution so as to remove the disqualification from being a candidate for election to the legislature of the State. The article does not mention that the making of oath or affirmation is to be preliminary to the validity of candidature in each constituency, and recognises the fact that, once the necessary qualification is obtained, that qualification removes the bar laid down by that article.

The importance of the requirement of oath or affirmation under article 173(a) has been reiterated in sub-section (2) of section 36 of the Representation of the People Act (1951) for Ground No. (a) thereof provides that the Returning Officer shall reject a nomination paper on the ground that on the date fixed for the scrutiny of nominations the candidate was, inter alia, not qualified to be chosen to fill the seat in the Legislative Assembly under article 173 of the Constitution. The requirement for the making and subscribing the oath or affirmation was therefore clearly mandatory.

During the scrutiny the Returning Officer is under a statutory duty to satisfy himself that the candidate who may have filed nomination paper possesses necessary qualification for contesting the election. Enquiry during scrutiny is summary in nature as there is no scope for any elaborate enquiry at that stage. Therefore, it is open to a party to place fresh or additional material before the High Court to show that the Returning Officer's order rejecting the nomination paper was improper. The proceedings in an election petition are not in the nature of appeal against the order of the Returning Officer. It is an original proceeding.

The court has to see that a person is not permitted to hold a post for which he is disqualified under the Constitution. A disqualified person should not hold the office but at the same time someone qualified therefore should not be unseated.

Where a candidate is challenged for not fulfilling the age of qualification for being a candidate under article 173, the burden of proof is on the petitioner.

To stand for election to a Legislative Assembly of a State a person must be an elector for any assembly constituency in that State and he must not be subject to any of the disqualifications mentioned in section 16 of the Representation of the People Act 1950 or disqualifications given in Chapter III of the Act. Condition (b) in section 19 of the Act of 1950 of being ordinarily resident in a constituency finds no place in any of the provisions of the Act of 1950 or in article 173 of the Constitution.

Article 174 - Sessions of the State Legislature, prorogation and dissolution

(1) The Governor shall from time to time summon the House or each House of the Legislature of the State to meet at such time and place as he thinks fit, but six months shall not intervene between its last sitting in one session and the date appointed for its first sitting in the next session

(2) The Governor may from time to time

(a) Prorogue the House or either House;

(b) dissolve the Legislative Assembly

Article 174 states that the Governor is empowered to summon the either or both the House of the Legislature of the State to convene a sitting. The Governor is vested with the discretionary power to call the sessions as and when he thinks fit. But there has to be an intervention of six months between two sittings. Further the Governor is vested with wide unrestrictive powers to discontinue i.e. to prorogue the sessions of either or both the Houses. However he is bound by the advice of the Council of Ministers. The Governor may notify the same by publishing a notification in the Official Gazette. The Governor is also empowered to dissolve the Legislative Assembly on the advice of the Council of Ministers in the State. But if the President assumes governmental powers by a proclamation under Article 356(1) such power of the Council of Ministers to give advice is taken away.

COUNCIL OF MINISTERS

Introduction

The Union Council of Ministers exercises the executive authority. It comprises of cabinet ministers, ministers of State and deputy ministers. The Council is led by the Prime Minister of India. The Prime Minister shall aid and advise the President in exercise of his functions. The Council is collectively responsible to the Lok Sabha. The Prime Minister is duty bound to communicate to the President all decisions of Council of Ministers relating to administration of affairs of the Union and proposals for legislation and information relating to them. Under the ambit of Constitution, the Cabinet can issue directives to the State Government under certain circumstances and also under the state of emergency it can control the working of the State Governments. The Council of Ministers determines the legislative programme of the Union and initiates the introduction and passing of Government legislation.

Article 74 - Council of Ministers to aid and advise President

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

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

(2) The question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any court

Position of Prime Minister Article 74 of the Constitution provides for a Council of Ministers which shall aid the President in the exercise of his functions. The Union Council of Ministers exercises executive authority. The senior ministers are called the cabinet ministers and the junior ministers are called the ministers of state. The council is led by the Prime Minister of India. The Council of Ministers are not only vested with the power of not merely giving advice but also they have decision making powers which are binding in nature. The Prime Minister shall communicate the decisions of the Council Minister to the President. The President may forward the same to the Council of Ministers again for reconsideration. However if a President rejects the advice of the Council of Ministers he shall not be questioned in a court of law. In matters relating to incurring to expenditure the President requires proper authorisation from the Parliament, failing which it shall be considered as unconstitutional and may also result in impeachment. Further the Council of Ministers are responsible to the Parliament for the policy decisions and acts of the Government.

Article 75- Other provisions as to Ministers:

(1) The Prime Minister shall be appointed by the President and the other Ministers shall be appointed by the President on the advice of the Prime Minister

(2) The Minister shall hold office during the pleasure of the President

(3) The Council of Ministers shall be collectively responsible to the House of the People

(4) Before a Minister enters upon his office, the President shall administer to him the oaths of office and of secrecy according to the forms set out for the purpose in the Third Schedule

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

(6) The salaries and allowances of Ministers shall be such as Parliament may from time to time by law determine and, until Parliament so determines, shall be as specified in the Second Schedule

Article 75 (1) provides for the appointment of the Prime Minister by the President and the appointment of other Ministers by the President on the advice of the Prime Minister. The Prime Minister and his Ministers shall be responsible to the lower House.

A Prime Minister at the time of his appointment need not necessarily be a member of either of the lower or any of the two Houses of Parliament. The President shall choose a Prime Minister who has the support of the party or coalition which may be expected to command a majority in the House of the People. When a Prime Minister in office dies or resigns on personal grounds, the President shall exercise his personal judgment in selecting a Prime Minister. The President is the official head of the State, but the active head is the Prime Minister.

The other ministers are appointed by the President on the advice of the Prime Minister. The nomination of minister rests with the Prime Minister. The President shall have considerable influence in their appointment but he has to give his assent to the opinion and views of the Prime Minister.

Article 75 (2) The Prime Minister and other Ministers hold office during the pleasure of the President. Indirectly it indicates that the office of the Ministers is at all times at the Prime Minister's disposal. That is, the President acts on the advice of the Prime Minister. Nomination and retention of Cabinet Ministers in the office rests upon the advice of the Prime Minister. No person should be retained as a member of the Cabinet if the Prime Minister says that he should be dismissed. The clause lays emphasis for only the dismissal of ministers. It does not apply to the dismissal of the Council of Ministers. It means that a ministry that has lost the confidence of the Lower House must resign , unless it is dissolved.

Article 75 (3) emphasises upon the collective responsibility of the Council of Ministers to the Lok Sabha. The Council of Ministers are responsible to the Lok Sabha not only as individuals but also collectively. It means that the entire Cabinet will generally accept responsibility for the acts of any of its members. This concept of collective responsibility lays down the foundation for the Cabinet's solidarity. Because the Cabinet decisions in majority bind all Cabinet Ministers irrespective of their contentions. In spite of the fact that the Council of Ministers are collectively responsible to the House of the People, if an action of a Minister is contrary to law, he shall be subject to judicial scrutiny. The object of collective responsibility is to make the Ministers collectively or vicariously responsible for the actions of each other. Collective responsibility indicates that all members of a Government are unanimous in support of its policies. They should express unanimity. The Ministers who voice their opinions for or against the policies in the Cabinet are personally and morally responsible for its success and failure. The object of

collective responsibility is to make the whole body of persons holding ministerial office collectively or vicariously responsible for such acts of others. The Council of Ministers shall be in office as long it commands the support and confidence of the majority of members of the House. The whole ministry shall be treated as one entity on every issues involving matters of policy.

In ***U.N.R. Rao* v. *Indira Gandhi*,** - it was urged that Article 75(3) should be read as meaning that the principle of collective responsibility applies only when the House of the People is in existence and not when it is dissolved or prorogued.

Further, Clause (4) of Article 75 envisages every Minister including the Prime Minister is required to take two types of oaths; an oath of office and an oath of secrecy. The forms of the same are provided in Schedule III to the Constitution which is in descriptive and substantive forms. The part consisting of the name and designation of the minister is descriptive. The part wherein he undertakes obligation is in the form of substantive. Provided the substantive part is followed accurately a minor error in the descriptive part shall not vitiate the oath. In the oath of secrecy the deliberations of the Cabinet are held in the strictest secrecy. The oath of secrecy serves as a good defence against compulsion to make statement before a commission of enquiry.

Article 75 (5) envisages that a Minister shall cease to hold office if for any period of six consecutive months he is not a members of either House of Parliament. The provision also enable a Minister to hold office upto six months if the House of the People is dissolved until the new Ministry is sworn in. A person who is not a member of either House may be appointed as a minister or even as a Prime Minister and he may continue to hold his office upto a period of six months.

Article 75 (6) states that the salary of Ministers is votable by Parliament. The same is specified in Second Schedule of the Constitution. The legislature shall determine the salaries. But if a person is disqualified to be a member of Parliament, he cannot be appointed for this purpose. Further a person cannot be reappointed after the expiry of six months unless he has become a member of either House of the Parliament.

Position of Chief Minister

Article 163 - Council of Ministers to aid and advise Governor

(1) There shall be a council of Ministers with the chief Minister at the head to aid and advise the Governor in the exercise of his functions, except in so far as he is by or under this constitution required to exercise his functions or any of them in his discretion

(2) If any question arises whether any matter is or is not a matter as respects which the Governor is by or under this Constitution required to act in his discretion, the decision of the Governor in his discretion shall be final, and the validity of anything done by the Governor shall not be called in question on the ground that he ought or ought not to have acted in his discretion

(3) The question whether any, and if so what, advice was tendered by Ministers to the Governor shall not be inquired into in any court

Article 163 (1) states that the form of government in the States is parliamentary. There is a Council of Ministers with the Chief Minister at the head to aid and advice the Governor. However the responsibility of the people is upon the Ministers and not upon the Governor. The chief minister is an elected or appointed head of government of sub-national entity. He is directly selected and appointed by the Governor. Generally the leader of the majority party in the Legislative Assembly is appointed as the Chief Minister. Sometimes the Governor may exercise his personal judgement in selecting the Chief Minister. He may also ask for the election of the leader by a party or a combination of parties.

Article 167 - Duties of Chief Minister as respects the furnishing of information to Governor, etc

It shall be the duty of the Chief Minister of each State

(a) to communicate to the Governor of the State all decisions of the council of Ministers relating to the administration of the affairs of the State and proposals for legislation;

(b) to furnish such information relating to the administration of the affairs of the State and proposals for legislation as the Governor may call for; and

(c) if the Governor so requires, to submit for the consideration of the Council of Ministers any matter on which a decision has been taken by a Minister but which has not been considered by the Council

Under this Article it is the bounden duty of the Chief Minister of a State to keep informed the Governor all matters concerning the administrative affairs. The Chief Minister shall communicate to the Governor of the State all decisions arrived at by the Cabinet relating to the administration of State affairs and legislative proposals. He is also duty bound to furnish all information relating to the administration of the State affairs and legislative proposals as and when the Governor requires. He shall also, if the Governor requires, submit for the consideration of the Council of Ministers any matter on which a decision has been taken by a minister but which has not been considered by the Council of Ministers.

UNIT - III

Speaker: Parliament

Introduction

The Speaker of House of the People (Lok Sabha) is the presiding officer of the House of the People (Lok Sabha) of the Parliament of India. The Speaker is elected in the first meeting of the Lok Sabha through general elections. The Speaker is chosen from amongst the sitting members of Lok Sabha. The Speaker of the Parliament is responsible for ensuring the smooth functioning of the House. The Parliamentary proceedings of the country are headed by the Speaker who shall be the presiding officer. The Speaker is considered to be the true guardian of the Indian parliamentary democracy holding the complete authority of the Lok Sabha. The Speaker is vested with wide administrative and discretionary powers as enumerated under the Constitution.

Article 93 - The Speaker and Deputy Speaker of the House of the People The House of the People shall, as soon as may be, choose two members of the House to be respectively Speaker and Deputy Speaker thereof and, so often as the office of Speaker or Deputy Speaker becomes vacant, the House shall choose another member to be Speaker or Deputy Speaker, as the case may be.

As per Article 93 of Indian Constitution, the Lok Sabha has a Speaker and a Deputy Speaker. In the Lok Sabha, both presiding officers—the Speaker and the Deputy Speaker- are elected from among its members by a simple majority of members present and voting in the House. No specific qualifications are prescribed for being elected Speaker; the Constitution only requires that Speaker should be a member of the House. But an understanding of the Constitution and the laws of the country and the rules of procedure and conventions of Parliament is considered a major asset for the holder of the office of the Speaker.

Article 94 - Vacation and resignation of, and removal from, the offices of Speaker and Deputy Speaker :

A member holding office as Speaker or Deputy Speaker of the House of the People

(a) shall vacate his office if he ceases to be a member of the House of the People;

(b) may at any time, by writing under his hand addressed, if such member is the Speaker, to the Deputy Speaker, and if such member is the Deputy Speaker, to the Speaker, resign his office; and

(c) may be removed from his office by a resolution of the House of the People passed by a majority of all the then members of the House: Provided that no resolution for the purpose of clause (c) shall be moved unless at least fourteen days notice has been given of the intention to move the resolution: Provided further that, whenever the House of the People is dissolved, the Speaker shall not vacate his office until immediately before the first meeting of the House of the People after the dissolution.

As per Article 94 of Indian Constitution, a Speaker or a Deputy Speaker should vacate his/her office, a) if he/she ceases to be a member of the House of the People, b) he/she resigns, or c) is removed from office by a resolution of the House passed by a majority.

The Speaker of Lok Sabha is both a member of the House and its Presiding Officer. The Speaker conducts the business in the House. He/she decides whether a bill is a money bill or not. He/she maintains discipline and decorum in the house and can punish a member for their unruly behaviour by suspending them. He/she permits the moving of various kinds of motions and resolutions like the motion of no confidence, motion of adjournment, motion of censure and calling attention notice as per the rules. The Speaker decides on the agenda to be taken up for discussion during the meeting. It is the Speaker of the Lok Sabha who presides over joint sittings called in the event of disagreement between the two Houses on a legislative measure. Following the 52nd Constitution amendment, the Speaker is vested with the power relating to the disqualification of a member of the Lok Sabha on grounds of defection. The Speaker makes obituary references in the House, formal references to important national and international events and the valedictory address at the conclusion of every Session of the Lok Sabha and also when the term of the House expires. Though a member of the House, the Speaker does not vote in the House except on those rare occasions when there is a tie at the end of a decision. Till date, the Speaker of the Lok Sabha has not been called upon to exercise this unique casting vote. While the office of Speaker is vacant due to absence/resignation/removal, the duties of the office are performed by the Deputy Speaker or, if the office of Deputy Speaker is also vacant, by such member of the House of the People as the President may appoint for the purpose. The Lok Sabha has also a separate non-elected Secretariat staff.

Article 95 - Power of the Deputy Speaker or other person to perform the duties of the office of, or to act as, Speaker

(1) While the office of Speaker is vacant, the duties of the office shall be performed by the Deputy Speaker or, if the office of Deputy Speaker is also vacant, by such member of the House of the People as the President may appoint for the purpose

(2) During the absence of the Speaker from any sitting of the House of the People the Deputy Speaker or, if he is also absent, such person as may be determined by the rules of procedure of the House, or, if no such person is present, such other person as may be determined by the House, shall act as Speaker

Article 95 (1) states that on occasions wherein the office of the Speaker remains vacant the Deputy Speaker shall take over the charge and act as a Speaker and perform the duties accordingly for the said vacant period. On the other hand if the office of Deputy Speaker is also vacant, then it is the President who appoint any member from the House to act as a Speaker.

Article 95 (2) states that if the Speaker and the Deputy Speaker are absent when they are required to sit and preside over the House, a member from the House who is present then shall be determined by the House according to its rules and procedures. And on non-availability of such member then any other person for the purpose shall be chosen.

Article 96 - The Speaker or the Deputy Speaker not to preside while a resolution for his removal from office is under consideration

(1) At any sitting of the House of the People, while any resolution for the removal of the Speaker from his office is under consideration, the Speaker, or while any resolution for the removal of the Deputy Speaker from his office is under consideration, the Deputy Speaker, shall not, though he is present, preside, and the provisions of clause (2) of Article 95 shall apply in relation to every such sitting as they apply in relation to a sitting from which the Speaker, or, as the case may be, the Deputy Speaker, is absent

(2) The Speaker shall have the right to speak in, and otherwise to take part in the proceedings of, the House of the People while any resolution for his removal from office is under consideration in the House and shall, notwithstanding anything in Article 100, be entitled to vote only in the first instance on such resolution or on any other matter during such proceedings but not in the case of an equality of votes

Article 96 emphasis that on removal of a Speaker and a Deputy Speaker by the passing of a resolution by the majority of the members of the House of the People and that while such resolution is under consideration and a final opinion is not yet arrived at, the Speaker or the Deputy Speaker are restrained from presiding over the House.

If the resolution under consideration is for the removal of the Speaker and even though he is present in the House, but it shall be the Deputy Speaker who shall preside. However he can present himself in the House and take part in the proceedings. He can also vote in the first instance on such

resolution. And if the resolution under consideration is for the removal of the Deputy Speaker, the Deputy Speaker shall not preside, although he is present and the Speaker is absent.

Legislative Assembly

Article 178: The Speaker and Deputy Speaker of the Legislative Assembly

Every Legislative Assembly of a State shall, as soon as may be, choose two members of the Assembly to be respectively Speaker and Deputy Speaker thereof and, so often as the office of Speaker or Deputy Speaker becomes vacant, the Assembly shall choose another member to be Speaker or Deputy Speaker, as the case may be.

The members of the Legislative Assembly elect from amongst themselves a Speaker who shall preside over the Assembly. The Speaker shall vacate his office immediately after he ceases to be a member of the Assembly. However, he shall not vacate his office on the dissolution of the Legislative Assembly and he shall continue till a new Speaker is elected. If the majority of the members pass a resolution to the effect, then the Speaker shall resign or he may be removed from his office. In the absence of the Speaker or upon his office becoming vacant, the Deputy Speaker shall perform the duties of the Speaker. The House cannot be constituted without the chairing of the Speaker or the Deputy Speaker.

Article 179: Vacation and resignation of, and removal from, the offices of Speaker and Deputy Speaker.

A member holding office as Speaker or Deputy Speaker of an Assembly—

(a) Shall vacate his office if he ceases to be a member of the Assembly;

(b) may at any time by writing under his hand addressed, if such member is the Speaker, to the Deputy Speaker, and if such member is the Deputy Speaker, to the Speaker, resign his office; and

(c) may be removed from his office by a resolution of the Assembly passed by a majority of all the then members of the Assembly:

Provided that no resolution for the purpose of clause (c) shall be moved unless at least fourteen days' notice has been given of the intention to move the resolution:

Provided further that, whenever the Assembly is dissolved, the Speaker shall not vacate his office until immediately before the first meeting of the Assembly after the dissolution.

Article 179 enumerates that the office of the Speaker and Deputy Speaker shall fall vacant if f he discontinues to be a member of the Legislative Assembly. A speaker and a deputy speaker may also vacate their office by submitting their resignation. Also they may be removed by the passing of a resolution by the majority of the members of Legislative Assembly. However a prior notice of fourteen days shall be issued to the Speaker and Deputy Speaker stating the intention and the reasons for removal. The resolution for the removal of the Speaker becomes operative when a notice of motion for his removal is given and is taken up for consideration. The principles of natural justice wherein a fair opportunity of hearing is given shall be adhered unto. Further in case of dissolution of the Assembly, the Speaker shall vacate his office only after the convening of the first meeting of the Assembly after its dissolution.

Article 180: Power of the Deputy Speaker or other person to perform the duties of the office of, or to act as a Speaker.

(1) While the office of Speaker is vacant, the duties of the office shall be performed by the Deputy Speaker or, if the office of Deputy Speaker is also vacant, by such member of the Assembly as the Governor may appoint for the purpose.

(2) During the absence of the Speaker from any sitting of the Assembly the Deputy Speaker or, if he is also absent, such person as may be determined by the rules of procedure of the Assembly, or, if no such person is present, such other person as may be determined by the Assembly, shall act as Speaker.

Article 180(1) enumerates that in circumstances wherein the office of the Speaker remains vacant the Deputy Speaker is vested with the powers to act as a Speaker and perform the duties accordingly. And if the office of Deputy Speaker is also vacant the Governor shall appoint any member of Assembly to act as a Speaker.

Clause (2) of Article 180 states that in case of absence of the Speaker and the Deputy Speaker from sitting and presiding over the Assembly, then the Assembly shall determine according to its rules and procedures such member as is present or any other person for the purpose.

Article 181: The Speaker or the Deputy Speaker not to preside while a resolution for his removal from office is under consideration.

(1) At any sitting of the Legislative Assembly, while any resolution for the removal of the Speaker from his office is under consideration, the Speaker, or while any resolution for the removal of the Deputy Speaker from his office is under consideration, the Deputy Speaker, shall not, though he is present, preside, and the provisions of clause (2) of article 180 shall apply in relation to every such sitting as they

apply in relation to a sitting from which the Speaker or, as the case may be, the Deputy Speaker, is absent.

(2) The Speaker shall have the right to speak in, and otherwise to take part in the proceedings of, the Legislative Assembly while any resolution for his removal from office is under consideration in the Assembly and shall, notwithstanding anything in article 189, be entitled to vote only in the first instance on such resolution or on any other matter during such proceedings but not in the case of an equality of votes.

Article 179 emphasis that a Speaker and a Deputy Speaker may be removed by the passing of a resolution by the majority of the members of Legislative Assembly. Article 181 lays down that while such resolution is under consideration and a final opinion is not yet arrived at, the Speaker or the Deputy Speaker shall not preside over the Assembly. However he can present himself in the House and take part in the proceedings. He can also vote in the first instance on such resolution. The rule laid down in Article 189 is inapplicable in this circumstance wherein the Speaker or a person acting as such does not vote in the first instance, but exercise a casting vote in the case of a tie.

Anti – Defection Laws

The 52nd Amendment Act, 1985 lead to amendment in Article 101, 102, 190 and 191 of the Constitution to provide the grounds for vacation of seats for the disqualification of the members ; and also inserted Tenth Schedule.

The statement of objects and reasons been given for the amendment is:

"The evil of political defections has been a matter of national concern. If it is not combated, it is likely to undermine the very foundation of our democracy and the principles with sustain it."

Rule 2- tenth schedule lays the grounds for disqualification of the member's i.e.:

If a member of a house belonging to a political party:

1. Has voluntarily given up his membership of such political party, or

2. Votes, or abstain from voting in such House, contrary to the direction of his political party.

However, if the member has taken prior permission, or is condoned by the party within 15 days from such voting or abstention, the member shall not be disqualified.

2. If an independent candidate joins a political party after the election.

3. If a nominated member of a house joins any political party after the expiry of six months from the date when he becomes a member of the legislature.

Rule 4 and 5- states the exemption from disqualifications i.e.:-

A member of the house shall not be disqualified where his original political party merges with another political party, and he and any other member of his political party:-

1. Have become members of the other political party, or of a new political party formed by such merge

2. Have not accepted the merger and opted to function as a separate group.

Rule 3- state that there will be no disqualification of members if they represent a faction of the original political party, which has arisen as a result of a split in the party. A defection by at least one-third members of such a political part was considered as a spilt which was not actionable.

Loopholes in the Anti Defection law:-

1. Power to the Speaker- as per Rule 6 of the schedule, the Speaker of the House or the Chairman has been given wide and absolute powers to decide the case related to disqualification of the members on the grounds of defection. The Speaker still remains as the member of the party which had nominated him/her for the post of speaker.

One of the major criticisms of this power is that not necessary the speaker has legal knowledge and expertise to look upon and perform such acts in such cases.

2. Judicial Review- as per the Rule 7, which bars the jurisdiction of the courts in any matter connected with disqualification of a member of a House, which states that it is outside the jurisdiction of all courts including the Supreme Court under Article 136 and High Courts under Article 226 and 227 of the Constitution to review the decisions made by the Speaker in this regard.

This can have terrible consequences in the light of difficulties enumerated above. The legislature in a way tried to restrict the power of judiciary provided under the Constitution, which is not tenable.

The rule barring the jurisdiction of Courts has been challenged multiple times before the courts and the Court, in ***Kihoto Hollohon*** **v**. ***Zachilhu and Others***, held that the law is valid in all respects expect on the matter related to the judicial review, which was held as unconstitutional. Any law affecting Articles 136, 226 and 227 of the Constitution is required to be ratified by the States under Article 368(2)

of the Constitution. As the required number of State assemblies had not ratified the provision, the Supreme Court declared the rule to be unconstitutional.

The Court also held that the Speaker, while deciding cases pertaining to defection of party members, acts as a tribunal and nothing more than that, and that his/ her decisions are subject to the review power of the High Courts and the Supreme Court. Mentioning a rule of caution, the Supreme Court warned against the exercise of power of judicial review prior to making of any decision by the Speaker.

3. No individual stand on part of members- according to the Rule 2 it can be seen that the anti-defection law puts the members of the party into a bracket of obedience in accordance with the rules and policies of the party , restricting the legislator's freedom to oppose the wrong acts of the party, bad policies, leaders and bills.

A political party acts as a dictator for its members who are not allowed to dissent. In this way it violates the principle of representative democracy wherein the members are forced to obey the high command.

In a well-settled representative democratic environment, people wish for that the electorate are taken care of their acts rather than working on the instructions and wishes of the party leaders and their policies. With the increasing powers being given to a party member, the members are not allowed to vote on any issue independently whether they are a part of party manifesto or not. The law tends to blur the distinction between defiance on part of members and defection of the members leading to their disqualification. With the lack of individuality on the part of members belonging to their parties, the anti-defection laws have failed to achieve the desired results.

4. What amounts to 'voluntarily giving up'- Rule 2(1)(a) of the Tenth Schedule mentions that the member of the House would be disqualified from the party if he voluntarily gives up his membership of the political party. But the Schedule does not clarify what "voluntarily giving up" means. This question had arise before the Supreme Court in Ravi Naik v. Union of India and the Court while interpreting the phrase held that it has a wider connotation and can be inferred from the conduct of the members. The words 'voluntarily gives up his membership' were not held synonymous with 'resignation'. It was held that a person may voluntarily give up his membership of a political party even without tendering his resignation from the membership of that party.

In ***G. Vishwanathan* v. *Speaker, Tamil Nadu Legislative Assembly***, a question arose whether joining another political party after being expelled from the original party would amount to voluntarily

giving up the membership or not. It was held in this case that on being expelled from the party, the member, though considered 'unattached', still remains the member of the old party for the purpose of the Tenth Schedule. However, if the expelled member joins another political party after expulsion, he is considered to have voluntarily given up the membership of his old political party.

Rajendra Singh Rana* v. *Swami Prasad Maurya and Others, is yet another case which expanded the meaning to the words 'voluntarily giving up of the membership.' It was held in the case that a letter by an elected party member to the Governor requesting him to call upon the leader of the opposite party to form a Government would by itself amount to an act of voluntarily giving up membership of the party of which he is an elected member.

5. Problem with merger provision- While Rule 4 of the Tenth Schedule seems to provide some exception from disqualification of members in the cases relating to mergers, there seems to be some loophole in the law. The provision tends to safeguard the members of a political party where the original political party merges with another party subject to the condition that atleast two-third of the members of the legislature party concerned have agreed to such merger. The flaw seems to be that the exception is based on the number of members rather than the reason behind the defection.

The common reasons for defection of individual members seem to be availability of lucrative office or ministerial posts with the other party. It can very well be expected that the very same reason might be available with those two-third members who have agreed to the merger. If defection by an individual member is not acceptable, it is very much difficult to assert that the same would be valid in case of mergers only because a large number of people are involved.

Role of Presiding Officers in Context of Anti-Defection Law

The 10th Schedule provides presiding officers of legislatures with the power to decide cases of defection. However, it has been noted that as the Speaker is dependent upon continuous support of the majority in the House, he may not satisfy the requirement of an independent adjudicating authority.

In the past, decisions of the Speakers with regard to disqualifications have been challenged before courts for being biased and partial. Several expert committees and commissions, including the Dinesh Goswami Committee (1998), Commission to Review the Constitution (2002) and the Law Commission (2015) have therefore recommended that defection cases must be decided by the President or Governor for centre and states respectively, who shall act on the advice of the Election Commission. This is the same practice that is followed for deciding questions related to disqualification of legislators on other grounds, such as holding an office of profit or being of unsound mind, under the Constitution. However,

note that the Supreme Court has upheld the provision granting the presiding officer the power to take these decisions on the ground that,

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

JUDICIARY

SUPREME COURT

Introduction-

Chapter IV under Part V of the constitution of India deals with the provisions relating to the Indian judiciary. The Articles dealing with constitution and jurisdiction of the Supreme Court of India are stated in detail from Articles 124-147. Unlike the other two branches, executive and legislature, in India, judiciary is integrated. This means that even though there may be High Courts in states, the law declared by the Supreme Court shall be binding on all the lower courts within the territory of India (Article 141) as per the doctrine of precedents.

Article 124 – Establishment and Constitution of Supreme Court

(1) There shall be a Supreme Court of India consisting of a Chief Justice of India and, until Parliament by law prescribes a larger number, of not more than seven other Judges.

(2) Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years:

Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted:

Provided further that —

(a) a Judge may, by writing under his hand addressed to the President, resign his office;

(b) a Judge may be removed from his office in the manner provided in clause (4).

(2A) The age of a Judge of the Supreme Court shall be determined by such authority and in such manner as Parliament may by law provide.

(3) A person shall not be qualified for appointment as a Judge of the Supreme Court unless he is a citizen of India and —

(a) has been for at least five years a Judge of a High Court or of two or more such Courts in succession; or

(b) has been for at least ten years an advocate of a High Court or of two or more such Courts in succession; or

(c) is, in the opinion of the President, a distinguished jurist.

Explanation I.—In this clause "High Court" means a High Court which exercises, or which at any time before the commencement of this Constitution exercised, jurisdiction in any part of the territory of India.

Explanation II.—In computing for the purpose of this clause the period during which a person has been an advocate, any period during which a person has held judicial office not inferior to that of a district judge after he became an advocate shall be included.

(4) A Judge of the Supreme Court shall not be removed from his office except by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two - thirds of the members of that House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity.

(5) Parliament may by law regulate the procedure for the presentation of an address and for the investigation and proof of the mis behaviour or incapacity of a Judge under clause (4).

(6) Every person appointed to be a Judge of the Supreme Court shall, before he enters upon his office, make and subscribe before the President, or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Third Schedule.

(7) No person who has held office as a Judge of the Supreme Court shall plead or act in any court or before any authority within the territory of India

Clause (1) of Art. 124 states that there shall be a Supreme Court of India. In Supreme Court, there is one chief judge known as 'The Chief Justice of India 'and other Judges. The number of other judges should be commensurate to the amount of work. The Supreme Court is the apex court and the final court of appeal under the constitution of India.

Clause (2) of Art.124 of the constitution of India prescribes the procedure for appointment of Judges to the Supreme Court. As per this provision, every judge of the Supreme Court is appointed by the president of India by warrant under his hand and seal. However, before making the appointment, the president is obliged to consult such of the judges of the Supreme Court and of the High Courts as he deems necessary. Further, in the case of appointment of a Judge other than the Chief Justice of India, it shall be done by the president of India after consultation with the chief justice of India. Although Art.124 (2) states that appointment of a judge is made by the president, but in fact, it is the union executive that exercises the power. It means, the president makes such the appointment on the advice of the council of ministers. The constitution has provided only for consultation which means the executive do not enjoy absolute power in making the said appointments as such a power to the executive may devastate and destroy the prospect of an independent, impartial Judiciary. This can be one of the best examples of the doctrine of separation of powers along with checks and balance system.

The qualifications for a person to be appointed as a judge of the Supreme Court are provided under Clause (3) of Art.124.They are as follows:

1) He must be an Indian citizen.

2) He must have been a judge of a High Court for at least five years, or

3) He must have been an advocate of a High Court of at least ten years; or

4) In the opinion of the president, he should be a distinguished jurist.

Apart from the above mentioned qualifications expressly prescribed by the Constitution, the implied qualifications required are: unimpeachable character and integrity; impartiality, independence; equanimity; incorruptibility.

As stated under Art.124 (2), a judge of the Supreme court shall hold an office until he attains the age of sixty-five years. He may resign before the age of retirement by addressing his letter of resignation to the president.

Removal by impeachment

As provided under Clause (4) of Art.124, a judge of the Supreme Court can be removed from office before he attains the age of sixty five years on grounds of proved misbehavior or incapacity. What amounts to 'Misbehavior' or 'Incapacity' is not explained under Art.124 (4). A judge can be removed on either of the grounds and there is no need to establish both "Misbehavior" and "Incapacity" due to the connotation of the term 'or'. Further, a sitting Judge can be removed only when his misbehavior or incapacity is proved and not otherwise. So, mere apprehension, allegation, or suspicion is not useful. Also the principle of natural Justice should also be followed so delinquent judge has to be apprised of the charge and be heard. A judge of Supreme Court can be removed from his office by an order of the president. Such an order can be passed only after an address by each house of parliament for the removal of the judge on the ground of proved misbehavior or incapacity is presented to the president. Such address must be supported by a majority of the total membership of the house and by a majority of not less than two-thirds of the members present and voting.

Clause (5) of Art.124 provides that parliament may by law regulate the procedure for the presentation of an address and for the investigation and proof of the misbehavior or incapacity of a judge. In pursuance to the above provision, parliament has enacted the Judges (Inquiry) Act, 1968 which provides an elaborate procedure for investigating and establishing 'misbehaviour' or 'incapacity' of the judge by a committee of inquiry to be constituted by the speaker of Lok Sabha or Chairman of Rajya Sabha. The committee has to frame definite charges and the judge concerned should be given a reasonable opportunity to present his defense. If the committee holds the judge guilty, then the house takes up the motion for consideration. After the motion is adopted as stipulated under clause (4) of Art.124 then address shall be presented to the president for the removal of the judge.

Jurisdiction, Powers and functions of the Supreme Court-

The jurisdiction of the Supreme Court under the constitution is vast. It is the apex court of appeal in respect of all the matters. The apex court is conferred with the following powers

Power to Enforce Fundamental Rights (Art.32):

Article 32 - Remedies for enforcement of rights conferred by this Part

(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part

(3) Without prejudice to the powers conferred on the Supreme Court by clause (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2)

(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution

Fundamental rights are enumerated in Part III of our constitution. There are different kinds of fundamental rights like 'Right to Equality', religion, caste 'Right not to be discriminated on the grounds of race, sex or place of birth, ' Freedom of Speech and Expression,' Equality of opportunity in matters of public employment 'Freedom of Assembly,' Freedom of Association.' In case of any violation of these rights they can look up to some authority for their enforcement. At this juncture, Art.32 comes into play and acquires significance. Dr. Ambedkar has remarked that "Art.32 is the soul of the constitution and the very heart of it and without this article our constitution would be a nullity."

Art. 32 provide remedy for the violation of fundamental rights enshrined in Part. III. Unlike other rights, it is remedial in nature and not substantive. Art.32 (1) provides the right to move to the Supreme Court through appropriate proceedings for the enforcement of the rights conferred by this part. Moreover it is important to note that the right to move the Supreme Court for the enforcement of the fundamental rights itself is a fundamental right. Thus, the Supreme Court is the ultimate protector and guarantor of the fundamental rights and a sole duty is casted upon this court for the protection of the citizens' fundamental rights. Art.32 (2) empowers the Supreme Court to issue writs like the writs of Habeas corpus, Mandamus, Quo warranto, Certiorari and Prohibition for the enforcement of the fundamental rights. The Court's power is not only confined to the issuance of writs but also issuance of directions or orders which appear to the court to be proper for the enforcement of the fundamental rights. The court's power is preventive, in the sense, preventing violations of fundamental rights, as well as remedial. In addition, the court can award compensation and exemplary costs when it is found that the State has violated the fundamental right to life and personal liberty as guaranteed under Art.21.

Supreme Court's power to commit a person for contempt

Article 129 – Supreme Court to be a Court of record

Supreme Court to be a court of record The Supreme Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself

A court of record has-

1) Power to determine its own jurisdiction and

2) It has power to punish for its contempt.

A Court is called as 'Court of Record' where its acts and judicial proceedings are enrolled for a perpetual memorial and testimony and has got the power to fine and imprison for contempt of itself. In other words, a Court of Record is a court of which the records are of evidentiary value and cannot be questioned when produced before any court. Power to punish for contempt is conferred in order to uphold the majesty and dignity of the court and to prevent scandal of the judiciary. Further to ensure that the stream of justice remains unsullied, to bar interference in the administration of justice, the Supreme Court's power to punish for its contempt extends to all courts and tribunals subordinate to it. For the exercise of this power, no one has to appraise the court.

In ***Delhi Judicial Service Assn***. **v.** ***State of Gujarat*** – the Supreme Court has held that its power to punish for contempt in Article 129 is not confined to its own contempt. It extends to all courts and tribunals subordinate to it in the country. The words "including the power to punish for contempt of itself" are not the words of restriction and do not exhaust or exclude its jurisdiction as a court of record to punish for the contempt of all subordinate courts.

This constitutional power of the court cannot be curtailed or taken away by any legislation, such as the Contempt of Courts Act, 1971. However it cannot be extended beyond its well defined limits to deal with matters already covered by legislation. Accordingly in ***Supreme Court Bar Association*** **v**. ***Union of India*** held that though contempt of court was a serious misconduct on the part of a lawyer for which he could be deprived o f his license to practice before the courts, he could be so deprived only by the Bar Council in view of clear provisions to that effect in Advocates Act, 1961 and the rules made under it. Thus the Court overruled its own decision in ***Vinay Chandra Mishra, re***, in which along with other punishment for contempt to a senior lawyer, it also suspended his license for a number of years.

Article 131 - Original jurisdiction of the Supreme Court

Subject to the provisions of this Constitution, the Supreme Court shall, to the exclusion of any other court, have original jurisdiction in any dispute

(a) between the Government of India and one or more States; or

(b) between the Government of India and any State or States on one side and one or more other States on the other; or

(c) between two or more States, if and in so far as the dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends:

Provided that the said jurisdiction shall not extend to a dispute arising out of any treaty, agreement, covenant, engagements, and or other similar instrument which, having been entered into or executed before the commencement of this Constitution, continues in operation after such commencement, or which provides that the said jurisdiction shall not extend to such a dispute

Original Jurisdiction

The Supreme Court has got original and exclusive jurisdiction in any dispute i) between one or more States and the government of India or ii) between one or more states on one side and the government of India and any State on the other side; or iii) between two or more states, if the dispute relates with a question of law or fact on which the existence or extent of a legal right depends. A court is considered to have original jurisdiction when it has authority to hear and determine a case at the first instance. The court has got exclusive jurisdiction when no other court has the authority to hear and decide the case. What is necessary to consider under Art.131 is that the existence or extent of a legal right must be in issue in the dispute between the parties, that is, between the government of India and one or more states, etc. The theory underlying Art.131 is that if there be a dispute between two or more states and it is not proper that the dispute be agitated before the court of one of the disputants i.e. disputing parties.

The article imposes two limitations on the exercise of the original jurisdiction :

1) To the party – There must be an inter-State dispute, i.e. the dispute must be between the units of Union or between the Union and any one or more of the States, or between the Union and any State or States on one side and one or more States or the other. The Supreme Court in its original jurisdiction shall not entertain suits brought by private individuals against the Government of India. In ***State of Bihar* v. *Union of India***, the Court held that a dispute between the State of Bihar and the Hindustan Steel Ltd., a registered company under the Companies Act, 1956, did not fall within its original jurisdiction because it was not a State for the purpose of Article 131.

2) To the subject matter – The dispute must involve any question on which the existence or extent of a legal right depends. A legal right is an interest recognised and protected by a rule of legal justice. The legal right may be of the Plaintiff or of the Defendant. But where the claim made by a party is dependant not on law but on non-legal considerations, the court has no jurisdiction under Article 131.

Under Article 131, the Supreme Court is not required to adjudicate upon the disputes in the same way as ordinary courts of law adjudicate. A suit need not be filed in the Supreme Court for complete adjudication of the dispute envisaged therein, or the passing of a decree capable of execution in the ordinary way as decrees of other courts are.

The proviso to Article 131 declares that the jurisdiction of Supreme Court does not extend to a dispute arising out of any treaty, agreement, covenant, engagement. A dispute involving interpretation of these documents is brought under the purview of the discretion of the executive. Further Parliament may by law exclude the jurisdiction of the Supreme Court in disputes between States with respect to the use, distribution or control of waters of any inter-State rivers. The Constitution also excludes the jurisdiction of the Supreme Court in matters referred to the Finance Commission and matters relating to adjustment of certain expenses between the Union and State.

Appellate jurisdiction of the Supreme Court -

Article 132 - Appellate jurisdiction of Supreme Court in appeals from High Courts in certain cases

(1) An appeal shall lie to the Supreme Court from any judgment, decree or final order of a High Court in the territory of India, whether in a civil, criminal or other proceeding, if the High Court certifies under Article 134A that the case involves a substantial question of law as t the interpretation of this Constitution

(2) Omitted

(3) Where such a certificate is given, any party in the case may appeal to the Supreme Court on the ground that any such question as aforesaid has been wrongly decided.

Explanation - For the purposes of this article, the expression final order includes an order declaring an issue which, if decided in favour of the appellant, would be sufficient for the final disposal of the case

Appellate jurisdiction

The Supreme Court is the final authority on questions involving the interpretation of the constitution. Different opinions by different High Courts on constitutional questions create confusion among the lawyers and citizens. Therefore Art.132 provides that an appeal shall lie to the Supreme Court

from any judgment, decree or final order of a High Court, whether in civil or criminal or other proceeding, if the High Court certifies that the case involves a substantial question of law as to the interpretation of the constitution. Further the explanation added to the article defines the expression "final order". It indicates an order deciding an issue which, if decided in favour of the appellant, would be sufficient for the final disposal of the case. Also the Article provides that in order to give a person locus standi to appeal on a certificate it is necessary that he be a party in the case before the High Court.

Supreme Court's appellate jurisdiction in civil matters –

Article 133 - Appellate jurisdiction of Supreme Court in appeals from High Courts in regard to civil matters

(1) An appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court in the territory of India if the High Court certifies under Article 134A.

(a) that the case involves a substantial question of law of general importance; and

(b) that in the opinion of the High Court the said question needs to be decided by the Supreme Court

(2) Notwithstanding anything in Article 132, any party appealing to the Supreme Court under clause (1) may urge as one of the grounds in such appeal that a substantial question of law as to the interpretation of this Constitution has been wrongly decided

(3) Notwithstanding anything in this article, no appeal shall, unless Parliament by law otherwise provides, lie to the Supreme Court from the judgment, decree or final order of one Judge of a High Court

Appeals in Civil cases

The Supreme Court has got power to entertain appeals from the judgment, decree or final order of a High Court in civil proceedings. If a person seeks relief in a civil court when his civil rights are infringed by another person or by the state then proceedings are considered to be civil in nature. The civil court may declare that the plaintiff's claim is justified and he is entitled to relief at the time of the conclusion of the proceedings. In order to invoke the Supreme Court's appellate Jurisdiction, the following conditions are important to be fulfilled: i) Appeal must be against a judgment, decree or final order of High Court in a civil proceeding. ii) The High Court must have certified that the case involves a substantial question of law of general importance and should be of the opinion that the substantial question of law needs to be decided by the Apex Court. It can be said that the judgment, decree or final order all seem to convey the same meaning i.e. the civil court's pronouncement that finally or

conclusively determines the rights of the parties in a controversy or suit. Under Art.133, no appeal can be made against the judgment, decree or final order of a single judge of High Court unless parliament enacts a law to remove this restriction.

Appeals to Supreme Court in criminal matters-

Article 134 Appellate jurisdiction of Supreme Court in regard to criminal matters

(1) An appeal shall lie to the Supreme Court from any judgment, final order or sentence in a criminal proceeding of a High Court in the territory of India if the High Court

(a) has on appeal reversed an order of acquittal of an accused person and sentenced him to death; or (b) has withdrawn for trial before itself any case from any court subordinate to its authority and has in such trial convicted the accused person and sentenced him to death; or

(c) certifies under Article 134A that the case is a fit one for appeal to the Supreme Court: Provided that an appeal under sub clause (c) shall lie subject to such provisions as may be made in that behalf under clause (1) of Article 145 and to such conditions as the High Court may establish or require

(2) Parliament may by law confer on the Supreme Court any further powers to entertain and hear appeals from any judgment, final order or sentence in a criminal proceeding of a High Court in the territory of India subject to such conditions and limitations as may be specified in such law

Appeals in Criminal cases

The Supreme Court has got the criminal appellate Jurisdiction. It can be invoked against the judgment, final order or sentence of High Court in a criminal proceeding when the High Court has certified that the case should be referred for appeal to the Supreme Court. The High Court grants certificate when difficult questions of law or principles are involved in the case. Ordinarily, the High Court's certificate would show that the case involves a substantial question of law or principle. The High Court has got discretion to grant or not grant the certificate under Art.134(1) (c) but the discretion should be judicial one which has to be judicially exercised in the light of well-established principles. The Supreme Court invokes it's criminal appellate jurisdiction in the following circumstances: a) When the High Court reversed the decision of acquittal of the accused by the Sessions Court and sentenced him to death; or b) When the High Court withdraws for trial before itself any case from any court subordinate to it and has convicted the accused person and sentenced him to death. Parliament may by enacting any law enlarge the appellate criminal Jurisdiction of the Supreme Court. In 1970, parliament has enacted a law which enables an accused to appeal to the Supreme Court when the High Court "has not sentenced him to

death under Art.134(2)(6)(1) but has sentenced him to imprisonment for life or for a period of not less than ten years. The Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act,1970 substituted the words underlined above for the words "to death" g) Special Leave to appeal to the Supreme Court under (Art.136): Under Art.136, the Supreme Court may, with its discretion, grant special leave to appeal from any judgment, decree, determination sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India. Under Articles 132 to 135, the Supreme Court's appellate Jurisdiction can be ignited by fulfilling the conditions mentioned there-under. But as per Article 136, the Supreme Court's permission or leave is necessary. Such permission or leave is granted by the Court only with its discretion. Further, appeal may be allowed against determination, sentence or any order either final or interim order of a court, which need not be a High Court or tribunal (Industrial Tribunal, Income Tax Tribunal) . Supreme Court may be inclined to grant special leave in situations where a party suffered gross injustice on account of violation of the principle of natural justice or where the tribunal's order or determination is wrong or absurd as to shock the court's conscience. Since Art.136 mentions about decrees, judgments, orders, sentence, determinations of courts or tribunals, purely executive or administrative order or direction cannot be the subject-matter of appeal and the court would be disinclined to accord leave. The court is to be convinced that there are special situations which warrant its intervention. For example, when the tribunal has been improperly constituted; where the procedure followed is unfair, unjust, and unreasonable; when the tribunal has assumed a jurisdiction which in law it does not enjoy. The Supreme Court has no power or Jurisdiction to grant special leave against the judgment, sentence, decree, order, determination, passed or made by any court or tribunal functioning under any law relating to the armed forces.

Power of Supreme Court's to review its own judgments, orders

Article 137 - Review of judgments or orders by the Supreme Court

Subject to the provisions of any law made by Parliament or any rules made under Article 145, the Supreme Court shall have power to review any judgment pronounced or order made by it.

The general proposition in respect of judicial decision-making is that there should be finality attached to court's judgments and that there should be an end to law suits. Such a rigid adherence to this proposition may result in gross and manifest injustice. A court should not be allowed to be a court of injustice. If, in a case, the court finds that a particular provision of the Act ignored notice or evidence which would have tilted the scales of justice and was not available at the time of its pronouncement, then, it may prefer to review its earlier judgment at the instance of the aggrieved. Art.137 confers the Supreme

Court to review its judgments. Court's review is permissible on the following grounds; i) Discovery of important and new matters of evidence; ii) Error or mistake of law apparent on the face of the record; iii) If there be any other justifiable, sufficient reason.

Supreme Court's Power to make an order necessary for doing complete Justice in any case-

Article 142 - Enforcement of decrees and orders of Supreme Court and unless as to discovery, etc

(1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or orders so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe

(2) Subject to the provisions of any law made in this behalf by Parliament, the Supreme Court shall, as respects the whole of the territory of India, have all and every power to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents, or the investigation or punishment of any contempt of itself

This is a very important power to deal democratic polity. The Supreme Court's power under Article 142 is a residuary power, supplementary and complementary to the powers specifically conferred on the court which it may exercise whenever it is just and equitable to do so and in particular to ensure the observance of due process of law, to do complete justice according to law. The power conferred on the Supreme Court under Article 142 is exercised by the court to order for the payment of compensation to a person who had been illegally detained, to order payment of interim compensation to the victim of rape etc.

Advisory jurisdiction

Article 143 - Power of President to consult Supreme Court

(1) If at any time it appears to the President that a question of law or fact has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question to that Court for consideration and the Court may, after such hearing as it thinks fit, report to the President its opinion thereon

(2) The President may, notwithstanding anything in the proviso to Article 131, refer a dispute of the kind mentioned in the said proviso to the Supreme Court for opinion and the Supreme Court shall, after such hearing as it thinks fit, report to the President its opinion thereon

Normally, function of the court is to decide the controversy presented to it and render its justice. Again, courts do not take suo moto notice of such prevalent controversy and offer the opinions. The court's jurisdiction is to be invoked by the aggrieved party by appropriate means, But, Art.143 empowers the Supreme Court to render advisory opinion in certain contingencies. Such advisory opinion of the Supreme Court may be rendered at the instance of the president of India which may enable parliament to pass appropriate legislation or to introspect and effect suitable amendments to the existing law. Art.143 empowers the president to refer to the Supreme court a question of law or fact which in the opinion of the president is of such nature and such public importance that it is expedient to seek the opinion of the court on it. It is to be noted that a question of law which the Supreme Court has already decided in a dispute presented to it cannot be the matter of a reference by the president for advisory opinion because the implication would be that the president would be inviting the apex court to at act as an appellate or reviewing authority over its earlier decision while seeking its advisory opinion under Art.143. On a presidential reference for advisory opinion, notice would be to the attorney- general and all concerned may also be served notices to appear as parties or as interveners. After hearing, the court reports to the president. The advisory opinion tendered does not bind the president. Conversely, the Supreme Court may also decline to express its opinion, specially, where the reference is vague.

High Courts

The High Court of a State is the highest court of the State and all other courts of the State work under it. Normally there is one High Court in every State but there can be only one High Court for two or more States as well according to the constitution. In every High Court, there is a Chief Justice and many other judges whose number is defined by the President of India. The Chief Justice of a High Court is appointed by the President with the consultation of the Chief Justice of the Supreme Court and the Governor of the State. The other judges are appointed by the will of President, Governor and the Chief Justice of High Court.

The High Court is vested with wide powers and functions. Every High Court has the power to issue writs of habeus corpus, mandamus, prohibition, quo-warranto and certiorari for the enforcement of Fundamental Rights or for other purpose. It has the power of Superintendence over all Courts and Tribunals throughout the territories in relation to which it exercises jurisdiction. And if the High Court is

satisfied that a case pending in a court subordinate to it involves a substantial question of law as to the interpretation of the Constitution, the determination of which is necessary for the disposal of the case, it shall withdraw the case and may either dispose of the case itself; or determine the said question of law and return the case to the court from which the case has been so withdrawn together with a copy of its judgment on such question, and the said court shall on receipt there of proceed to dispose of the case in conformity with such judgment. The High Court is consulted by the Governor in the appointment, posting and promotion of District Judges. It is also consulted in the appointment of other members of the State Judicial Service. The control over district court and courts subordinate thereto including the posting and promotion of and the grant of leave to persons belonging to the judicial service of a State and holding any post inferior to the post of district judge is vested in the High Court. High Court has original and appellate jurisdiction in civil and criminal matters as conferred by the Codes of Civil and Criminal Procedure and the Letters of Patent.

Article 215 - High Courts to be courts of record

Every High Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself.

Court of record suggests that the records of the Court have evidentiary value. These records cannot be questioned when produced in court. Also the court has the power to punish for contempt of itself. This power is a special power which means that the Legislature cannot take away this power and confer it afresh on the High Court by virtue of its own authority. The High Court is vested with all necessary and incidental powers to effectuate the jurisdiction to try and punish for contempt of court. Further the contempt matters arising in one High Court cannot be transferred to another High Court. The High Courts also have the power to review and correct their decisions.

216. Constitution of High Courts.—Every High Court shall consist of a Chief Justice and such other Judges as the President may from time to time deem it necessary to appoint.

The number of judges of a High Court is not fixed by the Constitution. It is the President who shall determine the number of judges to be appointed to a High Court as per the necessity. The Court

observed in ***S.P. Gupta v. Union of India*** that the President is under a constitutional obligation to review the strength of each High Court as per the arrears of cases pending therein. Also in ***Supreme Court Advocates on Record Assoc.*** **v.** ***Union of India (Second Judges' case)***, the court held that the Chief Justice of India and the Chief Justice of the High Court concerned must undertake the periodical review of the strength of judges in the interest of effective administration of justice and make recommendations about such strength to the President. The recommendations of the Chief Justice of India in this regard must be acted upon by the President.

Article 218 - Application of certain provisions relating to Supreme Court to High Courts.—The provisions of clauses (*4*) and (*5*) of article 124 shall apply in relation to a High Court as they apply in relation to the Supreme Court with the substitution of references to the High Court for references to the Supreme Court.

The judge of the High Court shall be removed from his office only by an order of the President and not otherwise. It shall be done so after an address is passed by each House of Parliament with a support of majority. The procedure for such a presentation of an address shall be prescribed by the Parliament. The grounds for removal may be for misbehavior or incapacity of a judge. However adequate proof is required for removal.

Article 219 - Oath or affirmation by Judges of High Courts.—Every person appointed to be a Judge of a High Court shall, before he enters upon his office, make and subscribe before the Governor of the State, or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Third Schedule.

The judge is called upon to take oath according to Article 219 wherein he is required to bear true faith and allegiance to the Constitution. Also the judge is bounden to perform the duties unabiased, in good will and without favouritism. The oath propagates that the judge shall uphold the Constitution and the laws.

Article 221 - Salaries, etc., of Judges.—(*1*) There shall be paid to the Judges of each High Court such salaries as may be determined by Parliament by law and, until provision in that behalf is so made, such salaries as are specified in the Second Schedule.

(*2*) Every Judge shall be entitled to such allowances and to such rights in respect of leave of absence and pension as may from time to time be determined by or under law made by Parliament and, until so determined, to such allowances and rights as are specified in the Second Schedule:

Provided that neither the allowances of a Judge nor his rights in respect of leave of absence or pension shall be varied to his disadvantage after his appointment

Before the amendment of 1986 the provisions concerning salaries of the High Court Judges envisaged that it shall be laid down by the Constitution without the provisions for variations. However after amendment the Parliament is conferred with the powers to determine such salaries subject to the provisions of Income Tax Act. The salaries, allowances and pensions of the judges are charged to the Consolidated Fund.

Article 222 - Transfer of a Judge from one High Court to another - (1) The President may, after consultation with the Chief Justice of India, transfer a judge from one High Court to any other High Court.

(2) When a judge has been or is so transferred, he shall, during the period he serves, after the commencement of the Constitution Fifteenth Amendment Act, 1963, as a Judge of the other High Court, be entitled to receive in addition to his salary such compensatory allowance as may be determined by Parliament by law, and until so determined, such compensatory allowance as the President may by order fix.

The aforesaid Article states that a High Court judge can be transferred from one High Court to another by the President after consultation with the Chief Justice of India.

Union of India v. Sankalchand Himatlal Sheth – enumerates on the aspects viz. independence of judiciary is vital, Transfer shall be done in public interest only in consultation with Chief Justice of India failing which the same can be challenged. The said principles were laid down in ***S.P. Gupta case*** also.

Article 225 - Jurisdiction of existing High Courts.—Subject to the provisions of this Constitution and to the provisions of any law of the appropriate Legislature made by virtue of powers conferred on that Legislature by this Constitution, the jurisdiction of, and the law administered in, any existing High Court, and the respective powers of the Judges thereof in relation to the administration of justice in the Court, including any power to make rules of Court and to regulate the sittings of the Court and of members thereof sitting alone or in Division Courts, shall be the same as immediately before the commencement of this Constitution:

Provided that any restriction to which the exercise of original jurisdiction by any of the High Courts with respect to any matter concerning the revenue or concerning any act ordered or done in the collection thereof was subject immediately before the commencement of this Constitution shall no longer apply to the exercise of such jurisdiction.

Article 225 empowers for the preservation of t he inherent jurisdiction the High Courts. It also gives the power to do justice. The High Courts enjoy unlimited power. They are also competent to issue directions for arrest of a foreign ship in exercise of a statutory jurisdiction etc. However the Union Legislature and the State Legislature has the power to make laws concerning its jurisdiction, powers and authority with regard to their competent subjects. .

Article 226 : Power of High Courts to issue certain writs –

(1) Notwithstanding anything in Article 32 every High Court shall have powers, throughout the territories in relation to which it exercise jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of

habeas corpus, mandamus, prohibitions, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose

(2) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories

(3) Where any party against whom an interim order, whether by way of injunction or stay or in any other manner, is made on, or in any proceedings relating to, a petition under clause (1), without

(a) furnishing to such party copies of such petition and all documents in support of the plea for such interim order; and

(b) giving such party an opportunity of being heard, makes an application to the High Court for the vacation of such order and furnishes a copy of such application to the party in whose favour such order has been made or the counsel of such party, the High Court shall dispose of the application within a period of two weeks from the date on which it is received or from the date on which the copy of such application is so furnished, whichever is later, or where the High Court is closed on the last day of that period, before the expiry of the next day afterwards on which the High Court is open; and if the application is not so disposed of, the interim order shall, on the expiry of that period, or, as the case may be, the expiry of the aid next day, stand vacated

(4) The power conferred on a High Court by this article shall not be in derogation of the power conferred on the Supreme court by clause (2) of Article 32

Article 226 states that the High Courts power to issue directions, orders, writs… for any other purpose.. It can issue against government situate outside its jurisdiction and the application against

injunction/interim/stay order ought to be disposed off within two weeks. Further the party against whom the order is made shall be supplied with the copy of the order and given an opportunity of being heard. This power is not in derogation of power of SC under article 32. The Article envisages Immense scope of public law remedy in the form of Prerogative power and very wide power. The importance of territorial extent of writ jurisdiction was enumerated in ***Election Commission v. S. V. Subba Rao*** which was the outcome of 15th amendment wherein the concepts of discretionary remedy, vast power (not at par with SC which has more vast power under 142 and supervisory power were enumerated.

Article 226 also enables the High Courts to issue to any person or authority, any government, orders or writs in the nature of Writ of Habeas Corpus, Writ of Mandamus, Writ of Certiorari, Writ of Prohibition and Writ of Quo Warranto.

Writ of Habeas Corpus

A writ of habeas corpus (which literally means to "produce the body") is a court order demanding that a public official (such as a warden) deliver an imprisoned individual to the court and show a valid reason for that person's detention. The procedure provides a means for prison inmates, or others acting on their behalf, to dispute the legal basis for confinement. Depending on what the evidence reveals, the judge may grant the inmate relief such as: release from prison, reduction in the sentence, an order halting illegal conditions of confinement or a declaration of rights. According to the general rule the writ of Habeas corpus can be filed by the person whose rights have been infringed. But, there is always an exception. It states that the person himself or his friend or relative can file the petition. The writ can be issued when the person has been confined and not produced before the magistrate within 24 hours, when the person has not violated any law and is still arrested, when the reason of arrest of a person under a law is unconstitutional, when detention is done to harm the person or is mala-fide.

Writ of Mandamus

A writ of mandamus is in the form of command. The term mandamus means “We Command”. This writ issued by the court to the inferior court, public official, public body, corporation, tribunal and also government. The writ directs them to perform their duties which they have refused to perform. Therefore, Writ of Mandamus is a wakening call for the authority. It wakes up the sleeping authorities to perform the entrusted duties. Mandamus thus demands an activity and sets the authority in action. Mandamus cannot issued against a private individual or private body, if the duty in question is discretionary and not mandatory, against president or governors of state, against a working chief justice and to enforce some kind of private contract. The writ petition of mandamus can be filld by any person, who wants the concerned authority to perform their duties. Such a filing person must have real or special interest in the subject matter and must have legal right to do so. A petition for writ of mandamus can be filed by any person who seeks a legal duty to be performed by a person or a body. Such a filing person must have real or special interest in the subject matter and must have legal right to do so.

Writ of Certiorari

The Constitution of India vests the power to issue *certiorari* in the Supreme Court of India, for the purpose of enforcing the fundamental rights guaranteed by Part III of the Constitution. The Parliament of India has the authority to give a similar *certiorari* power to any other court to enforce the fundamental rights, in addition to the *certiorari* power of the Supreme Court. In addition to the power to issue *certiorari* to protect fundamental rights, the Supreme Court and the High Courts all have jurisdiction to issue *certiorari* for the protection of other legal rights. Certiorari means “to certify.” Writ of Certiorari is a curative writ. The writ of certiorari is issued by the High Court to subordinate judicial or quasi-judicial bodies, directing them to transfer the records of a particular case, in order to determine whether the court has the jurisdiction to give the order, or whether it is against the principles of natural justice. A writ of certiorari is corrective in nature. Writ of certiorari can be applied in situations where a court, on passing an order, has gone beyond their jurisdiction in doing so, fraud or error on the face of records. i.e., when the court passes an order for a case which they had no power to do so, the aggrieved

can apply for the writ of certiorari. It is issued against the judicial or quasi-judicial authority, acting in a judicial manner.

Writ of Prohibition

Prohibition means to stop. This writ is popularly known as a "Stay order**.**" The Supreme Court and High Courts may prohibit the lower courts like that of the special tribunals, magistrates, commissions or other judiciary officers who are doing an act which exceeds to their jurisdiction or acting in contrary to the rule of natural justice. E.g., if a judicial officer has personal interest in a case, it may hamper the decision and the course of natural justice. It means that, this writ is issued when the courts have acted in excess of jurisdiction or in violation of principles of natural justice. When the writ is issued, proceedings in the lower court have stayed i.e. Res sub judice.The writ of prohibition can only be filed by the aggrieved individual. It is issue by an Inferior Court, Tribunal, Quasi-judicial Authority. The writ cannot be filed if the proceeding has matured into decision, writ will not lie and if the said court or authority in which writ is pending ceases to exist, writ will not lie. The case must be an on-going in an Inferior Court, tribunal or Quasi-judicial Authority. Writ of prohibition can be issued only when the proceedings are pending in a court. Writ of prohibition can be issued at any stage of the proceeding.

Writ of Quo Warranto

Quo Warranto means "by what authority?" or "show the authority". The object of this writ is to prevent a person who has wrongfully and unlawfully taken the possession of the office from continuing in the office. This writ is issued to examine the legality of the claim of a person or public office. The person or authority is stopped to act in an office which he is not entitled to; and thus stops usurpation of public office by anyone.

The writ of Quo Warranto is in the nature of judicial remedy by which, any person who has occupied the office unlawfully or illegally is asked to show by what authority he holds such office. The

writ of Quo warranto is pertinent only to the public offices only and not to private offices. The office must have been constituted by statute, or by the Constitution itself; the duties of the office must be of public nature; the office must be one of the tenure of which is permanent in the sense of not being terminable at pleasure; and the person proceeded against has been in actual possession and in the user of particular office in question.

Article 227 - Power of superintendence over all courts by the High Court.—(*1*) Every High Court shall have superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction.

(2) Without prejudice to the generality of the foregoing provision, the High Court may—

(a) call for returns from such courts;

(*b*) make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts; and

(*c*) prescribe forms in which books, entries and accounts shall be kept by the officers of any such courts.

(*3*) The High Court may also settle tables of fees to be allowed to the sheriff and all clerks and officers of such courts and to attorneys, advocates and pleaders practising therein:

Provided that any rules made, forms prescribed or tables settled under clause (*2*) or clause (*3*) shall not be inconsistent with the provision of any law for the time being in force, and shall require the previous approval of the Governor.

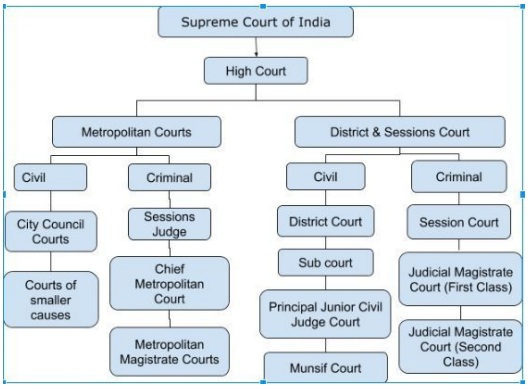
(*4*) Nothing in this article shall be deemed to confer on a High Court powers of superintendence over any court or tribunal constituted by or under any law relating to the Armed Forces.

UNIT- IV

Subordinate judiciary:

The District Courts of India are the district courts of the State governments in India for every district or for one or more districts together taking into account the number of cases, population distribution in the district. They administer justice in India at a district level. These courts are under administrative control of the High Court of the State to which the district concerned belongs. The decisions of District court are subject to the appellate jurisdiction of the High court.

The provisions related to subordinate courts are provided in the **6th part of the Indian Constitution. Articles 233-237 deal with the subordinate courts.**



Control over Subordinate Courts –

This is an extension of the above supervisory and appellate jurisdiction. It states that the High Court can withdraw a case pending before any subordinate court, if it involves the substantial question of law. The case can be disposed of itself or solve the question of law and return back to the same court. The subordinate courts include the District Judges, Judges of the city civil courts, Metropolitan magistrates and members of the judicial service of the State.

In the second case the opinion tendered by High court would be binding on the subordinate court. It also deals with matters pertaining to posting promotion, grant of leave, transfer and discipline of the members there in.

High court has complete authority and control over its officers and employees. In this regard it appoints officers and servants to be made by Chief Justice or such other judge of High Court as the Chief Justice may direct. However the Governor of the State may by rule require that in such cases as may be specified in the rule no person not already attached to the court shall be appointed to any office connected with the court except after the consultation with the State public service commission.

Control over subordinate courts is the collective and individual responsibility of the High Court as it is the head of the judiciary in the state and has got administrative control over the subordinate courts in respect of certain matters.

Lok Adalat:

The Lok Adalats have come up as a way of settling disputes both quickly and inexpensively. These are voluntary agencies at present and are monitored and overseen by State Legal Aid and Advice Board. The Legal Services Authority Act, 1987 has been un-acted which will provide a statutory footing to the legal aid movement. Till now lakh of cases are being settled by Lok Adalats in many parts of the country.

Public Interest Litigation:

Following English and American decisions, the Indian Supreme Court has admitted exceptions from the strict rules relating to affidavit locus standi and the like in the case of a class of litigations, classified as 'public interest litigation' (PIL) i.e., where the public in general are interested in the vindication of some right or the enforcement of some public duty.

The High Court's also have started following this practice in their jurisdiction under Article 226, and the Supreme Court has approved this practice, observing that where public interest is undermined by an arbitrary and perverse executive action, it would be the duty of the High Court to issue a writ.

The Court must satisfy itself that the party bringing the PIL is litigating bona fide for public good. It should not be merely a cloak for attaining private ends of a third party or of the party bringing the petition. The court can examine the previous records of public service rendered by the litigant.

An advocate filed a writ petition against the State or its instrumentalities seeking not only compensa-tion to a victim of rape committed by its employees (the railway employees), but also so many other reliefs including eradication of anti-social and criminal activities at the railway stations. The Su-preme Court held that the petition was in the nature of a PIL and the advocate could bring in the same, for which no personal injury or loss is an essential element.

Conclusion:

The jurisdiction and nomenclature of subordinate courts in the various States of the country are different. At present, there are three or more tiers of civil and criminal courts below the High Court. Cases at the trial stages are decided by and assume finality at the level of the subordinate courts. The trial system is the cutting edge of the judicial machine. It would, therefore, be necessary that the presiding officers of these courts are impartial and competent. It will also enhance the quality and quantity of their output. The administration of justice at this grass root level needs standardization. The Commission recommends that progressively the hierarchy of the subordinate courts should be brought down to a two tier of subordinate judiciary under the High Court. Further, strict selection criteria and adequate training facilities for the presiding officers of such courts should be provided.

I. ADMINISTRATIVE TRIBUNAL

Introduction:

The tribunals were established with the object of providing a speedy, cheap and decentralized determination of disputes arising out of the various welfare legislations and to address specifically cases come out of new socio-economic legislations. The word tribunal 'takes its origin from the Latin term tribunes which means ―a raised platform with the seat of judge, who elected by the pleas of protect their interests.

According to Oxford Companion of law ―any person or body of persons having to judge, adjudicate on or determine claims or dispute. Prof. Balram Gupta says that if an authority is to be considered as tribunal it must be constituted by the state invested with certain functions of the judicial powers of the State. Prof. M.P. Jain says that a body, besides being under a duty to act judicially, should be one which has been constituted by and invested with a part of the judicial functions of the State.

Basu says that tribunal is used in juxtaposition with the world code and refers to the quasi-judicial tribunals excluding courts which have the trappings of a court. Administrative tribunals are particularly associated with the administration and their decisions are administrative. But it is not significantly true but it is true to the extent of their concern with schemes in which the administration has an interest. Further, it is found in the majority of the cases that decisions of the administrative tribunals are more judicial in nature as there is a demand to apply rules impartially without leaning towards their executive polity. There is no specific definition for―Administrative Tribunals‖ in the Constitution of India. (Khare 2009; Austin 2003)

However, **Articles 227 and 136** of the Constitution o India provide only the word 'tribunal and nothing more. As there is no precise or scientific form of definition for tribunal, we should divest our concentration on the Supreme Court for its views regarding the tribunals by referring to certain case laws. In **Durga Shankar Mehtha v/s Raghuraj Singh** the Supreme Court expressed that Tribunal 'as used in Article 136 does not mean the same thing as court 'but includes within its ambit, all adjudicating bodies provided they are constituted by the state and invested with judicial as distinguished from administrative or executive functions.

In **Bharat Bank Ltd. v/s Employees**, the Supreme Court observed that though tribunals are clad in many of the trappings of court and though they exercise quasi-judicial functions, they are not full-fledged court. In **Associated cement companies Ltd. v/s P.N. Sharma**, the Supreme Court concluded about the tribunal as that it is an adjudicating body which decides controversies between the parties and

exercises judicial powers as distinguished from purely administrative functions and the possesses some of the trappings of a court, but not all.(Villalpando 2017)

However, there is basis test within Article 136 or 226 for tribunals that –

a. It is an adjudicating authority other than the court.

b. The power of adjudicating must be derived from a statute or a statutory rule.

c. The power of adjudicating must not be derived from an agreement between the parties.

S.N. Jain defines the tribunal, as ―the work is a name given to various types of administrative bodies. The only common element running through these bodies is that they are quasi- judicial and are required to observe principles of natural justice or fair hearing while determining issues. So, it can finally be defined as a judicial body not being an ordinary court that functions on constitutional mandate or under statutory empowerment performing judicially quasi-judicially as the arm of judicial system with a repository or expertise a unique to its nature.

Definition of Administrative Tribunal:

An administrative Tribunal is a multimember body to hear on cases filed by the staff members alleging non-observation of their terms of service or any other related matters and to pass judgments on those cases.

Need for Administrative Tribunals:

We all know that the government employs a large work force to carry out its diverse activities. Managing such a large number of personnel is a herculean task. Most of the government employees are better educated and enough aware to be insistent on their rights.

There are times when the disputes between the employer (Government) and employees over service matters can arise. This may also lead to litigation between the employees and the government. An employee can though approach the court for redressal of grievances for, the protection of the law is guaranteed to every citizen including government servants. But the judiciary is already overburdened with cases. Then, the court procedure is extremely cumbersome, costly and time-consuming. Due to the huge number of employees, the judicial remedy stands practically ruled out and there was a need for some alternative forum.

Thus, the basic objective of the administrative tribunals is to take out certain matters of disputes between the citizen and government agencies of purview of the regular courts of law and make the dispute Redressal process quick and less expensive.

The Administrative Reforms Commission (1966-70) had recommended the setting up of 'Civil Service Tribunals' to function as final appellate authorities in respect of orders inflicting the major punishments of dismissal, removal from service and reduction in rank. At around same time, J.C. Shah Committee had also recommended the establishment of an administrative tribunal to adjudicate on service matters.

In one of the judgments, the Supreme Court of India observed that civil servants need not waste their time in fighting battles in the regular law courts and suggested the establishment of such tribunals.

a. Characteristics of Administrative Tribunals -

The following are the characteristic of an administrative tribunal:

1. An Administrative tribunal has statutory origin as it is creature of statute;
2. It has the get –up of a court with having some of the trapping of a court but not all;
3. It performs quasi-judicial functions as it is entrusted with judicial powers of the State which is distinguished from pure administrative or executive functions;
4. It is a self-styled entity within the ambit of the Act regarding rigid procedures. It means it is not bound by the strict rules which should be followed by the court i.e. rules of evidence;
5. In some aspects of procedural matters such as to summon witnesses, to administer oath, to compel production of documents etc. it has possessed power as of the court;
6. Though the discretion is conferred on them, it is to be exercised objectively and judicially. It means that most of its decision is recorded the finding of facts objectively and apply the law without regard to executive policy.
7. It is confined exclusively to resolve the disputes/cases in which government is a party but often it moves to decide the disputes between two private parties. for example - Election tribunal, Rent Control Board;
8. It enjoys independent status free from any administrative interference in the discharge of their judicial or quasi-judicial functions;
9. The prerogative writs of certiorari and prohibition are available against the decisions of administrative tribunals.19Hence tribunal cannot dispose the matters as final arbitrator;
10. IT should act without any bias;
11. Once the issues settled by the High Court cannot be entertained by the administrative tribunal;
12. It is perpetual in nature and tribunals have been established specially to deal with a particular type of case or with a number of closely related types of cases.

b. Importance of Administrative Tribunal:

The reasons why parliament increasingly confers powers of adjudication on special tribunals rather than on the ordinary courts may be stated positively as showing the greater suitability of such tribunals, or negatively as showing the inadequacy of the ordinary courts for the particular kind of work that has to be done.

The growth of administrative decision making was the need to explore new public law standards based on moral and social principles away from the highly individualistic norms developed by the courts. Realising their limitation, the Supreme Court once said that leaving such technical matters to the decision of the court is like giving surgery to a barber and medicine to an astrologer.

An even more important practical reason for the growth of tribunals was the desire to provide a system of adjudication, which was informal, cheap and rapid. Litigation before a court of law is not only time consuming but is a luxury for the rich man. The reasons why parliament increasingly creates tribunals may be the ordinary courts are already over burden with work, their procedures is technical and costs are prohibitive and questions arising out of a social or industrial legislation are better decided by persons who have an intimate and specialized knowledge of the working of that Act. Hence for a government, this has taken on ambitious and massive plans of public health, education, planning, social security, transport, agriculture, industrialization, national assistance. It is impossible to carry out these programs and determine legal questions involved therein with the assistance of the law courts because of their highly individualistic and ritualistic approach. No intensive form of government can function without a decision making system of its own. Therefore, administrative decision making through administrative tribunals is inevitable and essential. The Administrative Tribunal can adjudicate on the matters: levy, assessment, collection and enforcement of any tax; foreign exchange, import and export across customs frontiers; industrial and labour disputes; land reforms by way of acquisition by the State of any estate as defined in Article 31A or of any rights therein or the extinguishment or modification of any such rights or by way of ceiling on agricultural land or in any other way; ceiling on urban property; elections to either House of Parliament or the House or either House of the Legislature of a State, but excluding the matters referred to in Article 329 and Article 329A; production, procurement, supply and distribution of foodstuffs (including edible oilseeds and oils) and such other goods as the President may, by public notification, declare to be essential goods for the purpose of this article and control of prices of such goods; any matter incidental to any of the above specified matter.

c. Objectives of the administrative tribunals:

Administrative tribunals constituted with few objectives:

a. To provide for a forum to deal exclusively with service matters which off loaded the burden of the cases of High Court from their jurisdiction;

b. To provide inexpensive and speedy relief to government servants in service matters;

c. To provide special powers to the tribunals to make their own special powers and procedures and not be guided by the Civil Procedure Code or the Law of Evidence but to work according to rules of natural justice.

d. As far as creation of tribunals is concerned constitution is silent. No express provision in the Constitution, as it stood originally, provides for the establishment of tribunals. However, **Articles 262(2) and 263(1)** are important in this regard. (Kagzi and Saharay 2014).

Article 262(2) provides for the creation of tribunal to adjudicate the disputes relating to water of interstate rivers or valleys. **Article 263 (1)** provides for creation of council charged with the duty of inquiry into the disputes between states. Apart from these two Articles, the creation of tribunals is implied in the **Articles 136, 226 and 227** of the Constitution as the term tribunal 'is used in these Articles. However, forty second Constitutional Amendment expressed the provision for the creation of tribunals. This Amendment opened the possibility for the proliferation of the tribunals system in the country. **Article 323A** empowers the parliament to establish service tribunals, which will deal with the service matters i.e., recruitment, conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or any State or any local or other authority in India or under the control or owned by the government and Article 323B empowers the appropriate legislature to provide the law, for adjudication or trial by tribunals of any disputes and offences with respect to several matters. Further the **Article 323B** is wide amplitude and it provides that tribunals may try certain criminal offences also. In 1985, Parliament passed the Administrative Tribunals Act in pursuant of Article 323 A of the Constitution. And under Article 323B parliament and state legislatures are passing law from time to time which provided for the creation of tribunals. The work assigned to the tribunal is very complex in nature. It requires qualified and experienced members to the adjudication of the subject matters. Hence the chairman must come from judiciary with an experience of adjudication to his credit.

d. Tribunal is not a substitute for High Court:

The tribunals empowered to adjudicate disputes and entertain complaints with respect to service matters. All other courts except Supreme Court are barred to entertain these cases. Therefore, tribunals do enjoy the same status or are at par with High Court. But a tribunal will not have power to issue writ as

power is not given to them. The Supreme Court in **S.P. Sampath Kumar's** case declared that the tribunal is the substitute of High Court and is entitled to exercise the power thereof. The position emerges that the High Court and tribunals are not rival institutions. The tribunals are apart of the jurisdiction of High Court i.e., relating to service matters an appeal cannot lay within the High Court against the order or judgment and as a matter of right before the Supreme Court. But Supreme Court can entertain appeal in the exercise of its extraordinary jurisdiction under Article 136. Hence, the tribunal's decision is made appealable within the tribunal itself before a large bench as an ordinary employee cannot be accepted to afford the cost of litigation in the Supreme Court, which may sometimes result in the denial of his right to seek justice. But in **Chandrakumar v/s Union of India case**, the Supreme Court reversed its earlier judgment and ruled that power of judiciary vested in the Supreme Court and High courts is constituted part of the basic structure of the constitution and could not be taken away. Now the tribunals are allowed to function as courts of first instance subject to the jurisdiction of High Courts. This downgraded the role of tribunals from the substantial role to supplemental role.

There is a condition to invoke tribunals to a civil servant that he should have availed to him under the service rules and he should have locus standi in the subject matter. The Government of India has framed rules for filing an application before Administrative Tribunal that it shall be presented in Form 1 by the applicant in person or by an agent or by a duly authorized advocate to the Registrar or another officer authorized by the Registrar to received the applications or sent by registered post with acknowledgement only addressed to the Registrar. After the application has been filed, the Registrar or the officer authorized by Registrar shall endorse the date on which it is presented for deemed to have been presented and sign the endorsement. In the scrutiny, any irregularity is found in the application the Registrar may allow the parties to remove in presence.

Otherwise he may refuse to register such application with reasons recorded in writing an appeal against the order of Registrar will be filed within fifteen days of such order. Tribunal empowers to regulate its own procedure including fixing of places and times of its enquiry and deciding whether to sit in public or private place. (Endicott 2015). The tribunal can admit evidence, in lieu of any originals document, a copy attested by a gazette of officer. It can avoid oral evidence and evidence on affidavits. No evidence will be taken in the absence of both the parties and hearing will commence when both the parties present. The person who is aggrieved by an order of the government or its agencies can approach the tribunal within a period of one year from the date on which the delinquent official was penalized and this representation has to be disposed of within the period of six months. However, delay can be condoned by the tribunal if it is satisfied with sufficient cause. The tribunal shall follow the principles of

natural justice. It is empowered to review its own decision and may reject the application of review if it is satisfied that there is no sufficient ground for it such rejected application of review is not appealable. It excludes the jurisdiction of other courts but subject to the writ jurisdiction of High Court and Jurisdiction of Supreme Court under:

The grounds for Supreme Court to interfere with the findings are:

- The tribunal has acted in excess of jurisdiction or has failed to exercise apparent jurisdiction.
- It has acted illegally. There is an error of law.
- The order of it is erroneous or has approached the question in a manner liable to result in injustice.
- It has acted against the principles of natural justice.
- No civil servant is to be dismissed or removed without a departmental enquiry.

The tribunal has the power of judicial review for the validity of such disciplinary proceeding but power is limited as it cannot change the decision. However, the Supreme Court under equitable jurisdiction under Article 136 enjoys the power to change such decision or opinion of the disciplinary proceedings. For the proper implementation of welfare schemes the tribunals were found to be essential and inevitable. Thus, the tribunal system cannot be inconsistent with rule of law in fact they have become the agencies for ensuring rule of law. Before excluding the power of the High Court under Articles 226 and 227 over administrative tribunals, a direct access is in fact not provided under Article 136, because the Supreme Court will grant special leave only in special cases. (Takwani and Thakker 2008)

The result is that of the closure of the doors of judiciary in certain matters. The Administrative Tribunals system is surely effective and useful. But it is hardly a substitute for administrative reform, which continues to be pressing need of our developing country. Nor is the Administrative Tribunal intended to replace or supplant the regular governmental system of the country. The Union Public Service Commission must continue to do its work and the departmental promotion committees must continue to meet. The Administrative Tribunal does not and is not intended to interfere, even in the slightest way, in the functioning of the executive. It is only when a complaint is filed that tribunal activates itself and begins moving. The unsatisfactory position of the law pertaining to tribunals calls for urgent reforms. It is high time to legislate to step in and introduce reforms at least on the following lines:

1. Need to list the tribunals working under various enactments.
2. A legislation providing for minimal uniform procedures for tribunals may be passed.
3. A watchdog committee to supervise the administrative tribunals should be constituted.

It must be independent, permanent and autonomous body composing of men of the highest integrity, legal background and deep knowledge of administration. Because the composition consists of retired judicial or non-judicial members. It is an admitted fact that a retired officer or a judge cannot work the same of zeal, courage and hard work as a direct recruit appointed on a permanent basis.

Case Laws:

In Durga Shankar Mehtha v/s Raghuraj Singh, the Supreme Court expressed that 'Tribunal' as used in Article 136 does not mean the same thing as 'court' but includes within its ambit, all adjudicating bodies provided they are constituted by the state and invested with judicial as distinguished from administrative or executive functions. In **Bharat Bank Ltd. v/s Employees**, the Supreme Court observed that though tribunals are clad in many of the trappings of court and though they exercise quasi-judicial functions, they are not full-fledged court. In **Associated cement companies Ltd. v/s P.N. Sharma**, the Supreme concluded about the tribunal as that it is an adjudicating body which decides controversies between the parties and exercises judicial powers as distinguished from purely administrative functions and the possesses some of the trappings of a court, but not all. However, there is basis test within Article 136 or 226 for tribunals that:

a. It is an adjudicating authority other than the court

b. The power of adjudicating must be derived from a statute or a statutory rule.

c. The power of adjudicating must not be derived from an agreement between the parties

S.N. Jain defines the tribunal, as "the work is a name given to various types of administrative bodies. The only common element running through these bodies is that they are quasi- judicial and are required to observe principles of natural justice or fair hearing while determining issues". So, it can finally be defined as a judicial body not being an ordinary court that functions on constitutional mandate or under statutory empowerment performing judicially quasi judicially as the arm of judicial system with a repository or expertise a unique to its nature.

Jurisdiction of tribunals in service matters

According to Article 323A, administrative tribunals can adjudicate the disputes and complaints with respect to the recruitment and conditions of service of persons appointed to public services and posts at Union Level, State Level as well as Any local or other authority within the territory of India.

Tribunals by State Legislatures

Article 323 B empowers the parliament or state legislatures to set up tribunals for matters other than those mentioned above. The matters to be covered by such tribunals are as follows:

- Levy, assessment, collection and enforcement of any tax
- Foreign exchange, import and export across customs frontiers;
- Industrial and labour disputes;
- Matters connected with Land reforms covered by Article 31A
- Ceiling on urban property;
- Elections to either House of Parliament or the House or either House of the Legislature of a State, but excluding the matters which include

Public Service Commission's

Introduction:

The UPSC is a central agency that has great responsibility for conducting examinations pertaining to Civil Services, Engineering Services, Defence Services, and Medical Services. It also conducts Economic Service, Statistical Service, and Police Forces examination.

The Union Public Service Commission of India was formed by the British Government during the British rule. In 1924, Lee Commission had suggested in its report for the establishment of an independent and impartial Public Service Commission for India and on the basis of such recommendation, the Union Public Service Commission was established in 1926.

Consequently by the government of India Act 1935, Public Service Commission was established separately for both the central and the state government services. After independence, arrangements were made to establish an independent and neutral Union Public Service Commission for the said purpose following the pattern adopted in the Government of India Act 1935.

Constitutional Provisions:

1. Article 315 to 323 of Indian Constitution has a provision for such an agency.
2. According to Act 315 of the constitution of India, there shall be a permanent Union Public Service Commission for appointment to the various posts of the central government services.
3. Similarly, as Act 318 of the constitution of India also stated that the Union Public Service Commission will be constituted with a chairman and a fixed number of members; the number of such members and the terms and conditions of their service is to be determined by the President of India. The President, as such, appoints the Chairman and other members of the commission for a period of six years.

Appointment and Tenure:

1. The Commission consists of a Chairman and ten other members. They are appreciative to follow the rules mentioned in Union Public Service Commission (Members) Regulations, 1969.
2. All the members of the commission are appointed by the President of India with at least half of the members being the Civil Servants (working or retired) with no less than ten years of experience in Central or State service.
3. The Constitution of India has also espoused certain measures to guarantee the neutrality and fairness of the U.P.S.C.

4. The Chairman of the Union Public Service Commission has not been authorized to take any office of profit under the central or any of the state governments after his retirement from service as chairman.

5. Furthermore, before the expiry of their term of service, the executive cannot remove the Chairman or any of the members of the commission from their service. They can be removed only through the means stipulated in the constitution. Apart from this, once these members are appointed the terms and conditions of their services cannot be changed.

6. Art. 322 announces that the remuneration and allowances of these members including the chairman will be considered as expenditure charged upon the Consolidated Fund of India, which means that their salaries and allowances are not subjected to the approval of the Parliament.

7. The Secretariat of UPSC is led by a Secretary, two additional secretaries, joint secretaries, and deputy secretaries.

8. Every member can hold office for six years or till the time he attains the age of 65 years, whichever is earlier.

9. A member can submit his resignation at any time to the President of India.

10. On the other side, the President can eliminate him on the basis of misbehaviour.

The UPSC submits a report of its work to the President annually. The report is then tabled in both houses of Parliament for discussion. The President places a memorandum in relation to the cases where the commission's recommendations were not accepted. The memorandum elucidates the reasons for non-acceptance.

Article 315 to 323 of Part XIV of the Indian Constitution deals with provisions relating to the Union Public Service Commission as well as the State Public Service Commission. These Constitutional Provisions include guidelines regarding the appointment, composition, removal, functions, and duties, etc. of the Public Service Commissions. Each state has its own Public Service Commission with functions similar to the Union Public Service Commission. A difficult task in any country, it becomes all the more difficult in a multi-lingual, multi-religious country like India which has a number of minority groups and backward classes and where the state is the most significant employer and government service has a prestige of its own. The State Public Service Commissions were constituted under the provisions of the constitution of India. Union Public Service Commission is the India's central agency. The agency's charter was granted by the constitution of India. State Public service Commission is also a constitutional body. The following table describes the content of the various provisions of the Constitution.

Composition of U.P.S.C. and S.P.S.C:

The U.P.S.C. and S.P.S.C. both consist of a Chairman and other members. The Commissions consist of 9 to 11 members including the chairman (though the number is not defined anywhere, and it changes from time to time and decided by the president in case of U.P.S.C and by the Governor in case of S.P.S.C). The current sanctioned strength of the Commissions is 11 (i.e., one Chairman and ten members).

Articles Relating To Public Service Commission:

Article 315 - Public service commissions for the Union and for the States.

Article 316 - Appointment and term of office of members.

Article 317 - Removal and suspension of a member of a Public Service Commission.

Article 318 - Power to make regulations as to conditions of service of members and staff of the Commission.

Article 319 - Prohibition as to the holding of offices by members of Commission on ceasing to be such members.

Article 320 - Functions of Public Service Commission.

Article 321 - Power to extend functions of Public Service Commission.

Article 322 - Expenses of Public Service Commission.

Article 323 - Reports of Public Service Commission.

a. Union Public Service Commission:

(A) Composition:

The U.P.S.C. consists of a Chairman and a number of members who are appointed by the President who, of course, acts in this matter, on the advice of the concerned Ministers **[Arts. 315(1) and 316(1)].**

The President may appoint an acting Chairman of the Commission if the office of the Chairman falls vacant, or if the Chairman is unable to discharge his functions due to absence or some other reason. The acting Chairman functions till the Chairman is able to resume his duties, or the person appointed as Chairman enters on the duties of the office **[Art. 316(1-A)].**

A member of the Commission is to hold office for six years from the date he takes charge of his office, or until he attains the age of sixty-five years, whichever is earlier [Art. 316(2). A member may, however, resign from his office by writing to the President **[Art. 316(2) (a)].**

(B) **Removal of a Member:**

The Chairman of the Public Service Commission is expected to show absolute integrity and impartiality in exercising the powers and duties as Chairman. His actions shall be transparent and he shall discharge his functions with utmost sincerity and integrity. If there is any failure on his part, or he commits any act which is not befitting the honor and prestige as a Chairman of the Public Service Commission, it would amount to misbehaviour as contemplated under the constitution. If it is proved that he has shown any favor to the candidate during the selection process that would certainly be an act of misbehaviour.

In **R/O Ram Ashray Yadav, Chairman, State of Bihar, AIR 2000 SC 1448 at 1456: (2000) 4 SCC 309 -** In this reference, the court concluded that no charge of misbehaviour was established against Dr. Yadav, although, at times, he "did not exhibit exemplary behaviour or conduct, expected of him". There were ''lapses" on his part but not "misbehaviour" within the meaning of Art.317 of the Constitution inviting action of his removal from office under **Art.317(1).**

(C) Other Provisions:

A person who holds office as a member of the Commission cannot be re-appointed to that office on the expiry of his term of office **[Art.316(3)],** nor is he eligible for any other employment under the Central or the State Government **[Art. 319(c)].** He can, however, be appointed as the Chairman of the Union Public Service Commission, or a State Public Service Commission **[Art.319(c)].**

The expenses of the UPSC, including any salaries, allowances and Pensions payable to or in respect of the members of the staff of the commission, are charged on the Consolidated Fund of India **[Art.322]**. This provision frees the Commission from parliamentary pressures.

(D) Functions of the Commission:

It is the duty of the Union Public Service Commission to conduct examinations for appointment to the services of the Union **[Art.320 (1)].** This does not mean that the examination should always be competitive and not selective. The object of holding the examination is to test the capacity of the candidates and just to have an idea whether a particular candidate is fit for the proposed appointment or not. In addition to the results of the examination, other considerations may also be kept in view in making

appointments, e .g. the viva voce test. PSCs must scrupulously follow the statutory rules during recruitment and in making appointment.

Case Studies:

- **H.S. Bedi v. Patiala, AIR 1953 Pepsu 196.**

In this case, the Supreme Court held that the provision is directory and not mandatory and any appointment by the Government without consulting the Commission would not be invalid.

- **Kesava v. State of Mysore, AIR 1956 Mys. 20.**

The Mysore High Court has held that since the Commission is an advisory or a consultative body to the Government, and also because under Art.323 the Government has to explain the reasons for non-acceptance of the Commission's advice, it is not open to the Commission to withhold any information wanted by the Government.

(E) Staff of the Supreme Court:

The members of the staff of the Supreme Court do not fall within the purview of Art. **320(3) (c).** The administrative control in respect of the staff of the Supreme Court is vested in the Chief Justice who has the power to appoint, remove, and make rules for their conditions of service. While the constitutional safeguards under Art.311 are available to every person in the civil service including persons employed in the Supreme Court, the safeguard in Art. 320(3) (c) is not available to the staff of the Supreme Court; otherwise it would be contrary to the implications of Art.146.

- **Jatinder Kumar v. State of Punjab, (1985) 1 SCC 122.**

It has been held by the Supreme Court that the words "shall be consulted'' in clause (3) of Article 320 are not to be construed as mandatory and accordingly in the absence of consultation the action of the Government under any of the sub-clauses of clause(3) shall not be null and void.

b. State Public Service Commission:

(A) Composition:

The Constitution establishes a Public Service Commission in each State **[Art. 315(1)].** It is possible for two or more States to have a Joint Public Service Commission **[Art.315 (2)].** The basic policy of the Constitution is that each State should have its own Public Service Commission, but if for administrative or financial reasons it is not possible for each State to have a Commission of its own, two or more States may have a Joint Public Service Commission. The composition of the State Commissions is governed by the same constitutional provisions as apply to the Union Commission. Thus, a State

Commission consists of a Chairman and several members who are appointed by the Governor **[Art 316(1)].** In case of a Joint Commission, the President makes these appointments **[Art.316 (1)].** Like the U.P.S.C., as nearly as may be, one half of the members of a State Commission should be persons who have held a government office for at least ten years at the date of their appointment to the Commission [proviso to Art.316(1)].

All provisions regarding the tenure of a member of the Union Commission apply mutatis mutandis to a member of a State Commission except with the following differences:

1. The age of retirement of a member of a State Commission is 62 years instead of 65 years as in the case of a member of the U.P.S.C.

2. To resign, a member of a State Commission writes to the Governor and a member of a Joint Commission to the President [**Arts. 316 and 317**].

3. The expenses of the State Commission are charged on the Consolidated Fund of the State [**Art.322**]. The Governor makes provisions with respect to the number of the Commission's Staff and their conditions of service.

4. Under Art.317 (1), the President makes a reference to the Supreme Court, the question of misbehaviour committed by the Chairman or a member of the State Public Service Commission for inquiry and report. If the court reports that he should be removed from office on any such ground, then the President shall remove him.

- **Hargovind Pant v. Raghukual Tilak**

In this case, it has been ruled by the Supreme Court that a member of a State Public Service Commission can be appointed as the Governor of a State. The main reason for this ruling being that the office of the Governor is a high constitutional office and cannot be said to be under the Government of India.

(B) **Functions of the State Commission:**

A State Public Service Commission discharges all those functions in respect of the State Services as does the Union Commission in relation to the Union Services. The protection of Art. 320 (3) (c) does not apply to the staff of the High Court and, therefore, the Chief Justice need not consult the State Public Service Commission when he dismisses a High Court employee. The State Legislature may impose additional functions on the State Commission regarding the State Services, local authority, public institutions or any other corporate authority constituted by law [Art. 321].

The State Commission is to be consulted by the Governor while framing rules for appointment to judicial service other than the posts of District Judges [Art. 234].

The State Commission is to present to the Governor an annual report of the work done by it. The report and the Governor's memorandum explaining as respects the cases where the Commission's advice was not accepted and the reasons for such non-acceptance, are to be laid before the State Legislature [Art. 323(2)]. A Joint Commission presents a similar report to each of the concerned State Governors and each Governor then takes the action as detailed above [Art.323(2)].

- **R. Hariharan v. K. Balachandran Nair, AIR 2000 SC 2933: (2000) 7 SCC 399.**

In this case, a statutory provision requiring the Electricity Board to consult the State Public Service Commission in the matter of appointment of assistant engineers has been held to be mandatory.

- **Bihar Public Service Commission v. S.J. Thakur, AIR 1994 SC 2466: 1994 Supp SCC 220.**

The Supreme Court has ruled that a member of the Commission could not question the validity or correctness of the functions performed or duties discharged by the Public Service Commission as a body. A member is regarded as a party to the function discharged or duty performed by the Commission, even though the member concerned might have been a dissenting member, or a member in a minority, or a member who abstained from participation in the function performed or duty discharged.

Appointment and Eligibility of members:

Article 316 of the Indian Constitution provides for provisions regarding the appointment of the chairman and the members of the U.P.S.C. and S.P.S.C.

The Chairman and other members of Union Public Service Commission and State Public Service Commissions are appointed by the President of India and the Governor of the State respectively.

Although no specific qualification is mentioned in the Constitution, but it mandates that 50% of the members of U.P.S.C. should be the ones who have held government office for at least 10 years.

The President of India and the Governor of State are empowered by the Constitution of India to determine the conditions of service of the Chairman and other members of the Union Public Service Commission and the State Public Service Commission respectively, at the time of their appointment.

The person to be appointed as the members of the Union Public Service Commission and State Public Service Commissions should not hold any office of profit under the central or the state government.

Appointment of chairman and acting chairman:

- In case, the office of the Chairman becomes vacant, the President shall appoint another member of the Commission as the acting chairman to perform the functions of the chairman in his/her absence.
- The governor can also appoint one of the members of the S.P.S.C. as an acting chairman if any of the following conditions prevail:
- The office of the chairman of the commission becomes vacant;
- The chairman of the commission, due to absence or for any other reason, is unable to perform the duties of his office.
- The acting chairman will perform the functions of the chairman until the chairman returns to its office.

Tenure of the Members and Chairman:

For the Union Public Service Commission, every member can hold office for six years or till the time he attains the age of 65 years, whichever is earlier. In the case of State Public Service Commission, the term is of six-year but the member can hold the office till he attains the age of 62 years, whichever is earlier.

A member of any commission can submit his resignation, at any time, to the President of India. The members of both U.P.S.C. and S.P.S.C. can be removed at any time by the president on various grounds.

Expenses:

According to Article 322, the expenses of the Union Public Service Commission and State Public Service Commission, including salaries, allowances, and pensions, payable to any of the members or staff of the Commission, shall be charged on the Consolidated Fund of India and the Consolidated Fund of the State respectively.

Reporting:

Article 323 mandates that it will be the duty of the Union Commission to submit to the President an annual report of the work done by the Commission. Whereas the State Public Service Commission will submit its annual report of its performance, to the Governor. Upon receipt of such report, the President shall present a copy, before each House of Parliament and the Governor shall present it to both the house of the legislature (if the legislature is bicameral), together with a memorandum, explaining the reasons as to why the advice of the Commission was not accepted by him.

Structure of the Organization:

The Union Public Service Commission (Members) Regulations, 1969 governs the terms and conditions of service of chairman and members of the Commission.

Secretariat:

The functions of the Commission are performed by a Secretariat headed by a Secretary with four Additional Secretaries. These additional secretaries consist of a number of Joint Secretaries, Deputy Secretaries and other supporting staff. For administrative purposes, the secretariat is further divided into several divisions, each undertaking a specific responsibility which is as follows:

Administration:

The administration administers the Secretariat as well as looks after personal matters of Chairman/Members and other Officers/Staff of the Commission.

All India Services:

Recruitment to All India Services is done either by direct recruitment, through Civil Services Examination or by promotion from the State Service. The AIS Branch handles the promotions of State Service officers to the IAS, IPS and IFS. It also handles policy matters relating to All India Services and amendments in the 'Promotion Regulations' of respective services.

Appointments:

They carry out appointments to Central and State services based on promotion and by the means of Deputation and Absorption.

Examination:

It carries out merit-based selection and recommendation of candidates, through various examinations, to Group A and Group B Services of the Government of India and the respective State.

General:

The general primarily deals with day-to-day housekeeping works for Commission. It deals with functions like arrangements and facilitation for conduction of Examinations by the U.P.S.C. and S.P.S.C., printing Annual Report etc.

Recruitment:

This branch of the U.P.S.C. and the S.P.S.C., carries out Direct Recruitment (out of the 3 possible mechanisms of 'direct recruitment', 'recruitment by promotion' and 'recruitment by transfer and permanent absorption') by selection to all Group `A' and certain Group `B' posts of the services of the Union (including some Union Territories) or the State. These recruitments are done either by selection (interview) or through competitive examination.

Services I: Handles disciplinary cases, as required under Article 320(3)(c), received from various Ministries/Departments and State Governments, for the advice of the Commission.

Services II: Handles cases other than the ones dealt by 'Services I' branch. It also compiles the Annual Report and coordinates visits of foreign delegations, hosting of international events and correspondence with foreign countries concerning Public Service Commissions, including the SAARC Member States.

Powers of U.P.S.C. and S.P.S.C:

Main power of Union Public Service Commission and the State Public Service Commission is the advisory power. It is empowered to give advice to the President and the Governors of any State on the following affairs:

- On all matters related to the appointment of the civil services of the governments.
- The evaluation of the efficiency and standard of the candidates for appointment, promotion or transfer in all civil posts.
- On all matters regarding the discipline and punctuality of the employees of the civil services.
- Matters associated with the demands and benefits of employees working under the Civil Services and employees injured while on duty.
- If the payment or expenditure for any work of an employee of Civil Services will be charged on the consolidated fund of India or not.
- Regarding promptness of decision and discipline of action in government functions, of paying compensation to a government employee, if the employee has suffered any problems or financial loss due to negligence on the part of the government.
- It also has powers to deal with matters related to punishment measures of those employees who have violated discipline or with all matters related to the interest of the government employees working under the Central government and the State government.

Thus, the Constitution of India has simply made the Union Public Service Commission and State Public Service Commission, as advisory institutions which provide advice on the subject sent to it by the President of India or by the Governors of the State respectively. But the acceptance or denial of advice is the absolute discretion of the respective governments.

This is because India has adopted a responsible self-governing government wherein the powers and responsibilities of the council of ministers cannot be delegated to its employees or to any other

organization. In brief, U.P.S.C. is the central recruitment agency in India and S.P.S.C. is the state recruitment agency in India.

The duty of the Union Public Service Commission and State Public Service Commission is to conduct examinations for appointment to the services of the Union and the State respectively. Article 320 of the Constitution of India provides for the following functions of the Union Public Service Commission and State Public Service Commission.

The first and foremost function of Union Public Service Commission and State Public Service Commission is to appoint in administrative services the meritorious and potential candidates after selecting them through competitive examinations at All India and State level respectively.

Secondly for any service for which candidates should possess special qualifications, the function of U.P.S.C. and S.P.S.C. is to assist the legislature in framing and operating schemes of joint recruitment.

Union Public Service Commission and State Public Service Commission advise the President and the Governor respectively, on every matter relating to methods of recruitment to civil services and for civil posts.

U.P.S.C. and S.P.S.C. lay down principles to be followed in making appointments to the posts of civil servants;

- in making promotions and transfers from one service to another;
- For checking the suitability of candidates for such appointments promotions or transfers.

Another function of U.P.S.C. and S.P.S.C. is to look at all disciplinary matters affecting a person serving in a civil capacity under the Government of India or the Government of a State. It may also include memorials or petitions relating to such matter.

Other Functions of U.P.S.C. and S.P.S.C:

There are other functions as well to be performed by the U.P.S.C. and the S.P.S.C. These are:

- To conduct examinations for appointment to the services of the Union and the State and conduct interviews for direct recruitment of Candidates.
- To advise on the matters that are referred to them and on matters which the President or the Governor may refer to the appropriate commission.
- Exercise any additional functions bestowed upon the Commission by an Act of Parliament or State legislature regarding the services of the Union or the State and also with respect to the services of any local authority constituted by law.

- It will be the duty of the Union Public Service Commission to provide assistance if in any case, it is requested by two or more states, to assist them in framing and operating schemes of joint recruitment for any service of the states.

It is compulsory for the Government of India and the State legislature to consult the Union Public Service Commission and State Public Service Commission respectively, in respect of all the matters stated above. But the President has the powers to make rules, specifying the general or particular circumstances where the commission may not be consulted. For example, according to the Union Public Service Commission (exemption from consultation) regulations framed by the President in 1958, it is not mandatory for the President to consult the U.P.S.C. in the following cases.

Posts in respect of which the authority of appointment, has specifically been conferred by the constitution in the President, Chairman of members of any Board, Tribunal Commission, Committee or any other similar authority, created under a statute or under the authority of a resolution of either Houses of the Parliament or by a resolution of the government of India for conducting an enquiry into any matter or advising the government of specified matters.

Posts concerned with the administration of North-East Frontier Agency and any service or post in respect of which the commission has agreed that it is not necessary for it to be consulted. The temporary and officiating appointments can also be made without consulting the U.P.S.C. provided the incumbent is not likely to hold the post for more than a year. But intimation has to be sent to the commission regarding such appointment as soon as the posts are filled. Similarly, there is no need to make any reference to the commission regarding the reservation of posts in favour of backward classes, Scheduled Castes, Schedule Tribes.

Independence of U.P.S.C. and S.P.S.C:

The Constitution mandates for the following provisions to safeguard and ensure the independent and impartial functioning of the Union Public Service Commission and State Public Service Commission:

The chairman or a member of the U.P.S.C. or S.P.S.C. can be removed from office by the President only in the manner and on the grounds mentioned in the Constitution. Thus, they enjoy the security of tenure.

Article 318 mandates that the conditions of service of the chairman or the members of U.P.S.C. and S.P.S.C. are determined by the President and the Governor respectively. But these conditions of service cannot be varied to their disadvantage after their appointment.

The entire expenses including the salaries, allowances, and pensions of the Chairman and members of the U.P.S.C. and S.P.S.C. are charged on the Consolidated Fund of India and the Consolidated Fund of State respectively and are not subject to the vote of Parliament in case of U.P.S.C. or the legislative assembly of the state in case of S.P.S.C.

Article 319 states that the chairman of the U.P.S.C. on ceasing to hold office is not eligible for further employment in the Government of India or any state. Whereas the chairman of S.P.S.C. can be made the chairman of either U.P.S.C. or any other S.P.S.C.

Article 319 also states that a member of the U.P.S.C. is eligible for appointment as the Chairman of U.P.S.C. or a State Public Service Commission but not for any other employment in the Government of India or any state. Whereas a member of S.P.S.C. is eligible to be appointed as the Chairman or a member of the U.P.S.C. or as the chairman of the same S.P.S.C. or member or chairman of any other S.P.S.C. The chairman or a member of U.P.S.C. and S.P.S.C. is not eligible for reappointment to that office for a second term.

Removal of members:

Article 317 says that the members of both public service commission can be removed by the President before the expiry of their term if any of the following four circumstances exist:

- The member of the commission goes bankrupt(insolvent).
- The member of the commission engages in any paid employment outside the official duties.
- The member of the commission becomes mentally or bodily infirm.
- For misbehavior on the part of the member of the commission.
- In cases of misbehavior, the matter is enquired by the Supreme Court, if the member is found guilty; the President can remove him/her from his membership of the commission. The decision of the Supreme Court is binding on the President in such matters.

The President can suspend the members of the Union Public Service Commission during the period when the matter is being inquired by the Supreme Court. Whereas in the case of the State Public Service Commission, this power to suspend the member is vested in the Governor of the State.

Concept of J.S.P.S.C:

The abbreviation J.S.P.S.C. stands for Joint State Public Service Commission. The Government of India Act, 1935 for the first time provided for the Joint State Public Service Commission for recruitment in two or more Provinces. This type of commissions is formed when two or more States request for the assistance of Union Public Service Commission in conducting a joint exam for recruitment to services in all these states. Constitution of India has made provisions regarding the establishment of the Joint State

Public Service Commission for two or more states. For example, Haryana had a J.S.P.S.C for a short period at the time of bifurcation of Punjab and Haryana. While the U.P.S.C. and the S.P.S.C. are directly created by the Constitution, J.S.P.S.C. is created by the act of parliament at the request of the concerned state legislatures, and thus it is a statutory body. The following are the features of a J.S.P.S.C:

Chairman and member of J.S.P.S.C. are appointed by the President.

- The tenure of the members of J.S.P.S.C. is of six-year or until they attain an age of 62 years, whichever is earlier.
- They can be removed or suspended by President and they can directly submit their resignation to the president.
- The terms and conditions of their office are determined by the President.
- The number of members in the Commission is decided by the President.

J.S.P.S.C. presents its annual performance report to each of the concerned state governors, who place the report further before their respective state legislatures. U.P.S.C. can also serve the needs of a state on the request of the state governors and with the approval of the President.

Conclusion:

The Public Service Commissions form a basic structure that ensures and protects the meritorious nature of the Indian civil services. However, there could be some changes and reforms to modify these commissions to work more efficiently. Commission to serve as a think-tank on personnel issues: The commissions should go beyond the role of recruiting candidates in answering the issues relating to civil services and their role in a rapidly changing society. So, it is clear that the Public Service Commission is a constitutional and independent authority. It plays a pivotal role in the selection and appointment of persons to public services. The Commission has to perform its functions and duties in an independent and objective manner uninfluenced by the dictates of any other authority. The Public Service Commission is expected to be fair and impartial and to function free from any influence from any quarter. Unfortunately, these bodies have not always maintained these high standards in some of the States.

Our constitution provides for four watchdogs (i.e., the Supreme Court, the Election Commission of India, the Comptroller and Auditor General of India, the Union Public Service Commission) that help to keep a check on different functions of the State. Supreme Court keeps a check on the judicial functions of the state. Election Commission of India ensures free and fair elections. The Comptroller and Auditor General keep in check the finances of the country. Similarly, the Union Public Service Commission is a watchdog to ensure fair recruitment on the basis of merit. U.P.S.C., along with the country's higher judiciary and the Election Commission, is amongst the few institutions which function with autonomy and freedom. The Public Service Commissions were established by the Government of India Act, 1935 at

the Provincial level known as the State Public Service Commission and the constitution of India gave it a constitutional status as autonomous bodies. Thus, it becomes essential on the part of citizens to know and understand these organizations better.

CONSTITUTIONAL PROTECTION TO CIVIL SERVANTS:

Civil Servants are considered as the back bone of the administration. In order to ensure the progress of the country it is essential to strengthen the administration by protecting civil servants from political and personal influence. So provisions have been included in the Constitution of India to protect the interest of civil servants along with the protection of national security and public interest. Part XIV of the Constitution of India deals with Services under the Union and the State. Article 309 empowers the Parliament and the State legislature regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State respectively. Doctrine of Pleasure in England a civil servant holds his office during the pleasure of the Crown. His services can be terminated at any time by the Crown without giving any reasons. Article 310 of the Constitution of India incorporates the English doctrine of pleasure by clearly stating that every person who is a member of a defence service or of a civil service of the Union or of an all India service or holds any post connected with defence or any civil post under the Union, holds office during the pleasure of the President, and every person who is a member of a civil service of a State or holds any civil post under a State holds office during the pleasure of the Governor of the State . But this power of the Government is not absolute. Article 311 puts certain restriction on the absolute power of the President or Governor for dismissal, removal or reduction in rank of an officer.

Article 311 reads as follows:

(1) No person who is a member of a civil service of the Union or an all India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed.

(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges.

The protective safe guards given under Article 311 are applicable only to civil servants, i.e. public officers. They are not available to defence personnel. In **State of U. P. v A. N. Singh** the Supreme Court

has held that a person holds a civil post if there exists a relationship of master and servant between the State and the person holding the post. The relationship is established if the State has right to select and appoint the holder of the post, right to control the manner and method of his doing the work and the payment by it of his wages or remuneration.

Dismissal and Removal - Dismissal and removal are synonymous terms, but in law they acquired technical meanings by long usage in Service Rules. In case of dismissal a person is debarred from future employment, but in case of removal he is not debarred from future employment. Removal by subordinate authority does not mean that the dismissal or removal must be by the same authority who made the appointment or by his direct superior. It is enough if the removing authority is of the same or co- ordinate rank as the appointing authority. Reduction in Rank means reduction from a higher rank or post to a lower rank or post and not loosing place in rank or cadre. In **State of Punjab v Kishan Das** - The Supreme Court held that a mere reduction in the salary in the same cadre is not reduction in rank.

Provisions for dismissal:

Inquiry: It is mandatory under **Article 311(2)** to make an inquiry before the dismissal, removal or reduction in rank of a civil servant. In that inquiry the civil servant has to be informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges.

Informed of the charges: means serving of a charge sheet explaining the reasons of the charges levelled against the concerned officer and statement of allegations against each charge.

Reasonable Opportunity of Being Heard: In **Khem Chand v Union of India** the Supreme Court held that the 'reasonable opportunity' means:- (a) An opportunity to deny his guilt and establish his innocence, which he can do only if he is told what the charges levelled against him are and the allegations on which such charges as based. (b) An opportunity to defend himself by cross examining the witness produced against him and by examining himself in support of his defiance. (c) An opportunity to make his representation as to why the proposed punishment should not be inflicted on him.

Termination of Service: When Amounts to Punishment - The protection under Art. 311 are available only when the dismissal, removal or reduction in rank is by way of punishment. In **Parshotham Lal Dhingra v Union of India** the Supreme Court has laid down two tests to determine whether termination is by way of punishment- (1) whether the servant had a right to hold the post or the

rank (under the terms of contract or under any rule) (2) whether he has been visited with evil consequences If yes it amounts to punishment.

Suspension of a government employee is not a punishment. It is neither dismissal or removal nor reduction in rank. So the employee cannot claim a reasonable opportunity to be heard.

Exclusion of Opportunity to be heard: Article 311(2) provides that reasonable opportunity of being heard is not applicable in the following cases. (a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or (b) where the authority empowered to dismiss or remove a person or to reduce him in rank ins satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry; or (c) where the President or the Governor, as the case may be, is satisfied that in the interest of the security of the State, it is not expedient to hold such inquiry.

An employee who is convicted on criminal charges need not be given an opportunity to be heard, before his dismissal from service. However in **Divisional personal Officer, Southern Railway v T. R. Chellappan** the Supreme Court held that the imposition of the penalty of dismissal, removal or reduction in rank without holding an inquiry was unconstitutional and illegal. The objective consideration is only possible when the delinquent employee is being heard.

But in **Union of India v Tulshiram Patel** the Court held that the dismissal, removal or reduction in rank of a person convicted on criminal charges is in public interest, and therefore not violative of Art. 311(2) of the Constitution.

The Court thus overruled its earlier decision in Chellappan's case. Compulsory retirement simpliciter is not punishment. It is done in ' public interest' and does not caste a stigma on the Government servant. So the employee cannot claim an opportunity to be heard before he is compulsorily retired from service. The Supreme Court of India has issued certain guidelines regarding compulsory retirement. In **State of Gujarat v Umedbhai M. Patel** the Court laid down the following principles. 1. When the Service of a public servant is no longer useful to the general administration, the officer can be compulsorily retired in public interest. 2. Ordinarily the order of compulsory retirement is not to be treated as a punishment under Art. 311 of the Constitution. 3. For better administration, it is necessary to chop off dead wood but the order of compulsory retirement can be based after having due regard to the entire service record of the officer. 4. Any adverse entries made in the confidential record shall be taken

note of and be given due weightage in passing such order. 5. Even uncommunicated entries in the confidential report can also be taken in to consideration. 6. The order of compulsory retirement shall not be passed as a short cut to avoid departmental inquiry when such course is more desirable. 7. If the officer is given promotion despite adverse entries in the C. R., that is a fact in favour of the officer. 8. Compulsory retirement shall not be imposed as a punitive measure.

In **Baikunth Nath v Chief Medical Officer** the Court issued further clarifications regarding compulsory retirement. (1) An order of compulsory retirement is not a punishment. It implies no stigma. (2) The order has to be passed by the Govt. in public interest. The order is passed on the subjective satisfaction of the Govt. (3) Principles of natural justice have no place in the context of an order of compulsory retirement. However courts will interfere if the order is passed mala fide or there is no evidence or it is arbitrary. (4) The Govt. shall have to consider the entire record of service before taking a decision in the matter particularly during the later years' record and performance. (5) An order of compulsory retirement is not liable to be quashed by a Court merely on showing that while passing it excommunicated adverse remarks were taken in to consideration.

The circumstances by itself cannot be a basis for interference. **Temporary Employees and Probationers in State of Punjab & Anr v Sukh Raj Bahadur** the Supreme Court laid down the following principles regarding the applicability of Article 311 to temporary servants and probationers.

1. The services of a temporary servant or a probationer can be terminated under the rules of his employment and such termination without anything more would not attract the operation of Art. 311 of the Constitution.

2. The circumstances preceding or attendant on the order of termination of service have to be examined in each case, the motive behind it being immaterial.

3. If the order visits the public servant with any evil consequences or casts an aspersion against his character or integrity, it must be considered to be one by way of punishment, no matter whether he was a mere probationer or a temporary servant.

4. An order of termination of service in unexceptionable form preceded by an enquiry launched by the superior authorities only to ascertain whether the public servant should be retained in service, does not attract the operation of Art. 311 of the Constitution.

5. If there be a full-scale departmental enquiry envisaged Art. 311 i.e. an Enquiry Officer is appointed, a charge sheet submitted, explanation called for and considered, any order of termination of service made thereafter will attract the operation of the said article. The Constitution of India through Article 311 thus protects and safeguards the rights of civil servants in Government service against arbitrary dismissal, removal and reduction in rank. Such protection enables the civil servants to discharge their functions boldly, efficiently and effectively. The public interest and security of India is given predominance over the rights of employees. So conviction for criminal offence, impracticability and inexpediency in the interest of the security of the State are recognised as exceptions.

The judiciary has given necessary guidelines and clarifications to supplement the law in Article 311. The judicial norms and constitutional provisions are helpful to strengthen the civil service by giving civil servants sufficient security of tenure. But there may arise instances where these protective provisions are used as a shield by civil servants to abuse their official powers without fear of being dismissed. Disciplinary proceedings initiated by Government departments against corrupt officials are time consuming.

The mandate of 'reasonable opportunity of being heard' in departmental inquiry encompasses the Principles of Natural Justice which is a wider and elastic concept to accommodate a number of norms on fair hearing. Violations of Principles of Natural Justice enable the courts to set aside the disciplinary proceedings on grounds of bias and procedural

CONSTITUTIONAL SAFEGUARDS AND LEGAL ISSUES RELATING TO CIVIL SERVANTS IN INDIA

Constitutional Framework of the Civil Services in India:

A) Introduction:

Articles 309 to 323 of the Constitution make elaborate provisions for the Central and Sate services. The Civil servant is indispensable to the governance of the country in the modern administrative age. Ministers frame policies and legislatures enact laws, but the task of efficiently and effectively implementing these policies and laws falls on the civil servants. The bureaucracy thus helps the political executive in the governance of the country. The Constitution, therefore, seeks to inculcate in the civil servant a sense of security and fair play so that he may work and function efficiently and give his best to the country. Nevertheless, the overriding power of the government to dismiss or demote a servant has

been kept intact, even though safeguards have been provided subject to which only such a power can be exercised.

With lot many cases coming with corruption of civil servants and other government official it is interesting to know what procedure has been provided in the constitution of India to punish them.

The doctrine of pleasure owes its origin to common law. The rule in England was that a civil servant can hold his office during the pleasure of the crown and the service will be terminated any time the crown wishes the same rule is applied in India. The member of Defence services or civil services of the union or All-India services hold their office during the pleasure of president. Similarly member of state services holds the office during the pleasure of governor. The provisions related to services under union and state is contained under part XIV of the Indian constitution.

The article 310 of Indian constitution reads that:

"Except as expressly provided by this Constitution, every person who is a member of a Defence service or of a civil service of the Union or of an All India Service or holds any post connected with Defence or any civil post under the Union holds office during the pleasure of the President, and every person who is a member of a civil service of a State or holds any civil post under a State holds office during the pleasure of the Governor of the State.

"Notwithstanding that a person holding a civil post under the Union or a State holds office during the pleasure of the President or, as the case may be of the Governor of the State, any contract under which a person, not being a member of a Defence service or of an All-India service or of a civil service of the Union or a State, is appointed under this Constitution to hold such a post may, if the President or the Governor, as the case may be, deems it necessary in order to secure the services of a person having special qualifications, provide for the payment to him of compensation, if before the expiration of an agreed period that post is abolished or he is, for reasons not connected with any misconduct on his part, required to vacate the post".

Now if such powers are given to president of India and the governor of states than it would be really difficult to exercise power on them so there are certain offices which are outside the purview of article 310 and article 311 was put as a restriction to doctrine of pleasure.

Services excluded from the purview of Article 310:

1. Tenure of Supreme Court judges **{Article 124}**

2. Tenure of high court judges **{Article148 (2)}**

3. The chief election commissioner **{Article 324}**

4. Chairman and member of public- service commission **{Article 317)**

The article 311 acts as a safeguard to civil servants. It reads as under;

(1) No person who is a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed.

(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges: Provided that where, it is proposed after such inquiry, to impose upon him any such penalty, such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed: Provided further that this clause shall not apply —

(a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or

(b) Where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry; or

(c) Where the President or the Governor, as the case may be, is satisfied that in the interest of the security of the State it is not expedient to hold such inquiry.

(3) If, in respect of any such person as aforesaid, a question arises whether it is reasonably practicable to hold such inquiry as is referred to in clause (2), the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank shall be final."

The procedure laid down in Article 311 is intended to assure, first, a measure of security of tenure to Government servants, who are covered by the Article and secondly to provide certain safeguards against arbitrary dismissal or removal of a Government servant or reduction to a lower rank. These provisions are enforceable in a court of law. Where there is an infringement of Article 311, the orders passed by the disciplinary authority are void ab-initio and in the eye of law "no more than a piece of waste paper" and the Government servant will be deemed to have continued in service or in the case of reduction in rank, in his previous post throughout. Article 311 is of the nature of a proviso to Article 310. The exercise of pleasure by the President under Article 310 is thus controlled and regulated by the provisions of Article 311.

When termination of service will amount to punishment of dismissal or removal.

1. Whether termination of service of a Government servant in any given circumstance will amount to punishment will depend upon whether under the terms and conditions governing his appointment to a post he had a right to hold the post but for termination of his service. If he has such a right, then the termination of his service will, by itself, be a punishment for it will operate as a forfeiture of his right to hold the post. But if the Government servant has no right to hold the post the termination of his employment or his reversion to a lower post will not deprive him of any right and will not, therefore, by itself be a punishment.

2. If the Government servant is a temporary on and has no right to hold the post, dismissal or removal will amount to punishment if such a Government servant has been visited with certain evil consequences.

When Article 311 is applicable:

The most notable point is that Article 311 is available only when dismissal, removal, reduction in rank is by way of punishment `.so it is difficult to determine as to when an order of termination of service or reduction in rank amounts to punishment in case of **Parshottam Lal Dhingra Vs Union of India.** The Supreme Court laid down 2 tests to determine when termination is by way of punishment –

- Whether the servant had a right to hold the post or the rank;
- Whether he has been visited with evil consequences.

If a government servant had a right to hold the post or rank under the terms of any contract of service, or under any rule, governing the service, then the termination of his service or reduction in rank amounts to a punishment and he will be entitled to protection under Article 311. Articles 310 and 311 apply to Government servants, whether permanent, temporary, officiating or on probation.

Exceptions to Article 311(2):

The provision to Article 311 (2) provides for certain circumstances in which the procedure envisaged in the substantive part of the clause need not be followed. These are set out below.

1. **Conviction on a criminal charge**- One of the circumstances excepted by clause (a) of the provision is when a person is dismissed or removed or reduced in rank on the ground of conduct which has laid to his conviction on a criminal charge. The rationale behind this exception is that a formal inquiry is not necessary in a case in which a court of law has already given a verdict. However, if a conviction is set aside or quashed by a higher court on appeal, the Government servant will be deemed not to have been convicted at all.

Then the Government servant will be treated as if he had not been convicted at all and as if the order of dismissal was never in existence. In such a case the Government servant will also be entitled to claim salary for the intervening period during which the dismissal order was in force. The claim for such arrears of salary will arise only on reinstatement and therefore the period of limitation under clause 102 of the Limitation Act would apply only with reference to that date.

The grounds of conduct for which action could be taken under this proviso could relate to a conviction on a criminal charge before appointment to Government service of the person concerned. If the appointing authority were aware of the conviction before he was appointed, it might well be expected to refuse to appoint such a person but if for some reason the fact of conviction did not become known till after his appointment, the person concerned could be discharged from service on the basis of his conviction under clause (a) of the proviso without following the normal procedure envisaged in Article 311.

2. Impracticability- Clause (b) of the proviso provides that where the appropriate disciplinary authority is satisfied, for reasons to be recorded by that authority in writing that it does not consider it reasonably practicable to give to the person an opportunity of showing cause, no such opportunity need be given. The satisfaction under this clause has to be of the disciplinary authority who has the power to dismiss, remove or reduce the Government servant in rank. As a check against an arbitrary use of this exception, it has been provided that the reasons for which the competent authority decides to do away with the prescribed procedures must be recorded in writing setting out why it would not be practicable to give the accused an opportunity. The use of this exception could be made in case, where, for example a person concerned has absconded or where, for other reasons, it is impracticable to communicate with him.

3. **Reasons of security**- Under proviso (c) to Article 311 (2), where the President is satisfied that the retention of a person in public service is prejudicial to the security of the State, his services can be terminated without recourse to the normal procedure prescribed in Article 311 (2).The satisfaction referred to in the proviso is the subjective satisfaction of the President about the expediency of not giving

an opportunity to the employee concerned in the interest of the security of the State. This clause does not require that reasons for the satisfaction should be recorded in writing. That indicates that the power given to the President is unfettered and cannot be made a justifiable issue, as that would amount to substituting the satisfaction of the court in place of the satisfaction of the President.

Is suspension or compulsory retirement a form of punishment?

Neither suspension nor compulsory retirement amounts to punishment and hence they can't be brought under the purview of Article 311 and has no protection is available. Supreme Court in case of such **Bansh singh Vs State of Punjab** clearly held that suspension from service is neither dismissal nor removal nor reduction in rank, therefore, if a Government servant is suspended he cannot claim the constitutional guarantee of Article 311[2].

In **Shyam Lal Vs State of U.P**. Supreme Court held that compulsory retirement differ from dismissal and removal as it involves no penal consequences and also a government servant who is compulsory retired does not loose any part of benefit earned during the service so it doesn't attract the provisions of Article 311.

Other safeguards to civil servants:

Article 311(1): It says that a civil servant cannot be dismissed or removed by any authority subordinate to the authority by which he was appointed

Article 311(2): It says that a civil servant cannot be removed or dismissed or reduced in rank unless he has been given a reasonable opportunity to show cause against action proposed to be taken against him.

In many cases like in **Khem Chand vs. Union of India** and in **Union of India and another vs. Tlusiram Patel**, the Supreme Court gave an exhaustive interpretation of the various aspects involved and they provide the administrative authorities authoritative guidelines in dealing with disciplinary cases.

Is article 310 and 311 contrary to article 20(2) of Indian constitution or to the principle of natural justice?

When a government servant is is punished for the same misconduct under the army act and also under central civil services (classification and control and appeal) rules 1965 then the question arises that can it be brought under the ambit of double jeopardy. The answer was given by supreme court in the case of **Union of India Vs Sunil Kumar Sarkar** held that the court martial proceeding is different from that

of central rules , the former deals with the personal aspect of misconduct and latter deals with disciplinary aspect of misconduct.

Ordinarily, natural justice does not postulate a right to be represented or assisted by a lawyer, in departmental Inquiries but in extreme or particular situation the rules of natural justice or fairness may require that the person should be given professional help.

Conclusion:

With recent cases like that of Pradeep Sharma, the encounter specialist of Mumbai police who has links with underworld and other charges of corruption was dismissed from his post which proves that civil servants cant make mockery of law if they are guilty then they will be punished and no matter what position they held. So, the main reason for which article 310 and 311 has been envisaged in the constitution by the makers of constitution is still working today but it is interesting to note that the framer of the constitution had a insight of corruption in near future that's why such provisions were included.

Election Commission: Powers and functions

Introduction:

The Election Commission is established as an autonomous body in order to ensure free, fair and impartial elections which are even insulated from political pressures and executive influence. Under Article 324(1) of Indian Constitution the Commission is setup as a permanent body. The Commission has got the jurisdiction throughout India over elections to Parliament, State legislature, Offices of President and Vice President.

The Election Commission is made as an all India body rather than separate bodies to supervise and conduct elections in each State is that some States in India consists of mixed population which in itself includes both the native people and well as other people who may be culturally, racially, linguistically different from that of native people. With a view to prevent any kind of injustice being done to any section of people, it was made as a single central body which would be free from local influences and pressures and have control over entire election machinery in the country.

a. **The Original structure of the Election Commission of India**:

India is a Socialist, Secular, Democratic Republic and the largest democracy in the World. The modern Indian nation-state came into existence on 15th of August 1947. As per the principles enshrined in the Constitution, general elections have been held at regular intervals in a free and fair manner. The Election Commission of India is a permanent Constitutional Body. It was established in accordance with the Constitution on 25th January 1950. The structure and powers of the Election Commission and its supervisory arrangements for ensuring efficient and impartial functioning of the electoral machinery are crucial importance to the working of the electoral system that any scheme of electoral reform would be largely ineffectual without certain essential changes in the Commission's structure and powers and more adequate system of supervision over the electoral machinery.

Article 324 Clause 2 of the Constitution of India envisages that Election Commission may consist of the Chief Election Commissioner and such member of other Election Commissioners as may be fixed from time to time to be made by the President for a term of six years, or up to the age of 65 years, whichever is earlier. Under **clause 3 of Article 324**, it is further provided that when any other Election Commissioner is appointed, the Chief Election Commissioner will act as the Chairman of the Election Commission. The Constitution has ensured that the Chief Election Commissioner shall perform his duty

uninfluenced by a party or political consideration and free from executive interference. For the first time in 1951-52, the President of India sanctioned four posts of Regional Election Commissioners. Out of the four posts, only two posts of Regional Commissioners were filled. In 1956, a new post of Deputy Election Commissioner (Dy.EC) was created in the Commission in place of Regional Commissioners. The Joint Committee on Amendments to Election Law recommended that Regional Election Commissioners (REC) might also be appointed as contemplated in **Article 324 (4)** of the Indian Constitution in order to assist the Election Commissioners in the performance of their functions. The appointment of Regional Election Commissioners will enable the Commission to have high ranking officers present in the State who can act as a channel of communication with the higher levels of the State administration and coordinate all election work at a fairly high level.

The Commission has a separate Secretariat at New Delhi consisting of about 300 officials in a hierarchical setup. The three Deputy Election Commissioners who are the senior most officers in the Secretariat are generally appointed with tenure from the national civil service of the country to assist the Commission. Directors, Principal Secretaries and Secretaries, Under Secretaries and Deputy Directors support the Deputy Election Commissioners. There is the functional and territorial distribution of work in the Commission. The work is organized in Divisions, Branches and Sections and each section has a complement of staff consisting of a section officer and a number of Assistants, Upper Division Clerks (UDC), Lower Division Clerks (LDC) and Group D staff. The Secretariat of the Commission has an independent budget, which is finalized directly in consultation between the Commission and the Finance Ministry of the Union Government. The major expenditure on the actual conduct of elections is, however, reflected in the budgets of the concerned constituent units of the Union - States and Union Territories. If elections are being held only for the Parliament, the expenditure is borne entirely by the Union Government while for the elections being held only for the State Legislature, the expenditure is borne entirely by the concerned State. In case of simultaneous elections to the Parliament and State Legislature, the expenditure is shared equally between the Union and the State Governments. The Commission has its unique administrative structure. There is separate administrative machinery for electoral roll management and separate administrative machinery for conducting elections. Some of the staffs are permanent to Election Commission while some others are from All India Services especially for the management of electoral rolls.

b. COMPOSITION OF ELECTION COMMISSION:

As of now, the Election Commission consists of a Chief Election Commissioner and two Election Commissioners. **Article 324** of Indian Constitution confers power on the President to appoint Election Commissioners and "such other Commissioners" as he may from time to time fix. These Commissioners are appointed for the time period of 6 years, or up to the age of 65 years.

The removal procedure of the Chief Election Commissioner from office resembles the procedure of removal of a Judge of Supreme Court. The salary payable to Chief Election Commissioner is also equal to that of a Judge of Supreme Court. The grounds for the removal of Chief Election Commissioner include misconduct or incapacity if two third members in both Lok Sabha and Rajya Sabha give their consent to the decision. Other Election Commissioners can be removed by the President on the recommendation by the Chief Election Commissioner.

b. Powers and functions of Election Commission of India:

The powers and functions of the Election Commission of India are derived from Article 324 of the Indian Constitution, the legislation relating to the elections and the rules and orders issued under the Constitution or under the legislation enacted by the Parliament. The most essential requisite of free and fair elections is that the elections should be conducted by an independent and impartial authority who can act as a guardian of the entire election machinery. The task of conducting free and fair elections has been assigned to the Election Commission of India. The plenary powers vested in the Election Commission by the Constitution for the conduct of elections are supplemented further by Acts of Parliament namely Representation of the People Act, 1950 and 1951.

Under **Article 324** of the Indian Constitution the powers of the Commission are meant to supplement rather than supplant the law in the matter of superintendence, direction and control as provided by Article 324 and therefore, that power does not prevail over the Acts passed by Parliament. In this context the provisions contained in Section 15 of the Representation of the People Act, 1951 vest the power of notifying the date of commencement of election in the Governor. If the Governor is prepared to notify the date of the election, the recommendatory body which the Election Commission is cannot refuse to recommend the date of the election under any pretext. The plenary powers of the Election Commission under Article 324 of the Constitution are of recommendatory value. The Governor can still issue the notification under Section 15 of the Representation of the People Act, 1951 if the recommendation of the Election Commission is not in conformity with the political scenario of the State concerned. In such a

contingency, if the Governor considers the elections to be imminent, it would be supplanting the provisions of Section 15 of the Representation of the People Act, 1951 and the powers of the Election Commission under Article 324 cannot be stretched so far.

Under **Article 174(1)** of the Constitution, the Governor is required to summon the House of the Legislature of the State to meet at such time and place as he thinks fit, but 6 months should not intervene between its last sitting in one session and the date appointed for its first sitting in the next session. If the elections are postponed, compliance with the provisions of Article 174(1) of the Constitution of India would become impossible. The Election Commission is under a constitutional duty to conduct the election at the earliest on completion of the term of the Legislative Assembly on dissolution or otherwise. If there is any impediment in conducting free and fair elections it can draw upon all the requisite resources of the Union and the State within its command to ensure free and fair election. Any man-made attempt to obstruct free and fair election is the antithesis to democratic norms. If and when the Election Commission finds the law and order situation difficult, it can only require a sufficient number of security forces to be deployed, but postponement of elections is hardly a remedy for that. It would be better if a mechanism is devised to settle such disputes which may arise between the Election Commission and the State Government or the Central Government.

The superintendence, direction and control of the elections to the Parliament, to the Legislature of every State, to the offices of the President and Vice-President of India, have been vested in the Election Commission. According to the Registration of Election Rules, 1960 and the conduct of Election Rules, 1961, the Election Commission of India has performed the following functions to discharge its duties freely and fairly: -

1. **Preparation of electoral rolls**:

   Article 325 of the Constitution lays down that there shall be one general electoral roll for every territorial constituency, the preparation of electoral rolls based on religion, race, caste or sex is forbidden. The preparation and maintenance of complete and accurate electoral rolls are essential prerequisites for holding elections. Under Article 326 of the Constitution, the electoral rolls must be prepared correctly for all eligible voters irrespective of their religion, race, caste and sex to hold free and fair elections. As per **Section 13-D, 15,27(2) and 27(4) of the Representation of the People Act, 1950,** the electoral rolls should be prepared for all

Parliamentary, Assembly and Council Constitution. The Election Commission of India has to prepare for identification the up-to-date list of all the persons who are entitled to voting at the poll.

2. Power to Superintendent, Direct and Control:

The Election Commission has got the power to conduct electoral rolls for all the elections of Parliament, State Legislature, Offices of President and Vice President. The Election Commission has the power of Superintendence, Direction and control over the preparation of the electoral rolls. The power of Superintendence, Direction and control which is vested in the Election Commission under Article 324(1) of the Indian Constitution are subject to the laws made by Parliament under Article 327 and it is also subject to the laws made by State Legislature under Article 328 of the Constitution. Election Commission has been entrusted the responsibility to conducting both National and State Election, therefore Article 324(1) is considered as a plenary provision vesting the responsibility of conducting elections under the Election Commission. As Article 324(1) is a plenary provision, it there is no law or provision made by Parliament or State Legislature to meet a particular situation, Article 324 confers power on the Election Commission to act and to enact such provisions necessary to push forward free and fair elections. The Election Commission has got the power to take care of surprising situations on which there has been no law made either by Parliament or State Legislature.

3. Power to Order Re-Poll:

Article 324 confers on the Election Commission not only the power to conduct elections but also the power to order a fresh poll. The order for re-poll may be given if there is hooliganism, breakdown of law and order at the time of polling or during counting of votes.

4. Power to Allot Symbols:

The Election Commission is empowered by the rule 5(1) of the rules made by the Central Government under Representation Of People's Act, 1951 to specify the symbols to the candidates for elections. The Symbols Order, 1968 has also been issued by the Election Commission read with the above mentioned rules. The validity of the order has been challenged stating it to be ultra vires to the Constitution on the ground that "Election Commission has got only executive but no legislative power, but the Supreme Court has always upheld the validity of the order explaning as

follows; " In India allotment of symbols to the candidates becomes necessary so that an illiterate voter may identify the candidate of his choice and cast his vote in his favour".

Supreme Court has observed in the case **Kanhaiya Lal v. R.K. Trivedi** as follows " Even if for any reason, it is held that any of the provisions contained in the symbols order are not traceable to the Act or the Rules, the power of the Election Commission under Article 324(1) of the Constitution which is plenary in character can compass all such provisions. Article 324 of the Constitution operates in the areas left unoccupied by the legislation.

5. Power to Postpone the Elections:

In the case **Digvijay Mote v. Union Of India** the Supreme Court has ruled that if there is any kind of disturbing situations going on in a state or in any part of the state which is preventing the conduction of free and fair elections, then the Election Commission has got the power to postpone the elections.

6. Power to Seek Information Regarding Election Expenses:

In the case **Registered Society v. UOI**, the question regarding the "election expenses" incurred by the political parties during the time of elections was brought before the court. The main contention in the arguments were that the elections in India are solely contested on the basis of money power, therefore the people should be made aware of the expenses that are incurred by the political parties and the candidates in the process of election.

The Court ruled that the purity of election is fundamental to democracy and therefore the Election Commission has got the power to issues such directions requiring the political parties to submit to the Election Commission, for its scrutiny, the details of the expenditure incurred during elections.

7. Power to Issues Budgets and Expenses:

The budgets of the formers Secretariat, which is liable for an independent budget is finalised by the Union Finance Ministry and Election Commission. Union Finance Ministry generally upheld the recommendation made by the Election Commission. The expenses of the elections should be taken care by the concerned states and the Union territories but it is the Union Government who bears the expenses of Lok Sabha elections entirely, in case of the legislative assembly elections, the concerned state bears the expenses.

8. Power to Disqualify the Candidates:

The power of post election disqualification of sitting members of the Parliament and State Legislature has been vested within the Election Commission. In the case where the person is found guilty of corrupt practices at elections that come before High Court or Supreme Court are also referred to the Election Commission for its opinion regarding whether such person shall be disqualified and it so, for what reason. The opinion of the Commission is binding on the President or as the case may be, the Governor to whom such opinion is tendered. The imposed disqualification on the candidate may be removed or reduced by the Election Commission.

Decriminalization of Politics:

Election Commission is seriously concerned about the existing criminalization in politics. In order to curb the criminal activities in politics it has taken variety of initiatives which are as follows;

Model Code of Conduct:

Election Commission in every election prescribes the model code of conduct for both political parties and the candidates which deals with the manner in which the political parties and the candidates should conduct themselves during elections in order to push forward free and fair elections. The Commission has also issued an order under Article 324, which says that each candidate mush issues an affidavit which includes the information regarding his/her criminal antecedent, assets as well as the qualification at the time of filing his/her nomination papers.

Checking Criminalization in Politics:

In order to prevent the entry of any anti social and criminal persons in the electrol arena, the Commission has urged all the political parties to come to a consensus that no person with the criminal background will be given the party ticket.

Limiting the Poll Expense:

India has already experienced many elections where there has been vulgar show of money during elections. In order to get rid of such activities, the Election Commission has issued limit on the amount that can be spent by a candidate during the election campaign. Election Commission also appoints

expenditure observers to keep an eye on the expenses incurred by the candidates during election campaign.

Use of Scientific and Technological Advancements

Making use of scientific and technological advancements has been trying to bring improvements in Election procedure. Introduction of EVM's (Electronic Voting Machines) is one of the steps in that direction. There has been a drastic decrease in malpractice during elections after the introduction of EVM's and there has also been improvement in the efficiency of voting process.

Further efficient step taken by Election Commission using scientific and technological advancement is the introduction of NOTA (None Of The Above), a ballot option, which allows the voter to indicate disapproval of all the candidates in a voting system. The principle on which it is based is as follows ; " Consent requires the ability to without consent in an election"

c. FUNCTIONS OF ELECTION COMMISSION:

i. Primary Functions:

The primary function of the Election Commission which is entrusted by the Constitution is superintendence, direction and control of the preparation of the electoral rolls for and conduct of the elections to Parliament and to the legislature of every state and also of the elections to the offices of the President and Vice President of India.

Other primary functions of Election Commission includes demarcation of constituencies, preparation of electoral rolls, arranging sufficient staff for smoothly conducting the elections, conduction of polls, briefings the details of elections to media etc.

ii. Other Functions under the Constitution:

Apart from the above primary function, the Election Commission has got an important duty of advising the President and the Governor in the matter of disqualification of sitting members of Parliament, State Legislature on all grounds other than the ground of defection **(Arts. 103 and 192).** Before deciding such questions, the President or as the case may be, the Governor is obliged to refer the matter to the Election Commission fits it's opinion and act accordingly to such opinion. The Supreme

Court has held in **Brudaben Nayak v. Election Commission of India** has said that the President and the Governor are bound by the opinion of the Election Commission.

iii. Other Functions under the Law:

The Election Commission has been vested with advisory jurisdiction under the law. If a person is found guilty of corrupt practise at election which comes before High Court in Election petition is before Supreme Court in election appeal, the President decides the question whether such persons should be disqualified from contesting future elections and, if so, for what period. Before deciding such questions, the President obtains the opinion of Election Commission and acts accordingly to such opinion.

iv. Quasi Judicial Functions:

All political parties wishing to contest in the elections much register themselves with the Election Commission. Such function of registration of political parties by the Election Commission has been held by the Supreme Court as quasi judicial function of the commission. The Supreme Court also held that in merger disputes between two political parties, the Election Commission exercises the judicial power of state and against whose decision an appeal shall straight away lie to Supreme Court under appellate jurisdiction under **Art. 136.**

CONCLUSION:

Over the years, the Election Commission has conducted a number of laudable electoral reforms to strengthen democracy and enhance the fairness odds elections by making efficient use of its powers. However, our system is still plagued by many vices. To win votes, political parties resort to foul method and corrupt practices.

There is a need to strengthen the hands of the Election Commission and to give it more legal and institutional powers. The Election Commission must be entrusted with powers to punish the errant politicians who transgress and violate the electoral laws.

Liability of State in Contract and In Torts:

I. Introduction:

Article 298 provides that the executive power of the Union and of each State shall extend to the carrying on of any trade or business and to the acquisition holding and disposal property and the making

of contracts for any purpose. Article 299 (I) lays down the manner of formulation of such contract. Article 299 provides that all contracts in the exercise of the executive power of the union or of a State shall be expressed to be made by the President or by the Governor of the State, as the case may be, and all such contracts and all assurances of property made in the exercise of that power shall be executed on behalf of the President or the Governor by such persons and in such manner as he may direct or authorize**.** **Article 299 (2)** makes it clear that neither the President nor the Governor shall be personally liable in respect of any contract or assurance made or executed for the purposes of this Constitution or for the purposes of any enactment relating or executing any such contract or assurance on behalf of any of them be personally liable in respect thereof. Subject to the provisions of **Article 299 (1),** the other provisions of the general law of contract apply even to the Government contract.

A contract with the Government of the Union or State will be valid and binding only if the following conditions are followed: -

1) The contract with the Government will not be binding if it is not expressed to be made in the name of the President or the Governor, as the case may be.

2) The contract must be executed on behalf of the President or the Governor of the State as the case may be. The word executed indicates that a contract with the Government will be valid only when it is in writing.

3) A person duly authorized by the President or the Governor of the State, as the case may be, must execute the contract.

The above provisions of Article 299 are mandatory and the contract made in contravention thereof is void and unenforceable.

The Supreme Court has made it clear that in the case grant of Government contract the Court should not interfere unless substantial public interest is involved or grant is mala fide when a writ petition is filed in the High Court challenging the award of a contract by a public authority or the State, the Court must be satisfied that there is some element of public interest involved in entertaining such a petition.

II. Effect of a Valid Contract with Government:

However, as **Article 299 (2)** provides neither the President nor the Governor shall be personally liable in respect of any contract or assurance made or executed for the purposes of this Constitution or for the purposes of any enactment relating to the Government of India. As soon as a contract is executed with

the Government in accordance with Article 299, the whole law of contract as contained in the Indian Contract Act comes into operations. Thus the applications of the private law of contract in the area of public contracts may result in the cases of injustice.

A contract of service with the Governments not covered by Article 299 of the Constitution. After a person is taken in a service under the Government, his rights and obligations are governed by the statutory rules framed by the Government and not by the contract of the parties.

Service contracts with the Government do not come within the scope of Article 299. They are subject to "pleasure". They are not contracts in usual sense of the term as they can be determined at will despite an express condition to the contrary.

In India the remedy for the branch of a contract with Government is simply a suit for damages. The writ of mandamus could not be issued for the enforcement of contractual obligations. But the Supreme Court in its pronouncement in **Gujarat State Financial Corporation v. Lotus Hotels** has taken a new stand and held that the writ of mandamus can be issued against the Government or its instrumentality for the enforcement of contractual obligations. The Court ruled that it is too late to contend today the Government can commit branch of a solemn undertaking on which other side has acted and then contend that the party suffering by the branch of contract may sue for damages and cannot compel specific performance of the contract through mandamus.

The doctrine of judicial review has extended to the contracts entered into by the State of its instrumentality with any person. Before the case of **Ramana Dayaram Shetty v. International Airport Authority** the attitude of the Court was in favour of the view that the Government has freedom to deal with anyone it chooses and if one person is chosen rather than another, the aggrieved party cannot claim the protection of article 14 because the choice of the person to fulfil a particular contract must be left to the Government, However, there has been significant change in the Court's attitude after the case of Ramana Dayaram Shetty.

The attitude for the Court appears to be in favour of the view that the Government does not enjoy absolute discretion to enter into contract with anyone it likes. They are bound to act reasonably fairly and in non-discriminatory manner.

In the case of **Kasturi Lal v. State of J&K**, in this case Justice Bhagwati has said "Every activity of the Government has a public element in it and it must, therefore, be informed with reason and guided by public interest. Every government cannot act arbitrarily without reason and if it does, its action would be liable to be invalidated." Non- arbitrariness, fairness in action and due consideration of legitimate

expectation of affected party are essential requisites for a valid state action. In a recent case **Tata Cellular v. Union of India**, the Supreme Court has held that the right to refuse the lowest or any other tender is always available to the Government but the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power.

a. Ratification

The present position is that the contract made in contravention of the provisions of Article 299 (1) shall be void and therefore cannot be ratified. The Supreme Court has made it clear that the provisions of Article 299 (1) are mandatory and therefore the contract made in contravention thereof is void and therefore cannot be ratified and cannot be enforced even by invoking the doctrine of Estoppel. In such condition the question of estoppel does not arise. The part to such contract cannot be estoppel from questioning the validity of the contract because there cannot be estoppel against the mandatory requirement of Article 299.

The Government cannot exercise its power arbitrarily or capriciously or in an unprincipled manner. In this case Justice Bhagwati has said " Every activity of the Government has a public element in it and it must therefore, be informed with reason and guided by public interest: Government cannot act arbitrarily and without reason and if it does, its action due consideration of legitimate expectation of affected party are Court has held that the right to refuse the lowest or any other tender is always available to the Government but the principles laid down in article 14 of the Constitution have to be kept in view while accepting or refusing a tender. The right to choose cannot be considered to be an arbitrary power. Of Course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down."

In the case of **Shrilekha Vidyarathi v. State of U.P (1991 S.C .C 212)** the Supreme Court has made it clear that the State has to act justly, fairly and reasonably even in contractual field. In the case of contractual actions of the State the public element is always present so as to attract article 14. State acts for public good and in public interest and its public character do not change merely because the statutory or contractual rights are also available to the other party. The court has held that the state action is public in nature and therefore it is open to the judicial review even if it pertains to the contractual field. Thus the contractual action of the state may be questioned as arbitrary in proceedings under Article 32 or 226 of the Constitution. It is to be noted that the provisions of Sections 73, 74 and 75 of the Indian Contract Act

dealing with the determination of the quantum of damages in the case of breach of contract also applies in the case of Government contract.

b. **Quasi-Contractual Liability:**

According to **section 70** where a person lawfully does anything for another person or delivers anything to him such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of or to restore, the thing so done or delivered. If the requirements of Section 70 of the Indian Contract act are fulfilled, even the Government will be liable to pay compensation for the work actually done or services rendered by the State.

Section 70 is not based on any subsisting contract between the parties but is based on quasi-contract or restitution. Section 70 enables a person who actually supplies goods or renders some services not intending to do gratuitously, to claim compensation from the person who enjoys the benefit of the supply made or services rendered. It is a liability, which arise on equitable grounds even though express agreement or contract may not be proved.

c. Section 65 of the Indian Contract Act, 1872

If the agreement with the Government is void as the requirement of Article 299 (1) have not been complied, the party receiving the advantage under such agreement is bound to restore it or to make compensation for it to the person form whom he has received it. Thus if a contractor enters into agreement with the Government for the construction of go down and received payment therefore and the agreement is found to be void as the requirements of Article 299 (1) have not been complied with, the Government can recover the amount advanced to the contractor under Section 65 of the Indian Contract act. Action 65 provides that when an agreement is discovered to be void or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it to make compensation for it to the person from whom he received it.

d. **Suit against State in Torts:**

Before discussing tortuous liability, it will be desirable to know the meaning of 'tort'. A tort is a civil wrong arising out of breach of a civil duty or breach of non-contractual obligation. The word 'tort' has been defined in Chambers Dictionary in the following words:-

"Tort is any wrong or injury not arising out of contact for which there is remedy by compensation or damages."

e. **Liability for Torts:**

In India immunity of the Government for the tortious acts of its servants, based on the remnants of old feudalistic notion that the king cannot be sued in his own courts without his consent ever existed. The doctrine of sovereign immunity, a common law rule, which existed in England, also found place in the United States before 1946 Mr. Justice Holmes in 1907 declared for a unanimous Supreme Court:

"A sovereign is exempt from suit not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."

f. Vicarious Liability of the State:

When the responsibility of the act of one person falls on another person, it is called vicarious liability. Such type of liabilities is very common. For example, when the servant of a person harms another person through his act, we held the servant as well as his master liable for the act done by the servant.

Here what we mean is essentially the vicarious liability of the State for the torts committed by its servants in the exercise of their duty. The State would of course not be liable if the acts done were necessary for protection life or property. Acts such as judicial or quasi-judicial decisions done in good faith would not invite any liability. There are specific statutory provisions which the administrative authorities from liability. Such protection, however, would not extend to malicious act. The burden of proving that an act was malicious would lie on the person who assails the administrative action. The principles of law of torts would apply in the determination of what is a tort and all the defences available to the respondent in a suit for tort would be available to the public servant also. If after all this, a public servant is proved to have been guilty of a tort like negligence, should the State, as his employer is liable?

In India **Article 300** declares that the Government of India or a of a State may be sued for the tortious acts of its servants in the same manner as the Dominion of India and the corresponding provinces could have been sued or have been sued before the commencement of the present Constitution. This rule is, however, subject to any such law made by the Parliament or the State Legislature.

III. Case Law on the tortiuous liability of the State:

The first important case involving the tortious liability of the Secretary of State for India in Council was raised in **P and O. Steam Navigation v. Secretary of State for India**.

The question referred to the Supreme Court was whether the Secretary of State for India is liable for the damages caused by the negligence of the servants in the service of the Government. The Supreme Court delivered a very learned judgment through Chief Justice Peacock, and answered the question in the affirmative. The Court pointed out the principle of law that the Secretary of State for India in Council is liable for the damages occasioned by the negligence of Government servants, if the negligence is such as would render an ordinary employer liable. According to the principle laid down in this case the Secretary of State can be liable only for acts of non sovereign nature, liability will not accrue for sovereign acts Chief Justice peacock admitted the distinction between the sovereign and non sovereign functions of the government and said:

"There is a great and clear distinction between acts done in exercise of what are termed sovereign powers, and acts done in the conduct of undertakings which might be carried on by private individuals without having such powers delegated to them."

But the judgment of P. and O. Steam Navigation case, was differently interpreted in Secretary of **State v. Hari Bhanji**, In this case it was held that if claims do not arise out of acts of State, the civil Courts could entertain them.

The conflicting position before the commencement of the Constitution has been set at rest in the well known judgment of the Supreme Court in **State of Rajasthan v. Vidyawati**, where the driver of a jeep, owned and maintained by the State of Rajasthan for the official use of the Collector of the district, drove it rashly and negligently while taking it back from the workshop to the residence of the Collector after repairs, and knocked down a pedestrian and fatally injured him. The State was sued for damages. The Supreme Court held that the State was vicariously liable for damages caused by the negligence of the driver.

In fact, the decision of the Supreme Court in **State of Rajasthan v. Vidyawati**, **Kesoram Poddar v. Secretary of State** for India, introduces an important qualification on the State immunity in tort based on the doctrines of sovereign and non-sovereign functions. It decided that the immunity for State action can only be claimed if the act in question was done in the course of the exercise of sovereign functions.

Then came the important case of **Kasturi Lal v. State of U. P.** where the Government was not held liable for the tort committed by its servant because the tort was said to have been committed by him

in the course of the discharge of statutory duties. The statutory functions imposed on the employee were referable to and ultimately based on the delegation of the sovereign powers of the State.

The Court held that the Government was not liable as the activity involved was a sovereign activity. The Court affirmed the distinction between sovereign and non-sovereign function drawn in the **P. and O. Steam Navigation's** case in the following terms.

The Supreme Court's judgment unambiguously indicates that the Court itself on the question of justice felt strongly that Kasturi lal should be compensated yet, as a matter of law they held that he could not be.

There are, on the other hand, a good number of cases where the courts, although have maintained the distinction between sovereign and non- sovereign functions yet in practice have transformed their attitude holding most of the functions of the government as non-sovereign. Consequently, there has been an expansion in the area of governmental liability in torts.

Sovereign and Non-Sovereign Dichotomy Changed Judicial Attitude

It is redeeming to note that the sovereign and non-sovereign dichotomy in the State functions which the Supreme Court has followed so far, is no being narrowed down by a new gloss over the sovereign functions of the State The courts started holding most of the governmental functions as non-sovereign with a result that the area of tortious liability of the government expanded considerably.

The Madhya Pradesh High Court has put up the entire legal position, which emerged from the analysis of the cases, in the following words:

"These cases show that the traditional sovereign functions are the making of law, the administration of justice, the maintenance of order, the repression of crime, carrying on for war, the making of treaties of peace another consequential functions, Whether this list be exhaustive or not, it is at least clear that the socio-economic and welfare activities undertaken by a modern state are not included in the traditional sovereign functions.

Damages:

It may happen that a public servant may be negligent in the exercise of his duty. It may, however, be difficult to recover compensation from him. From the point of view of the aggrieved person,

compensation is more important than punishment. Therefore, like all other employers the State must be made vicariously liable for the wrongful acts of its servants.

The Courts in India are now becoming conscious about increasing cases of excesses and negligence on the part of the administration resulting in the negation of the personal liberty. Hence they are coming forward with the pronouncements holding the Government liable for damages even in those cases where the plea of sovereign function could have negative the governmental liability. One such pronouncement came in the case of Rudal Shah v. State of Bihar. Here the petitioner was detained illegally in the prison for over fourteen years after his acquittal in a full dressed trail. The court awarded Rs. 30,000 as damages so the petitioner.

In Bhim Singh v. State of J&K, where the petitioner, a member of legislative Assembly was arrested while he was on his way to Srinagar to attend Legislative Assembly in gross violation of his constitutional rights under **Articles 21 and 22 (2)** of the Constitution, the court awarded monetary compensation of Rs.50,000 by way of exemplary costs to the petitioner.

Another landmark case namely, **C. Ramkonda Reddy v. State**, has been decided by the Andhra Pradesh, in which State plea of sovereign function was turned down and damages were awarded despite its being a cases of exercise of sovereign function.

In **Lucknow Development Authority v. M.K. Gupta**, the Supreme Court has observed that where public servant by malafide, oppressive and capricious acts in discharging official duty causes in justice, harassment and agony to common man and renders the State or its instrumentality liable to pay damages to the person aggrieved from public fund, the State or its instrumentality is duly bound to recover the amount of compensation so paid from the public servant concerned.

The Court very correctly analyses the entire position of sovereign liability in India and observed:

"The immunity peculiar to English system found its way in our system of governance through run of judgments rendered during British period, more particularly after 1858, even though the maxim lex non protest peccary that is the king can do no wrong had no place in ancient India or in medieval India as the king in both the periods subjected themselves to the rule of law and system of justice prevalent like the ordinary subjects of the States. According to Monu, it was the duty of the king to uphold the law and he was as much subject to the law as any other person. it was said by Brihaspati, where a servant commissioned by his master does an improper, for the benefit of his master, the latter shall be held responsible for it. Even during the Muslim rule the fundamental concept under Muslim law like Hindu

law was that the authority of king was subordinate to that of the laws. It was no different during British rule. The courts leaned in favor of holding the State responsible for the negligence of its officers."

a. Liability of the Public Servant:

Liability of the State must be distinguished from the liability of the individual officers of the State. So far as the liability of the individual officers is concerned, if they have acted outside the scope of their powers or have acted illegally, they are liable to the same extent as any other private citizen would be. The ordinary law of contact or torts or criminal law governs that liability. An officer acting in discharge of his duty without bias or malafides could not be held personally liable for the loss caused to the other person However such acts have to be done in pursuance of his official duty and they must not be ultra vires his powers. If an official act outside the scope of his powers, he should be liable in civil law to the same extent as a private individual would be. Where a public servant is required to be protected for acts done in the course of his duty, special statutory provisions are made for protecting them from liability.

b. Public Accountability:

Major developments in the area of public accountability have taken place. In the absence of public accountability today, corruption is a low-risk and high- profit business. The Classical observation of the Supreme Court in **D.D.A v. Skipper Constructions** deserves special attention.

The court observed.

"Some persons in the upper strata (which means the rich and the influential class of the society) have made the 'property career' the sole aim of their life. The means have become irrelevant in a land where its greatest son born in this country said, "Means are more important than the ends."

A sense of bravado prevails; everything can be managed; every authority and every institution can be managed... They have developed utter disregard for law may, contempt for it.

In order to strengthen the concept of public accountability the court in Common Cause. A **Registered Society (Petrol Pumps Matter) v. Union of India** held that it is high time that public servants should be held personally liable for their functions as public servants. Thus, for abusing the process of court public servant was held responsible and liable to pay the cost out of his own pocket. The principle thus developed is that a public servant dealing with public property in oppressive, arbitrary or unconstitutional manner would be liable to pay exemplary damages as compensation to the government, which is 'by the people.

In **Lucknow Development Authority v M. K. Gupta**, the Court asked as to who should pay the compensation for the harassment and agony to the victim? For acts and omissions causing loss or injury to the subject, the public authority must compensate. Where, however, the suffering was due to malafide or capricious act of public servant, such a public servant would be made to pay for it. Although the Court spoke in connection with the Consumer Protection Act, if this principle is to be extended to liability for wrongful acts in general, it would doubtless provide an effective deterrent against malafide and capricious acts of public servants. RM Sahai J observed.

"The administrative law of accountability of public authorities for their arbitrary and even ultra vires actions has taken many strides. It is now accepted both by this Court and English courts that the State is liable to compensate for loss or injury suffered by a citizen die to arbitrary actions of its employees."

Having stated this, the learned Judge stopped to consider who would pay such compensation. Such compensation would of course be paid from the public treasury, which would burden the taxpayer. He, therefore further ordered that when a complaint was entitled to compensation, because of the suffering caused by a malafide or oppressive or capricious act of a public servant, the Commission under the Consumer Protection Act should direct the department concerned to pay such compensation from the public fund immediately but to recover the same from those who are responsible for such unpardonable behavior by dividing it proportionately among them when they were more than one.

Where a married woman was detained on the pretext of her being a victim of abduction and rape, and the police officers threatened her and commanded her to implicate her husband and his family in a case of abduction and forcible marriage, the Court directed the State government to launch prosecution against the police officers concerned and to pay compensation to the woman and her family members who were tortured.

Where high ranking officials of a public authority, the Delhi Development Authority were held guilty of irregularities such as giving possession of lands sold in auction to the respondent bidder before receiving the auction amount in full, thus causing loss to the public and the guilt was established in an inquiry conducted by Justice (retired) O Chinappa Reddy, the Supreme Court directed the government to hold a departmental enquiry against such official. Where indiscriminate admissions were given in an educational institution in branch of eligible conditions, the Court ordered the government to take penal action against the person responsible for such admission. The head of the department is accountable to the court for carrying out he orders of the court. Personal costs may be awarded against the officer who fails to act in compliance with the court's order.

In recent years, the Supreme Court has also imposed personal fines and liabilities on ministers who used their discretionary powers on ulterior considerations. Where a minister allotted petrol pumps to his favorites or where a minister gave out of turn allotment of houses to persons related to her or known to her in preference to those who deserved such accommodation. The Court not only quashed the allotments but also imposed exemplary damages for having denied that largesse to the deserving people. Personal liability for abuse of power is a recent phenomenon.

The Court further observed:

"In modern sense the distinction between sovereign and non-sovereign power does not exist. It all depends on the nature of power and manner of its exercise. Legislative supremacy under the Constitution arises out of Constitutional provisions. Similarly the executive is free to implement and administer the law. One of the tests to determine if the legislative or executive functions sovereign in nature is whether the State is answerable for such actions in courts of law, for instance, acts such as defence of the country, raising armed forces and maintain it, making peace or war, foreign-affairs, power external sovereignty and are political in nature. Therefore, they are not amenable to the jurisdiction of ordinary civil court. The State is immune from being sued as the jurisdiction of the courts in such matters is impliedly barred."

But there the immunity ends. No civilized system can permit an executive to play with the people of its country and claim that it is entitled to act in any manner, as it is sovereign. No legal or political system today can place the State above law, as it is unjust and unfair for a citizen to be deprived of his property illegally by the negligent act of officers of State. The modern social thinking and judicial approach is to do away with archaic State protection and place the State or the Government at par with other juristic legal entity. Any watertight compartmentalization of the functions of the State as sovereign or non-sovereign is not sound. It is contrary to modern jurisprudence. But with the conceptual change of statutory power being statutory duty for sake of society and the people, the claim of a common man cannot be thrown out merely because it was done by an officer of the State official and the rights of the citizen are require to be reconciled so that the rule of law in a welfare State is not shaken.

It is unfortunate that no legislation has been enacted to lay down the law to torts in India. For that law, our courts have to draw from the English common law. Since the law of contract and the law of Sale of Goods and now the law of consumer protection have been enacted, it is high time that our Parliament enacts a law and thereby comes out of the legislative inertia. The law in India on State liability has developed in the last two decades through judicial process. It has made the State liable for the torts of its servants. The courts have, however, developed such a law without expressly overruling some of the earlier decision, which defined the State liability in very narrow terms.

While the State has enacted various anti-pollution laws and the laws for the protection of the consumers, which provide quick remedies to the citizens, there is yet no sincere and strict implementation of such laws. The industry has often shown inadequate regard fro provisions requiring installation of hazard preventing devices as required by the anti pollution laws. This became clear in MC Mehta v. Union of India. The State can be compelled to perform its statutory duties though a writ of mandamus, but will the State be liable to pay compensation to those who suffer because of its negligence or failure to obtain compliance of the industries to the provisions of the anti-pollution laws?

In recent years, the courts have awarded compensation in a number of situations. Compensation was awarded for police brutalities committed on policemen **People Union for Democratic Rights v. Police Commissioner** to victims of negligence by medical personnel in an eye camp resulting in irreversible damage to the eyes of patients, **A.S Mittal v. State of U. P.,** and to victims of road accidental President **Union of India v. Sadashiv** and to victims of environmental pollution. The plea of sovereign immunity has been rejected by courts time an again. **Pushpinder Kaur v. Corporal Sharma**. Besides these, the courts have awarded excreta payment and costs of public interest litigating to those who spearheaded it. The Supreme Court has held that where essential governmental functions were concerned, loss or injury occurring to any person due to failure of the government to discharge them would make it liable for compensation. Such compensation would be paid even if the plaintiff does not prove negligence on the part of an authority.

In **Nilbati Behera v. State of Orissa**, the Supreme Court held that the awards of compensation in the public law proceedings were different from the awards in the tort cases. In a civil suit for tortuous liability, whether the State was liable was an issue to be decided by taking evidence. The petitioner had to prove that the respondent was guilty of negligence and he suffered as a result of that. In a writ petition, the fact that a fundamental right had been violated was enough to entitle a person to compensation. Further, compensation in writ proceedings is symbolic and is not based on the quantification of the actual loss suffered by the petitioner.

Under the **Consumer Protection Act, 1986**, informal grievance redressal machinery has been provided. . Although consumer courts do not award damages for the civil wrongs, they have provided compensation to the consumer against unfair trade practice, deficient or negligent service or faulty goods. The consumer courts have not spared even government agencies. The Life Insurance Corporation, the nationalized banks, government hospitals have been made to pay compensation. Such actions of the consumer courts, however, do not deprive the consumer of his right to file a suit for tort in a civil court.

Conclusion :

Every activity of the Government has a public element in it and it must therefore, be informed with reason and guided by public interest: Government cannot act arbitrarily and without reason and if it does, its action due consideration of legitimate expectation of affected party are Court has held that the right to refuse the lowest or any other tender is always available to the Government but the principles laid down in article 14 of the Constitution have to be kept in view while accepting or refusing a tender. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down.

UNIT- V

1. Emergency:

Black law's dictionary defines emergency "as a failure of social system to deliver reasonable conditions of life". The term emergency may be defined as "circumstances arising suddenly that calls for immediate action by the public authorities under the powers especially granted to them". Dr. B.R Ambedkar claimed that the Indian Federation was unique as during the times of emergency it could convert itself into an entirely unitary system. In India, the emergency provisions are such that the constitution itself enables the federal government acquire the strength of unitary government whenever the situation demands. During such urgent needs all the specific methods should be exhausted and emergency should also be the last weapon to use as it affects India's federal feature of government.

There are three types of emergencies under the Indian Constitution namely-

- **National Emergency**
- **Failure of constitutional machinery in states**
- **Financial Emergency**

National Emergency

Article 352 of the Indian Constitution talks about the national emergency. National emergency is imposed whereby there is a grave threat to the security of India or any of its territory due to war, external aggression or armed rebellion. Such emergency shall be imposed by the President on the basis of written request by the Council of Ministers headed by the Prime Minister. When they are satisfied that there is an eminent danger thereof.

Every proclamation is required to be laid before each House of Parliament, it will cease to operate after one month from the date of its issue unless in the meantime it is approved by the parliament, the proclamation may continue for a period of 6 months unless revoked by the President. For further continuance of emergency the resolution has to be passed by either house of Parliament by a majority of not less than two-third members of the houses.

During the times of such emergency the executive, legislative and financial power rests with the centre whereas the state legislature is not suspended. The union government under Art.250 of the constitution gets the power to legislate in regards to subjects enumerated in the state list. Except Art 20

and 21 all the fundamental rights are suspended. Under Art.359 the President may suspend the right to move to the courts for enforcement of fundamental rights during the time of emergency.

National emergency has been imposed thrice in the country- in 1962 at time of Chinese aggression, in 1971 during the Indo-Pak war, in 1975 on the grounds of internal disturbances.

Failure of Constitutional Machinery in State

Article 256 talks about the failure of constitutional machinery in state also known as the President's rule. If the president on Governor's report or otherwise is satisfied that the situation has arisen that the government can't be carried in accordance with the constitutional provisions then, he may issue State emergency.

President can declare emergency either by the report of Governor or he himself is satisfied that the situation is such that the emergency has to be imposed. But at times, President may declare emergency when a report is not received from the governor. This was done by President Venkataraman in 1991 in the state of Tamil Nadu even though he didn't receive a report from the governor.

After the 42th Amendment of the constitution the state emergency was made immune from judicial review. But later in the 44th Amendment the legality of President's rule could be challenged

The proclamation relating to state emergency shall be laid before each House of Parliament unless both Houses approve it, the emergency shall cease to have effect after the expiry of a period of two months. Further the duration of proclamation can be extended to 6 months each time by both Houses of Parliament passing resolution approving its continuance. Beyond the period of a year the proclamation can only be continued, if the Election Commission certifies that it is not possible to hold election in the state or that territory. The consequences of state emergency are-

· The President assumes all the executive power of the state himself. The state administration runs by him or any person appointed by him generally the Governor.

· During such proclamation, the state assembly is either dissolved or suspended. But the MLA's do not lose their membership of the Assembly.

· Parliament makes laws regarding the state list. The parliament only passes the budget for the state.

· The High court of the state functions independently.

· President also proclaims ordinances in the state.

During the state emergency the Union government has absolute control over the state except the judiciary. If one looks at the past instances of state emergency in the country, three common grounds emerge that have been invoked under Art.356- breakdown of law and order, political instability, corruption and maladministration.

In ***Rameshwar Prasad V. UOI*** (Bihar Assembly Dissolution Case) it was held that the presidential proclamation dissolving state assembly in Bihar under Art.356 was unconstitutional on extraneous and irrelevant ground. The court said that the state governor misled the centre in recommending dissolution of state assembly.

In the historic case of ***S.R Bommai V. UOI***, a full bench of the Karnataka High court produced different opinion about the imposition of the President's rule in Karnataka, while in other states the court held that it was in violation of the constitution and would have restored the original position.

Financial Emergency

The President under **Article 360** of the constitution has the power to declare financial emergency if he is satisfied that the financial stability or the credit of India or any part of its territory is threatened. It has to be laid before both the Houses of Parliament and ceases to operate at the expiration of two months unless meanwhile approved by the resolution of Houses.

During the operation of financial emergency, the executive authority of the union extends to the giving of directions to any state to observe certain specified canons or financial propriety and such other directions that the President may find necessary. The directions may include reduction of salaries or allowance of those serving a state, of all those in connection with the affairs of union including judges of high court and Supreme Court. There has been no occasion of financial emergency in India.

Federalism according to Dicey is a weak form of government because it involves division of power between the Centre and the units. Every modern federation, however, has sought to avoid this weakness by providing for the assumption of larger powers by the federal government whenever unified action is necessary by reason of internal or external emergent circumstances. For different kinds of emergencies, The Indian Constitution confers extraordinary powers upon the union. The emergency provisions provided under the Constitution enables the federal government to acquire the strength of a unitary system whenever the exigencies of the situation so demand.

Emergency provision is a unique feature of Indian Constitution that allows the Centre to assume wide powers so as to handle special situations. In emergency, the Centre can take full legislative and executive control of any state. Emergency provision also allows the Centre to curtail or suspend freedom of the citizens.

Difference between Article 352 and Article 356

Point of difference	**Article 352**	**Article 356**
1.Application	In situations of war, external aggression or armed rebellion.	In situation of failure of constitutional machinery in State
2.Effect	No authority to the Centre to suspend the Constitution in a state.	The state legislature ceases to function as it is dissolved.
3.Effect on Fundamental Rights	affects Fundamental Rights	Does not affect Fundamental Rights
4.Centre-State Relationship	the relationship of all the states with the Centre changes	the relationship of only one state where the action is taken changes with the Centre
5.Proclamation	Approved by the Parliament within 1 month and thereafter every 6 months and there is no maximum duration prescribed	Approved by the Parliament within 2 months and thereafter every 6 months, and the maximum period that it remains in force is 3 years.

Effects of national emergency

The declaration of National Emergency effects both on the rights of individuals and the autonomy of the states in the following manner:

1. The most significant effect is that the federal form of the Constitution changes into unitary. The authority of the Centre increases and the Parliament assumes the power to make laws for the entire country or any part thereof, even in respect of subjects mentioned in the State List.

2. The President of India can issue directions to the states as to the manner in which the executive power of the states is to be exercised.

3. During the emergency period, the LokSabha can extend tenure by a period of 1 year at a time. But the same cannot be extended beyond 6 months after the proclamation ceases to operate. The tenure of State Assemblies can also be extended in the same manner.

4. During emergency, the President is empowered to modify the provisions regarding distribution of revenues between the Union and the States.

5. The Fundamental Rights under Article 19 are automatically suspended and this suspension continues till the end of the emergency.

But according to the 44th Amendment, Freedoms listed in Article 19 can be suspended only in case of proclamation on the ground of war or external aggression. From the above discussion, it becomes quite clear that emergency not only suspends the autonomy of the States but also converts the federal structure of India into a unitary one. Still it is considered necessary as it equips the Union Government with vast powers to cope up with the abnormal situations.

Effects of State Emergency

The declaration of emergency due to the breakdown of Constitutional machinery in a State has the following effects:

1. The President can assume to himself all or any of the functions of the State Government or he may vest all or any of those functions with the Governor or any other executive authority.
2. The President may dissolve the State Legislative Assembly or put it under suspension. He may authorise the Parliament to make laws on behalf of the State Legislature.
3. The President can make any other incidental or consequential provision necessary to give effect to the object of proclamation.

Effects of Financial Emergency

The proclamation of Financial Emergency may have the following consequences:
1. The Union Government may give direction to any of the States regarding financial matters.

2. The President may ask the States to reduce the salaries and allowances of all or any class of persons in government service.

3. The President may ask the States to reserve all the money bills for the consideration of the Parliament after they have been passed by the State Legislature.

4. The President may also give directions for the reduction of salaries and allowances of the Central Government employees including the Judges of the Supreme Court and the High Courts.

Effects of Proclamation of Emergency on the Fundamental Rights

• Federal laws will overrule state legislation, and the Union is empowered to govern areas (eg. Policing) that are normally devolved to the states.

• The Union is also empowered to take over and completely control the taxation and budgetary revenue processes. Under financial emergency, the Union is empowered to have the final say in the promulgation of financial acts approved by the state legislature.

• The Union may decide to suspend some or all of the fundamental rights guaranteed by Part III (Articles 12 through 35) of the constitution

• Further, the right to challenge the suspension of the above mentioned rights (the right to constitutional remedies) may also be suspended. However, this provision will not cover the suspension of Articles 20 and 21 which govern rights to personal liberty, Right to silence, freedom from double jeopardy and freedom from unlawful arrest and detention. Any individual who deems that his rights under these categories have been suspended unlawfully, can challenge the suspensions under a court of law.

• The Union may decide to dismiss the legislative functions of a state legislature and impose federal law for a period of six months. This state of suspension may be renewed at the end of this period under the vote of Parliament (indefinite number of times) until such a time when the Election Commission of India can certify the feasibility of holding free and fair elections in the state to reconstitute the legislature.

• Any order to the above effects however, should be passed by the House of Parliament "as soon may be after it is made".

Difference between Article 358 and Article 359

In the case of **Makhan Singh v. State of Punjab**, hon'ble Supreme Court distinguished between Articles 358 and 359 as below:

Article 358	Article 359
Freedoms given by Article 19 are suspended automatically under this Article as soon as the emergency is proclaimed.	Fundamental rights are not suspended automatically it has to be done by a presidential order. Only the courts cannot be moved to enforce fundamental rights.
Article 19 is suspended for the whole period of emergency.	Right to move courts is suspended for the period of emergency or until the proclamation of the president to remove suspension of fundamental right.
Effective all over the country.	May be confined to an area.
It operates only in case of emergency on the ground of threat to the security of the country because of war or external aggression.	It operates in any emergency proclaimed under Article 352

Changes Made By 44th Amendment

Background:

The proclamation of emergency is a very serious matter as it disturbs the normal fabric of the Constitution and adversely affects the rights of the people. Such a proclamation should, therefore, be issued only in exceptional circumstances and not merely to keep an unpopular government from office. This happened in June 1975 when an emergency was declared on the ground of internal disturbance without there being adequate justification for the same. The proclamation of 1975 was made on the ground of internal disturbance which proved to be the most controversial because there was violation of fundamental rights of the people on a large scale; drastic press censorship was imposed. A large number of persons were put in preventive detention without justification. In the light of these amendments have

thus been made by the 44th Amendment Act to the Emergency provisions of the constitutions to make repetition of the 1975 situation extremely difficult, if not impossible.

The 44th Amendment

The 44th amendment substantially altered the emergency provisions of the Constitution to ensure that it is not abused by the executive as done by Ms. Indira Gandhi in 1975. It also restored certain changes that were done by 42nd amendment. The following are important points of this amendment.

1. "Internal disturbance" was replaced by "armed rebellion" under art 352.

2. The decision of proclamation of emergency must be communicated by the Cabinet in writing.

3. Proclamation of emergency must be laid before both the houses of Parliament within one month.

4. To continue emergency, it must be re-approved by the houses every six month.

5. Emergency can be revoked by passing resolution to that effect by a simple majority of the houses present and voting. 1/10 of the members of a house can move such a resolution.

6. Article 358 provides that Article 19 will be suspended only upon war or external aggression and not upon armed rebellion. Further, every such law that transgresses Article 19 must recite that it is connected to Article 358. All other laws can still be challenged if they violate Article 19.

7. Article 359, provides, suspension of the right to move courts for violation of Part III will not include Articles 20 and 21.

8. Reversed back the term of LokSabha from 6 to 5 years.

In the case of ***Bhut Nath v. State of West Bengal***, the Supreme Court held that it is a political question and not a justiciable issue. Also to make the position more clear on this matter the 38th Amendment to the constitution added clause 5 to the Article 352 saying that the 'satisfaction' of the president as used in Article 352(1) and (3) is to mean "final and conclusive" and "could not be challenged in any court of law".

But later on after Indian democracy saw the abuse of these powers during the emergency of the 1975, by the 44th Amendment later on the provision of Article 352(5) inserted by the 38th Amendment to the constitution was revoked. Therefore the present position on this matter is that, it is upto the Supreme Court to decide whether it will treat the 'satisfaction' of the president to issue a proclamation of emergency, or to vary it or to continue it, as 'final' and 'non-justiciable', or as being subject to judicial review on some grounds.

Also it is worth noting herein that Justice Bhagwati has observed in the case of ***Minerva Mills*** that "whether the precedent proclaiming the emergency under Article 352 had applied his mind or whether he acted outside his powers or acted mala fide in proclaiming the emergency could not be excluded from the scope of judicial review."

B. Proclamation under Article 356

The susceptibility of a Proclamation under Article 356 to judicial review is beyond dispute, because the power under Article 356(1) is a conditional power. In the exercise of the power of judicial review, the court is entitled to examine whether the condition has been satisfied or not. So the controversy actually revolves around the scope and reach of judicial review. From the decisions in the case of ***State of Rajasthan v. Union of India*** and the *Bommai* case, it is clear that there cannot be a uniform rule applicable to all cases it is bound to vary depending upon the subject matter, nature of the right, and other factors. However, where it is possible the existence of satisfaction can always be challenged on the ground that it is 'mala fides' or 'based on wholly extraneous and irrelevant grounds'. The relevance of judicial review in matters involving Article 356 is also emphasized in the Supreme Court judgment in re **State of *Madhya Pradesh v. Bharat Singh***, where the Supreme Court held that it was not precluded from striking down a law passed prior to a Proclamation of Emergency, as ultra vires to the Constitution, just because the Proclamation was in force at that time.

Judicial review of the Proclamation under Article 356(1) was first tested in ***State of Rajasthan v. Union of India,*** in which a seven member's constitution bench of the Supreme Court by a unanimous judgment rejected the petitioner petition and upheld the centre's action of dissolving three assemblies under Article 356 as constitutionally valid.

The Supreme Court, in the case of ***Minerva Mills and Others v. Union of India and Others***, dwelt extensively on its power to examine the validity of a Proclamation of Emergency issued by the President. The Supreme Court in this matter observed, inter alia, that it should not hesitate to perform its constitutional duty merely because it involves considering political issues. At the same time, it should restrict itself to examining whether the constitutional requirements of Article 352 have been observed in the declaration of the Proclamation and it should not go into the sufficiency of the facts and circumstances of the presidential satisfaction in the existence of a situation of emergency.

Thus we can safely conclude that, though limited, the Presidential Proclamation under Article 356 is subject to judicial review. The most recent case which decided the extent of judicial review of the Proclamation by the President imposing 'President's Rule' in the states and consolidated the legal position on the subjective satisfaction of the President is ***S R Bommai v Union of India*** was a landmark in the history of the Indian Constitution. It was in this case that the Supreme Court boldly marked out the paradigm and limitations within which Article 356 was to function. In the words of Soli Sorabjee, eminent jurist and former Solicitor-General of India, "After the Supreme Court's judgment in the S. R. Bommai case, it is well settled that Article 356 is an extreme power and is to be used as a last resort in

cases where it is manifest that there is an impasse and the constitutional machinery in a State has collapsed".

FUNDAMENTAL RIGHTS VS. EMERGENCY

During the period of emergency, as declared under the either of the two categories discussed above, the State is empowered to suspend the Fundamental Rights guaranteed under Article 19 of the Constitution. The term 'State' is used here in the same sense in which it has been used in the Chapter on Fundamental Rights. It means that the power to suspend the operation of these Fundamental Rights is vested not only in Parliament but also in the Union Executive and even in subordinate authority. Further, the Constitution empowers the President to suspend the right to move any court of law for the enforcement of any of the Fundamental Rights. It means that virtually the whole Chapter on Fundamental Rights can be suspended during the operation of the emergency. However, such order are to be placed before Parliament as soon as possible for its approval.

But art. 20 and art.21 can not be suspended in any case

Suspension of fundamental rights during emergency is a matter of debate and conflicts of opinion ab initio, it would be a mistake to treat human rights as though there were a trade-off to be made between human rights and goals such a security and development. Fundamental rights are moral rights which have been made legal by the Constitution. These constitutional rights which are 'fundamental' in character represent rights in the 'strong sense'. They are distinct from ordinary legal and constitutional rights because they may not be restricted on ground of general utility. The very essence of these rights is that they are guaranteed even if the majority would be worse off in doing so,that fundamental rights are necessary to protect the dignity of an individual. Invasion of these rights is a very serious matter and it means treating a man as less than a man. This is grave injustice and it is worth paying the incremental cost in social policy or efficiency that is necessary to prevent it.

The Habeas Corpus Case

The most controversial use of emergency power in the history of India has been between 1975 and 1977. The experience of this state of emergency exposed the weaknesses and inadequacies of safeguards on use of crisis power by the government. Though restrictions were imposed on various rights in this period, the most serious infringement was of personal liberty, which is the focus on the next section.

The President issued orders under the Constitution of India, art. 359(1) suspending the right of any person to move any court for enforcement of fundamental rights under arts.14, 21 and 22 and 19 for the duration of the emergency. Following this declaration hundreds of persons were arrested and detained all over the country under the swoop of the Maintenance of Internal Security Act, 1971.

Various persons detained under Maintenance of Internal Security Act, 1971, s. 3(1) filed petitions in different High Courts for the issue of the writ of habeas corpus.

The balance between rights and security may be enhanced by making further changes than those recommended in the 1978 amendment. This includes making the information withheld by the government under art. 22(6) justiciable.

Seervai suggests this may be achieved by allowing a judge to examine the claim of the government that the information of grounds of detention has to be withheld in public interest.This via media is on the lines of the special advocate system in Britain.

The Indian experience with emergency powers reveals a mixed record. These powers were used more responsibly in 1962 than in 1970. The principle of proportionality must thus be the governing principle to ensure that rights are not subverted in the name of security.

Judicial Interpretation of Validity of Suspension of Fundamental Rights

1) POSITION BEFORE 1978:-

Suspension of Art. 19- ***Makhan Singh v. State of Punjab***

Art.358 makes it clear that things done or omitted to be done during emergency could not be challenged even after the emergency was over, in other words the suspension of art.19 was complete during the period in question and legislative and excutive action which contravened art.19 could not be questioned even after the emergency was over.

Suspension of Art.20, 21

A.D.M. Jabalpur v.Shivkant Shukla

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duration of the emergency. Following this declaration hundreds of persons were arrested and detained all over the country under the swoop of the Maintenance of Internal Security Act, 1971.

Various persons detained under Maintenance of Internal Security Act, 1971, s. 3(1) filed petitions in different high courts for the issue of the writ of habeas corpus.

The High Court broadly took the view that the detention may be challenged on the grounds of ultra vires, rejecting the preliminary objection of the government. Aggrieved by this the government filed appeals, some under certificates granted by High Courts and some under special leave granted by the Supreme Court. Despite every High Court ruling in favor of the detenue. The Supreme Court ruled in favor the Government. What the court except for Khanna, J. failed to realise is that the right to personal to life and liberty are human rights and is not a 'gift of the Constitution'. International Covenant on Civil and Political Rights ,art. 4 recognises the right to life and personal liberty to be a non- derogable right even during times of emergency.

Suspension of Art.14 and 16

Arjun Singh v. State of Rajasthan

The question arose whether art.16 is also suspended although it is not mentioned in order, the Rajasthan High Court held that art.16 remained operative even though art.14 was suspended. The court emphasized that under art.359 the enforcement of only such fundamental rights was suspended as were specifically and expressly mentioned in the presidential order.

Status of Art.356 after *Bommai* case-

The landmark case of ***S. R. Bommai v. Union of India***, in the history of the Indian Constitution has great implications in Center-State relations. It is in this case that the Supreme Court boldly marked out the limitations within which Article 356 has to function. The Supreme Court of India in its judgment in the case said that it is well settled that Article 356 is an extreme power and is to be used as a last method in cases where it is manifest that the constitutional machinery in a State has collapsed.

The views expressed by the bench in the case are similar to the concern showed by the Sarkaria Commission. In this case the bench observed that the power conferred by Article 356 upon the President is a conditioned power. It is not an absolute power. The existence of material - which may comprise of or

include the report of the Governor is a pre-condition. The satisfaction must be formed on relevant material, and must have rational.

Similarly, Article 356 of the Constitution confers a power upon the President to be exercised only where he is satisfied that a situation has arisen where the Government of a State cannot be carried on in accordance with the provisions of the Constitution. Under our Constitution, the power is really that of the Union Council of Ministers with the Prime Minister at its head. The satisfaction contemplated by the article is subjective in nature. However, the subjective satisfaction if based on malice may be questioned in court of law.

The remark of the Supreme Court that proclamation of emergency is not beyond judicial review is welcome step. The court held that the Proclamation under Article 356(1) is not immune from judicial review. The Supreme Court or the High Court can strike down the Proclamation if it is found to be mala fide or based on wholly irrelevant or extraneous grounds.

Earlier, with 38th (Amendment) Act by the 44th (Amendment) Act, government had taken out the power of reviewability of the action of imposition of emergency under Article 356(1). Now, under the new circumstances, when called upon, the Union of India has to produce the material on the basis of which action was taken.

The history of Indian constitution with respect to fundamental rights and their stability with emergency provisions is full of vagueness and ambiguity.

From the very beginning of "the case of habeas corpus" and ***Makhan Singh*** to the landmark case of ***S.R. Bommai***, the provisions and conditions are getting better and better. Initially even the suspension of Art. 20 and 21 during emergency was valid, though those rights are not given by "the constitution" but by nature itself.

1. Constitutional Interpretation

The following are some of the key principles applied specially in interpreting the provisions of the constitution -

i) Doctrine of pith and substance
ii) Doctrine of Colourable legislation
iii) Principle of Ancillary powers
iv) Principle of Occupied field

v) Doctrine of repugnancy

vi) Principle of Territorial Nexus

i) Doctrine of Pith and Substance:

Pith means "true nature" or "essence" and substance means the essential nature underlying a phenomenon. Thus, the doctrine of pith and substance relates to finding out the true nature of a statute. This doctrine is widely used when deciding whether a state is within its rights to create a statute that involves a subject mentioned in Union List of the Constitution. The basic idea behind this principle is that an act or a provision created by the State is valid if the true nature of the act or the provision is about a subject that falls in the State list. The case of ***State of Maharashtra v. F N Balsara*****,** illustrates this principle very nicely. In this case, the State of Maharashtra passed Bombay Prohibition Act that prohibited the sale and storage of liquor. This affected the business of the appellant who used to import liquor. He challenged the act on the ground that import and export are the subjects that belong in Union list and state is incapable of making any laws regarding it. SC rejected this argument and held that the true nature of the act is prohibition of alcohol in the state and this subject belongs to the State list. The court looks at the true character and nature of the act having regard to the purpose, scope, objective, and the effects of its provisions. Therefore, the fact that the act superficially touches on import of alcohol does not make it invalid.

Thus, as held in ***State of West Bengal v. Kesoram Industries*****, 2004**, the courts have to ignore the name given to the act by the legislature and must also disregard the incidental and superficial encroachments of the act and has to see where the impact of the legislation falls. It must then decide the constitutionality of the act.

ii) Principle of Incidental or Ancillary Powers:

This principle is an addition to the doctrine of Pith and Substance. What it means is that the power to legislate on a subject also includes power to legislate on ancillary matters that are reasonably connected to that subject. It is not always sufficient to determine the constitutionality of an act by just looking at the pith and substance of the act. In such cases, it has to be seen whether the matter referred in the act is essential to give effect to the main subject of the act. For example, power to impose tax would include the power to search and seizure to prevent the evasion of that tax. Similarly, the power to legislate on Land reforms includes the power to legislate on mortgage of the land. However, power relating to banking cannot be extended to include power relating to non-banking entities. However, if a subject is explicitly mentioned in a State or Union list, it cannot be said to be an ancillary matter. For example, power to tax is

mentioned in specific entries in the lists and so the power to tax cannot be claimed as ancillary to the power relating to any other entry of the lists.
As held in the case of ***State of Rajasthan v. G Chawla***, the power to legislate on a topic includes the power to legislate on an ancillary matter which can be said to be reasonably included in the topic.

The underlying idea behind this principle is that the grant of power includes everything necessary to exercise that power. However, this does not mean that the scope of the power can be extended to any unreasonable extent. Supreme Court has consistently cautioned against such extended construction. For example, in ***R M D Charbaugwala v. State of Mysore*****,** SC held that betting and gambling is a state subject as mentioned in Entry 34 of State list but it does not include power to impose taxes on betting and gambling because it exists as a separate item as Entry 62 in the same list.

iii) Doctrine of Colourable Legislation:

This doctrine is based on the principle that what cannot be done directly cannot be done indirectly. In other words, if the constitution does not permit certain provision of legislation, any provision that has the same effect indirect manner is also unconstitutional. This doctrine is found on the wider doctrine of "fraud on the constitution". A thing is Colourable when it seems to be one thing in the appearance but another thing underneath. ***K C Gajapati Narayan Deo v. State of Orissa*****,**is a famous case that illustrates the applicability of this doctrine. In this case, SC observed that the constitution has clearly distributed the legislative powers to various bodies, which have to act within their respective spheres. These limitations are marked by specific legislatives entries or in some cases these limitations are imposed in the form of fundamental rights of the constitution. Question may arise whether while enacting any provision such limits have been transgressed or not. Such transgression may be patent, manifest or direct. But it may also be covert, disguised, or indirect. It is to this later class of transgression that the doctrine of colourable legislation applies. In such case, although the legislation purports to act within the limits of its powers, yet in substance and in reality, it transgresses those powers. The transgression is veiled by mere pretense or disguise. But the legislature cannot be allowed to violate the constitutional prohibition by an indirect method. In this case, the validity of Orissa Agricultural Income Tax (Amendment) Act 1950 was in question. The argument was that it was not a bona fide taxation law but a colourable legislation whose main motive was to artificially lower the income of the intermediaries so that the state has to pay less compensation to them under Orissa Estates Abolition Act, 1952. SC held that it was not colourable legislation because the state was well within its power to set the taxes, no matter how unjust it was. The state is also empowered to adopt any method of compensation. The motive of the legislature in enacting a law is totally irrelevant.

A contrasting case is of ***K T Moopil Nair v. State of Kerala*****,** the state imposed a tax under Travancore Cochin Land Tax Act, 1955, which was so high that it was many times the annual income that the person was earning from the land. The SC held the act as violative of Articles 14 and 19(1)(f) in view of the fact that in the disguise of tax a person's property was being confiscated.

Similarly, in ***Balaji v. State of Mysore*****,** SC held that the order reserving 68% of the seats for students belonging to backward classes was violative of Article 14 in disguise of making a provision under Article 15(4).

iv) Doctrine of Eclipse

In the case of ***KeshavanMadhavaMenon v. The State of Bombay***, the law in question was an existing law at the time when the Constitution came into force. That existing law imposed on the exercise of the right guaranteed to the citizens of India by article 19(1)(g) restrictions which could not be justified as reasonable under clause (6) as it then stood and consequently under article 13(1) that existing law became void "to the extent of such inconsistency".

The court said that the law became void not *in toto* or for all purposes or for all times or for all persons but only "to the extent of such inconsistency", that is to say, to the extent it became inconsistent with the provisions of Part III which conferred the fundamental rights on the citizens.

This reasoning was also adopted in the case of ***BhikajiNarainDhakrasAnd Others v. The State Of Madhya Pradesh And Another*****.** This case also held that "on and after the commencement of the Constitution, the existing law, as a result of its becoming inconsistent with the provisions of article 19(1)(g) read with clause (6) as it then stood, could not be permitted to stand in the way of the exercise of that fundamental right. Article 13(1) by reason of its language cannot be read as having obliterated the entire operation of the inconsistent law or having wiped it out altogether the statute, book. Such law existed for all past transactions and for enforcement of rights and liabilities accrued before the date of the Constitution. The law continued in force, even after the commencement of the Constitution, with respect to persons who were not citizens and could not claim the fundamental right".

The court also said that article 13(1) had the effect of nullifying or rendering the existing law which had become inconsistent with fundamental right as it then stood, ineffectual, nugatory and devoid of any legal force or binding effect, only with respect to the exercise of the fundamental right on and after the date of the commencement of the Constitution. Finally the court said something that we today know of as the

crux of Doctrine of Eclipse."The true position is that the impugned law became, as it were, eclipsed, for the time being, by the fundamental right."

We see that such laws are not dead for all purposes. They exist for the purposes of pre-Constitution rights and liabilities and they remain operative, even after the commencement of the Constitution, as against non-citizens. It is only as against the citizens that they remain in a dormant or moribund condition.

Thus the Doctrine of Eclipse provides for the validation of Pre-Constitution Laws that violate fundamental rights upon the premise that such laws are not null and void *ab initio* but become unenforceable only to the extent of such inconsistency with the fundamental rights. If any subsequent amendment to the Constitution removes the inconsistency or the conflict of the existing law with the fundamental rights, then the Eclipse vanishes and that particular law again becomes active again.

v) Doctrine of Occupied Field

The doctrine of Pith and Substance according to which where the question arises of determining whether a particular law relates to a particular subject (mentioned in one list of another), the court looks into the substance of the matter. There is a very thin of line of difference between doctrine of Repugnancy and Doctrine of Occupied Field. As we know that repugnance arises only if there is an actual conflict between two legislations, one enacted by the State Legislature and the other by Parliament, both of which were competent to do so.

On the other hand, doctrine of Occupied Field simply refers to those legislative entries of State List, which are expressly made 'subject' to a corresponding Entry in either the Union List or the Concurrent List. Doctrine of Occupied Field has nothing to do with the conflict of laws between the state and the centre. It is merely concerned with the 'existence of legislative power' whereas repugnance is concerned with the 'exercise of legislative power' that is shown to exist. Doctrine of Occupied Field comes into picture even before the Union Law or the State Law has commenced. Under Article 254, as soon as a Union law receives assent of the President, it is said to be 'a law made by the Parliament'. Actual commencement of the law is not important for the purpose of attracting doctrine of Occupied Field.

vi) Doctrine of Territorial Nexus

Article 245 (2) of the Constitution of India makes it amply clear that *'No law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation'*. Thus a legislation cannot be questioned on the ground that it has extra-territorial operation.

It is well-established that the Courts of our country must enforce the law with the machinery available to them; and they are not entitled to question the authority of the Legislature in making a law which is extra-territorial.

Extra-territorial operation does not invalidate a law. But some nexus with India may still be necessary in some of the cases such as those involving taxation statutes.

The Legislature of a State may make laws for the whole or any part of the State[3]. Now, this leaves it open to scrutiny whether a particular law is really within the competence of the State Legislature enacting it. There are plethora of cases that have stated that the laws which a state is empowered to make must be for the purpose of that State. Thus, the Doctrine of Territorial Nexus has been applied to the States as well. There are two conditions that have been laid down in this respect:

1. The Connection (nexus) must be real and not illusory.
2. The liability sought to be imposed must be pertinent to that connection.

If the above two conditions are satisfied, any further examination of the sufficiency of Nexus cannot be a matter of consideration before the courts.

In various cases relating to taxation statutes, the courts have time and again stated that it is not necessary that the sale or purchase should take place within the Territorial Limits of the State. Broadly speaking local activities of buying or selling carried in the State in relation to local goods would be sufficient basis to sustain the taxing power of the State, provided of course, such activities ultimately result in concluded sale or purchase to be taxed.

There is also a Presumption of Constitutionality that the Legislature is presumed not to have exceeded its constitutional powers and a construction consistent with those powers is to be put upon the laws enacted by the Legislature.

It is well-established that the Parliament is empowered to make laws with respect to aspects or causes that occur, arise or exist, or maybe expected to do so, within the territory of India and also with respect to extra-territorial aspects or causes that have an impact or nexus with India. “Such laws would fall within the meaning, purport and ambit of grant of powers of Parliament to make laws ‘for the whole or any part

of the territory of India' and they may not be invalidated on the ground that they require extra territorial operation. Any laws enacted by the Parliament with respect to extra territorial aspects or causes that have no nexus with India would be *ultra vires* and would be laws made for a foreign territory."

This clearly indicates that as long as the law enacted by the Parliament has a nexus with India, even if such laws require extra territorial operation, the laws so enacted cannot be said to constitutionally invalid. It is only when the *'laws enacted by the Parliament with respect to extra territorial aspects or causes that have no nexus with India'* that such laws 'would be *ultra vires*.

1. Amendment of Constitution

Amendment of the constitution implies changing certain provisions or updating few external features to meet the requirement of the day. For the Constitution to reflect the reality and necessity of the day, provision of constitutional amendment is necessary.

Requirement of the Constitutional Amendment

The necessity for the Amendment of the Constitution can be emphasized as follows:

• If there had been no provision of the amendment, the people and the leaders would have adhered to some extra constitutional mean like revolution, violence and so on there by diluting the very constitution per se.

• Provisions for amendment of the constitution is made with a view to overcome the difficulties which may encounter in future in the working of the constitution.

• It is also necessary in order to fix loop holes at the time of constitution enactment

• Ideals, priorities and vision of the people vary greatly generation to generation. In order to incorporate these, amendment is desirable.

Procedures for Amending the Constitution

Constitution can be amended by various methods namely, simple majority, special majority, and ratification by at least half the states. Constitutional amendment under article 368 is considered as the core amendment procedure in the Indian constitution, whose procedure can be explained as follows-

368. Power of Parliament to amend the Constitution and procedure therefor

(1) Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article

(2) An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total

membership of that House present and voting, it shall be presented to the President who shall give his assent to the Bill and thereupon the Constitution shall stand amended in accordance with the terms of the Bill: Provided that if such amendment seeks to make any change in

(a) Article 54, Article 55, Article 73, Article 162 or Article 241, or
(b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or
(c) any of the Lists in the Seventh Schedule, or
(d) the representation of States in Parliament, or
(e) the provisions of this article, the amendment shall also require to be ratified by the Legislature of not less than one half of the States by resolution to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent

(3) Nothing in Article 13 shall apply to any amendment made under this article

(4) No amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this article whether before or after the commencement of Section 55 of the Constitution (Forty second Amendment) Act, 1976 shall be called in question in any court on any ground

(5) For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article

Describing the constitutional amendment procedure of the Indian constitution, K.G. Balakrishnan (former CJI) has rightly said that amending the Constitution strikes a good balance between flexibility and rigidity. Moreover, Granville Austin, a renowned scholar of the Indian Constitution said, "The amending process has proved itself as one of the most ably conceived aspects of the constitution. Although it appears complicated, it is merely diverse."

2. Basic Structure Theory

Originally, when the Constitution was framed, the Parliament had the authority to amend any part of the Constitution. The Parliament's amending power is subject to substantive limitations was first raised in ***Sankari Prasad Deo v. Union of India***. The Constitutional challenge had arisen with respect to Part III of the Constitution, which contains fundamental rights such as the right to life, equality, freedom of expression etc. The challenge in ***Sankari Prasad*** was premised upon the wording of Article 13 of the Constitution, which prohibits the State from making any law in violation of any fundamental right

enumerated in Part III. It was argued that a Constitutional amendment was "law", properly called; and so, under Article 13, it was impermissible for the State to amend Part III of the Constitution. The argument was unanimously rejected by a constitution bench of the Supreme Court, which held that the Parliament had the power to amend any provision of the Constitution, without exception.

The question came up again fourteen years later in ***Sajjan Singh* v. *State of Rajasthan***, also before a Constitution bench. Gajendragadkar C.J., speaking for him and two others, upheld ***Sankari Prasad.*** Mudholkar J. observed that the framers may have intended to give permanency to certain "basic features" such as the three organs of the State, separation of powers etc. He also questioned whether a change in the basic features of the Constitution could be defined as an "amendment" within the meaning of Article 368, or whether it would amount to rewriting the Constitution itself.

The position of law was then reversed in ***I.C. Golak Nath*v. *State of Punjab***. An eleven judge bench of the Supreme Court held that the Parliament had no power to amend Part III of the Constitution. All provisions dealing with fundamental rights were thus placed beyond the reach of the legislature.

In order to overcome ***GolakNath***, Parliament enacted the Twenty-Fourth Constitutional Amendment. This provided, *inter alia*, that the prohibition in Article 13 would not apply to an amendment of the Constitution under Article 368. It also substituted the words "amendment by way of addition, variation or repeal" for only "amendment" in Article 368. The Constitutional validity of the Twenty-Fourth Amendment, amongst others, was strongly challenged in ***Kesavananda Bharati* v. *State of Kerala.***

In ***Keshavanand Bharati*** case, initially a writ petition was filed for the validity of Kerala Land Reforms Act of 1963. But the Act was subsequently amended and was placed in the IXth Schedule. Later on Court was permitted to challenge the 25th and 29th Amendment of the Constitution. The Petition was heard before the thirteen Judges of the Supreme Court. The Court held that the Parliament's amending power was plenary, and extended to every provision of the Constitution; the Parliament could not *damage or destroy the basic structure of the Constitution*. In order to determine the *basic structure* of the Constitution, recourse was taken to the preamble, the Constitutional "scheme", the struggle for independence from colonial rule, and the drafting history of the Constitution. Chief Justice Sikri, in his majority opinion, provided five such "basic features" present in the Constitution viz. (i) supremacy of the Constitution, (ii) republican and democratic form of government, (iii) secular character of the Constitution, (iv) separation of powers between the executive, legislature and judiciary, and (v) federal character of the Constitution. Similar lists were prepared by the other majority judges.

The basic structure doctrine was crystallized in three further decisions of the decade. In ***Indira Nehru***

Gandhi* v. *Raj Narain*,** a Constitutional amendment dealing with the election of the Prime Minister and the Speaker was struck down for violating the basic features of *democracy*, the *rule of law* and *equality*. In ***Minerva Mills* v. *Union of India, the Parliament attempted to overturn ***Kesavananda*** by inserting the 42nd Amendment, which expressly stated that the amending power was unlimited, and not open to judicial review. The amendment was struck down by the Court on the ground that the *limited amending power of the Parliament* was itself part of the basic structure. Lastly, in *Waman Rao* v. *Union of India*,[8] it was held that laws placed in the 9th Schedule, and thus beyond the pale of fundamental rights review, would nevertheless have to be tested on the touchstone of the basic structure before they were given immunity.

In the next two decades there was consolidation of the doctrine. In a series of judgments, which may collectively be called the *Tribunals Cases*, it was held that *judicial review* of the Supreme Court under Article 32, and of the High Courts under Article 226, was a basic feature. First enunciated in ***S.R. Bommai* v. *Union of India*,** and then crystallized in the decisions of ***Ismail Faruqui* v. *Union of India*** and ***Aruna Roy* v. *Union of India***, the Court developed the concept of the basic feature of secularism as an attitude of even- handedness towards all religions. In ***I.R. Coelho* v. *State of Tamil Nadu***, the Court added Articles 14 (right to equality), Article 19 (fundamental freedoms) and Article 21 (right to life) to the list of basic features.

This brief overview highlights the following salient points: *first*, basic structure review is a *substantive limitation* upon the power of the Parliament to amend the Constitution, i.e., Constitutional amendments must conform to certain *standards* or *values*, and must not be in violation of certain *substantive content*, in order to be constitutionally valid; *secondly*, the task of adjudicating content-based violations of the basic structure must be performed by the judiciary; and *thirdly*, the components of the basic structure doctrine, such as democracy, the rule of law, secularism etc., have been enunciated in a highly abstract manner, permitting varying and different interpretations. It is this framework that must be kept in mind while analyzing the legitimacy of the basic structuredoctrine

The aim of the Democratic state is conservation of natural rights of a man, namely liberty, security and resistance to oppression. Judiciary must uphold the Constitution taking the cognizance of the needs and aspirations of the people articulated in the Preamble and the Basic structure.

Judiciary upholds the basic structure of the written draft. The purpose of proper interpretation of Rule of Law, the interpretation of the judiciary may be aligned with the basic structure of the constitution. Judicial creativity must fill in the gap between the existing law and the law as it ought to be. The

Constitution as a 'Grund norm' should be interpreted according to the current societal standards, complete justice or true justice must encompass within its morality and ethics. The interpretation of the laws has to be purposive. This means

the interpretation must serve the object of the enactment keeping in view of the supreme law, the 'grund norm,' the constitution. Every law has to accord either the Constitution; otherwise it suffers the defect of invalidity or unconstitutionality. Indian constitution is not only a formal text, but also a dream and an instrument to bring about social reform.

The constitution vests in judiciary, the power to adjudicate upon the constitutional validity of all the laws. If a laws made by parliament or state legislature violates any provision of the constitution, the Supreme Court has power to declare such a law invalid or ultra virus. So the process of judicial scrutiny of legislative acts is called Judicial Review. Article 368 of the Constitution gives the impression that Parliament's amending powers are absolute and encompass all parts of the document. But the Supreme Court has acted as a brake to the legislative enthusiasm of Parliament ever since independence. With the intention of preserving the original ideals envisioned by the constitution-makers. The jurisdiction of Supreme Court is essential for protection of basic features of the constitution.

On the other hand Indira Government had been attempting to thwart this doctrine by successive amendments of art. 368 starting with 24th amendment, 1971 and ending with 42nd Amendment Act, 1976.The Court has adhered to this view notwithstanding any of the amendments. Judicial tendency has arised of the Legislature to make frequent amendments to the constitution, which was eating the vitals of the constitution, which Supreme Court called Basic feature.[16] Wide ranging arguments before the Court in ***Keshavanand Bharati*** case for over 60 days both for and against the validity of the Amendments Eleven Opinions were delivered by the Judges. Until the case of ***Golak Nath,*** Supreme Court has been holding that no part of the Constitution is unamendable, and Parliament can amend even the Fundamental Rights by passing the Constitutional Amendments Act

The new clause 31 C was added declaring that law giving effect to the state policy towards Directive Principles contained in Art. 39(b) or (c) would be held void because of inconsistency with arts. 14, 19 and 31. Further the declaration in law that it was enacted to give effect to the policy towards securing these Directive Principles would render the law immune from being challenged in any court on the ground that it did not give effect to such policy.

The Supreme Court recognized Basic Structure dogma for the first time in the historic ***KesavanandaBharati***case. Ever since the Supreme Court has been the interpreter of the Constitution and the arbiter of all amendments made by parliament. The Supreme Court declared that the amending powers under Article368 did not intend to 'damage', 'emasculate', 'destroy', 'abrogate', 'change' or 'alter' the 'basic structure' or framework of the constitution. This decision is not just a landmark in the evolution of constitutional law, but indeed a turning point in the Constitutional history. Therefore, by going through all these case laws in the past, Judiciary is the sole protector of Basic structure. But the Dogma of Basic Structure is nor exhaustive. Judiciary, is going on expanding the horizons of the basic structure dogma, this leads to loosening of the theory of Basic Structure. But, in the post era of liberalization, also Judiciary depending upon the circumstances of each case has to determine what all are the basic structure from time to time to preserve the aspirations of the framers as well as to protect the rights of the citizens and to preserve public order, public policy, morality ethics set out in the Constitution as the goals and aims of the Country as a whole.

Ordinary Law can be amended every now and then, but the Constitution is not amended every now and then. “We are making this Constitution for centuries to come and it cannot be easily amended as easily as we can amend a legislative enactment”It was thus discussed in the Constituent Assembly by the framers of the Constitution.

Provisions for amendment of the constitution is made with a view to overcome the difficulties which may encounter in future in the working of the constitution. The time is not static; it goes on changing .The social, economic and political conditions of the people go on changing so the constitutional law of the country must also change in order toward it to the changing needs, changing life of the people. If no provisions were made for amendment of the constitution, the people would have recourse to extra constitutional method like revolution to change the constitution.The framers of the Indian constitution were anxious tohave a document which could grow with a growing nation, adapt itself to the changing circumstances of a growing people. The Constitution has to be changed at every interval of time. Nobody can say that this is the finality. A constitution which is static is a constitution which ultimately becomes a big hurdle in the path of the progress of the nation.

Therefore, it is to be understood that the ordinarily laws are enacted to meet certain contingencies or situations or areas whereas the Constitution is framed for ages to come and is designed to approach future contingencies. Therefore supremacy of Constitution is undisputed and cannot be challenged in a

court of law. In the Post Liberalization period also, although there is a progress of the country, it should not be at the cost of foregoing basic structure and loosening the thread of Democracy, Republic, Secularism or Unity and Integrity, on which the foundation of our Constitution lies. Any law made by the Legislature if repugnant to the Constitution will be void. In every Democratic form of Government, Constitution is a vital document, according to which the country carries out its operation. Constitution protects the rights of the citizens of a concerned nation. Thus a Constitution can be safely described as a social contract between the government and the people it governs. The significance of the Constitution is to lay out the basic structure of the government according to which the people aregoverned.

3. Schedules

Schedules are lists in the Constitution of India that categorize and tabulate bureaucratic activities and policy of the Government. Indian Constitution had originally eight schedules. The 9th schedule was added via First Amendment Act, while 10th Schedule was first added by 35th Amendment {Sikkim as Associate State}. Once Sikkim became a state of India, the 10 Schedule was repealed but later added once again by 52th Amendment Act, 1985 in context with the "Anti-defection" law. Here is a brief description of the schedules of Indian Constitution:

First Schedule

First schedule lists the states and territories on of India; lists any changes to their borders and the laws used to make that change.

Second Schedule

Second schedule lists the emoluments for holders of constitutional offices such as salaries of President, Vice President, Ministers, Judges and Comptroller and Auditor-General of India etc.

Third Schedule

This schedule lists the various forms of oath for holders of various constitutional offices.

Fourth Schedule

Fourth schedule enumerates the allocation of RajyaSabha seats to States or Union Territories.

Fifth Schedule

This schedule enumerates administration and control of Scheduled Areas and Scheduled Tribes (areas and tribes needing special protection due to disadvantageous conditions).

- Scheduled Areas are autonomous areas within a state, administered federally, usually populated by a predominant Scheduled Tribe.
- Scheduled Tribes are groups of indigenous people, identified in the Constitution, struggling socio-economically

Sixth Schedule

This schedule comprises provisions for the administration of tribal areas in Assam, Meghalaya, Tripura, Mizoram. Read this article in detail about sixth schedule.

Seventh Schedule

This schedule has divided the Union and State subjects on which they can make laws. It comprises Union List, State List and Concurrent List.

Eighth Schedule

This schedule lists the official languages of the Union.

Ninth Schedule

This schedule enumerates land and tenure reforms; the accession of Sikkim with India etc.

Tenth Schedule

This schedule comprises anti-defection provisions for Members of Parliament and Members of the State Legislatures.

Eleventh Schedule

It was added by 73rd amendment and has list of subjects under the Panchayat Raj institutions or rural local government.

Twelfth Schedule

It was added by 74th amendment and enlists the subjects under Municipalities or urban local government.

4. Review of working of Constitution

After over sixty years of Parliamentary democracy in India, people have started losing faith in it as it has become synonymous with elections only. The victim of democracy is the politics. If in India, people are asked to vote for an institution that has maintained some level of integrity – they would vote for the

Supreme Court, Election Commission or to the Comptroller and Auditor General of India. Their last preference would be either Parliament or State Assemblies. In the parliamentary democracy till the leaders become responsible, conscious of their duties and responsive to the public opinion, democracy itself will not be stable. If they start ignoring the will of the people, the government will become dictatorial. In India, politicians are looked upon with disdain. There is reason for this. Politicians whom people elect with much fanfare tend to become the arbiters and abusers of power.

The realization of social and economic justice, as promised by the Constitution still remains a dream, and the system of administration has reduced and limited the sovereignty of the people to a mere right to exercise their franchise at elections. Gloomy, harsh, unimaginative and indifferent administration has affected the poor to their core. Corruption, inefficiency and insensitivity, particularly in the distribution of goods have given rise to extra-legal systems. The people in India today stand more divided amongst themselves than at the time of the country's independence. Common national purpose is seldom seen pursued by the national political parties and noble purposes of public life have degenerated into opportunistic and self seeking politics of competitive personal gains.

Corruption, it seems, has been legalized, particularly in political life. Electoral reforms and reforming of the political parties and their internal democracy are essential parts of reform.The politician- bureaucrat nexus have eroded administrative credibility. Unprincipled, opportunistic political re-alignments and defections and re-defections minimize the scope of the stability of the governments. The instability of the governments gave rise to maladministration which has paralyzed the creative energies of the people. The opportunistic and self seeking politics and politicians and an increasing scenario of politician, criminal and the bureaucratic nexus has resulted into enormous corruption in electoral, political and bureaucratic spheres. There is pervasive degeneration of values.

In view of the prevailing atmosphere, the foremost requirement is the restoration of confidence in the institutions of democracy. This needs strong and enlightened leadership to address the emergent problems of divergent nature dealing with the aspirations of the people and requirements of the country. Besides the politicians, bureaucrats and criminals, the voters are also responsible, to some extent, for the prevailing situation because they do not discharge their civic duty honestly. The alarming increase of violence and money influence in the electoral process is a matter of grave concern which threatens the very survival of the democratic system. Besides the frustration from political and administrative side, there has been a picture of near collapse of the judicial trial system. The delays and mounting costs of the cases have kept the general people away from justice, thereby causing frustration and blocking of their aspirations. The

percentage of cases that go through the whole processes in courts is quite large which urgently need exploration of some other means.

There has been increasing disillusionment about the fairness of electoral process. Corruption and criminalization has over-shadowed its processes. The enormity of the costs of elections has kept the suitable persons away from this exercise and has led to the degradation of political processes to detriment of common good. Political parties collect enormous funds from criminals and capitalists for meeting electoral expenditure, thereby causing pervasive degeneration of standards in public life. This is also reflected in the quality of governments and of the governing process.

The above mentioned systematic and constitutional failures were foreseen by some members of the Constituent Assembly and they had raised their doubts in the discussion of the Constituent Assembly. DamodarSwaroop Seth, a member of the CA had raised similar views in the discussion held on 5th November 1948. He had said "this Constitution as a whole, instead of being evolved from our life and reared from the bottom upwards is being imported from outside and built from above downwards. A Constitution which is not based on units and in the making of which they have no voice, in which there is not even a mention of thousands and lakhs of villages of India and in framing which they have had no hand, well you can give such a Constitution to the Country but I very much doubt whether you would be able to keep it long".

Participating in the debate on the same day (5th November, 1948) HV Kamath had said "Now, what is state for? The utility of state has to be judged from its effect on the common man's welfare. The ultimate conflict that has to be resolved is this: Whether the individual is for the state or the state is for the individual".

Carrying forward the debate Naziruddin Ahmad (West Bengal) had commented "Coming to the Directive Principles of the State policy, articles 28 to 48, I think that these are pious expressions. They have no binding force. These cannot be enforced in a court of law and really, as the Honourable the Law Minister himself candidly admitted they are pious superfluities. That is the criticism."

Even after over sixty years of independence the country is still reeling under the heat of minority and reservation. While participating in debate in Constituent Assembly Krishna Chandra Sharma (United Province: General) had said" I do not think our minorities are minorities in the real sense of the of term or classes or groups accepted by the League of Nations. We all lived in this Country for centuries, for thousands of years. We have imbibed a common culture, a common way of living, common way of

thinking. Thus, I do not understand the meaning of giving these special privileges in chapter XIV. It creates statutory minorities and to say that the thing will last for ten years only is to forget the lesson of the past……But the result was the partition of the Country". He suggested" if there are any safeguards or any encouragement necessary for the backward classes or certain other classes, there might be other means namely, giving scholarship to deserving students, giving other financial help, opening institutions and other facilities which are necessary for their amelioration and lifting up; but to perpetuate division in body politic, to perpetuate division in the nation, would be detrimental to the healthy growth of the nation and would do an incalculable harm to us and our prosperity".

During six decades the country has grown from 10 states to 28 states with seven Union Territories. The population has grown from 36 crores to 1.2 billion; it has become sixth largest economy in the world; the literacy rate has grown; and the country is today a nuclear power. Inspite of this progress, country's track record to fight against poverty, illiteracy and corruption are shockingly by below the poverty line. The largest democracy in the world has moved in the direction of instability and crisis of governability. The gradual decline in value system, erosion in political order and a deepening of social and economic crisis have brought the Indian political system to cross roads. Now the time is ripe for the people and its leaders to take a decision about the future course of action.

It is no denying a fact that despite all those shortcomings, the people of India have reposed their faith in the democratic process, they maintained the democratic system. But democracy gets strong roots where its plantation proceeds from social to economic and then to political. In India, instead of social democracy taking strong roots ahead, the economic and political democracy arrived earlier. As long as equality and social justice are not visibly present, only voting rights can not bring about change in the profile of a society which was under alien control for centuries.

Today, in the 21st Century can we say that the real power to govern this country is vested in its people? Often question arises that does the Constitution in true terms express the will of the people or it has just become a tool in the hands of some hungry politicians? Are the people of India in real terms assured of justice, liberty, equality and fraternity? Is the common man receiving justice? Does equality really prevail? Has the Constitution not failed to translate noble principles into practical instruments? Its glaring inadequacy is seen in the dispensation of justice, protection of basic liberties enforcement of bureaucratic accountability and appointments of constitutional functionaries.

The nature of the Constitution of India is not Indian. The Constitutions of USA and Britain has been copied. Some articles have been borrowed from the Constitutions of Ireland, Australia and Canada

besides being dependent upon the Government of India Act 1935. Thus, the very nature of the Indian Constitution is a slavish imitation of the Constitution of these Countries. Due to the mismatch in the nature of the Constitution, it has been amended more than 110 times during last sixty years. On the other hand when we see the Constitution of United States which was presented on 17th September 1787 with only eleven articles has so far, been amended only twenty seven times. This comparison speaks volume of the mismatch of the Constitution with the Indian condition.

The need for Constitutional review has been a topic widely debated across the Country. The founding fathers of the Indian Constitution who granted more rights to the people without balancing them with their duties, perhaps did not foresee the emergence of present political environment, wherein the political players of the various segments in the country are more interested in fulfilling their individual aspirations than the aspirations of the people. The debate to review the Constitution started right from the first decade of the enforcement Constitution and within two years of its coming into force, it was required to be amended vide first amendment Bill 1951.

During the period from 1950 to 1967, the Parliament and most of the state assemblies were under the rule of the Congress Party. But after 1967 non-congress coalitions took over the reign of power in several northern states. During this period several issues pertaining to union-state relations cropped up. In the period following fourth General Election there was wide spread concern over the phenomenon of unprincipled defections. The problem came up for discussion in the LokSabha on 8 December in 1967. The Parliament adopted a resolution which said" The House is of opinion that a high level committee consisting of representatives of political parties and Constitutional experts be setup immediately by Government to consider the problem of legislators changing their allegiance from one party to another and their frequent crossing of the floor in all its aspects, and make recommendations in this regard". Following Parliament resolution, Y B Chavan (Home Minister) committee was formed which addressed variety of issues including the problem of defections.

Subsequently the Congress president D. K Barooah appointed a committee on 26 Feb 1976 to study the question of amendment of the Constitution. The 12 member committee headed by SardarSwarn Singh submitted its report to the Congress President in April 1976. The committee in its recommendation touched upon wide range of issues including the Preamble, Directive Principles, Power of Parliament to amend Constitution, Election matters, disqualification of membership of House or State legislature etc.

On 27- October 1976 the 42nd Amendment Bill was presented in the LokSabha. The Prime Minister Mrs. Indira Gandhi in her speech said that the purpose of the Bill was "To remedy the anomalies that have long

been noticed and to overcome obstacles put up by economic and political vested interest". She said "the Bill was responsive to the aspirations of the people and reflects the realities of the present time and the future". The Bill was passed in the LokSabha with 4 against it and 366 in favour and in RajyaSabha passed by 190 Votes in its favour and none against it. The amendment led to imposition of Emergency in the country which is a dark period of the Indian democracy.

After change of the Government in 1977, the then Prime Minster Morarji Desai appointed a committee of the Members of Parliament and subsequently set up a sub-committee of the cabinet mainly to correct imbalance in the Constitution caused by some provisions of the 42nd amendment. In 1983, a committee was constituted under the chairmanship of justice R S Sarkaria with fairly wide ranging terms of reference.

The NDA in its National Agenda for Governance issued as its Election Manifesto had pledged to appoint a commission to review the Constitution. The pledge was affirmed in the President's address to the Parliament on 22 February 2000. Accordingly on 23rd February 2000 the President of India appointed II-member Commission headed by Justice M N Venkatachaliah, Former Chief Justice of India. The Commission was named as "The National Commission to review the working of the Constitution". The terms of reference of the Commission stated - The commission shall examine, in the light of the experiences of the past 50 years, as to how best the Constitution can respond to the changing needs of efficient, smooth and effective system of governance and socio- economic development of modern India within the framework of Parliamentary democracy and to recommend changes, if any, that are required in the provisions of the Constitution without interfering with its basic structure or features." The Drafting and Editorial Committee of the commission submitted the complete Draft Report to the chairperson on 15 February, 2002. It is not known as to what action was taken thereafter.

During last two decades there have been persistent demands from the civil society, some NGOs, academics, Constitutional scholars and others to have a comprehensive review of the Constitution. Several books and large number of articles and research papers are published, and numbers of seminars have been organized on this topic. There is a general feeling that a review of the Constitution will have a positive impact on the system which will neutralize the hurdles in governance. A Constitution is meant to facilitate the working of the government and administration and also to guide other structures of the country. The static form of the Constitution will not be able to meet the challenges of the situations and requirement of the changing world.

Pandit Jawaharlal Nehru while speaking on the Draft Constitution on November 8, 1948 said “The Constitution is after all some kind of legal body given to the ways of Government and the life of the people. A Constitution if it is out of touch with the people’s life, aims and aspirations becomes rather empty, if it falls behind those aims, it drags the people down. It should be something ahead to keep people’s eyes and minds made up to a certain high mark... Remember this that while we want this Constitution to be as solid and as permanent a structure as we can make it... there should be certain flexibility. If you make anything rigid and permanent you stop a nation’s growth, the growth of a living, vital, organic people”. Pandit Nehru reiterated this view over and over again on different occasions.

It is now high time that instead of amending one clause or the other of the Constitution, we must gather courage to review the suitability of this Constitution to the people, culture and civilisation of this country. It must be emphasized that a Constitution of the country has to be deeply rooted to the cultural and civilizational ethos of the country.